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GOVERNOR

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SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

SENT VIA EMAIL

December 19, 2018

SUBJECT: SUBCOMMITTEE PROCESS PROCEDURES

Dear ELTAC Members:

Summary of Issues

At the Environmental Laboratory Technical Advisory Committee (ELTAC) meeting on December 13, 2018, the ELTAC members voted 9 to 4 with 1 abstention for ELTAC to:

Motion by Ron Coss: ELTAC form a workgroup to create a tier of standards based on TNI and they be given a timeframe to report back to the full committee that will allow us to move forward to the Water Board. The committee will begin work in a timely manner and TNI based.

Motion Seconded by Huy Do

Motion Amended by Jill Brodt: There be an emphasis of the Quality Management System workgroup be applicable to all ELAP labs. The focus be for all ELAP labs. So, don't do any work for a dual system.

ELTAC members Mindy Boele, Jill Brodt, Gail Cho (tentative) Huy Do, and Ron Coss offered to be on the subcommittee. In addition, several members of the public have requested to be part of the subcommittee.

As explained below, the formal creation of the subcommittee has implications for how the subcommittee can conduct its business. The Bagley-Keene Open Meeting Act (Act) requires that formally created advisory committees consisting of three or more are subject to the Act's requirements, which include formally noticing a meeting and requiring that it be open to the public. The subcommittee cannot, therefore, send to one another comments and edits on an alternative draft proposal. That would be a serial meeting and prohibited by the Act. Though the subcommittee can each be sent a copy of a proposal to consider ahead of a meeting, the subcommittee must meet in public to discuss its comments and edits. Though the subcommittee can meet via teleconference, each place that someone is calling in from must be open to the public.

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

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Discussion of Law

1. Subcommittee is Subject to Bagley-Keene

The Act requires all meetings of a state body to be open and public, and all persons are permitted to attend any meeting of a state body, except as otherwise provided in the Act. (Gov. Code §11123(a).) Government Code section 11121(a) defines "state body" as including "every state board, or commission or similar multimember body of the state that is created by statute," such as ELTAC, which was created pursuant to Health and Safety Code section 100863. It also states that a state body is an "advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body... and if the advisory body so created consists of three or more persons." (Gov. Code §11121(c).) Although "formal action" is not defined, "action taken" is defined as "a collective decision made by the members of the state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action." This means that when the ELTAC voted to create a subcommittee that had more than two members, the newly created subcommittee was subject to the Act's requirements.

In the past, committees had not been created by formal action, and therefore were not subject to the Act's requirements. ELAP went back through the ELTAC meeting notes and found that workgroups were formed informally during past meetings.

2. Subcommittee Must Follow Act's Requirements In Order to Discuss Alternative Proposal

All meetings of a state body must be open and public, and all persons must be permitted to attend. (Gov. Code §11123) A meeting occurs whenever a majority of a state body meets to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body. (Gov Code §11122(a)). This means that because there are four subcommittee members, a meeting would occur if three of the members meet.

a. Serial Meetings are Not Permitted

Meeting does not just mean meeting in person to discuss or deliberate any item within their jurisdiction. Subsection (b) of Government Code section 11122.5 prohibits "any use of direct communication, personal intermediaries, technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on any item by the members of the state body." For example, this would prohibit members of the state body from having a conference call to discuss a proposal for the alternatives. Similarly, the Act prohibits "serial meetings," which consists of a series of communications, each involving less than a quorum of the legislative body, but which taken as a whole, involves a majority of the body's members. ("A Handy Guide to the Bagley Keene Open Meeting Act 2004," California Attorney General's Office, p. 5.) For example, if one member makes edits to a draft document, and then passes to another, who then makes edits and passes to another, and so on, this would create a serial meeting. Although an email out to all subcommittee members would not constitute a meeting, if the members replied to one

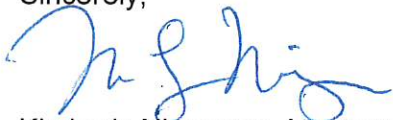
another, that would constitute a serial meeting.¹ Similarly, when a person acts as the hub of a wheel, and that person communicates individually with the various members, a serial meeting has occurred. For example, in one case, the court concluded that a series of individual telephone calls between the agency attorney and the members of the body constituted a meeting. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105.) Although members of the subcommittee can each be sent a copy of a proposal to consider ahead of a meeting, the subcommittee must meet in public to discuss its comments and edits. Subcommittee members should be careful of "replying to all" in an email.

b. Meetings Must be Noticed and Open to the Public

Because the subcommittee is a state body subject to the requirements of Bagley Keene, all of the meetings must be noticed. For regular meetings (not special or emergency meetings), a 10-day notice is required. The notice must include the date, time and place of the meeting, along with an agenda that sufficiently describes the items of business to be transacted or discussed. The location of the site must be open to the public and accessible to the disabled.

Meetings may be held by teleconference, which is defined as a meeting of a state body, the members of which are at different locations, connected by electronic means..." (Gov. Code §11123(b).) The meeting must be audible to the public at a location specified in the notice. Each teleconference location must be identified in the notice and accessible to the public. Therefore, a member of the state body cannot call in from home or their place of employment, unless that location is going to be made accessible to the public to join at that location.

Sincerely,



Kimberly Niemeyer, Attorney III
Office of Chief Counsel

cc: Christine Sotelo, CA ELAP, SWRCB
Robert Brownwood, Division of Drinking Water, SWRCB
Stephen Clark, ELTAC Chairperson, PacificEcoRisk
Amber Baylor, SOCWA

¹ To avoid accidentally having a serial meeting, it is a good idea when sending out emails to all subcommittee members to put the names in the bcc line so that no one can accidentally "reply to all," creating a serial meeting.