



## State Water Resources Control Board

### **NOTICE OF PUBLIC HEARING AND PRE-HEARING CONFERENCE**

The State Water Resources Control Board  
Administrative Hearings Office  
will hold a public hearing and pre-hearing conference  
on the March 24, 2022 Notice of Proposed Revocation of

**water-right License 881B, held by the  
United States Army Corps of Engineers.**

The Notice of Proposed Revocation was  
issued by the State Water Resources Control Board,  
Office of the Delta Watermaster.

The **pre-hearing conference** will be held on  
**July 26, 2022, at 1:00 p.m.**  
and will be held by Zoom teleconference.

The **public hearing** will begin on  
**December 15, 2022, at 9:00 a.m.,**  
**continuing on additional days as necessary,**  
and will be held by Zoom teleconference.

Representatives of parties and other people who want to participate in this pre-hearing conference or this hearing may access these Zoom teleconferences by using the following link and call-in information:

<https://waterboards.zoom.us/j/92081599232?pwd=RFJjUIU1aUpveUxQaEFwYVQ0QWk3Zz09>

with Meeting ID: 920 8159 9232 and Passcode: 748724

or by calling in at

+16699009128,,92081599232#,,,,\*748724# US (San Jose)

Interested members of the public who would like to watch this pre-hearing conference or hearing without participating may do so through the Administrative Hearings Office YouTube channel, at <https://www.youtube.com/channel/UCM-gmipRyd7Nw-g8l-C7Nig/videos?view=57>

## **PURPOSE OF HEARING**

The purpose of this hearing is for the Administrative Hearings Office (AHO) to receive evidence relevant to, and arguments regarding, the Notice of Proposed Revocation of water-right License 881B, and any responses or defenses to the notice. The Delta Watermaster for the State Water Resources Control Board (State Water Board or Board) issued this notice on March 24, 2022. After either the pre-hearing process or 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 and arguments in the administrative record.

## **BACKGROUND**

On March 24, 2022, Michael Patrick George, the Delta Watermaster for the State Water Board, issued a Notice of Proposed Revocation of water-right License 881B (Notice of Proposed Revocation).

The following is a summary of the Delta Watermaster's allegations in the Notice of Proposed Revocation:

On November 27, 1929, the predecessor to the State Water Board issued water-right License 881, with a priority date of September 17, 1924. License 881 authorized the diversion of water from Liberty Cut, within the Sacramento-San Joaquin Delta, for the purpose of irrigation from June 15 to August 30. On May 1, 1989, the State Water Board divided License 881 into Licenses 881A and 881B. The Board issued License 881B to William C. and W. Ashley Payne. License 881B retained the priority date of September 17, 1924, and authorized diversions of up to 1,450 acre-feet of water per year from Liberty Cut for irrigation of 1,400 acres of land in the Sacramento-San Joaquin Delta.

In 2010, the State Water Board updated its records to reflect that the United States Army Corps of Engineers (USACE) had acquired License 881B. USACE filed Reports of Licensee for License 881B for calendar years 2007, 2008, 2009, and 2010. The reports indicated that USACE had not diverted any water or put any water to beneficial use pursuant to License 881B during any of those years.

The Delta Watermaster proposes to revoke License 881B pursuant to Water Code sections 1675 and 1241 based on the allegation that, since at least 2007, USACE has not diverted or put to beneficial use all or any part of the water available for diversion and beneficial use under License 881B.

On April 8, 2022, Assistant District Counsel for the Sacramento District of the USACE sent a letter to the Delta Watermaster requesting a hearing on the Notice of Proposed Revocation. The letter requests the opportunity for the USACE to formally challenge, by motion to dismiss or other appropriate procedure, through a special appearance, the

State Water Board's jurisdiction and authority to revoke License 881B in the manner described in the Notice of Proposed Revocation.

Water Code section 1112, subdivision (a)(3), provides that, subject to an exception not applicable here, an AHO hearing officer shall preside over a hearing in any matter involving a notice of proposed revocation of a license issued under Water Code section 1675.

### **HEARING OFFICER AND HEARING TEAM**

Nicole Kuenzi, a hearing officer in the State Water Board's AHO, will be the hearing officer for this proceeding and will prepare a written order, according to the requirements outlined in Water Code section 1114, subdivision (c)(1). Other members of the AHO may be present and assist the hearing officer throughout these proceedings. The hearing officer and other AHO staff members may consult with staff of the Board's Division of Water Rights (except staff in the Enforcement Section), attorneys in the Board's Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding. The hearing officer and other AHO staff members will not discuss this matter with any members of the Board's Office of Enforcement, the Delta Watermaster's Office, or the Division's Enforcement Section.

### **PROSECUTION TEAM**

A State Water Board Prosecution Team will be a party to this hearing. The State Water Board Prosecution Team will be comprised of attorneys from the State Water Board's Office of Enforcement and staff from the Office of the Delta Watermaster and the State Water Board's Division of Water Rights Enforcement Section.

### **HEARING ISSUES**

The AHO hearing officer will receive evidence and arguments relevant to the following issues and sub-issues:

- 1) Does the State Water Board have jurisdiction to revoke water-right License 881B pursuant to Water Code sections 1241 and 1675?
- 2) If the State Water Board has such jurisdiction, should the Board revoke License 881B pursuant to Water Code sections 1241 and 1675?
  - a. Has the licensee ceased to put the water authorized to be diverted and used under License 881B to useful or beneficial purposes?
  - b. Has the licensee failed to beneficially use all or any part of the water authorized to be diverted and used under License 881B for a period of at least five years?

- c. During any 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 License 881B?

### **PRE-HEARING PROCESS**

The hearing officer intends to address hearing issue (1) through a pre-hearing process by allowing the parties to file written briefs on this issue before the hearing officer conducts an evidentiary hearing on issue (2) and the related sub-issues. If, during that pre-hearing process, the hearing officer concludes that the State Water Board does not have jurisdiction to revoke water-right License 881B pursuant to Water Code sections 1241 and 1675, then the hearing officer may prepare and submit a proposed order to the Board that addresses issue (1) without conducting an evidentiary hearing on issue (2) and the related sub-issues. If the hearing officer concludes that the State Water Board may have jurisdiction to revoke water-right License 881B, then the hearing officer will conduct the evidentiary hearing on issue (2) and the related sub-issues, and prepare and submit a proposed order to the Board after the hearing.

Each initial brief on hearing issue (1) shall be a maximum of 15 pages, double-spaced, in a font size not smaller than 12 points. Each response brief on hearing issue (1) shall be a maximum of 10 pages, double-spaced, in a font size not smaller than 12 points. Each party must file its initial brief and response brief with the AHO and serve copies of it on the other parties listed in the attached service list by the deadline specified in this notice.

### **PRE-HEARING CONFERENCE**

The AHO hearing officer will hold a pre-hearing conference on the date and at the time specified on the first page of this notice by Zoom teleconference. No in-person appearances will be allowed. The pre-hearing conference will be held and electronically recorded by Zoom teleconference. The AHO will not retain a court reporter for the status conference. Any party may arrange for a court reporter at the party's own expense.

During the pre-hearing conference the hearing officer will address the following issues:

- 1) Should the hearing officer amend any of the hearing issues listed above or add any additional hearing issues?
- 2) Does any party have any comments on the pre-hearing process to address hearing issue (1) described in this notice?
- 3) Should the hearing officer change any of the deadlines or hearing dates or make other changes to the pre-hearing or hearing schedule included in this notice?
- 4) Are there any other issues about the pre-hearing or hearing process that the hearing officer should address?

Parties do not need to file pre-hearing conference statements. If any party wants to file a pre-hearing conference statement, the party shall file the pre-hearing conference statement with the AHO and serve copies of it on the other parties listed in the attached service list by the deadline listed below. The AHO will post the statements on the Water Board AHO-FTP site in the folder for this matter.

**NOTICES OF INTENT TO APPEAR**

**Any person or entity who wants to participate in the pre-hearing conference or the hearing in this matter must file a Notice of Intent to Appear (NOI) with the AHO, using the form enclosed with this notice, before the deadline listed below.** Because the AHO will post all NOIs on the Water Board’s FTP site, parties do not need to send copies of their NOIs to the other parties.

The AHO encourages parties to agree to accept electronic service (by e-mail) of all documents regarding this hearing. If a party is not willing to do this, then the party may check the appropriate box on the NOI form. Parties not agreeing to accept electronic service of documents will experience delays as paper copies of documents are transmitted to them by U.S. Mail. If this box is not checked, then the AHO will assume that the party agrees to accept electronic service.

After the deadline to submit NOIs and pre-hearing conference statements, the AHO will post the NOIs and any pre-hearing conference statements on the Water Board’s FTP site in the folder for this matter.

**HEARING SCHEDULE AND DEADLINES**

<b>Deadlines / Schedule</b>	<b>Date and Time</b>
Deadline to file NOIs and optional pre-hearing conference statements.	<b>July 22, 2022, 12:00 p.m.</b>
Pre-hearing conference.	<b>July 26, 2022, 1:00 p.m.</b>
Deadline for parties to file initial briefs on hearing issue (1).	<b>August 12, 12:00 p.m.</b>
Deadline for parties to file response briefs on hearing issue (1).	<b>August 26, 2022, 12:00 p.m.</b>
Hearing Officer to issue hearing officer ruling or draft proposed order on hearing issue (1).	<b>October 14, 2022, 12:00 p.m.</b>
Deadline for all parties to file case-in-chief exhibits and exhibit identification indices.	<b>November 14, 2022, 12:00 p.m.</b>
Deadline for all parties to file rebuttal exhibits and exhibit identification indices.	<b>December 5, 2022, 12:00 p.m.</b>
Deadline for parties to file opening briefs.	<b>December 5, 2022, 12:00 p.m.</b>
Hearing begins.	<b>December 15, 2022, 9:00 a.m., continuing on additional dates as necessary.</b>

## **SUBMITTAL OF DOCUMENTS TO AHO AND OTHER PARTIES**

All documents submitted to the AHO shall be addressed and submitted by one of the following methods (with proofs of service, as discussed above):

By Email (preferred method)	<a href="mailto:AdminHrgOffice@waterboards.ca.gov">AdminHrgOffice@waterboards.ca.gov</a> with subject line "License 881B"
By Mail:	State Water Resources Control Board Administrative Hearings Office P. O. Box 100 Sacramento, CA 95812-0100
By Hand Delivery (see instructions below):	Joe Serna Jr. CalEPA Building Administrative Hearings Office c/o Water Rights Records Unit 1001 I Street, 2nd Floor, Room 114 Sacramento, CA 95814

Service of documents by hand-delivery may be more difficult or delayed due to building or office closures during the COVID-19 pandemic. Please plan ahead if you wish to hand deliver documents. Any hand-delivered submittals must be date-and-time stamped by the Division of Water Rights Records Unit personnel before the submittal deadline. Persons delivering submittals to the Records Unit must first check in with CalEPA Building lobby security personnel on the first floor of the CalEPA Building and obtain authorization to go to the Water Rights Records Unit on the second floor.

## **INITIAL ADMINISTRATIVE RECORD**

The AHO has copied documents that it has received that are relevant to this proceeding and included them in the initial administrative record for this proceeding. The AHO has posted the initial administrative record on the Board's FTP site in the folder for this matter. Instructions on how to access this folder on the Board's FTP site are in section 8 below.

## **AHO WEBPAGE AND NOTICES**

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO will post all of its notices and other AHO documents regarding these proceedings on the AHO's internet webpage at [https://www.waterboards.ca.gov/water\\_issues/programs/administrative\\_hearings\\_office/](https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/) Any interested person or entity may sign up to receive all AHO notices at [https://www.waterboards.ca.gov/resources/email\\_subscriptions/swrcb\\_subscribe.html](https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html)

## **LIVE-STREAM AND RECORDING**

The pre-hearing conference and public hearing will be live streamed through the Administrative Hearings Office YouTube channel, accessible by clicking on the link provided below. After the conclusion of the conference and the hearing, a recording of the YouTube live-stream of the conference will be available on the Administrative Hearings Office YouTube channel. These recordings will include automatic captions for accessibility.

The live stream and recordings may be accessed at the following link:  
<https://www.youtube.com/channel/UCM-gmipRyd7Nw-g8l-C7Nig/videos?view=57m>

## **PROHIBITION ON EX PARTE COMMUNICATIONS; SEPARATION OF FUNCTIONS**

While this proceeding is pending, *ex parte* communications between any party or interested person and any member of the AHO hearing team are prohibited. *Ex parte* communications are any type of communication regarding this proceeding that occurs between a party or interested person and the hearing officer or a member of the hearing team without notice and an opportunity for all parties to participate.

Please do not attempt to communicate by telephone with any AHO hearing officer or any AHO staff member regarding this hearing, because other parties would not be able to participate in such communications. If any party wishes to communicate with the AHO at any time regarding any issue related to this proceeding, including any issue regarding hearing procedures or filing of documents, please communicate by e-mail to [adminhrgoffice@waterboards.ca.gov](mailto:adminhrgoffice@waterboards.ca.gov) or by letter to the AHO and serve all other parties with copies of the communication. The party shall include a proof of service through a formal proof of service or by other verification.<sup>1</sup>

The Prosecution Team is separated from the AHO hearing team. Like all other parties, members of the Prosecution Team are prohibited from having any *ex parte* communications about this proceeding with members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.)<sup>2</sup> These rules regarding *ex parte* communications apply to all members of the AHO hearing team.

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<sup>1</sup> All references to “proof of service” in this document refer to either a formal proof of service or a list of the parties and the addresses of them or their representatives in an e-mail “cc” (carbon copy) list or the cc portion of a letter.

<sup>2</sup> For a discussion of *ex parte* communications regarding State Water Board members, see “Ex Parte Questions and Answers,” available on the State Water Board’s website at: [http://www.waterboards.ca.gov/laws\\_regulations/docs/exparte.pdf](http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf).

## PROCEDURES FOR THIS WATER-RIGHT HEARING

The following procedures apply to this hearing. The hearing officer may amend these procedures before, during or after the hearing as she deems appropriate.

- 1. HEARING PROCEDURES:** The AHO will conduct this hearing according to the procedures for hearings set forth in California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760. Copies of these regulations are posted on the State Water Resources Control Board's website: [http://www.waterboards.ca.gov/laws\\_regulations](http://www.waterboards.ca.gov/laws_regulations). If there is any conflict between any provision of this notice and any provision of these regulations or any applicable statute, then the provision of the regulation or statute shall apply to this hearing.

Consistent with California Code of Regulations, title 23, section 648.5, unless the hearing officer determines otherwise before or during the hearing, each party may make an opening statement, present witnesses and exhibits, cross-examine opposing parties' witnesses, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if that witness were under cross-examination. The hearing officer may allow parties to present closing arguments or submit closing briefs. These procedures are described in more detail in section 10. The hearing officer may issue rulings regarding these procedures before or during the hearing.

The AHO encourages parties with common interests to work together to make unified presentations and to take other actions to make the hearing process more efficient.

Parties may file any requests for exceptions to these hearing procedures in writing with the AHO and must serve any such requests on the other parties. To provide time for parties to respond, the hearing officer normally will not rule on procedural requests filed in writing until at least five days after receiving the request, unless the hearing schedule requires an earlier ruling.

- 2. SETTLEMENTS:** In a water-right enforcement hearing, the parties normally include a State Water Board prosecution team and a respondent. The prosecution team and the respondent may engage in private settlement discussions, and may, or may not, include any other persons in those discussions.

No representative of the AHO will participate in such settlement discussions. If the parties or their representatives sign a written settlement agreement, then they shall promptly file a copy of the signed agreement with the AHO.

Although the AHO may authorize other persons to participate in the hearing as parties, such authorizations do not necessarily allow those persons to participate in any settlement discussions between the prosecution team and the respondent in water-right enforcement matters.



The State Water Board, or the Executive Director under State Water Board Resolution No. 2012-0061, may issue an order approving a settlement agreement between the prosecution team and the respondent in water-right enforcement matters, even if other parties to the proceeding have not approved the settlement agreement. The hearing officer normally will give all parties opportunities to comment on any settlement agreement submitted to the AHO before the AHO transmits a proposed order approving the settlement agreement to State Water Board or Executive Director, unless all parties to the hearing or their representatives have signed the settlement agreement.

- 3. PARTIES:** As provided in California Code of Regulations, title 23, section 648.1, subdivisions (a) and (b), the **United States Army Corps of Engineers (USACE)** and the **Prosecution Team** are parties to this proceeding.

The hearing officer may allow any other person or entity that timely files a Notice of Intent to Appear to participate in the hearing as a party. (See Cal. Code Regs., tit. 23, § 648.1, subd. (a) & (b).) A person or entity that has not been identified as a party in this notice that wants to participate as a party in this hearing shall file a Notice of Intent to Appear with the AHO before the deadline specified in this notice. The person or entity shall include an attachment to the Notice of Intent to Appear form demonstrating good cause as to why the hearing officer should allow the person or entity to participate in the hearing as a party rather than as an interested person presenting a policy statement.

The hearing officer may impose limitations on any party's participation in the hearing. (See Gov. Code, § 11440.50, subd. (c).) The hearing officer also may designate persons or entities that do not file timely Notices of Intent to Appear as parties, for good cause shown and subject to appropriate conditions. Except as specifically provided in this notice or by ruling of the hearing officer, the hearing officer will allow only parties to present evidence, make objections, and examine witnesses.

- 4. POLICY STATEMENTS BY INTERESTED PERSONS:** As provided in California Code of Regulations, title 23, section 648.1, subdivision (d), the hearing officer normally will allow interested persons who are not designated as parties to present or submit non-evidentiary policy statements. Interested persons may submit policy statements in writing before the hearing or present or summarize them orally during the hearing. The hearing officer will not permit a person or entity that appears and presents only a policy statement to make objections to parties' exhibits or testimony, offer evidence, conduct cross-examination, make legal arguments, or otherwise participate in the evidentiary hearing. The AHO will not add such persons or entities to the service list.

Policy statements are not subject to the pre-hearing requirements for testimony or exhibits, except that interested persons who want to make oral policy statements

during the hearing should file Notices of Intent to Appear indicating an intent to make only a policy statement. The hearing officer may impose time limits on presentations of oral policy statements or oral summaries of written policy statements.

The AHO requests that interested persons and entities who file written policy statements with the AHO serve copies of their statements on all parties before the person or entity presents such statements or summaries of them during the hearing. See section 8 for details regarding electronic submittals of documents.

- 5. NOTICES OF INTENT TO APPEAR:** As provided in California Code of Regulations, title 23, section 648.4, all people and entities that want to participate in the hearing as parties must file either an electronic copy or a paper copy of a Notice of Intent to Appear with the AHO before the deadline specified in this notice. The AHO may interpret a failure to file a Notice of Intent to Appear by this deadline as a decision not to appear.

As discussed in the preceding section, the AHO requests that any interested person who will not be participating as a party and will be presenting only a non-evidentiary oral policy statement or oral summary of a written policy statement file a Notice of Intent to Appear before the deadline and specify in the notice that the person only will be presenting an oral policy statement or summary.

As provided in California Code of Regulations section 648.4, subdivision (b), the Notice of Intent to Appear for parties (but not for people only presenting policy statements) must state the name and address of the participant. For parties, the Notice of Intent to Appear also must state: (1) the name of each witness whom the party intends to call at the hearing; (2) a brief description of the subject of each witness's proposed testimony; and (3) an estimate of the time that the party requests for each of its witnesses to present an oral summary of his or her written proposed testimony. (See section 6 for requirements that apply to written testimony.)

If a party intends to call any expert witnesses, the party shall designate each expert witness as an expert witness in the party's Notice of Intent to Appear.

Parties that do not intend to present cases-in-chief but want to cross-examine witnesses or present rebuttal testimony should so indicate on their Notices of Intent to Appear.<sup>3</sup> A party that decides not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the AHO and the other parties as soon as possible.

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<sup>3</sup> A party is not required to present evidence as part of a case-in-chief. The hearing officer will allow parties not presenting evidence as cases-in-chief to participate through opening statements, cross-examination, and rebuttal, and to present closing statements or briefs, if the hearing officer allows other parties to present such closing statements or briefs.

Parties that are not willing to accept electronic service of hearing documents must check the appropriate box on the Notice of Intent to Appear. Because service of documents to such parties normally will be by U.S. Mail, such parties will experience delays in receiving hearing documents.

The AHO will maintain a current service list with the names of parties and their contact information to each person or entity that has submitted a Notice of Intent to Appear or asked to be on the updated service list and will post this service list on the State Water Board's FTP site in the folder for this proceeding. The service list will indicate if any party is not willing to accept electronic service.

**6. WRITTEN PROPOSED TESTIMONY AND OTHER EXHIBITS:** Exhibits include all written proposed testimony, statements of qualifications of expert witnesses, summary slides, and other documents to be submitted as evidence.

Exhibits also may include copies of Board decisions and orders that parties want to cite in their legal briefs and that are not posted on the Board's website at this link: [https://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/](https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/). Parties should not submit copies of Board decisions and orders that the Board has posted on its website at this link, and parties may cite such decisions and orders in their legal briefs without submitting copies of them as exhibits.

As provided in California Code of Regulations, title 23, section 648.4, subdivision (c), each party that wants to offer testimony into evidence shall submit written proposed direct testimony of each witness by the deadline for filing exhibits. The hearing officer will not permit a witness to give oral testimony that goes beyond the scope of the witness's written proposed testimony absent good cause. Each party shall designate each of its witness's written proposed testimony as a separate exhibit. A witness does not need to sign his or her proposed testimony. After each witness takes the oath, the hearing officer will ask the witness to confirm that his or her written proposed testimony is his or her testimony for the hearing.

Each party must submit all of its witnesses' written proposed testimony with the party's other exhibits before the exhibit filing deadline. A party who offers expert testimony must submit an exhibit containing a statement of each expert witness's qualifications, in addition to a separate exhibit with the expert witness's written proposed testimony.

The AHO strongly encourages each party to prepare and submit as a separate exhibit for each witness a set of slides that summarize each witness's testimony. During the hearing, the party may use the exhibit with the slides to facilitate each of the party's witness's oral summary of his or her written proposed testimony. The parties must label the slides for each witness as a separate exhibit and submit it by the exhibit submittal deadline.

**7. EXHIBIT FORMATTING AND ORGANIZATION:** A party submitting evidence must file with the AHO both the exhibits and an Exhibit Identification Index. The Exhibit Identification Index is a list of exhibits in Excel format.

Each party should label exhibits with a short version of the party's name and sequential numbers. For example, the Prosecution Team's exhibits should be numbered PT-1, PT-2, etc. Do not use any sub-letters like 1a, 1b, etc. for exhibit numbers.

Each party should number each paragraph of each witness's written testimony sequentially, 1, 2, 3, etc. (This paragraph numbering will make it easier for the hearing officer and representatives of other parties to ask each witness questions about his or her written testimony.) Witnesses should not use any sub-paragraph letters like 1a, 1b, etc. in their written testimony. A witness may include headings like "Background," "Introduction," etc. for different sections of the witness's written proposed testimony, but should not number or letter these headings and should not re-start the paragraph numbering in each section.

The AHO encourages parties to use pleading paper with line numbers in the left margins for their witnesses' written proposed testimony.

Each party must submit to the AHO the exhibits and exhibit identification indices for this hearing before the deadline specified in this Hearing Notice. The AHO may treat a party's failure to submit exhibits before this deadline as a waiver of the party's right to submit exhibits for the hearing and a waiver of the party's status as a party.

- a. Parties submitting exhibits based on complex technical analyses also must submit sufficient information so that a qualified independent expert could reproduce the results.

Parties submitting exhibits based on models or technical studies (such as reports, recommendations, or requirements) also must submit sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the models or studies, so that a qualified independent expert could reproduce the model or technical study and use it to obtain the same results.

- b. Consistent with California Code of Regulations, title 23, section 648.3, the hearing officer has discretion to decide whether to receive into evidence by reference any relevant, otherwise admissible, public records of the State Water Board and any documents or other evidence that a public agency has prepared or published, provided that the original or a copy was in the possession of the State Water Board before the hearing officer issued this notice. A party offering such an exhibit by reference shall advise the other parties and the AHO of the title of the document, the particular portions of the document, including page and

paragraph numbers, that the party will ask the hearing officer to consider, the purpose for which the party will use the portions of the exhibit if it is accepted into evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.

- c. The hearing officer normally will exclude exhibits that rely on unpublished technical documents unless the hearing office has admitted the unpublished technical documents into evidence.
- d. Parties submitting large-format exhibits such as maps, charts, and other graphics shall provide the originals for the hearing record in a form that can be folded to 8 ½ x 11 inches. Parties also shall file, for the hearing record, a reduced copy of a large-format original exhibit. The hearing officer will determine whether the large-format version or the reduced copy, or both, will be admitted into evidence.
- e. Documents uploaded by the parties normally must be in Adobe Portable Document Format (PDF), except that spreadsheets may be submitted in Microsoft Excel format, slide presentations may be submitted in Microsoft PowerPoint format, and exhibit identification indices must be submitted in Microsoft Excel format.
- f. If a party wants to submit an exhibit in any other format, then the party shall submit a written request to the hearing officer, and serve copies of the request on all other parties on the service list, at least 10 days before the deadline for submitting exhibits. The request shall describe the other format, explain what software is necessary for the hearing officer and other parties to be able to review the exhibit in that format, and explain why the party believes it is appropriate for the party to submit the exhibit in that format. The hearing officer normally will rule on such requests before the exhibit submittal deadline.

## **8. SUBMISSIONS OF EXHIBITS:**

To expedite the exchange of documents, reduce paper use, and lower the cost of participating in the hearing, all participants must submit exhibits by uploading them to the State Water Board's FTP site in electronic form (in addition to filing one paper copy of each exhibit with the AHO) unless the hearing officer authorizes submission of exhibits in different formats.

The State Water Board's FTP site may be accessed at <https://ftp.waterboards.ca.gov/>. All parties may use the shared account on this site to access and download documents in the administrative record for this hearing. This shared account is referred to in this notice as the "AHO-FTP Download Folders." The AHO will provide each party a unique account to upload the party's documents for this hearing. These accounts are referred to in this hearing notice as the "Parties' Upload Folders."

**a. AHO-FTP Download Folders:**

The AHO will create a folder for this proceeding on the State Water Board's FTP site. The folder for this proceeding will contain all administrative record documents related to this proceeding and may contain various subfolders, including subfolders for background documents and hearing documents. This folder is referred to in this notice as the "AHO-FTP folder for this proceeding." Only AHO personnel may upload files to this folder. The AHO will post each party's hearing exhibits, exhibit identification indices and closing briefs to this folder promptly after each filing deadline. The AHO may add other administrative record documents to this folder during this proceeding (including recordings of hearings, correspondence, and the AHO's proposed order). The documents in this folder will be the AHO's administrative record for this proceeding. Anyone may download documents from the AHO-FTP Download Folder for any proceeding, including this proceeding, at any time.

If any party believes that the AHO should add documents to, or remove any documents from, this folder for this proceeding, then the party may file a request to the hearing officer for such action (by e-mailing the request to the AHO e-mail inbox), and shall transmit copies of the request to all other parties on the service list. The hearing officer will issue rulings or take other actions on such requests as the hearing officer deems appropriate.

**b. Parties' Upload Folders:**

The AHO will create a separate upload account for each party that files an NOI as a party for this hearing, so that the party may upload the party's exhibits and other documents to the folder for that account. In most cases, these accounts will be specific for each party and each hearing and the AHO will close the accounts for each hearing after the hearing and related proceedings have been completed.

Any party to this proceeding may upload documents for this proceeding (primarily exhibits and exhibit identification indices and closing briefs) using the party's upload account. Only the party may upload files to the party's folder, and only the AHO may view, transfer and download files from this folder. After the applicable filing deadline, AHO staff will move documents uploaded by each party to the administrative record in the AHO-FTP Download Folder for the proceeding, so all other parties may view and download the documents.

Each party shall upload its exhibits and Exhibit Identification Index to the party's folder on the State Water Board's FTP site before the exhibit filing deadline specified in this notice. A party that uploads hearing documents to the FTP site does not need to serve copies of the documents on the other parties, except that, if another party has not agreed to accept electronic service of documents, then the party uploading hearing documents to the Board's FTP site also shall serve paper copies of all such documents on that other party and shall file a proof of this service with the AHO. When a party has uploaded all of the party's exhibits to the Board's FTP site, the party or party's representative shall send an email the AHO at [AdminHrgOffice@Waterboards.ca.gov](mailto:AdminHrgOffice@Waterboards.ca.gov), with copies to the other parties on the service list, notifying the AHO and the other parties that the party has uploaded the documents.

Each party also shall mail or hand-deliver one paper copy of each of the party's exhibits that is less than 100 pages long and the party's Exhibit Identification Index to one of the AHO's two addresses listed below, with a proof of service of these paper copies. A party may provide this proof of service of these paper copies by sending an e-mail or letter to the AHO, with the transmittal of copies of the e-mail or letter to the other parties shown in the e-mail "cc" (carbon copy) list or the cc portion of the letter. The party shall make this mailing of the paper copies of the party's exhibits by the exhibit filing deadline, but the AHO does not need to receive the mailed paper copies of the exhibits by this deadline. If a party is hand-delivering paper copies of each of the party's exhibits, this hand-delivery may be made within 24 hours after the exhibit filing deadline. Parties do not need to submit any paper copies of any exhibits that are over 100 pages long. Any party that elects not to submit paper copies of such exhibits shall state this election in the party's exhibit list.

After the exhibit filing deadline, the AHO will move all filed exhibits and Exhibit Identification Indices from the parties' Upload Folders to the administrative record folder and advise the parties that these documents are available for downloading from that folder. The AHO may rename or renumber exhibits that do not have proper exhibit names or numbers. If the AHO does this, then the AHO may create an electronic folder of documents that the party has submitted and a separate electronic folder of any documents the AHO has renamed or renumbered, in the administrative record folder.

If a party cannot upload exhibits to the FTP site, then the party may mail two paper copies of all its exhibits to the AHO at:

State Water Resources Control Board  
Administrative Hearings Office  
P. O. Box 100  
Sacramento, CA 95812-0100

Alternatively, a party may send paper copies of its exhibits to the AHO by overnight delivery to:

Joe Serna Jr. CalEPA Building  
State Water Resources Control Board  
Administrative Hearings Office  
1001 I Street  
Sacramento, CA 95814

If a party uses either of these alternative means of filing paper copies of its exhibits with the AHO in lieu of electronically filing the exhibits, then the party shall complete the filing of the paper copies by the exhibit filing deadline specified in this notice.

**9. PRE-HEARING CONFERENCE:** The hearing officer will conduct a pre-hearing conference before the hearing to discuss the pre-hearing and hearing schedules, the scope of the hearing, the formats of exhibits, opening statements and policy statements, methods of service, and any other appropriate procedural issues. This notice states the date and time of the pre-hearing conference. The hearing officer may issue notices of subsequent pre-hearing conferences. The hearing officer may issue a pre-hearing conference order after each pre-hearing conference.

**10. ORDER OF PROCEEDING:** The hearing officer will follow the order of proceedings specified in California Code of Regulations, title 23, section 648.5, unless the hearing officer decides to modify the order of proceeding before or during the hearing. The hearing officer will set time limits for each element of the proceeding specified below before or during the hearing.

- a. **Policy Statements:** The hearing officer will allow interested persons to present oral policy statements and oral summaries of written policy statements at the start of the hearing before the presentations of cases-in-chief. The hearing officer will limit oral policy statements and oral summaries of written policy statements to 5 minutes.
- b. **Presentation of Cases-In-Chief:** Each party that so indicates in its Notice of Intent to Appear may present a case-in-chief addressing the key issues in this hearing notice. Each case-in-chief will consist of an opening statement, if the party decides to make one, and oral summaries of the witnesses' written proposed testimony. The hearing officer then will allow other parties to cross-examine the witnesses who have presented written proposed testimony or oral summaries of their written proposed testimony. The hearing officer may allow re-direct examination and re-cross examination. The hearing officer will decide whether to accept the party's exhibits into evidence upon the party's request or motion after completion of all examinations of the party's witnesses.



- i. **Opening Statements:** At the beginning of each party's case-in-chief, the party or the party's attorney or other representative may make an opening statement that briefly and concisely states the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. The hearing officer will limit oral opening statements limited to 5 minutes per party. A party may submit a written opening statement before the hearing or during the hearing before the party's case-in-chief and then, if desired, may provide an oral summary of the written opening statement. A party should include any policy-oriented statements in the party's opening statement.
- ii. **Oral Summaries of Written Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, all witnesses shall swear or affirm that the written and oral testimony they will present will be true and correct. A witness shall not read written proposed testimony into the record, but instead shall just provide a summary. A witness provides his or her direct testimony when he or she confirms that a designated exhibit or exhibits is or are his or her testimony. The purpose of this part of the hearing is for the witness to briefly summarize his or her testimony. The hearing officer will not allow witnesses to testify orally to matters not in their written proposed testimony.
- iii. **Cross-Examination:** The hearing officer will permit other parties to cross-examine a party's witnesses on the witnesses' written submittals, oral summaries and clarifying testimony, and other relevant matters not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) If a party presents multiple witnesses, the hearing officer will decide whether the party's witnesses will be cross-examined individually or as a panel or panels. Ordinarily, only a party or the party's representative will be permitted to cross-examine a witness, but the hearing officer may allow a party to designate a person technically qualified in the subject being considered to cross-examine a witness.
- iv. **Re-Direct and Re-Cross Examination:** The hearing officer may allow re-direct and re-cross examination of each party's witnesses. Any re-direct examination and re-cross examination permitted may not exceed the scope of the cross-examination and the re-direct examination, respectively. The hearing officer may establish time limits for any permitted re-direct and re-cross examination.
- v. **Hearing Officer's Questions:** Consistent with California Code of Regulations, title 23, section 648.5, subdivision (b), the hearing officer may ask any witness questions, and may cross-examine any witness, at any time.

- c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officer will allow parties to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence another party has presented in its case-in-chief.

The hearing officer will set a schedule for submittal of written proposed rebuttal testimony and rebuttal exhibits. Written rebuttal testimony must specify the previously submitted testimony that is being rebutted. The hearing officer normally will limit cross-examination of witnesses offering rebuttal evidence to the scope of the rebuttal evidence.

- d. **Closing Statements and Legal Arguments:** The hearing officer will set a schedule for the parties to file written closing briefs. The parties shall follow the procedures described above for uploading exhibits to the parties' folders on the State Water Board's FTP site when they upload their closing briefs, and shall file one paper copy with the AHO. Each party shall mail a paper copy of its closing brief to any party that has not agreed to accept electronic service of documents and shall indicate this service in a proof of service filed with the AHO. No party may attach any documents of an evidentiary nature to the party's closing brief unless the hearing officer already has admitted the document into evidence or the document is the subject of an offer of proof made during the hearing. After the deadline for filing closing briefs, the AHO will file all closing briefs in the AHO-FTP folder for this proceeding.

**11. RULES OF EVIDENCE:** Government Code section 11513 shall apply to all evidence offered during this hearing. Consistent with Government Code section 11513, subdivision (d), a party may use hearsay evidence to supplement or explain other evidence, but over timely objection such evidence will not be sufficient by itself to support a finding unless the evidence would be admissible over objection in a civil action.

**12. COURT REPORTER:** The AHO will not order a court reporter for any pre-hearing conferences or hearings in this proceeding. Any interested party may order a court reporter at the party's own expense. Any party that arranges for a court reporter and intends to submit the reporter's transcript to the AHO should inform the court reporter that court reporter's transcripts submitted to the AHO will become public documents upon submission and that the AHO will file them in the AHO-FTP folder for this proceeding. However, even if the AHO files such transcripts, the AHO's official records of this proceeding will be the audio-plus-video recordings described in the following paragraphs and not the reporter's transcripts.

**13. OFFICIAL RECORD:** The official administrative record for this proceeding will be all the electronic files that the AHO has saved in the AHO-FTP folder this proceeding. The AHO uses the paper copies of exhibits that parties submit to the AHO for internal use only.

The official record of any part of this proceeding, such as a conference or hearing, is the audio-plus-video recording file of that part of the proceeding. All citations in written briefs to parts of this proceeding shall include the dates and times of the cited portions of the audio-plus-video recordings of those parts of this proceeding. If a party has filed a court reporter's transcript of any part of this proceeding, then the party may include a parallel citation to the transcript, but the first part of each citation shall be to date and time in the audio-plus-video recording.

**14. TELECONFERENCE HEARING:** The AHO is conducting this hearing by Zoom teleconference. New users of Zoom may want to review Zoom's support guide: <https://support.zoom.us/hc/en-us/categories/200101697>.

To facilitate a clear understanding of who is speaking, the hearing officer will ask each person to identify himself or herself as necessary during the teleconference hearing. The hearing officer prefers that parties participate by both audio and video through the Zoom meeting link. If this is not possible, then the hearing officer will accept audio-only participations.

The AHO will record all pre-hearing conferences and hearings using the Zoom videoconference recording software and will post an audio-plus-video file and a Zoom-generated transcript of each such proceeding in in the AHO-FTP folder for this proceeding.

Parties should test their devices' video and audio functions before the start of the hearing or pre-hearing conference. At the lower left-hand side of the Zoom window is a microphone and a video camera symbol. If there is a red line across the symbols, your microphone is on mute and video camera is off.

Please plan to call into the video conference at least 10 minutes before the scheduled hearing or pre-hearing conference time to ensure you can resolve any technical issues before the hearing or pre-hearing conference begins. You will initially be in a virtual waiting room and will be admitted to the hearing by a member of the AHO. When you speak, please turn your video on and unmute your microphone by clicking on the symbols in the lower left-hand side of the Zoom window. During the hearing, please be respectful and patient, raising your hand on-screen to get the hearing officer's attention. To reduce acoustic background noise, please remain on mute if you are not speaking. If you have other devices that are tuned into the meeting, please turn off the speaker volume of those devices. Other participants will be able to see your name, depending on your Zoom account settings. Other participants may also see the last three digits of your phone number unless you have called in anonymously. During the hearing, AHO staff may add designations of participants' names to the Zoom display.

If the device you are using freezes, please notify staff at [AdminHrgOffice@Waterboards.ca.gov](mailto:AdminHrgOffice@Waterboards.ca.gov) or by calling (916) 341-6940 and leaving a voicemail message and restart the device. AHO staff will be monitoring the e-mail inbox and voicemail and will notify the hearing officer. If restarting the device does not work, try calling into the hearing using the phone number provided to you with the Zoom meeting information.

In lieu of participating in the Zoom hearing, anyone may watch past or present AHO hearings by clicking "Watch AHO Hearings" on [https://www.waterboards.ca.gov/water\\_issues/programs/administrative\\_hearings\\_office](https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office). People watching AHO hearings by this method will not be able to participate in the hearing, and will not be identified to anyone else.

Date: July 5, 2022

/s/ Nicole L. Kuenzi  
Nicole Kuenzi, Hearing Officer

Attachments:

- Notice of Intent to Appear Form
- Service List

**NOTICE OF INTENT TO APPEAR FORM**

\_\_\_\_\_ (name of participant) plans to participate in the pre-hearing conference and hearing on the March 24, 2022 Notice of Proposed Revocation of water-right License 881B held by the United States Army Corps of Engineers.

**The pre-hearing conference will be on July 26, 2022, at 1:00 p.m. and the hearing will begin on December 15, 2022, at 9:00 a.m.**

Name (type or print):

\_\_\_\_\_

Represented party (if applicable):

\_\_\_\_\_

Mailing Address:

\_\_\_\_\_

Telephone Number: \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Optional:

I/we decline electronic service of hearing-related materials.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## SERVICE LIST

Michael Patrick George  
Delta Watermaster  
State Water Resources Control Board  
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Sacramento, CA 95814  
[Michael.George@waterboards.ca.gov](mailto:Michael.George@waterboards.ca.gov)

John Prager  
Office of Enforcement,  
State Water Resources Control Board  
801 K Street, 23<sup>rd</sup> Floor  
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