
State Water Resources Control Board

NOTICE OF PUBLIC HEARING

The State Water Resources Control Board
will hold a Public Hearing on
Western Analytical Laboratories, Inc's Petition of the
Issuance of Citation and Denial of Accreditation

The Public Hearing will commence on
December 5, 2019
at 1:00 p.m.
in the Coastal Hearing Room,
at the California Environmental Protection Agency Headquarters,
1001 I Street, 2nd Floor
Sacramento, California 95814

PURPOSE OF HEARING

The State Water Resources Control Board (State Water Board) through the Environmental Laboratory Accreditation Program (ELAP) has the authority to deny accreditation to laboratories that do not meet the requirements set out in the Environmental Laboratories Accreditation Act (ELAA). (Health and Safety Code sections 100825 *et. seq.*) The State Water Board may also impose civil liability against laboratories who violate ELAA or the regulations set out in Chapter 19 of Title 22 of the California Code of Regulations that help implement the statute (Health & Saf. Code §100880).

ELAP denied Western Analytical Laboratory's (WAL) application for renewal accreditation and issued the laboratory a citation for penalties in the amount of \$137, 841.60 for failure to comply with ELAA and the applicable regulations. WAL filed a Petition for Reconsideration pursuant to Health and Safety Code section 116701. The State Water Board has scheduled a hearing to consider the matters.

At the hearing, the State Water Board will receive evidence regarding the alleged violation(s). After weighing and considering the evidence, the State Water Board has the option to either uphold the denial of the application for renewal accreditation, vacate the denial and remand the matter back to ELAP for further assessment of WAL's accreditation, determine full compliance with the ELAA and issue accreditation for one or more Fields of Testing in which WAL applied, or take any other action it deems necessary. Similarly, the State Water Board may either uphold the citation for penalties,

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

assess a higher or lower amount up to the maximum amount allowed by law, decline to assess any liability, or take any other action it deems necessary.

BACKGROUND

On May 9, 2019, ELAP sent to WAL a letter revoking WAL's accreditation to analyze environmental samples for regulatory purposes pursuant to Health and Safety Code section 100905, and denying WAL's application for renewal accreditation pursuant to Health and Safety Code section 100850(b)¹. Under section 100905, a laboratory has an opportunity to request a hearing within twenty days of receipt of a notice of revocation. In addition, ELAP issued a citation for \$137,841.60 in civil penalties. The basis for the three actions (revocation, denial of the renewal application, and issuance of the citation) was the same alleged conduct that was discovered in June 2018. This included irregularities with data that was being submitted for compliance with waste discharge requirements issued by the San Diego Regional Water Quality Control Board to Skyline Ranch Country Club ("Skyline"). Specifically, it is alleged that WAL reported data for samples that it had not received or analyzed, relying on unsupported data sheets created by Skyline Ranch Country Club, and/or was operating a non-accredited laboratory at the discharger's wastewater treatment site for analyzing coliform samples.

On May 14, 2019, WAL requested a hearing on the revocation. However, because WAL's current accreditation was set to expire by operation of law on June 30, 2019, it was decided that instead ELAP would drop the revocation proceeding, allow WAL's current accreditation to expire by operation of law, and deny the renewal application. On June 10, 2019, WAL filed this petition for reconsideration, including a request for a stay. Several temporary stays were issued, and on July 25, 2019, the State Water Board Executive Officer, Eileen Sobeck, issued a letter continuing WAL's interim accreditation until the hearing has been held and the State Water Board has issued a decision.

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) Did WAL's creation of reports for Skyline with coliform sampling results violate the ELAA?
- 2) Was WAL operating a laboratory at Skyline?
- 3) Was the issuance of citation to WAL for a civil liability in the amount of \$137,841.60 appropriate?
- 4) Was the denial of WAL's application for renewal accreditation appropriate?
- 5) Has WAL implemented corrective actions to address problems?

¹Unless otherwise noted, all references are to Health and Safety Code.

HEARING OFFICER AND HEARING TEAM

State Water Board Member Sean Maguire will preside as the hearing officer for this proceeding. Other members of the Board may be present during the hearing. A hearing team will assist the hearing officer by providing legal and technical advice. The hearing team members will be Kimberly Niemeyer, Staff Counsel and Andrew Hamilton, ELAP Environmental Scientist. The hearing team will assist the hearing officer and other members of the State Water Board throughout this proceeding.

PROSECUTION TEAM AND SEPARATION OF FUNCTIONS

To ensure a fair hearing, the State Water Board staff and attorneys that have issued the denial of accreditation and citation (the "Prosecution Team") have been separated from the hearing team. The Prosecution Team is composed of: Nickolaus Knight, Office of Enforcement Staff Counsel; Christine Sotelo, ELAP Environmental Program Manager; Jacob Oaxaca, ELAP Senior Environmental Scientist; Naeem Ahmad, ELAP Environmental Scientist; and Christopher Hand, ELAP Environmental Scientist.

The prosecution team, like all parties, is prohibited from having *ex parte* communications with any members of the State Water Board and any members of the hearing team regarding substantive issues and controversial procedural issues within the scope of this proceeding. This separation of functions also applies to the supervisors of each team (Gov. Code, §§ 11430.10-11430.80.). Members of the State Water Board's Prosecution Team have not communicated with the members of the State Water Board or the Board's Advisory Team regarding any substantive matter at issue in the proceeding.

HEARING PARTICIPATION PROCEDURES

WAL has requested a hearing and it is scheduled for December 5, 2019, at 1pm.

At the hearing, WAL and the Prosecution Team (also referred to jointly as the "parties") will have the opportunity to present evidence on the issues identified above. All evidence and information that will be presented at the hearing must be identified and provided in advance of the hearing by the deadlines identified below.

Currently before the State Water Board are the denial of the application for renewal accreditation, the citation for civil liability, and all the exhibits to those documents, including the evidence ELAP based its determination on. In addition, before the State Water Board is WAL's petition for reconsideration, and the exhibits attached thereto. The parties may submit additional evidence, including exhibits, written testimony, witness qualifications, and other relevant evidence.

Deadlines for Hearing Participation

By 5:00 p.m. on October 14, 2019 each party must submit any additional argument and evidence, including the name of each witness (including State Water Board staff) whom the Party intends to call at the hearing and the subject(s) that will be covered by each witness. Witness testimony at trial may not exceed the scope of previously submitted written material.

Copies must be received by the State Water Board and served on the other party. A statement of service with manner of service indicated shall be filed with each party's exhibits (See Attached "INFORMATION CONCERNING APPEARANCE AT HEARINGS").

For each exhibit that the party plans to rely upon at the hearing, including each witness' written statement, please number each exhibit submitted, and describe each on the attached Exhibit Identification Index. Previously submitted documents have already been identified in the Exhibit Identification Index.

SUBMITTALS TO THE STATE WATER BOARD AND THE ENFORCEMENT TEAM

All documents submitted to the State Water Board should be addressed as follows:

How to Submit Documents to the State Water Board

By Email:	kim.niemeyer@waterboards.ca.gov With Subject of "WAL Petition Hearing"
By Fax:	(916) 341-5199
By Mail:	State Water Resources Control Board Office of Chief Counsel 1001 I Street, PO Box 100 Attention: Kimberly Niemeyer, Staff Counsel Sacramento, CA 95812

Copies of all documents submitted to the State Water Board must also be provided to the enforcement team and should be addressed as follows:

How to Submit Documents to the Enforcement Team

By Email:	nickolaus.knight@waterboards.ca.gov subject of "WAL Petition Hearing"
By Fax:	(916) 341-5284
By Mail:	State Water Resources Control Board Office of Enforcement 801 K Street, 23 rd Floor Sacramento, CA 95812

How to Submit Documents to WAL

By Email:	w.carter@musicckpeeler.com With Subject of "WAL Petition Hearing"
By Fax:	(213) 629-7600
By Mail:	Musick, Peeler & Garrett One Wilshire Boulevard Suite 2000 Los Angeles, CA 90017-3383

Note: All hand delivered submittals must be date and time stamped by the Office of Chief Counsel on the twenty-second floor of the Joe Serna Jr. CalEPA Building (CalEPA Building) at the above address prior to or at the submittal deadline. Persons delivering submittals must first check in with lobby security personnel on the first floor. Hand delivered submittals that do not have a timely date and time stamp by the Office of Chief Counsel will be considered late and may not be accepted by the hearing officer.

UNLESS NOTICE TO THE STATE WATER BOARD AND THE OTHER PARTY IS PROVIDED, ELECTRONIC SERVICE OF HEARING-RELATED MATERIALS IS PRESUMED TO BE ACCEPTED. If you do not want to accept electronic service, the State Water Board and the other party must be notified by September 30, 2019.

OPPORTUNITY FOR SETTLEMENT

Please read the discussion of settlements in the enclosure entitled "Information Concerning Appearance at Hearings." The prosecution team and WAL 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 hearing team cannot participate in settlement discussions. Should the prosecution team and WAL reach settlement, they must notify the hearing team as soon as possible.

IF YOU HAVE ANY QUESTIONS

During the pendency of this proceeding, there shall be no *ex parte* communications regarding substantive or controversial procedural matters within the scope of the proceeding between State Water Board members or hearing team members and any of the other participants, including members of the prosecution team. (Gov. Code, §§ 11430.10-11430.80.) Questions concerning non-controversial procedural matters should be directed to Kim Niemeyer at (916) 341-5547, or by e-mail at Kim.niemeyer@waterboards.ca.gov (Gov. Code, § 11430.20, subd. (b).)

If you have any legal or technical questions concerning the allegations, or if you wish to discuss settlement prior to hearing, you may contact prosecution team member Nickolaus Knight, at (916) 327-0169, or by email at Nickolaus.knight@waterboards.ca.gov.

TRAVEL TO AND ACCESSIBILITY AND SECURITY AT CALEPA BUILDING

The hearing location is in the Coastal Hearing Room on the second floor of the CalEPA building at 1001 I Street in Sacramento, California, and is accessible to people with disabilities. All visitors to the building must check in with security on the first floor. Please allow sufficient time for check-in at the building. Individuals who require special accommodations are requested to contact Kim Niemeyer at (916) 341-5547 or by e-mail at Kim.niemeyer@waterboards.ca.gov

Metered parking is located on the street, and there are several parking garages within walking distance of the building, including a city lot across from the on CalEPA building on 10th Street, between I and J Streets. There are fees for parking.

October 21, 2019

Date



Jeanine Townsend
Clerk to the Board

INFORMATION CONCERNING APPEARANCE AT HEARINGS

The following procedural requirements will apply and will be strictly enforced:

- 1. HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Resources Control Board (State Water Board or Board) is available upon request or may be viewed at the [State Water Board's Laws and Regulations webpage](#).

Any procedures not provided by this Hearing Procedure are not applicable to this hearing. Except as provided in Section 648(b) and herein, Chapter 5 of the California Administrative Procedures Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.

Unless otherwise determined by the hearing officer, each party will have one hour (60 minutes) to allocate however they would like, including making an opening statement, calling and examining witnesses, introducing exhibits, cross-examining opposing witnesses and providing a closing statement. Questions by the hearing team will not count against each parties' total allotted time.

Parties must file any requests for exceptions to procedural requirements in writing with the hearing officer. To provide time for parties to respond, the hearing officer will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing. The hearing officer reserves the right to issue further rulings clarifying or limiting the rights of any party where authorized under applicable statutes and regulations.

- 2. SETTLEMENTS:** In adjudicatory hearings such as this, a State Water Board staff member or team prosecutes an alleged violation. In such enforcement cases, the prosecution team and a party who is the subject of the proposed enforcement action may at their discretion engage in private settlement discussions, or may include any other persons in those discussions. Any settlement agreement by the parties must be approved by the State Water Board.
- 3. PARTIES:** The only parties to the hearing are the Western Analytical Laboratory (WAL) and the prosecution team for the State Water Board.

No additional parties will be designated in accordance with the procedures for this hearing, and only parties will be allowed to present evidence.

- 4. INTERESTED PERSONS:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not designated as parties. A person or entity that appears and presents only a policy statement is not a party and will not be allowed to make objections, offer

evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. Interested persons will not be added to the service list and will not receive copies of written testimony or exhibits from the parties, but may request hearing documents from the hearing team (Kim.niemeyer@waterboards.ca.gov or (916) 341-5547.)

Policy statements are subject to the following provisions in addition to the requirements outlined in regulation. (Cal. Code Regs., tit. 23, § 648.1, subd. (d).) Persons interested in making a policy statement during the hearing are requested to file a copy of that statement by the deadline for the submission of legal argument and evidence by the parties. Policy statements should be sent to both parties and the State Water Board as identified in the Hearing Notice.

5. LEGAL ARGUMENTS, WITNESS STATEMENTS AND OTHER EXHIBITS: Exhibits include legal arguments, witness statements, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit a summary of such testimony in writing.² Oral testimony that goes beyond the scope of the written testimony may be excluded. A party who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

In accordance with California Code of Regulations, Title 23, section 648.4, the State Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the hearing officer may exclude material that is not submitted in accordance with this Hearing Procedure. Excluded material will not be considered by the State Water Board.

Each party shall submit to the State Water Board an electronic copy of each of its exhibits and exhibit index or three (3) paper copies of each. Each party shall also serve a copy of each exhibit and the exhibit index on the other party. A statement of service with manner of service indicated shall be filed with each party's exhibits.

The exhibits and indexes for this hearing, and a statement of service, must be received by the State Water Board and served on the other parties no later than the deadline prescribed in the Hearing Notice.

Parties submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, parties may supply, for the hearing record, a reduced copy of a large format original if it is readable.

² The hearing officer may make an exception to this rule if the witness is adverse to the party presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement.

6. ELECTRONIC SUBMISSIONS: To expedite the exchange of information, reduce paper use, and lower the cost of participating in the hearing, participants are encouraged to submit hearing documents to the State Water Board in electronic form and parties are encouraged use and accept electronic service. If a party does not want to accept electronic service, it must notify the State Water Board and the other party by September 30, 2019; otherwise, electronic service will be presumed to be accepted.

Documents submitted or served electronically must be in Adobe Portable Document Format (PDF) except where a reasonable exception may be made for a Microsoft Office-supported format, such as Microsoft Excel for spreadsheets, Microsoft PowerPoint for slide presentations, and Microsoft Excel or Word for Exhibit Identification Indexes. Electronic submittals to the State Water Board of documents of 11 megabytes or less in total size (incoming mail server attachment limitation) may be sent via electronic mail to: Kim.niemeyer@waterboards.ca.gov with a subject of "WAL Petition Hearing". Electronic submittals to the State Water Board of documents greater than 11 megabytes in total size should be submitted on a compact disc (CD), digital versatile disc (DVD), or universal serial bus (USB) flash drive. Each electronically submitted exhibit must be saved as a separate PDF file, with the filename in lower case lettering.

7. PRE-HEARING CONFERENCE: At the hearing officer's discretion, a pre-hearing conference may be conducted before the proceeding to discuss the scope of the hearing, the status of any protests, and any other appropriate procedural issues.

8. ORDER OF PROCEEDING: Each Party will have sixty (60) minutes and may allocate their time as they see fit. Hearing officer will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events.

a. **Policy Statements within the Evidentiary Hearing:** Policy statements by interested persons that are not a party to the case will be heard at the start of the hearing, before the presentation of cases-in-chief. **Oral summaries of the policy statements will be limited to 5 minutes.**

b. **Presentation of Cases-In-Chief:** The case-in-chief will consist of any opening statement, oral testimony, introduction of exhibits, and cross-examination witnesses. The hearing officer may allow redirect examination and recross examination. The hearing officer will decide whether to accept the party's exhibits into evidence upon a motion of the party after completion of the case-in-chief.

i. **Opening Statements:** At the beginning of a case-in-chief, the party or the party's attorney may make an opening statement briefly and concisely stating 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.

- ii. **Oral Testimony:** All witnesses submitting testimony shall appear at the hearing to affirm that the testimony is true and correct, and should be available for cross-examination. A witnesses' failure to appear may result in the submitted testimony being treated as hearsay. Written testimony affirmed by the witness is direct testimony, and need not be read into the record.
 - iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness' oral 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 as a panel.
 - iv. **Redirect and Recross Examination:** Redirect or re-cross examination is not required, but may be allowed if approved by the hearing officer, and will count against the time allocated to a party. Any redirect examination and re-cross examination permitted will be limited to the scope of the cross-examination and the redirect examination, respectively.
 - v. **Questions by State Water Board and Staff:** State Water Board members and staff may ask questions at any time and may cross-examine any witness. Such questions and answers do not count against a party's allocated time.
- c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officer may allow parties to present rebuttal evidence. Rebuttal evidence is evidence offered to disprove or contradict evidence presented by an opposing party. This Hearing Procedure requires rebuttal evidence to be submitted prior to the start of the hearing in order to ensure the fairness and orderly conduct of the proceeding.
- d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times, if appropriate, the hearing officer may allow oral closing statements or legal arguments or set a schedule for filing legal briefs or written closing statements. If the hearing officer authorizes the parties to file briefs, an electronic copy (or 3 written copies if not submitting documents electronically) of the brief shall be submitted to the State Water Board, and 1 copy shall be served on the other party, along with a statement of service indicating the manner of service. A party shall not attach a document of an evidentiary nature to a brief unless the document is already in the evidentiary hearing record or is the subject of an offer into evidence made at the hearing.

Power Point and other visual presentations may be used at the hearing, but their content shall not exceed the scope of previously-submitted written material. These presentations must be provided to the Advisory Team 3-days before the hearing so that they may be included in the administrative record.

- 9. EX PARTE CONTACTS:** During the pendency of this proceeding, there shall be no *ex parte* communications with State Water Board members or State Water Board hearing team staff and supervisors, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Any communications regarding potentially substantive or controversial procedural matters, including but not limited to evidence, briefs, and motions, must demonstrate that all parties were served and the manner of service. Parties may accomplish this by submitting a proof of service or by other verification, such as correct addresses in an electronic-mail carbon copy list, or a list of the parties copied and addresses in the carbon copy portion of a letter. Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b).) A document regarding *ex parte* communications entitled "Ex Parte Questions and Answers" is available upon request or from the [State Water Board's website](#).
- 10. RULES OF EVIDENCE:** Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

EXHIBIT IDENTIFICATION INDEX

Public Hearing on Western Analytical Laboratories, Inc’s Petition of ELAPs Denial of its Application for Accreditation and Issuance of Citation for Civil Liabilities

The Public Hearing will commence on December 5, 2019 at 1 p.m.

PARTICIPANT: _____

Exhibit Identification Number	Exhibit Description	Status of Evidence (for Hearing Team use only)		
		Introduced	Accepted	By Official Notice
1	May 9, 2019 Citation			
2	May 9, 2019 Notice of Revocation and Denial of Renewal Application			
3	May 28, 2019 email to Advisory Team from Nickolaus Knight Dismissing/Withdrawing Notice of Revocation			
4	June 10, 2019 WAL's Petition for Reconsideration, Hearing, and Immediate Stay (with Ex. A-E)			
5	June 21, 2019 letter from Eileen Sobeck granting stay until July 21, 2019			
6	July 12, 2019 Email from Nickolaus Knight for prosecution team regarding whether the State Water Board should issue a stay			
7	July 12, 2019 Email from William Carter for WAL regarding whether the State Water Board should issue a stay			
8	July 19, 2019 letter extending stay until July 26, 2019.			
9	July 25, 2019 Letter from Eileen Sobeck granting stay pending hearing and decision by board			