
State Water Resources Control Board

NOTICE OF PUBLIC HEARING AND TENTATIVE HEARING PROCEDURE

The State Water Resources Control Board
will hold a Public Hearing on the Proposed Disciplinary Action
Regarding Benjamin B. Magana, Jr.

on

August 22, 2023

Commencing at 10:00 a.m.,

Continuing to August 23, 2023 as necessary,

in the Coastal Hearing Room,

at the California Environmental Protection Agency Headquarters,
1001 I Street, Second Floor
Sacramento CA 95814

Purpose of Hearing

The State Water Resources Control Board (State Water Board) will hold a hearing to consider the allegations made by the Prosecution Team (Prosecution Team, defined further below) in the instant matter. On November 2, 2022, the Prosecution Team issued to Benjamin B. Magana, Jr. (Respondent) a Proposed Disciplinary Action, proposing that Mr. Magana's Grade D3 water distribution operator certificate (Certificate No. 34232) be revoked. The Proposed Disciplinary Action is based upon the Prosecution Team's determination that Respondent violated Health and Safety Code sections 106877 (subdivisions (b)(2), (b)(3), (b)(4) and (b)(6)) and 106878 (subdivisions (b)(2) and (c)) by providing false or misleading information to the state, failing to ensure proper treatment of the distribution system, and employing a water distribution operator who does not hold a valid, unexpired water distribution operator certificate. The Prosecution Team proposes revocation of Respondent's Grade D3 drinking water distribution operator certificate, and notification of Respondent's current and former employers. On December 16, 2022, the Respondent requested a hearing before the State Water Board regarding the Proposed Disciplinary Action.

The State Water Board has the authority to suspend, revoke, or refuse to grant or renew any water distribution operator certificate to operate a water distribution system or may place on probation or reprimand the certificate holder upon any reasonable grounds, including, but not limited to, the use of fraud or deception in the course of operating a water distribution system, the failure to use reasonable care of judgment in the operation of a water distribution system, the inability to perform operating duties

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

properly in a water distribution system, and the conduct of willful or negligent acts that cause or allow the violation of the federal Safe Drinking Water Act (subchapter XII (commencing with section 300f) of chapter 6A of title 42 of the United States Code), the California Safe Drinking Water Act (chapter 4 (commencing with section 116270) of part 12 of division 104 of the Health and Safety Code), or the regulations or standards adopted pursuant to either act. (Health and Saf. Code, § 106877, subds. (b)(2), (3), (4), and (6).) A person who commits certain of these acts (use of fraud or deception in the course of operating a water distribution system, failure to use reasonable care of judgment in the operation of a water distribution system, and conduct of willful or negligent acts that cause or allow the violation of the federal or state Safe Drinking Water Act or regulations or standards adopted pursuant thereto) also may be liable civilly up to \$5,000 for each violation. (Health & Saf. Code, § 106878, subd. (c).)

A person who operates a water distribution system must possess a valid, unexpired water distribution operator certificate of the appropriate grade. (Health & Saf. Code, § 106885, subd. (b)(1).) Any person who is in responsible charge of a water distribution system and allows the employment of any person as a water distribution operator who does not hold a valid, unexpired water distribution operator certificate of the appropriate grade is guilty of a misdemeanor and may be liable civilly up to \$100 for each day of violation. (Health & Saf. Code, § 106878, subd. (b)(2).)

Prior to suspension or revocation of an operator certificate, the State Water Board shall provide the certificate holder with the opportunity for a hearing in accordance with the rules adopted pursuant to Water Code section 185. (Health and Saf. Code, § 106877, subd. (c).) The rules adopted pursuant to Water Code section 185 are located in the California Code of Regulations, title 23, division 3, chapter 1.5, article 2, section 648 et seq. The State Water Board may impose civil liability under article 3 of chapter 4 of division 104 of the Health and Safety Code administratively in accordance with article 2.5 of chapter 5 of division 7 of the Water Code. (Health & Saf. Code, § 106879, subd. (a).)

The State Water Board has scheduled a hearing to consider the matter. At the hearing, the State Water Board will receive evidence regarding the alleged submission of false or misleading information to the state, the alleged failure to ensure proper treatment of the distribution system, the alleged employment of a water distribution operator who does not hold a valid, unexpired water distribution operator certificate, and the imposition of the proposed certificate revocation and employer notification, as well as evidence regarding any legal theories relevant to the prosecution or defense of the allegations. After weighing and considering the evidence, the State Water Board has the option to approve the proposed revocation and notification, disapprove the proposed revocation and notification, or take any other action it deems necessary.

Key Issues

The State Water Board's decision will be based upon evidence in the record developed at the hearing. Parties should submit exhibits and testimony responsive to the following issues:

1. The legal and factual basis for the allegations that Respondent submitted false and misleading information to the state, failed to ensure proper treatment of the distribution system, and employed a water distribution operator who did not hold a valid, unexpired distribution operator certificate.
2. The legal and factual basis for assessing the penalties proposed, i.e., the revocation of the drinking water distribution operator certificate and the notification of employers.
3. Any other issues relevant to the prosecution or defense of the allegations.

Hearing Officer and Advisory Team

State Water Board Vice Chair Dorene D'Adamo will preside as the Hearing Officer for this proceeding. Other members of the State Water Board may be present during the hearing. (Note: State Water Board Member Nichole Morgan has recused herself from any involvement in this proceeding. Although Board Member Morgan has no impermissible conflict of interest under any applicable laws, she will not participate in any decisions relating to this proceeding and her recusal shall be noted in all communications (emails, memoranda, etc.) to State Water Board members or the State Water Board Executive Office relating to this matter.)

State Water Board staff and attorneys (the Advisory Team) will assist the Hearing Officer and other members of the State Water Board throughout this proceeding, providing legal and technical advice.

Advisory Team members from the Office of Chief Counsel are Merswind Reyer and Anne Hartridge.

The Advisory Team member from the Division of Financial Assistance is Sahand Rastegarpour.

Prosecution Team and Separation of Functions

The State Water Board separates prosecutorial and adjudicative functions in matters that are prosecutorial in nature. State Water Board staff and attorneys that have developed and issued the Proposed Disciplinary Action (the Prosecution Team) have been separated from the Advisory Team. The Prosecution Team is not advising the Hearing Officer or the State Water Board in this proceeding.

Prosecution Team members from the State Water Board's Office of Enforcement are Nickolaus Knight, Bryan Elder, Tomas Eggers, and Michael Yoakum.

The Prosecution Team member from the Office of Chief Counsel is Julie M. Osborn.

Ex Parte Communications

To maintain the State Water Board's impartiality, ex parte contacts are prohibited. (See, e.g., Gov. Code, § 11430.10 et seq.) Ex parte contacts are those communications that are directed at the Hearing Officer, other State Water Board members, or the Advisory Team members, regarding the pending matter, and which are not communicated in a manner open to all other parties. Communications regarding non-controversial procedural matters are not considered ex parte contacts and are therefore not restricted.

Members of the Prosecution Team have not communicated and will not communicate with the Hearing Officer, other members of the State Water Board, or the Advisory Team regarding any substantive matter at issue in the proceeding.

To avoid ex parte contacts in pre-hearing communications, Respondent should ensure that the Prosecution Team is copied on all correspondence directed to the Advisory Team, and *vice-versa*.

Approval of Hearing Procedure

Attached to this Notice is a Tentative Hearing Procedure that, once final, will govern the conduct of proceedings related to consideration of the Proposed Disciplinary Action. The Prosecution Team and Respondent shall have the opportunity to: (1) comment on the Tentative Hearing Procedure; (2) propose changes to deadlines and other substantive provisions; (3) provide alternative preferred contact information; and (4) object to service of hearing documents via email to the identified primary point(s) of contact, which otherwise will be the default method of service. To be considered by the Advisory Team, all comments and proposed revisions shall be submitted via email to Merswind.Reyer@waterboards.ca.gov no later than **12:00 pm on May 19, 2023** and shall be provided to the other parties via email. The parties will be provided a copy of the Hearing Procedure via email and/or certified mail. The Hearing Procedure also will be posted to the State Water Board's website. (https://www.waterboards.ca.gov/public_notices/operator_certification_proceedings).

For the purposes of California Code of Regulations, title 23, section 648 et seq., the Hearing Procedure (including any subsequent revisions thereto) shall be incorporated as part of this Notice. Once the Hearing Procedure is finalized, this Notice may be reissued.

Opportunity for Public Participation

The State Water Board will consider written comments submitted by members of the public that are interested in the pending matter (Interested Persons). The parties to the proceeding will be permitted to submit formal written responses to written comments from Interested Persons. To allow for this, all written comments shall be submitted to the Advisory Team, and to the parties, as early as possible, and in no case later than **12:00 pm on June 14, 2023**.

Interested Persons also will be provided the opportunity to orally present general policy statements to the State Water Board at the hearing. Such statements generally will be limited to 3 minutes per Interested Person, though the Hearing Officer may grant additional time upon request. Interested Persons do not need to submit written statements in order to speak at the hearing.

Unless formally recognized as a “Designated Party” per the Hearing Procedure, an Interested Person is not a party entitled to participate directly in the proceeding, except as provided above. Interested Persons will not be permitted to present evidence (e.g., photos, eyewitness testimony, etc.). They also are not subject to cross-examination. Although the State Water Board will consider comments from Interested Persons on matters of general policy, such comments are not admissible as evidence.

Requests for “Designated Party” Status

The Hearing Procedure will govern the process by which Interested Persons apply for “Designated Party” status. The deadline to apply for this status shall be no earlier than **May 23, 2023** and may be extended at the discretion of the Hearing Officer.

Video and Teleconference Option

The hearing on the Proposed Disciplinary Action will be conducted with a physical meeting location and an option for the public to participate remotely via the ZOOM video conferencing platform and may also be broadcasted via livestream. Named parties and any Designated Parties intending to appear at the hearing remotely will automatically be provided ZOOM information.

If you are an Interested Person and do not intend to speak at the hearing, you can watch the meeting via livestream if available. The livestream URL will be posted to the State Water Board website approximately two weeks before the first day of the hearing. If livestream is not available, or if you are an Interested Person and intend to speak at the hearing, you will need access to the ZOOM virtual meeting using the Meeting ID and Passcode. The Meeting ID and phone numbers will be on the State Water Board’s website approximately two weeks before the first day of the hearing. To obtain the Passcode, you will need to follow directions to be provided on the State Water Board’s website, and State Water Board staff will send you the Passcode.

Opportunity for Settlement

The Prosecution Team and the Respondent may, at their discretion, engage in private settlement discussions and may include other persons in those discussions. Due to the separation of functions discussed previously, the Advisory Team cannot participate in settlement discussions. Should the Prosecution Team and the Respondent reach settlement, they must notify the Advisory Team as soon as possible.

Questions

Questions concerning non-controversial procedural matters should be directed to Advisory Team Member Merswind Reyer at Merswind.Reyer@waterboards.ca.gov.

Questions about legal or technical matters concerning the Proposed Disciplinary Action should be directed to Prosecution Team Member Nickolaus Knight, at Nickolaus.Knight@waterboards.ca.gov. Respondent also should contact Prosecution Team Member Nickolaus Knight if the Respondent wishes to discuss settlement prior to hearing.

May 1, 2023

Date



Courtney Tyler
Clerk to the Board

Attachment:
Tentative Hearing Procedure

[TENTATIVE] HEARING PROCEDURE

This document contains a proposed Hearing Procedure for consideration by the Respondent and Prosecution Team and shall have no effect until approved by the Hearing Officer for this proceeding. Notably, substantive requirements, time allotments, and deadlines are subject to change based on input from the Parties. Once approved, the final Hearing Procedure will be posted to the State Water Board's website. (https://www.waterboards.ca.gov/public_notices/operator_certification_proceedings)

Effective Date: Upon approval by the Hearing Officer

Proposed Action: Proposed Disciplinary Action
Regarding Benjamin B. Magana, Jr.

Hearing Date: August 22, 2023

Location: Coastal Hearing Room, CalEPA Headquarters, 1001 I Street,
Second Floor, Sacramento; Zoom Videoconferencing Platform

Respondent: Benjamin B. Magana, Jr.

A. Applicable Laws and Regulations

For purposes of California Code of Regulations, title 23 (Title 23), section 648 et seq., this hearing constitutes an "adjudicative proceeding." This proceeding is governed by the following statutes, regulations, and policies:

- (1) Article 3 of chapter 4 of part 1 of division 104 of the Health and Safety Code;
- (2) Article 1 of chapter 4 of part 12 of division 104 of the Health and Safety Code;
- (3) Chapter 13 of division 4 of title 22 of the California Code of Regulations;
- (4) Title 23 of the California Code of Regulations, sections 648 – 648.8, available for review on the State Water Board's laws and regulations webpage (https://www.waterboards.ca.gov/laws_regulations);
- (5) Chapter 4.5 of the Administrative Procedure Act (Gov. Code, § 11400 et seq.), excluding article 8 (*Language Assistance*), article 13 (*Emergency Decision*), article 14 (*Declaratory Decision*) and article 16 (*Administrative Adjudication Code of Ethics*);
- (6) Evidence Code sections 801 – 805; and

(7) Government Code section 11513.

Except for Government Code section 11513 (see above), chapter 5 of the Administrative Procedure Act (commencing with section 11500 of the Government Code) does not apply to this hearing.

Any procedures not provided by this Hearing Procedure are not applicable to this hearing.

B. Video and Teleconference Option

The Administrative Procedures Act allows all or part of a hearing to be conducted by telephone, television, or other electronic means. (Gov. Code, §§ 11425.20 & 11440.30). The hearing on the Proposed Disciplinary Action will be conducted with both a physical meeting location and an option for the public to participate remotely via the ZOOM video conferencing platform and may also be broadcasted via livestream and may also be broadcasted via livestream. Named parties and any Designated Parties intending to appear at the hearing remotely will automatically be provided ZOOM information.

If you are an Interested Person and do not intend to speak at the hearing, you can watch the meeting via livestream if available. The livestream URL will be posted to the State Water Board website approximately two weeks before the first day of the hearing. If livestream is not available, or if you are an Interested Person and intend to speak at the hearing, you will need access to the ZOOM virtual meeting using the Meeting ID and Passcode. The Meeting ID and phone numbers will be on the State Water Board's website approximately two weeks before the first day of the hearing. To obtain the Passcode, you will need to follow directions to be provided on the State Water Board's website, and State Water Board staff will send you the Passcode.

The Advisory Team will record all pre-hearing conferences and hearings using the ZOOM videoconferencing recording software and will post an audio-plus-video file and a ZOOM-generated transcript of each such proceeding in the File Transfer Protocol (FTP) site for this proceeding described below.

C. Parties and Separation of Functions

To ensure that Respondent receives a fair hearing, State Water Board staff and counsel have undertaken a separation of functions. State Water Board staff and counsel that have issued the Proposed Disciplinary Action (Prosecution Team) have been separated from the State Water Board staff and attorneys that will advise the State Water Board on the Proposed Disciplinary Action (Advisory Team). (Gov. Code, § 11425.10, subd. (a)(4).) This separation of functions also applies to the supervisors of each team. Any Member of the Advisory Team who normally supervises any member of the Prosecution Team is not acting as that person's supervisor in this proceeding. Similarly, any member of the Prosecution Team who normally supervises any member of the Advisory Team is not acting as that person's supervisor in this proceeding. Members of the

Advisory Team have not exercised authority over the Prosecution Team or advised them with respect to this matter. Similarly, members of the Prosecution Team have not exercised authority over the Advisory Team or advised them with respect to this matter. The State Water Board's Office of Enforcement is not advising the Hearing Officer or the State Water Board in this proceeding. Other members of the Prosecution Team act or have acted as advisors to the State Water Board in other, unrelated matters, but they are not advising the Hearing Officer or the State Water Board in this proceeding. The Prosecution Team will present evidence for consideration by the State Water Board. The Advisory Team will provide legal and technical advice to the State Water Board.

The Advisory Team, Prosecution Team, Respondent, and Designated Parties (if any) are listed below:

Hearing Officer and Advisory Team

Dorene D'Adamo, Hearing Officer, Vice Chair, State Water Board
Merswind Reyer, Attorney IV, State Water Board, Office of Chief Counsel
Sahand Rastegarpour, Senior WRC Engineer, State Water Board, Division of Financial Assistance
Anne Hartridge, Assistant Chief Counsel, State Water Board, Office of Chief Counsel

Prosecution Team

Nickolaus Knight, Attorney IV, State Water Board, Office of Enforcement
Bryan Elder, Supervising WRC Engineer, State Water Board, Office of Enforcement
Tomas Eggers, Senior WRC Engineer, State Water Board, Office of Enforcement
Michael Yoakum, Staff Services Analyst, State Water Board, Office of Enforcement
Julie M. Osborn, Attorney IV, State Water Board, Office of Chief Counsel

Respondent

Benjamin B. Magana, Jr.

Designated Parties

Parties to be designated in accordance with Section F.

D. Ex Parte Contacts Prohibited

Any communication regarding the Proposed Disciplinary Action that is directed at the Hearing Officer, other State Water Board members, or the Advisory Team by a participant in the hearing and that is not made in a manner open to all other parties is considered an "ex parte" contact. All "ex parte" contacts are prohibited. (Gov. Code, § 11430.10.) Communications regarding non-controversial procedural matters are not considered ex parte contacts and are permitted.

E. Interested Persons (Non-Parties)

The Hearing Officer will consider written comments submitted by members of the public that are interested in the pending matter (Interested Persons). The parties to the proceeding will be permitted to submit formal written responses to Interested Person written comments. To allow for such responses, all written comments shall be submitted with the subject line “Public Comment – August 22, 2023 Magana Hearing” to the Advisory Team, and the parties, via the email contacts provided below, as early as possible, and in no case later than **12:00 pm on June 14, 2023**.

Interested Persons will also be provided the opportunity to orally present general policy statements to the Hearing Officer at the hearing. Such statements will be limited to 3 minutes per Interested Person for this hearing, though the Hearing Officer may grant additional time on a case-by-case basis. Interested Persons do not need to submit written statements in order to speak at the hearing.

Unless they are formally recognized as a “Designated Party” per the Hearing Procedure, Interested Persons are not parties entitled to directly participate in the proceeding, except as provided above. Interested Persons will not be permitted to present evidence (e.g., photos, eyewitness testimony, etc.). They are also not subject to cross-examination but may be asked to respond to clarifying questions from the Hearing Officer or the Advisory Team. Although the State Water Board will consider comments from Interested Persons on matters of general policy, such comments are not admissible as evidence.

F. Applications for “Designated Party” Status

By default, the only parties to an adjudicative enforcement proceeding are: (1) the Prosecution Team; and (2) the Respondent named in the Proposed Disciplinary Action. (See Gov. Code, § 11405.60; Cal. Code Regs. tit. 23, § 648.1, subd. (a).) In some circumstances, however, it may be appropriate for certain Interested Persons to participate directly in the proceeding as a “Designated Party.” (Gov. Code, § 11440.50; Cal. Code Regs. tit. 23, § 648.1, subd. (a).) Such determinations shall be made discretionarily on a case-by-case basis by the Hearing Officer.

To request “Designated Party” status, Interested Persons must submit a written request to the Advisory Team, by email to Merswind.Reyer@waterboards.ca.gov, and serve the request on all parties to the proceeding via email and/or certified mail, no later than **12:00 pm on May 23, 2023**. The written request must include the following information:

- (1) An explanation of how the issues to be addressed at the hearing substantially affect the person requesting Designated Party status (Applicant);
- (2) Why the Applicant believes that the Prosecution Team and Respondent will not adequately represent their interests;
- (3) A summary of the evidence that the Applicant seeks to present at the hearing, including whether they seek to present their own witness testimony; and

(4) Whether the Applicant seeks to cross-examine the other parties' witnesses.

The Advisory Team will promptly respond to all timely written requests for Designated Party status. The Advisory Team may request further information before the determination is made. A request for Designated Party status shall not be granted if, in the totality of circumstances, it appears that such designation will impair the interests of justice and the orderly and prompt conduct of the proceeding. The Hearing Officer may impose restrictions on the requestor's hearing participation, including limiting or excluding the use of cross-examination and other procedures to promote the orderly and prompt conduct of the proceeding. (Gov. Code, § 11440.50, subd. (c).)

In the event that "Designated Party" status is granted, this Hearing Procedure may be revised as appropriate.

G. Pre-Hearing Submittals

To avoid the introduction of surprise testimony and exhibits, and to minimize the need for oral argument and testimony at the hearing, this Hearing Procedure requires the parties to submit all documentary evidence, witness information, and legal/technical memoranda to the Advisory Team prior to the hearing. (Cal. Code Regs. tit. 23 § 648.4, subds. (a), (b), & (c).) Absent a showing of good cause and lack of prejudice to the parties, the Hearing Officer may exclude materials that are not submitted in accordance with this Hearing Procedure. (Cal. Code Regs. tit. 23, § 648.4, subd. (d).) Excluded materials will not be considered by the State Water Board. (Cal. Code Regs. tit. 23 § 648.4, subd. (e).)

1. Electronic Submittals to Advisory Team [All Parties]

All pre-hearing submittals and rebuttals to the Advisory Team under this Hearing Procedure shall occur electronically via File Transfer Protocol (FTP) (<https://ftp.waterboards.ca.gov/>), except as otherwise provided below. Submittals to the FTP site must not contain confidential information. Parties may obtain FTP log-in information from the Advisory Team.

Once a party has uploaded its materials to the FTP site, the party shall notify the Advisory Team and all other parties via email and identify each of the files that have been uploaded.

Exhibits shall be uploaded as sequentially numbered pdf files with file names in all lower case, and following the naming conventions set forth below:

Prosecution Team: **pt_exh_###_xxxx.pdf**
Respondent: **resp_exh_###_xxxx.pdf**

Any party needing assistance with uploading its materials to the FTP site should contact MaryAnne Rosario at MaryAnne.Rosario@waterboards.ca.gov or (916) 319-7998.

In the event that there are additional Designated Parties participating in the proceeding, the Advisory Team will provide additional instructions regarding file naming.

2. Submittal Index [All Parties]

Except as otherwise expressly provided below, each pre-hearing submittal shall be accompanied by a table listing each document included as part of the submittal. The table shall include the following columns: *Document Title*; *PT/Respondent Exhibit Number*; *Exhibit Date* (i.e., when the document was generated); and *File Name*.

3. Prosecution Team Submittals

No later than **12:00 pm on June 23, 2023**, the Prosecution Team shall submit the following materials to the Advisory Team, via the process described above:

- (1) All documentary evidence supporting the Proposed Disciplinary Action, with each document separately designated as a sequentially numbered exhibit (i.e., Exhibit 1, Exhibit 2, Exhibit 3, etc.). Each allegation in the Proposed Disciplinary Action shall be supported by an exhibit and/or witness testimony to be offered at the hearing.
- (2) [OPTIONAL] A memorandum articulating the Prosecution Team's legal arguments and technical analyses in support of the Proposed Disciplinary Action.
- (3) A Witness Information Sheet containing the name of each witness the Prosecution Team intends to call to testify at the hearing; the subject matter of each witness' testimony; and the estimated time required for each witness. If any of the proposed witnesses will be testifying as an expert (see Evid. Code, § 800 et seq.), the memorandum also shall include the witnesses' qualifications as an expert.

4. Respondent and Designated Party Submittals

No later than **12:00 pm on July 19, 2023**, the Respondent and any Designated Parties shall submit the following materials to the Advisory Team, via the process described above:

- (1) Any additional documentary evidence that supports the submitting party's position with respect to the Proposed Disciplinary Action. These materials shall be separately designated as sequentially numbered exhibits, starting with "Exhibit 1."
- (2) [OPTIONAL] A memorandum articulating the submitting party's legal arguments and technical analyses in support of their position(s) with respect to the Proposed Disciplinary Action.

A Witness Information Sheet containing the name of each witness the submitting party intends to call to testify at the hearing; the subject matter of each witness' testimony; and the estimated time required for each witness. If any of the proposed witnesses will be testifying as an expert (see Evid. Code, § 800 et seq.), the memorandum also shall include the witnesses' qualifications as an expert.

5. Rebuttal Evidence [All Parties; Upon Parties' Agreement]

Notwithstanding the pre-hearing evidence submission deadlines specified above, the parties will be permitted to introduce additional evidence necessary to disprove or contradict evidence submitted by another party (Rebuttal Evidence).

By default, California Code of Regulations, title 23, section 648.4, subdivision (f) permits parties to introduce Rebuttal Evidence for the first time during the hearing. However, the Hearing Procedure may waive this provision and require pre-submission of Rebuttal Evidence. (Cal. Code Regs. tit. 23, § 648, subd. (d).)

To maintain fairness, ensure orderly conduct of the proceeding, and avoid “surprise evidence” (see Cal. Code Regs. tit. 23, § 648.4, subd. (a)), this Hearing Procedure requires that Rebuttal Evidence be submitted to the Advisory Team and other parties, via the process described above, no later than **12:00 p.m. on August 9, 2023**. The requirement to submit Rebuttal Evidence in advance of the hearing applies only to rebut timely-submitted written evidence; the parties will have the opportunity to rebut oral testimony submitted at the hearing.

6. Responses to Interested Person Written Comments [All Parties; Optional]

The parties may elect to submit written responses to written comments from Interested Persons. All such responses must be submitted to the Advisory Team, and to the other parties, no later than **12:00 pm on August 9, 2023**. This submittal may occur via email and need not be accompanied by an updated index table. In lieu of a written response, the parties also may address such comments at the hearing.

7. Proposed Order [All Parties; Optional]

Pursuant to Government Code section 11425.10, subdivision (a)(6), the State Water Board’s decision shall be in writing, based on the record, and include a statement of the factual and legal basis of the decision.

No later than **12:00 pm on September 13, 2023**, the Prosecution Team and the Respondent may submit a proposed order (Proposed Order) for review by the Advisory Team and transmittal to the State Water Board for consideration.

These submittals shall occur via email with email service to the other parties and need not be accompanied by an updated index table. The Proposed Order shall be submitted both as a Microsoft Word file and as a PDF.

8. Presentation Slides [All Parties; Mandatory if Slides Are Used]

No later than **12:00 pm on August 16, 2023**, the parties shall provide the Advisory Team with their presentation slides for use at the hearing, as a PowerPoint file and PDF (for inclusion in the administrative record). This submittal shall occur via email and need not be accompanied by an updated index table. If the party does not intend to present slides at the hearing, no PowerPoint submittals are required from the party.

H. Conduct of Hearing

1. Hearing Time Limits

“Adjudicative proceedings shall be conducted in a manner ... deem[ed] most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the [State Water] Board.” (Cal. Code Regs. tit. 23, § 648.5, subd. (a).) To that end, it has been determined that the following time limits shall apply to the parties at the hearing.

Prosecution Team:	60 Minutes
Respondent:	60 Minutes
Designated Parties [if any]:	60 Minutes

The above time limits have been proposed by the Advisory Team. The parties may propose alternative time limits for the operative Hearing Procedure.

The above time limits are based on the Advisory Team’s review of the allegations within the Proposed Disciplinary Action, and based on experience in similar enforcement proceedings, and any input from the parties.

The parties may allocate their allotted time as they see fit between presenting evidence and testimony, cross-examining adverse witnesses, and making an opening or closing statement. Discussions on procedural issues will not count against the parties’ allotments. A timer will be used to track how much time has elapsed. This timer will be paused during Hearing Officer and Advisory Team questions and party responses to those questions. Additional time may be provided at the discretion of the Hearing Officer (at the hearing), upon a showing that additional time is necessary.

2. Witness Testimony

At the hearing, witness testimony shall be limited to those subjects previously specified in the party’s Witness Information Sheet (see above). Upon request, the Hearing Officer may permit testimony on additional subjects, provided that it will not result in undue prejudice to the other parties.

All witnesses who have submitted written testimony shall be available to appear during the hearing (to affirm that the testimony is true and correct) and shall be subject to cross-examination. The failure of a witness to be available during the hearing may result in the submitted testimony being treated as hearsay. (Cal. Code Regs. tit. 23, § 648.4, subds. (d) & (e).)

All persons intending to testify at the hearing shall take the oath administered by the presiding officer. (Gov. Code, § 11513; Cal. Code Regs. tit. 23, § 648.5, subd. (a)(3).)

3. 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.

- (1) An opening statement by the Hearing Officer summarizing the subject matter and purpose of the hearing;
- (2) Identification of all persons participating in the hearing;
- (3) Administration of oath to persons who intend to testify;
- (4) Presentation of any exhibits by staff of the State Water Board assisting the Hearing Officer;
- (5) Presentation of interested person policy statements; and
- (6) Parties' presentations of evidence. The hearing will proceed in the following order (beginning with the Prosecution Team, then the Respondent, for each item):
 - a. Party's opening statement;
 - b. Summaries of the party's witnesses' written proposed testimony or presentation of the party's oral testimony;
 - c. Cross-examination of the party's witnesses;
 - d. Re-direct examination and re-cross examination of the party's witnesses, if allowed by the Hearing Officer;
 - e. Questions from the Hearing Officer and Advisory Team, which may occur at any time, but normally will be after all other parties have completed their cross- examinations of a party's witnesses;
 - f. Submitting exhibits into evidence, with opportunities for objections by other party;
 - g. Presentations of parties' rebuttal evidence; and
 - h. Closing statements.

4. Rules of Evidence

The proceeding shall be conducted in accordance with the provisions and rules of evidence set forth in Government Code section 11513.

Hearsay shall be admissible as evidence, subject to the provisions of Government Code section 11513.

Evidence already in the State Water Board's files may be submitted by reference if the location of the evidence is clearly identified. (Cal. Code Regs. tit. 23, § 648.3.)

5. Presentations

Slide presentations (e.g., PowerPoint) may be used at the hearing, provided their contents do not exceed the scope of previously submitted material, and provided the presentations have timely been provided to the Advisory Team as specified above. State Water Board administrative staff will be running the presentation at the party's direction.

6. Court Reporter

The Advisory Team will not order a court reporter for any pre-hearing conferences or hearings in this proceeding. Any party may order a court reporter at its own expense. Any party that arranges for a court reporter and intends to submit the reporter's transcript to the Hearing Officer should inform the court reporter that the court reporter's transcripts submitted to the Hearing Officer will become public documents on submission and the Advisory Team will file them in the FTP folder for this proceeding. However, even if the Advisory Team files the transcripts, the official record of this proceeding will be the audio-plus-video recordings described in the following paragraph, and not the reporter's transcripts.

7. Official Record

The official administrative record for this proceeding will be all the electronic files in the FTP site folder for this proceeding. The official record of any part of this proceeding, such as a conference or hearing, is the audio-plus-video recording of that part of the proceeding. All citations in written briefs or other documents 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.

I. Requests for Extensions

Parties may request the extension of any deadline specified in this Hearing Procedure. Such requests shall be made via email to the Advisory Team, with the other parties copied on the email. The granting or denial of a request shall be exclusively within the discretion of the Hearing Officer.

J. Modifications to Hearing Procedure

This Hearing Procedure may be revised by the Hearing Officer after appropriate notice and opportunity to be heard. For the purposes of this section, the extension of a deadline, or adjustment of pre-hearing conference date or time, shall not be construed as a revision to the Hearing Procedure.

K. Communication via Email

To the extent practicable, all communications between the parties prior to the hearing shall occur via email, per the email addresses listed under the **Contact Information** section below. Unless a party has indicated that it is not willing to accept electronic service of hearing documents, email shall be the default method for such service.

At a minimum, all emails to the Prosecution Team shall include the attorneys for the Prosecution Team listed below, who shall serve as the primary points of contact for the Prosecution Team (i.e., in lieu of including all members on the email). Alternatively, the parties may elect to include each Prosecution Team member on each email.

At a minimum, all emails to the Advisory Team shall be directed to the attorneys for the Advisory Team listed below, who shall serve as the primary point of contact for the Advisory Team; the parties may elect to include other members of the Advisory Team as well. See Section D for prohibition on ex parte contacts.

Except as directed otherwise in writing by the Respondent, the Respondent shall serve as his own primary point of contact.

L. Settlements

The Prosecution Team and Respondent may, at their discretion, engage in private settlement discussions and may include other persons in those discussions. Respecting separation of functions, the Advisory Team cannot participate in settlement discussions. Should the Prosecution Team and Respondent reach settlement, they must notify the Advisory Team as soon as possible.

[TENTATIVE] SUMMARY OF DEADLINES

Table 1—Deadlines

DATE	REQUIRED ACTIONS / DEADLINES
On or before May 5, 2023	Advisory Team issues Notice and Tentative Hearing Procedure
May 5-May 23, 2023	Requests for Designated Party status accepted
May 19, 2023	Parties provide comments on Tentative Hearing Procedure
May 31, 2023	Advisory Team reissues Notice and final Hearing Procedure
May 25, 2023, 3:00-4:00 p.m.	Pre-hearing conference (optional; remote attendance only)
June 14, 2023	Interested Person comments due
June 23, 2023	Prosecution Team submittals due
July 19, 2023	Respondent, Designated Parties submittals due
August 9, 2023	All Parties submit rebuttal evidence (if Parties agree) All Parties respond to Interest Person comments (optional)
August 16, 2023	All Parties submit presentations to be used at hearing
August 22, 2023	Hearing
August 23, 2023	Hearing (if necessary)
September 13, 2023	All Parties submit Proposed Order (optional)

CONTACT INFORMATION

Advisory Team

Merswind Reyer

Attorney IV, State Water Board, Office of Chief Counsel
1001 I Street, 22nd Floor,
Sacramento, CA 95814
Merswind.Reyer@waterboards.ca.gov

Prosecution Team

Nickolaus Knight

Attorney IV, State Water Board, Office of Enforcement
801 K Street, 21st Floor,
Sacramento, CA 95814
Nickolaus.Knight@waterboards.ca.gov

Respondent Benjamin B. Magana, Jr.

Benjamin B. Magana, Jr.

238 N. York Street
Porterville, CA 93257
Benjamin.Magana1985@gmail.com