

**From:** Michael A. Brodsky  
**To:** [CWFhearing](#)  
**Cc:** [Alan Lilly](#); [Aaron Ferguson](#); [Andrew Hitchings](#); [Andrew Ramos](#); [Alexis E. Krieg](#); [Amy Aufdemberge](#); [Alex Peltzer](#); [awearn@nrdc.org](#); [Barbara Barrigan-Parilla](#); [Barbara Vlamis](#); [Barry Sgarrella](#); [Barbara Daly](#); [Brian Johnson](#); [Chris Shutes](#); [Gary Bobker](#); [Brad Pappalardo](#); [Brett Baker](#); [William Burke](#); [Bob Wright](#); [Wilcox, Carl@Wildlife](#); [Carol Krieger](#); [Colin Bailey](#); [Conner Everts](#); [David Aladjem](#); [Daniel Wilson](#); [Dustin Cooper](#); [dcoty@bpmnj.com](#); [Deidre Des Jardins](#); [Dean Ruiz](#); [Bill Jennings](#); [Dan Kelly](#); [dmwolk@solanocounty.com](#); [Douglass Andrew Obegi](#); "Daniel J. O'Hanlon"; [David Orth](#); [Emily Pappalardo](#); [Espe Vielma](#); [ewehr@gwdwater.org](#); [elamoe@minasianlaw.com](#); [Fred Etheridge](#); [fmorrissey@orangecoveid.org](#); [Mitch Avalon](#); [Gregory Adams](#); [hwalter@kmtg.com](#); [Bill Wells](#); [Mizell, James@DWR](#); [jailin@awattorneys.com](#); [Jennifer Buckman](#); [Jeff Conway](#); [jfox@awattorneys.com](#); [Jennifer Spaletta](#); [John H. Herrick](#); [jminasian@minasianlaw.com](#); [Jonas Minton](#); [John Luebberke](#); [Jon D. Rubin](#); [jph@tulareid.org](#); [Suzanne Womack](#); [Jonathan Salmon](#); [Jamey M.B. Volker](#)  
**Subject:** cwf hearings  
**Date:** Thursday, December 28, 2017 8:33:24 PM  
**Attachments:** [PRA with capiton.pdf](#)

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Please find service of attached document.

This email is sent in two batches. This is batch one.

Michael Brodsky  
Law Offices of Michael A. Brodsky  
201 Esplanade, Uppr Suite  
Capitola, CA 95010  
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6 Attorney for Protestants Save the California Delta Alliance, et al.

7 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 **IN RE CALIFORNIA WATERFIX**  
10 **CALIFORNIA DEPARTMENT OF**  
11 **WATER RESOURCES AND U.S.**  
12 **BUREAU OF RECLAMATION**  
13 **PETITION FOR CHANGES IN**  
14 **WATER RIGHTS, POINTS OF**  
15 **DIVERSION/RE-DIVERSION**

**LETTER TO MICHAEL LAUFFER DATED**  
**DECEMBER 28, 2017**

16  
17 The attached letter to Michael Lauffer, following up on a Public Records Act request  
18 regarding ex parte communications by WaterFix Hearing Team members is submitted and served  
19 on all parties to the WaterFix Hearing for information only and in the interest of transparency. The  
20 letter has been transmitted separately to SWRCB staff as effecting a follow up on the PRA request.  
21

22 Dated: December 28, 2017

23 Respectfully Submitted,

24   
25 Michael A. Brodsky

26  
27  
28

December 28, 2017

VIA EMAIL

Michael A.M. Lauffer, Chief Counsel  
Nicole L. Kuenzi, Attorney  
Matthew Jay, Water Rights Public Records Act Requests  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
Michael.Lauffer@waterboards.ca.gov  
Matthew.Jay@waterboards.ca.gov  
Nicole.Kuenzi@waterboards.ca.gov

Re: Follow Up Patrick Porgans' Public Records Act Request of August 31, 2017

Dear Mr. Lauffer:

This letter is a follow up to a Public Records Act request made by Mr. Patrick Porgans on August 31, 2017, pursuant to the California Public Records Act, California Government Code Chapter 3.5. This office represents Mr. Porgans with respect to his Public Records Act request. This office also represents Save the California Delta Alliance. Delta Alliance hereby joins Mr. Porgans in prosecuting his Public Records Act request.

For the reasons described below, we believe it is appropriate for the head legal officer of the State Water Resources Control Board, the Chief Counsel, to ensure a full and timely response to this letter. We have addressed this letter to Mr. Jay as well because his name appears as the contact for Public Records Act requests related to water rights. We have also addressed it to Ms. Kuenzi because she authored the initial responses to Mr. Porgans' request.

Because of the extensive ethical violations that have taken place in the conduct of ex parte communications between WaterFix Hearing Team members and the WaterFix Petitioner, we suggest that your personal attention is warranted and thank the State Water Resources Control Board in advance for its full and timely response.<sup>1</sup>

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<sup>1</sup> Attachment 8 is an eloquent memo on the corrosive effect of ex parte communications authored by Mr. Lauffer. Attachment 16 is Enclosure D to the October 30, 2015, Notice of WaterFix Petition, prohibiting ex parte communications from that point forward. Attachment 17, is one of dozens of rulings and notices issued by the board during the pendency of Petition hearings, ever reminding all parties not to engage in ex parte communications.

**I. BACKGROUND ON THE NATURE OF THE MATERIALS REQUESTED AND THE URGENCY OF THIS REQUEST.**

**THE BOARD IS OBLIGATED TO RESPOND AND PRODUCE THE REQUESTED CATEGORY A DOCUMENTS BY JANUARY 4, 2018, AND CATEGORY B DOCUMENTS BY JANUARY 8, 2018.**

For the reasons described below, we request that the State Water Resources Control Board (“Board”) make its response to this letter its highest priority and allocate whatever resources and personnel are needed to respond within 7 days with full production of all the documents described below as “Category A” documents and within 10 days with full production of all other documents described below.

Government Code section 6253(c) provides a public agency with 10 days from the receipt of a Public Records Act request to notify the requesting party of the agency’s determination as to whether the requested documents are in its possession and whether the documents will be produced (“initial response”). The initial response shall also “state the estimated date and time when the records will be made available.” (Gov. Code § 6253(c).) These time periods do not apply to the documents described herein because the documents described and listed herein were embraced by Mr. Porgans’ August 31, 2017, request and should have been produced long ago. They are overdue.

We believe that the Board is obligated to give this request first priority due to the inordinate delay, and substantial breach of public accountability and administrative integrity caused by that delay, in responding to Mr. Porgans’ requests for materials related to the extensive unlawful *ex parte* communications between California WaterFix Hearing Team members and California WaterFix Petitioner, the California Department of Water Resources (“DWR”).

The materials finally produced just ten days ago, and over fifteen weeks after requested, disclose ongoing, substantial, willful, and obvious violations of the Board’s general prohibition on *ex parte* communications, violation of the specific prohibition on *ex parte* communications contained in Enclosure D to the October 30, 2015, Notice of Petition for the California WaterFix Project, violation of California Government Code section 11430.10, violation of the California Rules of Professional Conduct, and violation of Canon of Judicial Conduct 3(B)(7).

Hearing Team members, including Board legal counsel Dana Heinrich and Hearing Team Member and Board lead engineer Diane Riddle, met *ex parte* with DWR WaterFix attorneys and engineers serving as proponents of the Project before the Board at least nine times between January 4, 2016, and October 4, 2016. The purpose of the meetings was a collaboration between Board Hearing Team members and DWR Petition proponents to prepare the evidence that DWR would then present to the Board as its *sole* evidence to convince the Board to approve the change petition.

Board Hearing team members unlawfully heard *ex parte* evidence from DWR and unlawfully gave DWR *ex parte* direction about the content of DWR’s evidence to be presented later publicly to the Board with respect to the impact analysis in the EIR, with respect to the input and output of Boundary 1–Boundary 2 modeling, and with respect to legal issues that were, and are, before the Board as an adjudicatory body.

On June 10, 2016, Diane Riddle wrote, with respect to an upcoming meeting: “I’m out this week and Dana is out the following week. Is it primarily modeling you would like to present or text? If it is text to address the legal issues Dana [Heinrich] raised, I think you can meet without me. If its is modeling, I would prefer to be there and could do a webex late Thursday (4-5 maybe).” (Attachment 1) Ms. Heinrich raising legal issues with Petitioner in *ex parte* communications was a violation of the Board’s general prohibition on *ex parte* communications, a violation of the specific prohibition on *ex*

parte communications contained in Enclosure D to the October 30, 2015, Notice of Petition for the California WaterFix Project, a violation of California Government Code section 11430.10, a violation of the California Rules of Professional Conduct, a violation of Canon of Judicial Conduct 3(B)(7), and a violation of the “common law ... of legal ethics.” (“ethics violations”) (*Mathew Zaheri Corporation v. New Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305, 1315–1317.) Ms. Heinrich was communicating and meeting with Petitioner about “legal issues” separate from any modeling of a Board suggested alternative—at the same time she was sitting as judge of Petitioner’s case on those same legal issues. These ethical violations are “sufficiently heinous to warrant reversal” of any ultimate decision the Board renders on the WaterFix Petition.<sup>2</sup> (*Id.* at 1315.)

On Monday April 11, 2016, Hearing Team member and environmental scientist John Gerlach, wrote of an upcoming meeting, with copies to DWR personnel and Hearing Team leaders Riddle and Heinrich, that “It sounds like the meeting should include more than technical staff as the issues likely go beyond pure technical issues. Given the different statements that I’ve read, could you please clarify what modeling will be relied on for the case-in-chief for each of the three phases of the hearing—1A, 1B, and 2.” (Attachment 2.) Any discussion of Petitioner’s strategy for presenting evidence must take place with notice to, and opportunity to be heard from, all parties. Mr. Gerlach’s ex parte communications about DWR’s presentation of evidence was an ethical violation, especially when he expressly recognized that the subject matter went “beyond pure technical issues.”

Again on Monday April 11, 2016, Gerlach also wrote, in a separate email to DWR Change Petition proponents, that “After you bring me up to speed on the new modeling Diane would like a meeting with the larger group to discuss the CEQA effects analysis based on the modeling.” (Attachment 3.) The EIR and its CEQA effect analysis *is evidence* in the hearings about whether or not the Project will harm legal users of water or the environment. Hearing Team members meeting ex parte with a “larger group” including DWR to discuss DWR’s evidence was an ethical violation.

The modeling repeatedly discussed is the modeling in Appendix 5E of the WaterFix EIR, which is the Boundary 1–Boundary 2 analysis. “This web conference is a follow-up meeting to discuss the approach to developing Appendix 5E.” (Attachment 4.)

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<sup>2</sup> In her October 18, 2017, response to Mr. Porgans’ Public Records Act request, Board attorney Nicole Kkuenzi wrote of Hearing Team members’ substantive ex parte communications with Petitioner that “To the extent that any substantive issues were discussed, they were not conveyed to the State Water Board Members, and therefore no prohibited, indirect ex parte communications occurred.” (Attachment 15)

The Boards’ October 30, 2015, Notice of Petition states that “During the pendency of this proceeding, there shall be no *ex parte* communications between State Water Board members *or State Water Board hearing team staff* and any of the other participants ... .” (Attachment 18, *emphasis added*) Ms. Kuenzi obviously knew that a *direct* violation of the ex parte rule had taken place. Ms. Heinrich advises the Hearing Officers on every aspect of the Hearings, including all evidentiary rulings, and is bound by the same ethical standards as a judge.

Appendix 5E contains two boundary “scenarios, each at year 2025 (Early Long Term [ELT]) that were presented in the State Water Board water rights petition process (Boundary 1 and Boundary 2). Boundaries 1 and 2 were presented to the State Water Board during the water rights petition process as a means to represent a potential range of operations that could occur as a result of the proposed Adaptive Management Program,” during operation of the WaterFix Project. (Appendix 5E, FEIR, p. 5E-1.) (Attachment 5) The correspondence produced on December 18 repeatedly references Hearing-Team-coached development of the Boundary 1–Boundary 2 analysis.

And this same Boundary 1–Boundary 2 analysis is the only evidence DWR presents on the key hearing issue of whether the proposed changes will “alter water flows” or “alter water quality” in a way that causes injury to other users of water, fish and wildlife, and recreation. (October 30, 2015 Hearing Notice, p. 11–12.) As DWR summarized it, “In Part 1 of this hearing Petitioners presented the boundary analysis of B1 to B2 in order to demonstrate no impact to legal users of water within the range of foreseeable outcomes of the adaptive management process.” (September 8, 2017, Letter From DWR and USBR to hearing Officers p. 2.) (Attachment 6) DWR has put forth that same Boundary 1–Boundary 2 analysis and CEQA effects analysis derived therefrom as the basis for its case-in-chief for Part 2 as well.

These meetings, and intense, virtually non-stop collaboration over thirteen months, were far removed from any legitimate role the Board played as a Responsible Agency under CEQA in suggesting a Board-preferred alternative. There is no reason why Hearing Team members should be involved in any substantive ex parte communications with the Petitioner for any reason. And the intimate collaboration was not about SWRCB suggested alternatives; it was about preparing DWR’s evidence in a manner that would allow the Petition to be approved by the Board.

As it stands, these proceedings and the evidence upon which they rely appear to be irrevocably tainted. “The ex parte communications in this case did violate the law of legal ethics. ... [S]uch misconduct [is] prejudicial as a miscarriage of justice ... and sufficiently heinous to warrant reversal ... because it shows bias on the part of the tribunal.” (*Mathew Zaheri Corporation v. New Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305, 1315.)

This letter is a follow up to a Public Records Act request, not a motion to disqualify the entire Hearing Team or a renewed motion to exclude the Boundary 1–Boundary 2 modeling and EIR based on new information (although such motions may be unavoidable). The point of this background section is to impress upon the Board the seriousness of these ex parte contacts and to convince the Board to dedicate full resources to responding to this request. With Part 2 of the WaterFix hearing set to commence on January 18, it is essential to immediately get a full accounting of what happened in formulating the Boundary 1–Boundary 2 modeling and the CEQA effects analysis. Likely the only way for the WaterFix hearings to continue at all is to allow all parties to give direction to the team of Boundary 1–Boundary 2 modelers for substantial additional modeling.

If there is to be a collaborative process between the Board and parties to the hearings to develop the modeling upon which the Petition (and appropriate flow criteria) will be decided, the parties participating in modeling collaboration with the Board cannot be limited to the Petitioner, as has been the case thus far. Protestants are legally entitled to an equal role in shaping the Boundary 1–Boundary 2 analysis, if that analysis is to serve as evidence in these hearings or be used to determine flow criteria at all.<sup>3</sup>

Likewise with the CEQA effects analysis. Likely any way forward with these hearings will involve disqualification of the entire hearing team and its replacement with a professional, *independent*, qualified hearing officer, such as an administrative law judge. In order to determine if there is any way forward through further modeling and appointment of an untainted hearing officer, we must first know what happened. Thus the critical, and time-sensitive, nature of this request.

Further, Government Code section 6253.1 requires that an agency “[a]ssist the member of the public to identify records and information that are responsive to the request or the purpose of the request.” This background section is applied towards our request for assistance in identifying records responsive to elucidating the full nature, content, and extent of ex parte contacts related to the WaterFix Petition after October 30, 2015, between Hearing Team members or other Board employees or agents, and WaterFix Petitioners. Records sought include, but are not limited to, anything exchanged ex parte relating to the content of any WaterFix modeling or the content of the WaterFix EIR. “Petitioner” as used here includes any employee, contractor, or individual or entity acting on behalf of or at the behest of USBR, the Department of the Interior, any other agency or instrumentality of the United States, DWR, the California Resources Agency, or any other agency or instrumentality of the State of California, or any state or federal water contractor. Records include correspondence, graphics, notes, visual materials, slides, audio recordings, video recordings and any other record. Ex parte means any communication not presented at a noticed WaterFix Hearing or not served contemporaneously on all parties to the WaterFix Change Petition Hearings.

## **II. SPECIFIC DOCUMENTS REQUESTED**

### **A. Category A Documents: Readily Identifiable Documents Now Overdue And Improperly Excluded From Production on October 18, 2017, and December 18, 2017.**

Mr. Porgans’ PRA request of 31, 2017, requested “all Ex Parte correspondence between the California Department of Water Resources and the State Water Resources

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<sup>3</sup> Although the Board rejected repeated requests to bifurcate the process and treat the determination of appropriate flow criteria in a rulemaking, rather than adjudicative process, the Boards’ approach to determining flow criteria has in fact been through a rulemaking-like process—meeting repeatedly with interested parties in an informal give-and-take setting, gathering information, and forging the Boundary 1–Boundary 2 analysis through an iterative, collaborative process. This may be an effective way to shape appropriate flow criteria, however rulemaking cannot exclude the parties affected by the rule—here all protestants. In addition to unlawful ex parte communication, the Boundary 1–Boundary 2 collaboration resulted in an underground regulation.

Control Board, from the submittal of the Change Petition, 26 August 2015, to the present.” (Porgans’ PRA Request of August 31, 2017) (Attachment 7.) At the time Mr. Porgans made this request he was unrepresented by counsel and the Board was aware of this fact. In its October 18, 2017, letter producing documents, the Board explained that it had only performed a search for emails and made no other efforts to produce documents responsive to Mr. Porgans’ request.

Although Mr. Porgans used the word “correspondence” in his request, he also quoted liberally from the April 25, 2013, Memorandum of the Chief Counsel of the State Water Resources Control Board on Ex Parte Communications. That memo describes “Ex Parte *Communications* as fundamentally offensive in an adjudicative proceeding because they involve an *opportunity* by one party to influence the decision maker outside the presence of opposing parties.” (Attachment 8, *emphasis added*)

“The focus should be on the criteria in the request and the description of the information, as reasonably construed, and the search should be broad enough to account for the problem that the requester may not know what documents or information of interest an agency possesses.” (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal. App. 4th 1385, 1425.) The agency must produce all materials responsive “to the *purpose* of the request.” (Government Code § 6253.1, *emphasis added*.)

The emails produced on December 18 contain attachments or references to other documents that were being used “by one party to influence the decision maker outside the presence of the other parties,” and relate to ex parte meetings that clearly “involve an opportunity” for ex parte influence on the decision maker. The documents attached or referenced in the emails pertain to the modeling that Mr. Porgans was particularly concerned about in his PRA request of August 31, 2017. The documents attached or referenced in the produced emails are clearly responsive “to the purpose of the request,” which was to expose unethical ex parte activity by the Hearing Team. Limiting the production to emails only and withholding these documents, which plainly appear to anyone reading the emails, was unreasonable and unresponsive within the meaning of Government Code section 6253.1. The improperly excluded documents, being identified again here for *immediate* production are:

1. In an October 4, 2016, email from DWR attorney Kenneth Bogdan to Diane Riddle and Dana Heinrich, Mr. Bogdan writes “Hi here are the edits to the intro that we discussed this morning. It’s in track and some of the underlying edits were ones Jennifer had made in discussions after we sent you the appendix, I made additional ones on top of that.” (Attachment 9) At the top of the page there is an icon for an attachment labeled App\_5E. **Please produce** the document that is attached, the version of the document with edits “Jennifer [Pierre] had made,” and the version of the document with edits “I [Bogdan] made additional ones on top of that.” Please produce the attachment and the write up as it was at this time, and the other drafts referenced as they were at the time. Production of documents in their current public form will be unresponsive to this request.

2. In a September 21, 2016, email from DWR staffer Marcus Yee to Diane Riddle with copy to Kenneth Bogdan, Mr. Yee writes “DWR just received the attached screencheck version of App 5e. (Attachment 10) **Please produce** the screencheck version of Appendix 5E referred to in the email.

3. In a June 21, 2016, email sent on behalf of Diane Riddle to Marcus Yee of DWR, Riddle references “some of the visuals you presented” yesterday and requests to “see those again” by “Emailing the presentation or doing a WebEx.” (Attachment 11) **Please produce the** visuals referenced in the email.

4. In an email exchange of June 10, 2016, between DWR’s Marcus Yee and Hearing Team lead Diane Riddle, discussing an upcoming meeting, Riddle asks “Is it primarily modeling you would like to present or text?” Yee answers, “We like to discuss the modeling.” (Attachment 12) **Please produce** the modeling or any other graphics, written materials, visual or audio materials, or other representations that were presented at this meeting or exchanged in preparation for the meeting or as a follow up to the meeting.

5. In an email from DWR attorney Kenneth Bogdan to Hearing Team lead Dana Heinrich dated April 18, 2016, Bogdan says “attached please find a write up of the impact discussion for the additional modeling prepared for the SWB.” (Attachment 13) There is an icon of an attached document at the top of the email. **Please produce** the attachment and the write up as it was a this time. Production of documents in their current public form will be unresponsive to this request.

All of the documents in this section were unreasonably withheld from production, are readily identifiable, and are overdue. Please produce all of these materials immediately.

**B. Materials Presented At Meetings, Exchanged In Preparation For Meetings, Or Exchanged As Follow up To Meetings Regarding Modeling Or The EIR Or Any Other Matter.**

Hearing Team members met with DWR staff on at least the following occasions:

Date: Tuesday, September 15, 2015  
Time: 10:00–10:30am (Open room till 11)  
Place: Room 1710 in Cal EPA Building  
Present: Tripp Mizelle, Rich Satkowski, Dana Heinrich  
Subject: Technical and Procedural issues of Petition Addendum, with mention of mapping issues.

Date: Monday, January 4, 2016  
Time: 11:00am–12:30pm  
Place: Cal EPA room 1410  
Present: Samantha Olson, Dana Heinrich, Kenneth Bogdan, Rich Satkowski, John Gerlach, Cassandra Enos  
Subject: WaterFix EIR Discussion

Date: Monday, January 25, 2016  
Time: 2:00–4:00pm  
Place: DWR 422 (Bonderson Building)  
Present: Kenneth Bogdan, Dianne Riddle, Cassandra Enos, Jennifer Pierre (by phone), Chandra Chilmakuri, Dana Heinrich, Rich Satkowski, John Gerlach  
Subject: Preparation of the Final EIR/EIS

Date: Thursday, April 21, 2016  
Time: 3:30–5:30pm  
Place: Bonderson Building (room number N/A)  
Present: Jennifer Pierre, John Gerlach, Kenneth Bogdan, Chandra Chilmakuri, Dana Heinrich, Diane Riddle, Kyle Ochendusko  
Subject: Discussion on Water Board Modeling for WaterFix

Date: Thursday, May 26, 2016  
Time: 10:00am–12:00pm  
Place: Bonderson 422  
Present: Jennifer Pierre, Kenneth Bogdan, Dana Heinrich, Chandra Chilmakuri, Diane Riddle, Kyle Ochendusko, John Gerlach  
Subject: Appendix 5E

Date: Thursday, June 16, 2016  
Time: 4:00–5:00pm  
Place: Skype Meeting  
Present: Marcus Yee, Diane Riddle, Kenneth Bogdan, Dana Heinrich, Kyle Ochendusko, Jennifer Pierre  
Subject: Appendix 5E follow up

Date: Friday, June 24, 2016  
Time: 10:00–11:00am  
Place: Conference Phone Call  
Present: Marcus Yee, Diane Riddle, Kyle Ochendusko, Kenneth Bogdan, Dana Heinrich, Jennifer Pierre  
Subject: Appendix 5E discussion

Date: Thursday, July 14, 2016  
Time: 3:00–3:30pm  
Place: Conference Phone Call (Webex)  
Present: Marcus Yee, Diane Riddle, Dana Heinrich, Kenneth Bogdan, Kyle Ochendusko, Russell Stein, Chandra Chilmakuri, Jennifer Pierre, Richard Wilder  
Subject: Appendix 5E follow up

Date: Tuesday, July 19, 2016  
Time: Before 3pm  
Place: N/A  
Present: Kenneth Bogdan, Dana Heinrich  
Subject: Renting a room at the Retro Lodge

Date: Friday, August 19, 2016  
Time: Either 8:00–9:00 a.m. or somewhere between 1:00 and 5:00pm  
Place: Phone Call  
Present: Michelle Hutzel, Michael Lauffer, Kenneth Bogdan, Gordon Burns, Kimberly Arbuckle, Karla Nemeth, Michael Jewell  
Subject: Call re: Delta (or 404 permit; unclear; attendees unclear)

Date: Tuesday, October 4, 2016  
Time: 9:00–11:30am  
Place: Web Conference  
Present: Keneth Bogdan, Marcus Yee, Dana Heinrich, Kyle Ochenduszkowski, Jennifer Pierre, Chandra Chilmakuri, Rick Wilder  
Subject: Appendix 5E

(See Attachment 14; in some cases actual attendees are unclear and the above is our best understanding of who may have attended) That is a total of at least 13 hours of meetings on 11 occasions over 13 months.

**Please produce** any and all materials exchanged between Hearing Team members or other Board personnel and Petitioner in connection with the above meetings that were after October 30, 2015, including agendas, minutes, documents, graphics, notes, visual materials, video or audio recordings, slides, other materials that were passed out, presented at, exchanged in preparation for, or exchanged in follow up to these meetings.

**Please produce** any and all notes taken by Hearing Team members or other Board personnel at these, or other ex parte meetings with Petitioner after October 30, 2015, concerning the WaterFix Petition or WaterFix Project.

**Please produce** any transcripts of these, or any other, ex parte meetings after October 30, 2015, between Hearing Team members or other Board personnel and Petitioner concerning the WaterFix Petition or WaterFix Project.

**C. Materials Exchanged Ex Parte Between Petitioner And Hearing Team Members Or Other Board Personnel Related To The WaterFix Change Petition Or The WaterFix Project.**

In addition to the numerous meetings, ex parte collaboration on formulating DWR's evidence for the WaterFix Change Petition hearings was ongoing throughout the hearing process. **Please produce** any and all materials exchanged ex parte after October 30, 2015, between Hearing Team members or other Board personnel and Petitioner in connection with the WaterFix change petition or WaterFix Project.

**D. Materials Related To Identifying Any Recordings Of Web-Based Or Telephonic Meetings.**

A number of ex parte meetings were conducted via the web conferencing service WeBex. Other meetings were conducted via Skype. Others were conducted using phone-based conferencing services. WeBex provides video and/or audio recording of its web-based conferences. The other services may provide recordings as well.

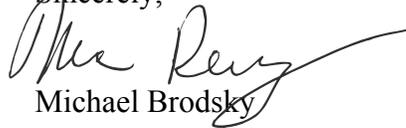
**Please produce** any documents that would contain information about the exact identification of web based or phone-based conferences, such as conference ID numbers or other indicia, that could be used to locate audio or video recordings of conferences.

**Please produce** any documents that would indicate whether or not any of the web or phone based conferences were recorded or not.

**Please produce** any audio or video recordings or transcripts of the web-based or telephonic conferences and any audio or video recordings or transcripts of the in-person meetings described in Section B above, or any other ex parte meetings between Hearing Team members or other Board personnel and Petitioner concerning the WateFix Petition or the WaterFix Project after October 30, 2015.

Thank you in advance for responding to this request.

Sincerely,



Michael Brodsky

# Attachment 1

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**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Friday, June 10, 2016 4:27 PM  
**Subject:** RE: CWF Appendix 5E Follow-up

Great. Thanks, Diane. We like to discuss the modelling, but I suspect it will be a short call.

Chandra, please set up a phone line and send out an invite for a ten minute conference call for us.

Thanks,  
marcus

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**From:** Riddle, Diane@Waterboards  
**Sent:** Friday, June 10, 2016 12:10 PM  
**To:** Yee, Marcus@DWR <Marcus.Yee@water.ca.gov>  
**Cc:** Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Heinrich, Dana@Waterboards <Dana.Heinrich@waterboards.ca.gov>; Ochendusko, Kyle@Waterboards <Kyle.Ochendusko@waterboards.ca.gov>  
**Subject:** RE: CWF Appendix 5E Follow-up

I'm out next week and Dana is out the following. Is it primarily modeling you would like to present or text? If it is text to address the legal issues Dana raised, I think you can meet without me. If it is modeling, I would prefer to be there and could do a webex late Thursday (4-5 maybe).

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**From:** Yee, Marcus@DWR  
**Sent:** Friday, June 10, 2016 7:08 AM  
**To:** Riddle, Diane@Waterboards  
**Cc:** Bogdan, Kenneth [M.@DWR](#); Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards  
**Subject:** CWF Appendix 5E Follow-up

Hi Diane,  
We'd like to follow up with you on Appendix 5E. I know this may be a bit of a stretch, but I thought I'd throw it out there just in case.  
Any chance you guys might be available on Wednesday (6/15) from 11-12 for a check-in. We could make it a Webex.  
-marcus

Marcus L. Yee  
Department of Water Resources

Sent from my mobile device.

# Attachment 2

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**From:** Gerlach, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GERLACH, JOHN81D2F47C-5AB7-4479-AFC3-0420CE8BAB51CF4>  
**Sent:** Monday, April 11, 2016 10:53 AM  
**Subject:** RE: Water Board modeling for WaterFix

How does meeting at 3:30 pm on Thursday April 21<sup>st</sup> work for everyone?

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**From:** Pierre, Jennifer [mailto:Jennifer.Pierre@icfi.com]  
**Sent:** Monday, April 11, 2016 10:06 AM  
**To:** Bogdan, Kenneth M.@DWR; Gerlach, John@Waterboards; Chandra.Chilmakuri@CH2M.com  
**Cc:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards  
**Subject:** RE: Water Board modeling for WaterFix

Good morning. I'm not available until 1pm. Any chance we could meet in the afternoon of the 21st?

Jennifer

---

**From:** Bogdan, Kenneth [M.@DWR \[mailto:Kenneth.Bogdan@water.ca.gov\]](mailto:Kenneth.Bogdan@water.ca.gov)  
**Sent:** Monday, April 11, 2016 10:03 AM  
**To:** Gerlach, John@Waterboards <[John.Gerlach@waterboards.ca.gov](mailto:John.Gerlach@waterboards.ca.gov)>; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Cc:** Riddle, Diane@Waterboards <[Diane.Riddle@waterboards.ca.gov](mailto:Diane.Riddle@waterboards.ca.gov)>; Heinrich, Dana@Waterboards <[Dana.Heinrich@waterboards.ca.gov](mailto:Dana.Heinrich@waterboards.ca.gov)>; Pierre, Jennifer <[Jennifer.Pierre@icfi.com](mailto:Jennifer.Pierre@icfi.com)>  
**Subject:** RE: Water Board modeling for WaterFix

Hi John – thanks for the response. Let's chat about all of this when we meet face to face.

I have a meeting that ends at 11:00 on the 21st. Any chance we could meet here? Otherwise maybe schedule it for 11:30? Let's see if Jennifer can make it as well.

Thanks,

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

---

**From:** Gerlach, John@Waterboards  
**Sent:** Monday, April 11, 2016 9:55 AM  
**To:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)

**Cc:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards  
**Subject:** RE: Water Board modeling for WaterFix

Thanks Ken.

It sounds as if the meeting should include more than technical staff as the issues likely go beyond pure technical issues.

Given the different statements that I've read, could you please clarify what modeling will be relied on for the case-in-chief for each of the three phases of the hearing - 1A, 1B, and 2. It's not clear to me from the tables in the March 11, 2015 letter from DWR and Reclamation to the SWRCB how the WaterFix RDEIR/SDEIS modeling for water quality (DSM2 16 year period) and the BA modeling for endangered species (82 year period) are being used in the various hearing phases.

Based on what I can see on Diane's Outlook calendar, could we set up a meeting at 11 am on Thursday April 21<sup>st</sup>?

Thank you,

John

---

**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Monday, April 11, 2016 9:10 AM  
**To:** Gerlach, John@Waterboards; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Subject:** RE: Water Board modeling for WaterFix

Hi John and Chandra – just to clarify (I am sure I wasn't clear with Dana since modeling is not my specialty!), Chandra has not run the latter end H4 analysis and wanted to talk with you on several assumptions (including whether to use the 2015 version of Calsim). I'd like to be part of the discussion as there are a few things that may weigh into the decisions on moving forward with the modeling. I have also been the bottle neck on the impact analysis side of things and can give an update about that too.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

---

**From:** Gerlach, John@Waterboards  
**Sent:** Monday, April 11, 2016 7:21 AM  
**To:** [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Cc:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Subject:** Water Board modeling for WaterFix

Hi Chandra,

Ken mentioned to one of our attorneys that you had completed some additional modeling for the Water Boards scenario using H4 as the baseline. Dianne Riddle asked me to contact you so that you could provide some technical

# Attachment 3

**Cc:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards  
**Subject:** RE: Water Board modeling for WaterFix

Thanks Ken.

It sounds as if the meeting should include more than technical staff as the issues likely go beyond pure technical issues.

Given the different statements that I've read, could you please clarify what modeling will be relied on for the case-in-chief for each of the three phases of the hearing - 1A, 1B, and 2. It's not clear to me from the tables in the March 11, 2015 letter from DWR and Reclamation to the SWRCB how the WaterFix RDEIR/SDEIS modeling for water quality (DSM2 16 year period) and the BA modeling for endangered species (82 year period) are being used in the various hearing phases.

Based on what I can see on Diane's Outlook calendar, could we set up a meeting at 11 am on Thursday April 21<sup>st</sup>?

Thank you,

John

---

**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Monday, April 11, 2016 9:10 AM  
**To:** Gerlach, John@Waterboards; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Subject:** RE: Water Board modeling for WaterFix

Hi John and Chandra – just to clarify (I am sure I wasn't clear with Dana since modeling is not my specialty!), Chandra has not run the latter end H4 analysis and wanted to talk with you on several assumptions (including whether to use the 2015 version of Calsim). I'd like to be part of the discussion as there are a few things that may weigh into the decisions on moving forward with the modeling. I have also been the bottle neck on the impact analysis side of things and can give an update about that too.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

---

**From:** Gerlach, John@Waterboards  
**Sent:** Monday, April 11, 2016 7:21 AM  
**To:** [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Cc:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Subject:** Water Board modeling for WaterFix

Hi Chandra,

Ken mentioned to one of our attorneys that you had completed some additional modeling for the Water Boards scenario using H4 as the baseline. Dianne Riddle asked me to contact you so that you could provide some technical

specifics to me about the new modeling. Our discussion will be focused on the modeling and not the effects analysis. My third hand information is that while the H3 baseline was based on the 2010 version of CalSim2 that the H4 baseline might be based on the 2015 version of CalSim2. We'd also like to know if both runs used the same analysis period, say ELT, and whether there are any other different assumptions.

After you bring me up to speed on the new modeling Diane would like a meeting with the larger group to discuss the CEQA effects analysis based on the modeling. I don't know the status of those efforts but if they have been completed Diane would like to set something up for late next week as she is out of town this week.

If you have an questions please feel free to give me a call.

Thanks,

John

=====  
John Gerlach, Ph.D., J.D. | Senior Environmental Scientist  
State Water Resources Control Board | Division of Water Rights  
1001 "I" Street, 14th Floor | Sacramento, CA 95814  
[John.Gerlach@waterboards.ca.gov](mailto:John.Gerlach@waterboards.ca.gov)  
P: (916) 341-5394

# Attachment 4

California WaterFix Appendix 5E - Meeting

File Meeting Help Tell me what you want to do

YM  
Mon 7/11/2016 12:56 PM  
Yee, Marcus@DWR  
California WaterFix Appendix 5E

Required  
As the meeting organizer, you do not need to respond to the meeting.

When Thursday, July 14, 2016 3:00 PM-3:30 PM Location Goto meeting details will be sent out later this afternoon

This web conference is a follow-up meeting to discuss the approach to developing Appendix 5E.

# Attachment 5

1  
2  
3

**Supplemental Modeling Related to the  
State Water Resources Control Board**

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## Supplemental Modeling Related to the State Water Resources Control Board

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### 5E.1 Introduction and Purpose of the Supplemental Modeling

The State Water Resources Control Board (State Water Board) is expected to issue discretionary approvals considered a “project” under California Environmental Quality Act (CEQA), and therefore, the State Water Board is identified as a Responsible Agency for purposes of California Department of Water Resources (DWR’s) CEQA document. DWR prepared the Bay Delta Conservation Plan (BDCP) Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) in consideration of the State Water Board and other Responsible Agency approvals and specifically included Alternative 8 in the BDCP Draft EIR/EIS at the request of State Water Board staff. The 2015 Partially Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS) included, at the request of State Water Board staff, supplemental modeling at year 2025 (Early Long Term [ELT]), conducted to evaluate an operational scenario that provides higher Delta outflows than the Preferred Alternative (Alternative 4A), while including model assumptions that avoid impacts to fish and aquatic resources attributable to reductions in cold water pool storage and flow modifications under Alternative 8 and other higher outflow scenarios analyzed in the BDCP Draft EIR/EIS.

This appendix includes a revised and updated version of the State Water Board staff requested scenario that was presented in the RDEIR/SDEIS (referred to as Scenario 2 in this appendix) and also provides supplemental modeling and analysis of 2 additional scenarios, each at year 2025 (Early Long Term [ELT]) that were presented in the State Water Board water rights petition process (Boundary 1 and Boundary 2). Boundaries 1 and 2 were presented to the State Water Board during the water rights petition process as a means to represent a potential range of operations that could occur as a result of the proposed Adaptive Management Program, and the conditions of any approvals obtained as a result of the ongoing regulatory review of U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Wildlife, and State Water Board. The description and analysis included in this appendix for Boundaries 1 and 2 incorporates by reference the testimony presented to the State Water Board July 29 through September 27, 2016, for the California WaterFix change in point of diversion petition. The testimony exhibits on which this analysis relied are posted at:

[http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF\\_ChangePetition\\_TOC\\_V212.pdf](http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF_ChangePetition_TOC_V212.pdf)

The transcripts on which this analysis relied are posted at:

[http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF\\_ChangePetitionHearingTranscript.pdf](http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF_ChangePetitionHearingTranscript.pdf)

1 Specifically, the modeling and water quality exhibits (DWR-5, DWR-513, DWR-514, and DWR-515)  
2 and transcripts (August 19, 23, and 24, 2016) were relied upon for this analysis. Boundary 2 was  
3 based on the higher Delta outflow operational scenario requested by State Water Board staff that  
4 was evaluated in the 2015 RDEIR/SDEIS. Scenario 2 is identical to Boundary 2 in all respects except  
5 for upstream releases from Lake Oroville in April and May to support the higher Delta outflow  
6 requirements included in Scenario 2.

7 The evaluations for Boundaries 1 and 2 and Scenario 2 were conducted primarily to consider  
8 changes in outflow, without specific consideration of the project objectives or purpose and need  
9 statement. Overall, the purpose of this evaluation was to provide a range of Delta outflows and other  
10 operational parameters to consider as a part of the CEQA/NEPA process as well as during agency  
11 decision-making, including the State Water Board’s water rights hearing on the petition for changes  
12 in State Water Project (SWP) and Central Valley Project (CVP) authorized points of diversion  
13 necessary to implement the proposed project.

## 14 5E.2 Modeling Assumptions

15 Three scenarios were evaluated in this appendix: Boundary 1, Boundary 2, and Scenario 2.  
16 Additionally, modeling for Alternatives 4H3 and 4H4 was conducted for the State Water Board  
17 petition process. The modeling results of Alternative 4H3, Alternative 4H4, Boundary 1 and  
18 Boundary 2 are included as Attachment 5E-1. The modeling results for Scenario 2 are included  
19 below in Section 5E.3. Tables 5E-1 through 5E-5 below includes the assumptions for the 3 scenarios  
20 evaluated in this appendix, plus the No Action Alternative (for reference).

21 **Table 5E-1. Key CALSIM II CWF No Action Alternative, CPOD Boundary 1 and Boundary 2, and Scenario**  
22 **2 Inputs and Assumptions**

	No Action Alternative (NAA)	Boundary 1	Boundary 2	Scenario 2
Planning horizon <sup>a</sup>	Year 2030	Same as NAA	Same as NAA	Same as Boundary 2
Inflows/ Supplies	Historical with modifications for operations upstream of rim reservoirs and with changed climate at Year 2030	Same as NAA	Same as NAA	Same as Boundary 2
<b>Facilities</b>				
North Delta Diversion Intakes	Not included	9,000 cfs north Delta diversion intake on the Sacramento River at Hood	Same as Boundary 1	Same as Boundary 2
Head of Old River Gate	Temporary Head of Old River Barrier installed in the fall months	Permanent Head of Old River (HOR) Gate	Same as Boundary 1	Same as Boundary 2

# Attachment 6



September 8, 2017

[CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) via Email

Chair Felicia Marcus  
Board Member Tam Doduc  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

Re: August 31, 2017 Ruling Regarding Scheduling of Part 2 and Other  
Procedural Matters

Dear Chair Marcus and Board Member Doduc:

The California Department of Water Resources ("DWR") and the U.S. Bureau of Reclamation ("Reclamation")(jointly "Petitioners") are responding to your ruling of August 31, 2017. In that ruling you requested that, by September 8, 2017, Petitioners provide an "updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are set forth solely as modeling assumptions."

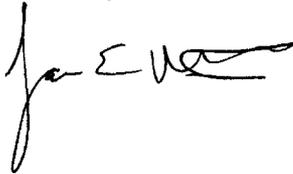
The attached tables describe a summary of the operating criteria for the project that was approved by DWR on July 21, 2017 and is described in the Final Environmental Impact Report and additional information made available to the public at that time. The tables also describe the operating criteria for the projects permitted by the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife.

Petitioners propose that the California WaterFix be conditioned upon the terms contained in Water Rights Decision 1641 ("D-1641"). Modeling assumptions demonstrate it is possible to meet existing regulatory requirements inclusive of D-1641 and the 2008/2009 Biological Opinions. For purposes of this hearing, these modeling assumptions are not proposed as conditions but are presented in order to demonstrate compliance with the existing Water Quality Control Plan, which sets forth the thresholds for protecting beneficial uses.

The California WaterFix includes an adaptive management process. In Part 1 of this hearing Petitioners presented the boundary analysis of B1 to B2 in order to demonstrate no impact to legal users of water within the range of foreseeable outcomes of the adaptive management process. Through the adaptive management process, that was made a requirement of the Biological Opinions and 2081(b) Incidental Take Permit for the California WaterFix, new information can be assessed and, if appropriate, incorporated into the ESA/CESA permits. Therefore as part of this project, Petitioners are requesting that the Hearing Officers incorporate the adaptive management process into the water rights permits, and Petitioners are not proposing as conditions the operational criteria contained within the Biological Opinions and 2081(b) Incidental Take Permit.

Petitioners look forward to presenting evidence in Part 2 of the water rights hearing.

Sincerely,



Tripp Mizell  
Senior Attorney  
Office of the Chief Counsel  
CA Department of Water Resources



Amy L. Aufdemberge  
Assistant Regional Solicitor  
Office of the Regional Solicitor  
U.S. Department of the Interior

cc: *Electronic service*

Felicia Marcus, Chair & hearing officer, State Water Resources Control Board  
Tam Doduc, Board Member & hearing officer, State Water Resources Control Board  
Tom Howard, Executive Director, State Water Resources Control Board  
Michael Lauffer, Chief Counsel, State Water Resources Control Board  
Electronic service list as provided by the State Water Resources Control Board on August 11, 2017.

*Personal service via U.S. Postal Service*

Suzanne Womack and Sheldon Moore,  
Clifton Court, L.P.,  
3619 Land Park Drive,  
Sacramento, CA 95818

# Attachment 7

PATRICK PORGANS  
**PORGANS/ASSOCIATES**  
P.O. Box 60940  
(916) 543-0780 or 833-8734  
Email: [pp@planetarysolutionaries.org](mailto:pp@planetarysolutionaries.org)

31 August 2017

Sent Via Email: [Dana.Heinrich@waterboards.ca.gov](mailto:Dana.Heinrich@waterboards.ca.gov)

Dana Heinrich  
Office of Chief Counsel / Water Rights  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

**Please Confirm Receipt of this Email**

Re: Public Records Act Request for Ex Parte Correspondence about the Change Petition since 26 Aug. 2015

Dear Ms. Heinrich

Per section 6250 et seq. of the Public Records Act, Porgans/Associates (P/A) are formally requesting all Ex Parte correspondences between the California Department of Water Resources and the State Water Resources Control Board, from the submittal of the Change Petition, 26 August 2015, to the present.

April 25, 2013, memorandum of the Chief Counsel for the State Water Resources Control Board on [Ex Parte Communications](#) states in part,

Ex parte communications are fundamentally offensive in adjudicative proceedings because they involve an opportunity by one party to influence the decision maker outside the presence of opposing parties, thus violating due process requirements. Such communications are not subject to rebuttal or comment by other parties. Ex parte communications can frustrate a lengthy and painstaking adjudicative process because certain decisive facts and arguments would not be reflected in the record or in the decisions. Finally, ex parte contacts may frustrate judicial review since the record would be missing such communications.<sup>1</sup>

However, during cross-examination in the WaterFix hearing, it was revealed that there was ongoing Ex Parte correspondence between the Department of Water Resources and the Board about modeling for a revised version of the scenario in Appendix C of the Revised Draft EIR/EIS. (Transcript dated July 29, 2016, p. 76:10-77:22, included as Exhibit A.)

Pursuant to my rights under the California Public Records Act (Government Code Section 6250 et seq.), P/A ask that the Board provide copies of the following correspondence:

Ex Parte correspondence, since the Change Petition was submitted on August 26, 2015, between the Department of Water Resources and Board staff about modeling for the Board for determination of “appropriate Delta flow criteria” under Water Code section 85086.

- Any ex parte correspondence since the Change Petition was submitted on August 26, 2015, between the Department of Water Resources and Board staff about the Boundary 1 and Boundary 2 scenarios that were introduced by the Department of Water Resources in modeling for Part 1 of the WaterFix hearing.

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<sup>1</sup> To: Board Members, State Water Resources Control Board and California Regional Water Quality Control Boards, from Michael A. M. Lauffer, Chief Council, Transmittal of Ex Parte Communications, Questions and Answers Document, 3. Q. What purposes are served by limitations on ex parte communications? 25 April 2013 (p. 6) [via email],

- Any ex parte correspondence, since the Change Petition was submitted on August 26, 2015, regarding scheduling of Part 1 or Part 2 of the WaterFix Change Petition hearing.

In *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 741) the court held that,

In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions [in a given adjudicative proceeding] and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.

The Ex Parte communications about "refinements" to modeling for the Board during Part 1 of the WaterFix Hearing involved a member of the Hearing Team, and so there was no internal separation of functions. Disclosing the Ex Parte communications with the Department of Water Resources would clear up issues of potential bias.

P/A ask for a determination on this request within ten days of your receipt of it, and an even prompter reply if you can make that determination without having to review the record[s] in question. If you determine that any or all the information qualifies for an exemption from disclosure, P/A ask you to note whether, as is normally the case under the Act, the exemption is discretionary, and if so whether it is necessary in this case to exercise your discretion to withhold the information.

If you determine that some but not all of the information may be exempt from disclosure and that you intend to withhold it, P/A ask that you redact it for the time being and make the rest available as requested. In any event, please provide a signed notification citing the legal authorities on which you rely if you determine that any or all of the information is exempt or will not be disclosed. Thank you for your time and attention to this matter.

Sincerely,

*Patrick Porgans*  
Patrick Porgans

cc: To all parties participating in the Change Petition

# Attachment 8

## State Water Resources Control Board

**TO:** [via e-mail]  
Board Members  
**STATE WATER RESOURCES CONTROL BOARD AND  
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS**

**FROM:**   
Michael A.M. Lauffer  
Chief Counsel  
**OFFICE OF CHIEF COUNSEL**

**DATE:** April 25, 2013

**SUBJECT:** TRANSMITTAL OF EX PARTE COMMUNICATIONS QUESTIONS AND  
ANSWERS DOCUMENT

Attached please find an updated document on ex parte communications. This memorandum and the accompanying Ex Parte Questions and Answers supersede all previous Office of Chief Counsel memoranda on the same subject.<sup>1</sup>

The changes in the attached reflect recent legislation that amends the Porter-Cologne Water Quality Control Act effective January 1, 2013. The changes resulting from Senate Bill 965 (Wright) (Stats. 2012, ch. 551) generally allow ex parte communications about issues concerning certain pending general orders of the water boards, but make certain interested persons subject to reporting requirements. Questions 28 through 35 and question 45 of the Ex Parte Questions and Answers document address these new ex parte communication rules and reporting requirements for general orders.

The State Water Resources Control Board and the nine California Regional Water Quality Control Boards perform a variety of functions. The boards convene to set broad policy consistent with the laws passed by Congress and the Legislature. In this regard, the boards perform a legislative function. The boards also routinely determine the rights and duties of individual dischargers or even a class of dischargers. In this regard, the boards perform a judicial function. The judicial function manifests itself when the boards adopt permits and conditional waivers or take enforcement actions. Some water board actions, such as the adoption of general permits, straddle the line between judicial and legislative functions because they establish rights and duties of future, unnamed dischargers.

---

<sup>1</sup> The most recent memorandum was a December 28, 2012 memorandum from me to members of the State Water Resources Control Board and the California Regional Water Quality Control Boards. That memo superseded prior memoranda from the Office of Chief Counsel concerning ex parte communications. The only change since my December 28, 2012 memorandum is the addition of question 45 addressing site visits and pending general orders.

Different rules apply depending on the type of action pending before a water board. One of the distinctions between legislative and judicial proceedings is the prohibition against ex parte communications. An ex parte communication is a communication to a board member about a pending water board matter that occurs in the absence of other parties to the matter and without notice and opportunity for all parties to participate in the communication. In legislative-type proceedings, ex parte communications are allowed. In judicial-type proceedings, ex parte communications are prohibited. In hybrid proceedings, such as the issuance of certain general permits, ex parte communications are generally allowed, but communications from certain interested persons must be disclosed. The accompanying questions and answer document addresses common issues pertaining to ex parte communications.

I have structured the questions and answers document to serve as a reference document for board members and the attorneys within the Office of Chief Counsel. By breaking the subject matter into discrete questions, my intent is to provide a list that board members can quickly scan to identify relevant issues and the accompanying legal answer.

There are four broad themes pertaining to communications with board members.

1. If a proceeding is not pending or impending before a water board, board members may communicate with the public and governmental officials regarding general issues within the water board's jurisdiction. Water board members may also participate in information gathering efforts such as tours or site visits.
2. If a proceeding is pending or impending before a water board for the issuance of general waste discharge requirements, a categorical waiver, or a general 401 certification, board members may communicate with the public and government officials about the pending order. Special disclosure requirements apply to communications that involve certain persons with an interest in the proceeding.
3. If any other adjudicative proceeding is pending or impending before a water board, ex parte communications with that water board's members regarding an issue in that proceeding are prohibited.
4. If a rulemaking or other proceeding is pending or impending before a water board, a board member may, if he or she chooses to do so, have ex parte communications regarding issues in that proceeding.

The questions and answer document does not and cannot address all the issues pertaining to ex parte communications. Over time additional questions may be added based on feedback from board members.

#### Attachment

cc: [All via e-mail only]  
Tom Howard, EXEC  
Jonathan Bishop, EXEC  
Caren Trgovcich, EXEC  
All Executive Officers, Regional Water Boards  
All Assistant Executive Officers, Regional Water Boards  
Branch Offices  
All Office of Chief Counsel attorneys

# EX PARTE QUESTIONS AND ANSWERS

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<b>I. Ex Parte Summary .....</b>	<b>1</b>
1. Q. What is an ex parte communication? .....	1
2. Q. What is a communication? .....	2
3. Q. What purposes are served by limitations on ex parte communications?.....	2
4. Q. Do ex parte communications rules prevent water board members from understanding the issues and people's concerns? .....	2
5. Q. How can board members educate themselves without violating the prohibition on ex parte communications? .....	3
6. Q. How can water board members explain ex parte rules to the public? .....	3
7. Q. What proceedings are subject to the prohibition on ex parte communications?.....	3
<b>II. Adjudicative Proceedings.....</b>	<b>4</b>
<b>A. Types of Adjudicative Actions .....</b>	<b>4</b>
8. Q. What actions are adjudicative? .....	4
9. Q. Are ex parte communications prohibited for pending adjudicative actions?.....	4
10. Q. Does the ex parte communications prohibition apply to a conditional waiver of waste discharge requirements that identifies a specific person or persons?.....	4
11. Q. May discrete policy issues within an adjudicative proceeding be considered separately in a non-adjudicative proceeding? .....	5
<b>B. Pending Adjudicative Proceeding.....</b>	<b>5</b>
12. Q. When is a proceeding pending?.....	5
13. Q. What is an impending matter?.....	5
14. Q. How can a board member determine whether an action is pending? .....	6
15. Q. Are adjudicative matters pending before the regional water boards also pending before the State Water Board?.....	6
16. Q. Does a reopener provision in a permit mean an action is pending? .....	7
<b>C. Scope of Ex Parte Communications Prohibition .....</b>	<b>7</b>
17. Q. What subjects are covered by the ex parte communications prohibition?.....	7
18. Q. Are all communications prohibited with a person interested in an adjudicative proceeding pending before a water board? .....	8
19. Q. Are there exceptions to the prohibition? .....	8
20. Q. What is a matter of practice or procedure that is not in controversy? .....	8
<b>D. Persons Subject to the Ex Parte Communications Prohibition .....</b>	<b>8</b>
21. Q. Who is subject to the rules prohibiting ex parte communications?.....	8
22. Q. May staff communicate with board members without violating ex parte rules?.....	9
23. Q. Are other government officials subject to the ex parte rules? .....	10
24. Q. May a board member attend a publicly noticed staff-level workshop on an adjudicative matter? .....	10
<b>E. Consequences of Prohibited Ex Parte Communications .....</b>	<b>10</b>
25. Q. What are the consequences of violating the ex parte communications prohibition? .....	10
26. Q. How may a board member cure an inadvertent ex parte communication? .....	10
27. Q. What if a board member received a communication about an adjudicative proceeding before becoming a board member? .....	11

## EX PARTE QUESTIONS AND ANSWERS

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<b>F. Exception for Certain General Orders</b> .....	<b>11</b>
28. Q. Are proceedings on general waste discharge requirements, categorical waivers, and general 401 certifications (general orders) considered adjudicative proceedings? .....	11
29. Q. Does the ex parte communications prohibition apply to general orders? .....	12
30. Q. Who must disclose ex parte communications regarding general orders? .....	12
31. Q. What disclosure requirements apply to ex parte communications regarding general orders? .....	13
32. Q. How can a board member determine whether a member of a group is a “representative” for purposes of the disclosure requirements for general orders? .....	13
33. Q. Can a water board limit ex parte communications regarding a pending general order? .....	14
34. Q. Are all region-wide or statewide permits “general orders”? .....	14
35. Q. What are the consequences of violating the special disclosure requirements for general orders? .....	14
<b>III. Rulemaking and Other Proceedings</b> .....	<b>14</b>
36. Q. What actions are rulemaking? .....	14
37. Q. Is there a prohibition on private communications in rulemaking actions? .....	15
38. Q. What is the Office of Chief Counsel’s recommendation on handling communications in rulemaking proceedings? .....	15
39. Q. If a member chooses to disclose a communication, what is the preferred procedure? .....	15
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# EX PARTE QUESTIONS AND ANSWERS

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## I. EX PARTE SUMMARY

### Summary of ex parte framework:

1. If a proceeding is not pending or impending before a water board, board members may communicate with the public and governmental officials regarding general issues within the water board's jurisdiction. Water board members may also participate in information gathering efforts such as tours or site visits.
2. If a proceeding is pending or impending before a water board for the issuance of general waste discharge requirements, a categorical waiver, or a general 401 certification, board members may communicate with the public and government officials about the pending order. Special disclosure requirements apply to communications that involve certain persons with an interest in the proceeding.
3. If any other adjudicative proceeding is pending or impending before a water board, ex parte communications with that water board's members regarding an issue in that proceeding are prohibited.
4. If a rulemaking or other proceeding is pending or impending before a water board, a board member may, if he or she chooses to do so, have ex parte communications regarding issues in that proceeding.

### 1. Q. What is an ex parte communication?

A. An ex parte communication is a communication to a board member from any person<sup>1</sup> about a pending water board matter that occurs in the absence of other parties to the matter and without notice and opportunity for all parties to participate in the communication. People often refer to these communications as "one-sided," "off-the-record," or private communications between a board member and any person concerning a matter that is pending or impending before the applicable water board.

One-sided communications does not mean that the communication must occur in privacy or among two people in order to be an ex parte communication. Even a public communication before a large audience may still be an ex parte communication if other parties to the proceeding do not have notice of and an opportunity to participate in the communication.

#### *Examples of ex parte communications include:*

1. A water board has scheduled a hearing to consider the assessment of administrative civil liability against a discharger for an illegal discharge. Before the hearing, a representative of an environmental group attempts to speak to a new board member regarding the discharger's alleged long-term violations of environmental laws. Such a communication would be ex parte.
2. A water board has scheduled a hearing to consider the issuance of a new discharge permit to Dairy X. The president of Dairy X invites a board member out to the site to

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<sup>1</sup> There are special rules for certain staff who advise the board member. Please see Question 22.

## EX PARTE QUESTIONS AND ANSWERS

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show him/her the facility and explain its operation. Such a communication would be ex parte.

**2. Q. What is a communication?**

Communications include face-to-face conversations, phone calls, written correspondence, e-mails, instant messaging, and the next level of technology that presents itself. The Office of Chief Counsel also considers site visits and tours to be ex parte communications. By their very nature, site visits communicate evidentiary information to board members. Site visits can be a useful part of the decision-making process and special procedures should be used for site visits. (Please see Questions 43-45.)

**3. Q. What purposes are served by limitations on ex parte communications?**

Rules regarding ex parte communications have their roots in constitutional principles of due process and fundamental fairness. With public agencies, ex parte communications rules also serve an important function in providing transparency. Ex parte communications may contribute to public cynicism that decisions are based more on special access and influence than on the facts, the laws, and the exercise of discretion to promote the public interest.

Ex parte communications are fundamentally offensive in adjudicative proceedings because they involve an opportunity by one party to influence the decision maker outside the presence of opposing parties, thus violating due process requirements. Such communications are not subject to rebuttal or comment by other parties. Ex parte communications can frustrate a lengthy and painstaking adjudicative process because certain decisive facts and arguments would not be reflected in the record or in the decisions. Finally, ex parte contacts may frustrate judicial review since the record would be missing such communications.

**4. Q. Do ex parte communications rules prevent water board members from understanding the issues and people's concerns?**

Ex parte communications rules do not prevent the flow of information to water board members. Instead, ex parte rules shape how the board members receive that information and are intended to ensure that board members receive relevant information in a fair and transparent manner. A person can share issues and concerns by filing appropriate documents with the board and during a public meeting consistent with the water boards' administrative procedures.

Essentially, ex parte rules allow everyone to know and, if desired, rebut the information upon which the water boards make decisions before they make their decisions. The rules are also intended to ensure that all board members have a common record upon which to make their decisions and that a court will be able to ascertain the bases for such decisions.

## **EX PARTE QUESTIONS AND ANSWERS**

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**5. Q. How can board members educate themselves without violating the prohibition on ex parte communications?**

Rules on ex parte communications should not serve to prevent board members from understanding the matters to be considered and decided by the board. If a board member needs additional information about a matter, there are appropriate processes that can be used. There is no substitute for an active, engaged board member when it comes to understanding an issue. Asking questions on the record, or requesting staff and interested persons to specifically address certain issues on the record, helps provide the necessary foundation for board action. In addition, staff assigned to advise the board (see Question 22) may provide assistance and advice, and may help evaluate evidence in the record, so long as the staff does not furnish, augment, diminish, or modify the evidence in the record.

**6. Q. How can water board members explain ex parte rules to the public?**

This is a decision for individual board members to make. Board members are free to refer callers to the Office of Chief Counsel. If the board member chooses to explain ex parte limitations with a person, there are certain themes to keep in mind when explaining ex parte rules.

First, ex parte rules do not prevent anyone from providing information to the water boards or requesting specific actions from the water boards. Ex parte rules simply require that the information come into the record through a writing subject to public review or in a duly noticed, public meeting. Second, ex parte rules are designed to ensure fairness for everyone. No person or interest uniquely benefits from ex parte rules. The rules apply to everyone, and prevent any one person or interest from having special access to water board members. Third, ex parte rules provide transparency, allowing everyone to understand and to appreciate how the water boards reach a decision. By encouraging persons to submit written comments or speak on the record, a person's comments will be heard by all the water board members and other stakeholders. If a person persists, however, a board member can explain that s/he might become subject to disqualification, in which case the person's efforts to communicate with the board member will have been to no avail.

**7. Q. What proceedings are subject to the prohibition on ex parte communications?**

Only adjudicative proceedings are subject to the prohibition on ex parte communications. The water boards function in many capacities, from setting broad policies on water quality control, to planning to implement those policies, to implementing those policies through specific regulatory actions that determine the rights and duties of a person or class of persons. Adjudicative proceedings fall in the latter category of implementing policies through actions that determine the specific rights and duties of persons. (Please see Questions 8-10.)

The continuum from policy-setting to policy-implementing does not have discrete breakpoints. This question and answer document is designed to answer some of the most common questions and provide a useful framework for understanding ex parte issues. It does not create any rules beyond those contained in the Administrative

## EX PARTE QUESTIONS AND ANSWERS

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Procedure Act or court decisions. Board members will need to work closely with legal counsel at times to determine whether the prohibition on ex parte communications applies to a specific action or proceeding.

### II. ADJUDICATIVE PROCEEDINGS

#### A. Types of Adjudicative Actions

##### 8. Q. What actions are adjudicative?

Adjudicative actions are those actions where the water boards make a decision after determining specific facts and applying laws and regulations to those facts. Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Adjudicative proceedings include, but are not limited to, enforcement actions and permit issuance. For example, any person who proposes to discharge waste to waters of the state must apply for a discharge permit. The proceeding to consider whether to issue the permit and the conditions to include in the permit would be adjudicative.

Below is a partial list of common water board actions that often follow adjudicative proceedings:

- National Pollutant Discharge Elimination System (NPDES) permits;
- Waste discharge requirements (WDRs);
- Water right permits and requests for reconsideration;
- Orders conditionally waiving waste discharge requirements;
- Administrative civil liability (ACL) orders;
- Cease and desist orders;
- Cleanup and abatement orders;
- Water quality certification orders (401 certification);
- Permit revocations.

A list of common actions that are not subject to the ex parte prohibition is provided in Part III.

##### 9. Q. Are ex parte communications prohibited for pending adjudicative actions?

Yes. The ex parte communications prohibition for adjudicative proceedings originates in court decisions and has been codified in Chapter 4.5 of the Administrative Procedure Act. The Administrative Procedure Act prohibits “direct or indirect” communications to water board members about an issue in a pending adjudicative proceeding.

##### 10. Q. Does the ex parte communications prohibition apply to a conditional waiver of waste discharge requirements that identifies a specific person or persons?

Yes. The issuance of a conditional waiver pursuant to Water Code section 13269 that identifies a specific person or persons is more appropriately considered an adjudicative proceeding. These types of waivers determine the rights and duties of those persons identified in the order. The orders are directly enforceable against the persons. Conditional waivers are specifically exempt from the rulemaking provisions of the

## EX PARTE QUESTIONS AND ANSWERS

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Administrative Procedure Act. The water boards adopt conditional waivers following the same procedures that are used for any other permitting decision, as opposed to the legislative procedures used to adopt water quality control plans or for administrative rulemaking. Conditional waivers are also subject to the same judicial review standards as any other permit. Together these attributes mean that the issuance of a conditional waiver is an adjudicative action.

**11. Q. May discrete policy issues within an adjudicative proceeding be considered separately in a non-adjudicative proceeding?**

Under appropriate circumstances, a discrete, significant policy issue may be segregated from the adjudicative proceeding and decided using suitable procedures for policy-setting (e.g., regulations, amendments to a water quality control plan, or state policy for water quality control). The Court of Appeal recently sanctioned this approach in the *State Water Resources Control Board Cases*,<sup>2</sup> while noting the importance of recognizing the different requirements that apply to matters decided in an adjudicative proceeding and those decided separately in legislative proceedings. Those issues considered in the policy-setting procedure would not be subject to the prohibitions on ex parte communications during the policy-setting proceeding. However, the ex parte communications prohibition still applies to the adjudicative proceeding (including those issues not involved in the policy-setting proceeding and those issues addressed in the policy-setting proceeding once the policy-setting proceeding has concluded).

**B. Pending Adjudicative Proceeding**  
**12. Q. When is a proceeding pending?**

A proceeding is pending from the time the water board issues an initial pleading in an evidentiary proceeding, or from the time an application for a decision is filed that will require an evidentiary hearing, whichever is earlier. In many circumstances, the “initial pleading” will be a notice of hearing with the staff’s proposed action.

For example, an adjudicative proceeding is pending for an administrative civil liability order from the time an administrative civil liability complaint is issued. A proceeding for issuance of waste discharge requirements is pending before a regional water board when the board receives a report of waste discharge, because that is an application for decision that will occur in a hearing before the board. For general waste discharge requirements, the notice of an evidentiary hearing makes the matter pending. For water rights permits, the best legal interpretation is that the proceeding is pending when the State Water Board issues a notice of hearing, because prior to that time there is no assurance that there will be an evidentiary hearing since the division chief may issue certain water rights permits.

**13. Q. What is an impending matter?**

The Administrative Procedure Act only addresses “pending” proceedings, however, there may be circumstances where board members are aware that an adjudicative

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<sup>2</sup> *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674.

## EX PARTE QUESTIONS AND ANSWERS

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action is impending. The fairness and transparency of the process are no less compromised if an ex parte communication takes place a few days before the issuance of a notice of hearing or the filing of a report of waste discharge. The desire of a person to speak with a board member about a specific site should generally be viewed as a signal that something is impending. Where a proceeding is clearly impending, water board members should consider ex parte communications to be prohibited based on due process considerations. For example, if a water board member knows that a notice on an enforcement action is to be signed on a Tuesday, it would be inappropriate for the board member to receive an ex parte communication concerning the enforcement matter on Monday night. On the other hand, a matter would generally not be considered impending if the issuance of a notice of hearing or the filing of a report of waste discharge is not reasonably expected to occur until several months after the communication in question.

The issues concerning impending matters can be difficult and fact-specific. The most important issue with impending matters is to avoid a situation where it appears the communication was timed to avoid the Administrative Procedure Act's prohibition on ex parte communications for pending adjudicative actions. In the event there is a communication received on an impending matter, the board member may want to consider whether an appropriate disclosure should be made to avoid a subsequent allegation of impropriety. (Please see Question 26.) Water board members should consult with legal counsel if they have any questions on a specific communication in an impending matter.

**14. Q. How can a board member determine whether an action is pending?**

Some regional water boards maintain a list of applications under consideration and outstanding notices. Confer with your regional water board's Executive Officer (or for State Water Board members, the Executive Director) to determine how your water board maintains a list of pending adjudicative actions.

**15. Q. Are adjudicative matters pending before the regional water boards also pending before the State Water Board?**

No, but once the State Water Board receives a petition requesting the State Water Board to commence review of a regional water board action, the ex parte communications prohibition applies to the petition proceeding. The State Water Board has the authority to review the regional water boards' adjudicative actions. Most regional water board adjudicative actions are not petitioned to the State Water Board. It would be inappropriate to consider a matter pending before the State Water Board while it is still pending before the regional water board and it might never be challenged to the State Water Board.

A State Water Board member may wish to confer with the Office of Chief Counsel before having a communication about a controversial regional water board adjudicative action where there is a substantial likelihood that a petition will be filed with the State Water Board. In certain circumstances, the more cautious legal advice may be to regard the adjudicative proceeding as *impending* before the State Water Board, even though it is still pending before the regional water board. Determining whether the matter is

## EX PARTE QUESTIONS AND ANSWERS

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impending would be a fact-specific inquiry, and would only be the advice of legal counsel in light of those facts.

Once the State Water Board receives a petition, the basis for the State Water Board's review will generally be the evidentiary and administrative record before the regional water board. As a result, the same prohibition on ex parte communications that applies to regional water board members in the region taking the action applies to the State Water Board members deciding the petition on the merits. The prohibition on communications with the State Water Board members concerning a petition begins when the State Water Board receives a petition requesting the State Water Board to commence review of a regional water board's action or inaction.

The State Water Board's regulations authorize an interested person to submit a petition and hold that petition abeyance. The regulations also authorize a petitioner to request that a petition be removed from active review and placed in abeyance. Consistent with the Administrative Procedure Act, a petition in abeyance is not pending before the State Water Board because a petition in abeyance does not request the State Water Board to make a decision. The petition in abeyance serves as placeholder that allows the interested person to request a decision from the State Water Board at a later date. Until and unless a petition in abeyance is activated, there is no application for a decision pending before the State Water Board.

**16. Q. Does a reopener provision in a permit mean an action is pending?**

No, not until a specific reopener or permit modification action is noticed for board action. Many permits include provisions that allow the regional water board to modify the permit based on subsequent information or conditions. The ability for a regional water board to reopen and modify the permit in the future does not trigger the prohibition on ex parte communication. However, once a water board issues a notice to reopen the permit, the rules concerning pending adjudicative proceedings would apply to the consideration of permit amendments.

**C. Scope of Ex Parte Communications Prohibition**

**17. Q. What subjects are covered by the ex parte communications prohibition?**

The Administrative Procedure Act's prohibition on ex parte communications is very broad. It extends to "direct and indirect" communications. Board members must be mindful that persons who ordinarily would not be subject to the prohibition (e.g., secretaries, staff assigned to advise the board) cannot be used as a conduit for a prohibited ex parte communication, and thereby a source of an indirect communication.

The ex parte communications prohibition also extends to "any issue in the proceeding." With limited exceptions discussed in Questions 19-20, if the communication involves any issue in the proceeding, be it a factual issue, a legal issue, or a policy issue, it is subject to the ex parte communications prohibition.

## **EX PARTE QUESTIONS AND ANSWERS**

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- 18. Q. Are all communications prohibited with a person interested in an adjudicative proceeding pending before a water board?**

No. Communications are only prohibited to the extent they reach an issue in the proceeding. Even where a matter is pending before a water board, a communication with a party to the matter is not considered ex parte if the communication does not relate to the matter.

- 19. Q. Are there exceptions to the prohibition?**

There are certain limited exceptions to the prohibition on ex parte communications. First, as discussed in Questions 28-3534, different rules apply to proceedings involving general orders. Second, as discussed in Question 22, certain staff advising the board are not subject to the prohibition. Second, there are limited statutory exemptions, but generally they should only be used after consultation with legal counsel. The first statutory exemption is typically not available to the water boards, and involves communications to resolve an ex parte matter specifically authorized by statute. The second statutory exemption is for communications that concern a matter of procedure or practice that is not in controversy.

- 20. Q. What is a matter of practice or procedure that is not in controversy?**

The Law Revision Commission comments supporting the Administrative Procedure Act give several examples of the types of “practice and procedure” matters that are not in controversy. Matters of practice and procedure include the format of papers to be submitted, the number of copies, manner of service, and calendaring meetings. The Administrative Procedure Act also identifies continuances, as a matter of practice or procedure. Delays associated with a continuance request, however, may often be controversial. As a result, a request for continuance ordinarily should be made through more formal procedures to ensure that all parties are aware of the request and have an opportunity to respond.

Generally, staff or counsel, as opposed to a board member, would handle the types of matters embraced by this exception to the Administrative Procedure Act’s prohibition on ex parte communications.

**D. Persons Subject to the Ex Parte Communications Prohibition**

- 21. Q. Who is subject to the rules prohibiting ex parte communications?**

Generally, the prohibition on ex parte communications extends to any person attempting to communicate with a board member about an issue in a pending adjudicative proceeding. The Administrative Procedure Act broadly defines person to include “an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.” As a result, essentially anyone expressing an interest in a water board action and attempting to communicate with a board member is subject to the prohibition on ex parte communications in adjudicative proceedings.

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The notable exceptions to the prohibition are for communications between board members and from certain staff of the water boards (see Question 22), as well as the exception to the prohibition for certain general orders (see Questions 28-35). Because board members collectively serve as the presiding officer for an adjudicative hearing, communications among the board members are not subject to the ex parte prohibition. Obviously the members remain subject to other substantive and procedural laws (such as the Bagley-Keene Open Meeting Act, which prohibits a quorum of a state board from discussing an issue either collectively or through serial discussions).

### **22. Q. May staff communicate with board members without violating ex parte rules?**

Certain staff may communicate with the board members without violating ex parte rules. Staff may communicate with water board members about a pending adjudicative proceeding under three circumstances. Staff and legal counsel will generally be responsible for knowing their assignments on specific proceedings, and will only contact board members if appropriate pursuant to one of the following circumstances. If a board member wishes to communicate with staff and does not know which staff may be an appropriate contact, the board member should contact the Office of Chief Counsel to determine the appropriate staff contact. (Please see Question 51.)

(1) *Staff Assigned to Assist and Advise the Board:* In virtually all circumstances, there are some staff (including at least one attorney) assigned to assist and advise a water board. These staff members are not advocates for a particular action, and in fact, cannot have served as investigators, prosecutors, or advocates in the proceeding or its pre-adjudicative stage for the ex parte exception to apply. These staff members may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record. For certain proceedings, the water board may issue a memorandum detailing staff responsibilities and identifying the staff assigned to assist and advise the board.

(2) *Staff Advising the Board on a Settlement Offer:* A staff member of the water boards, even if s/he has previously served as an investigator or advocate in the pending adjudicative proceeding, may communicate with a board member concerning a settlement proposal advocated by the staff member. In order to fit within this exception, the settlement proposal must be a specific proposal, supported by the staff member and another party to the proceeding, and the staff member must be advocating for the specific proposal. While the Administrative Procedure Act permits such communications, the more cautious approach would be for the water board to receive the proposed settlement communication in writing to avoid any subsequent claims of irregularity and to allow the water board to receive a candid assessment from advisory staff who have not participated in the investigation or advocacy of a specific action. A written communication should be used when the proposed settlement is not supported by all the parties to the proceeding.

(3) *Staff Advising the Board in Nonprosecutorial Proceedings:* A staff member of the water boards, even if s/he has previously served as an investigator or advocate in the pending adjudicative proceeding may communicate with a board member concerning issues in a non-prosecutorial proceeding. These discussions are not subject to the ex parte communications prohibition.

## EX PARTE QUESTIONS AND ANSWERS

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**23. Q. Are other government officials subject to the ex parte rules?**

Yes. Persons representing other government officials and agencies (local, state, or federal) are subject to the Administrative Procedure Act's prohibition on ex parte communications if they attempt to communicate with a water board member about a pending adjudicative proceeding. Keep in mind that the State Water Board and regional water boards are separate state agencies. As a result, the ex parte rules extend to communications between members of different water boards. However, the limitations on communications from governmental officials generally will not apply to certain general orders as discussed in Questions 28-35.

**24. Q. May a board member attend a publicly noticed staff-level workshop on an adjudicative matter?**

Yes. When water board staff notice a meeting, even as a staff-level workshop, interested persons are on notice that issues pertaining to the adjudicative matter will be discussed. The staff workshop record (including, for example, the audio tape from the workshop) would become part of the record and basis for the subsequent action by the water board. It is permissible for a board member or multiple board members to attend such a workshop, and the communications received during such a workshop are not ex parte communications. If a quorum of the water board may be present, a Bagley-Keene Open Meeting Act notice may also be necessary.

**E. Consequences of Prohibited Ex Parte Communications**

**25. Q. What are the consequences of violating the ex parte communications prohibition?**

Prohibited ex parte communications can have a number of consequences. First, board members must disclose a prohibited ex parte communication on the record and the board may be required to hear comments or additional evidence in response to the ex parte communication. Second, a prohibited ex parte communication may be grounds for disqualifying the board member from participating in the adjudicative proceeding. Third, a prohibited ex parte communication could be used as a basis for a subsequent legal challenge to the board's adjudicative action, especially if the communication is not properly disclosed and the board member participates in the proceeding. The Administrative Procedure Act also authorizes a water board to sanction a person violating the prohibition on ex parte communications, although this is likely to be used only for egregious or recurring violations.

**26. Q. How may a board member cure an inadvertent ex parte communication?**

The Administrative Procedure Act provides explicit procedures that a board member is required to follow if there has been an ex parte communications. These procedures do not subsume the rule or provide a mechanism for circumventing the Legislature's prohibition on ex parte communications in adjudicative proceedings.

In the event of receiving a prohibited ex parte communication, the water board member must disclose the communication on the record. Disclosure requires either (1) including

## EX PARTE QUESTIONS AND ANSWERS

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a written ex parte communication in the record, along with any response from the board member, or (2) memorializing an oral communication by including a memorandum in the record stating the substance of the communication, identifying who was present at the time of the communication, and any response from the board member. The board member must notify all parties of the ex parte disclosures. Additional proceedings may be necessary if a party timely requests an opportunity to address the disclosure.

In the event a board member receives what may be a prohibited ex parte communication, it is important to work with legal counsel to determine whether the communication is indeed prohibited, and, if the communication is prohibited, that it is disclosed as required by the Administrative Procedure Act.

**27. Q. What if a board member received a communication about an adjudicative proceeding before becoming a board member?**

The Administrative Procedure Act requires a water board member to disclose any communications the member received, prior to becoming a board member, about adjudicative proceedings pending before the water board at the time the member received the communication. This provision recognizes that the communication was not per se prohibited (because the person was not yet a board member), but still provides a mechanism to disclose such communications in the interest of fairness. The disclosure follows the same procedure discussed in Question 26.

Importantly, this provision of the Administrative Procedure Act does not require all communications the new board member has ever received to be disclosed simply because the communication involves an issue in the adjudicative proceeding. Instead, the provision only reaches back to the time the adjudicative proceeding was pending before the water board. Further, the factual circumstances requiring disclosure rarely occur because there are three necessary elements to trigger this disclosure requirement: (1) a communication the member recalls receiving prior to serving on the board, (2) the communication involves an adjudicative matter pending before the board, and (3) the communication occurred at a time the adjudicative matter was already pending before the board.

**F. Exception for Certain General Orders**

**28. Q. Are proceedings on general waste discharge requirements, categorical waivers, and general 401 certifications (general orders) considered adjudicative proceedings?**

Yes. A general order determines the rights and duties of those persons subject to the general order. A general order does not identify the specific dischargers it covers by name, but instead allows discharges to enroll for coverage under the general order. Upon enrollment, these general orders are directly enforceable against the dischargers who enroll under them. In addition, general orders are specifically exempt from the rulemaking provisions of the Administrative Procedure Act. The water boards also issue general orders following the same procedures that are used for any other permitting decision. Finally, general orders are subject to the same judicial review standards as any other permit. In function and form, the issuance of general orders is an adjudicative

## EX PARTE QUESTIONS AND ANSWERS

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action. The proceedings culminating in the issuance of general waste discharge orders are, therefore, more appropriately considered adjudicative proceedings.

**29. Q. Does the ex parte communications prohibition apply to general orders?**

No. Effective January 1, 2013, the Water Code exempts general orders from the ex parte communications prohibition. A general order for this purpose is an order that does not name specific dischargers, but instead allows persons to enroll for coverage under the order. Any person may engage in oral or written ex parte communications with board members regarding a pending or impending general order, but certain categories of persons must provide public disclosure of those ex parte communications.

The ex parte exception for general orders only applies to the water board's adoption of the order. Once a facility enrolls in a general order, enforcement actions are subject to the usual ex parte communications prohibition.

**30. Q. Who must disclose ex parte communications regarding general orders?**

The Water Code requires three categories of persons to disclose ex parte communications with a water board member about a pending general order. These categories are:

- (i) a potential enrollee in the general order, and representatives or employees of such person;
- (ii) any person with a financial interest in the general order, and the representatives or employees of such person; and
- (iii) a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the board's decision.

For purposes of ex parte communications concerning general orders, these persons are considered "interested persons," and the ex parte communication disclosure requirements for general orders only apply to these three categories of interested person.

The Water Code places the disclosure obligation for general orders on the interested person engaged in ex parte communications with a board member. A board member who participates in ex parte communications regarding general orders is not required to make any oral or written disclosures; however, nothing precludes a board from assisting an interested person in making the required disclosure. Further, if for some reason an interested person neglects or refuses to make the required disclosure, then the board member should disclose the ex parte communication at the board meeting where the general order is considered to ensure completeness of the record and to afford an opportunity for other persons to address the communication.

There is no disclosure requirement for members of the public who do not fall within one of the three categories above. Board members are nevertheless encouraged to disclose ex parte communications in the same manner as in rulemaking proceedings. (Please see Questions 38-39.)

## EX PARTE QUESTIONS AND ANSWERS

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**31. Q. What disclosure requirements apply to ex parte communications regarding general orders?**

As with other adjudicative proceedings, no disclosure is required for an ex parte communication about a matter of procedure or practice that is not in controversy. (Please see Question 20.) For all other ex parte communications concerning a general order, interested persons in the three categories identified in Question 30 must provide a written disclosure to the applicable water board within seven working days after the communication takes place. The disclosure must include the date, time, location, and type of communication (written, oral or both); identify all participants; state who initiated the communication; and describe the substance of the communication. All materials (including PowerPoint presentations) used as part of a meeting or other communication must be included.

Board members are encouraged to request meeting agendas in advance to facilitate the meeting participants' timely preparation of disclosure materials. Board members should remind any interested person requesting ex parte communications on a general order of the disclosure requirement, and provide contact information for the staff member designated to receive the disclosure documents.

Water board staff must post the disclosure on the board's website and email a copy to any available electronic distribution lists for the general order. Before posting and distributing a disclosure, the staff should provide a copy of the disclosure to the member and any water board staff who were present during the ex parte communication to ensure the disclosure accurately summarizes the communication.

Although the statute only refers to "pending" general orders, the same disclosure process should be used for "impending" general orders. (Please see Question 13.)

**32. Q. How can a board member determine whether a member of a group is a "representative" for purposes of the disclosure requirements for general orders?**

The special disclosure requirements for general orders apply to "representatives acting on behalf of" an association that intends to influence the board's decision. If it is not clear whether an individual represents an interest group or is simply a member, board members may ask what the individual's position is with the organization; whether the individual is speaking on behalf of the organization; whether the organization has formally or tacitly authorized the individual to speak on its behalf; and what the individual's role will be in preparing formal written comments or speaking at the hearing.

Because the disclosure requirement is intended to ensure fairness and transparency in water board proceedings, the term "representative" should be interpreted broadly. In cases where it is unclear whether a particular individual is acting in a representative capacity, board members should request the individual to provide the disclosure. Any questions about the requirements may be addressed to the board's legal counsel.

## EX PARTE QUESTIONS AND ANSWERS

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**33. Q. Can a water board limit ex parte communications regarding a pending general order?**

Yes. A water board may prohibit ex parte communications during the 14 days prior to the board meeting at which the board is scheduled to adopt the general order. If the item is continued, the board may lift any existing 14-day prohibition on ex parte communications, in which case it then has the option to impose a new prohibition for the 14 days prior to any rescheduled adoption meeting. Individual board members may decline invitations to meet with members of the public at any time, even if no prohibition is in place.

**34. Q. Are all region-wide or statewide permits “general orders”?**

No. The ex parte exception only applies to orders that do not name specific dischargers but instead require eligible dischargers to enroll or file a notice of intent to be covered by the general order. Several regional water boards have issued region-wide or regional municipal separate storm sewer system (MS4) permits that identify specific dischargers. Issuance, reissuance, or modification of these orders is subject to the same prohibition on ex parte communications that applies to individual waste discharge requirements. Any other waste discharge requirement, waiver, or 401 certification issued to a group of named entities would also be subject to the ex parte communications prohibition.

**35. Q. What are the consequences of violating the special disclosure requirements for general orders?**

Board staff or legal counsel should contact the interested person for further information if a disclosure does not meet the statutory requirements. If the disclosure does not accurately summarize the communication, the board member or staff may request the interested person to correct the disclosure or the board member or staff may supplement the disclosure either in writing or at the board meeting where the general order is considered.

In appropriate circumstances, a water board may impose sanctions on an interested person who violates the disclosure requirements.

### **III. RULEMAKING AND OTHER PROCEEDINGS**

**36. Q. What actions are rulemaking?**

Rulemaking proceedings are proceedings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application. Rulemaking proceedings include proceedings to adopt regulations, water quality control plans, policies, or guidelines. The water boards adopt most total maximum daily loads (TMDLs) as basin plan amendments, so TMDLs typically are rulemaking proceedings.

Below is a partial list of common water board actions resulting from rulemaking proceedings:

- Water quality control plans (e.g., basin plan amendments, statewide plans such as the Ocean Plan);

## EX PARTE QUESTIONS AND ANSWERS

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- State Policy for Water Quality Control (e.g., the State Water Board's Water Quality Enforcement Policy);
- Regulations;
- Guidelines.

**37. Q. Is there a prohibition on private communications in rulemaking actions?**

No. The Administrative Procedure Act contains no prohibition against private communications during rulemaking proceedings. However, information obtained outside of the public record for the rulemaking action may not form the basis for a board's action and the board's action must be supported by the information contained in the record. Some of the same policy rationales for the ex parte communications prohibition exist for rulemaking. Nothing prevents individual water board members from choosing to avoid such communications during rulemaking proceedings.

**38. Q. What is the Office of Chief Counsel's recommendation on handling communications in rulemaking proceedings?**

There is no constitutional or statutory duty to disclose private communications in rulemaking proceedings, but the Office of Chief Counsel advises water board members to disclose on the record any private communications received during rulemaking proceedings. The reasons for this recommendation are multifold. First, the water boards must base rulemaking decisions on the public record, because the public record is a water board's justification for defending an action in court. If a board member supports a specific rulemaking decision because of technical information the member receives from an ex parte communication but fails to disclose the communication, that information will not be in the record to support the board's action.

Second, the same fairness and transparency issues that underlie the ex parte prohibition for adjudicative proceedings support disclosing private communications in rulemaking proceedings. The water boards only have limited jurisdiction within the ambit delegated by the Legislature. It is appropriate that the public know the information and basis for the water boards' decisions to ensure that those decisions are being made not only in conformance with the law, but also within the scope of the considerations identified by the Legislature and water board regulations.

**39. Q. If a member chooses to disclose a communication, what is the preferred procedure?**

If a board member chooses to participate in private communications in rulemaking proceedings and chooses to disclose those communications, the Office of Chief Counsel recommends a procedure similar to that described in Question 26 for adjudicative proceedings. First, the board member would notify the person that a full disclosure of the private communication will be entered in the water board's record. Second, the board member would disclose the private communication in the water board's record. The disclosure would include the identity of the persons involved in the communication, the approximate date of the communication, and the substance of the communication.

## EX PARTE QUESTIONS AND ANSWERS

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**40. Q. May a board member communicate with a person about how a general requirement may be translated into a subsequent permit requirement?**

Yes, as long as the subsequent permit proceeding is not pending or impending. When a water board is considering a general provision of rulemaking action it is appropriate to hear testimony about how the general provision may be converted into specific, subsequent permit requirements. The fact that this information is received during a rulemaking proceeding does not trigger the ex parte communications prohibition for the subsequent adjudicative proceeding that implements the requirements of the rulemaking. The ex parte communications prohibition will attach when the subsequent adjudicative action is pending. (Please see Questions 12-13.)

**41. Q. What are “other proceedings”?**

Certain proceedings before the water boards are neither adjudicative nor rulemaking proceedings. For example, the water boards often have informational items presented by staff or stakeholders. Informational items do not necessarily lead to a specific board action, but inform members about general water quality or water rights matters. In addition, the State Water Board takes some actions that are neither rulemaking or adjudicative actions (e.g., certain contracting and grants actions).

Below is a list of common, other proceedings:

- Information items;
- Workshops not conducted as part of an adjudicative or rulemaking proceeding;
- Contracting;
- Grant awarding;
- Hiring decisions and awards for employee accomplishments;
- Adopting or making comments to other entities conducting their own proceedings, such as comments on a federal Environmental Impact Statement;
- Discretionary actions to initiate or consider initiating proceedings, not amounting to a decision on the merits, such as referral of a matter to the Attorney General for enforcement.

**42. Q. Are “other proceedings” subject to ex parte rules?**

These other proceedings do not trigger ex parte communications prohibitions under the Administrative Procedure Act and do not have the same factors supporting the Office of Chief Counsel’s recommendation to disclose ex parte communications in rulemaking proceedings. Where these proceedings involve closed sessions, communications subject to the attorney-client privilege, or certain law enforcement related information, confidentiality protections may apply. Otherwise, nothing prevents individual water board members from choosing to avoid such communications or to disclose such communications.

## EX PARTE QUESTIONS AND ANSWERS

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### IV. SITE VISITS

**43. Q. Is a site visit a form of ex parte communication?**

Yes. Unless a tour or site visit is publicly noticed, the Office of Chief Counsel considers a site visit or tour of a facility, while an adjudicative proceedings is pending for that facility, to be an ex parte communication. By their very nature, site visits communicate evidentiary information to water board members. In addition, site visits frequently result in communications from the site operator about the pending matter.

**44. Q. Can a board member visit a regulated facility when an adjudicative action is pending?**

Yes, but only if the board provides interested persons notice and an opportunity to participate. Site visits can be a useful part of the decision-making process and special procedures should be used for site visits. A site visit essentially moves part of the evidentiary proceeding from the board hearing to a visit of the site. It is not necessary that all board members participate in the site visit for it to be permissible. In fact, a single board member can participate in a staff-level site visit if the board properly notices the visit.

To notice a site visit, the interested party list for an adjudicative proceeding should be provided sufficient notice with information about the tour and how to participate. There may be special concerns about accessibility and liability that may raise other legal issues. It is important to work with legal counsel when arranging site visits during a pending adjudicative proceeding.

**45. Q. Can a board member visit a facility that will be regulated by a pending general order when an adjudicative action is pending?**

If a site visit concerns a facility that will be regulated by a pending general order subject to the special disclosure requirements of Questions 29-31, then the board member should work with legal counsel to determine the extent to which any special disclosure or notice requirements apply. The most transparent and fair way to handle site visits while a general order is pending is to provide notice and an opportunity for interested persons to participate as described in Question 44. Providing public notice also reduces potential evidentiary concerns. For these reasons, the Office of Chief Counsel recommends the procedure described in Question 44 for site visits to a facility that will be regulated by a pending general order.

If notice and an opportunity for public participation is not provided, then the disclosure requirements in Questions 29-31 apply to any site visit concerning a pending general order. Moreover, because site visits are inherently evidentiary in nature, steps should be taken either by the person hosting the site visit, the board member, or the water board staff to visually document the portions of the site visit relevant to the proceeding (e.g., photo documenting physical features, best management practices, etc.). Unlike most ex parte communications, which discuss or explain evidence that is already in the record, the visual documentation is evidentiary in nature. Therefore, any site visits should occur and be reported before the close of the evidentiary record. Board members should work

## EX PARTE QUESTIONS AND ANSWERS

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closely with staff and counsel to ensure the appropriate timing and documentation of these types of site visits.

**46. Q. Can a board member visit a regulated facility when no adjudicative action is pending for that facility?**

Yes. When there is no adjudicative action pending or impending, a water board member may visit a site that is subject to the water board's regulations. Before scheduling such a visit, it is important to coordinate with water board staff to ensure there is no pending enforcement action involving the facility and to ensure that the owner has no objection to a visit.

### V. GENERAL ISSUES

**47. Q. Why can legislators talk to anyone and the board members cannot?**

Ex parte communications rules reflect the water boards' hybrid powers. Unlike the Legislature, the water boards have attributes of both legislative power and judicial power. The ex parte communications prohibition arises when the water boards are exercising their judicial power. Rules and due process preclude judges from receiving ex parte communications on matters pending before them or inferior courts. Similarly, even when exercising legislative power, the water boards do so within the narrow confines of power granted by the Legislature. Ex parte rules can help ensure that the water boards are exercising the powers conferred by the Legislature within the confines of the power conferred by the Legislature.

**48. Q. Why can the public talk to city council members and not board members?**

There is some overlap between ex parte communications prohibitions for city council members and water board members. To the extent the prohibition is broader for water board members it reflects the greater number of adjudicative matters decided by the water boards and the breadth of the Administrative Procedure Act. The Administrative Procedure Act is not directly applicable to city councils. As a result, ex parte communications with city council members do not necessarily reach "direct and indirect" communications on "any issue in the proceeding."

**49. Q. How should a board member handle comments concerning pending adjudicative proceedings raised in connection with other proceedings in which the board member participates?**

As part of a board member's participation in other matters, a board member may receive communications relating to specific adjudicative proceedings. For example, a legislator may ask a State Water Board member to participate in a meeting related to proposed proceedings relating to application processing. As part of that meeting the legislator or another participant may complain about how a particular application, that is the subject of a pending adjudicative proceeding, is being handled. The meeting does not involve an improper ex parte contact, because it concerns proposed legislation, not an adjudicative proceeding, but the specific complaint involves an inappropriate ex parte contact.

## EX PARTE QUESTIONS AND ANSWERS

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To avoid this problem, board members should make clear at the outset that they cannot discuss specific adjudicative proceedings pending before the water boards. If, despite this warning, a participant begins to raise issues concerning a specific pending proceeding, the board member should interrupt to remind the participants that the board member cannot discuss those issues. Any ex parte communications that occur as part of the meeting should be disclosed following the procedures discussed in Question 26.

**50. Q. Is a communication about a pending adjudicative matter, received during a public forum, an ex parte communication?**

Yes. While the water boards traditionally allow members of the public to briefly address during a “public forum” any items not on the agenda, persons interested in a pending adjudicative proceeding do not have notice that their issue may be discussed during a specific public forum. Therefore, even though the board receives the communication during a public meeting, the communication may violate the ex parte prohibition if it concerns a pending adjudicative proceeding. Legal counsel will typically work with a water board’s chair if this circumstance occurs. Fortunately, such communications can typically be cured by including a copy of the public forum transcript or tape into the administrative record for the adjudicative proceeding.

**51. Q. Whom can a board member speak with to clarify ex parte concerns?**

Water board members should contact the Office of Chief Counsel with questions about ex parte issues. A regional water board member should contact the attorney assigned to represent the member’s region or the assistant chief counsel for regional board services. State Water Board members should contact the chief counsel.

In all circumstances, a water board member should indicate that he or she has a question about ex parte communications in *Matter X*—identifying the specific matter. It is important to identify the specific matter, because at times certain attorneys within the Office of Chief Counsel (even the chief counsel) may be recused from a matter or may be assigned to prosecute the matter. By identifying the matter from the outset of the communication, the attorney can make sure you are getting the correct advice from the correct person.

**52. Q. Who is responsible for complying with the ex parte rules – the board members or the public?**

There is a shared responsibility for complying with the ex parte communications prohibition of the Administrative Procedure Act. Water board members are expected to know the rules and remain vigilant in their application of the rule. If a person attempts to violate the prohibition on ex parte communications, the board member should be prepared to stop the communication, because of the risk the communication could result in disqualification of the board member.

Persons participating in adjudicative proceedings also have an obligation to understand and follow the rules, particularly attorneys and professional lobbyists. As discussed in

## **EX PARTE QUESTIONS AND ANSWERS**

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Question 25, in egregious circumstances violating the prohibition on ex parte communications can subject a person to civil contempt proceedings.

# Attachment 9

\*

HD  
Mon 10/10/2016 4:56 PM  
Heinrich, Dana@Waterboards  
RE: Appendix 5E

To: Bogdan, Kenneth M. @DWR; Riddle, Diane@Waterboards; Ochendusko, Kyle@Waterboards  
Cc: Yee, Marcus@DWR; 'Pierre, Jennifer'; Chandra.Chilmakuri@CH2M.com

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Ken and company,

Attached are some edits to the intro. Thank you for fixing the mischaracterization of Boundary 1. The comment concerns the revisions to the SWRCB staff scenario that was analyzed in the DEIR. I think the intro would benefit from a brief description of the changes we have made. I was hoping that Diane could fill that in, but she's out this week and I don't want to hold this up. I figure someone on your team is equally capable of providing that piece. I did not make any edits to the impact analysis section. I assume you all are working on that based on our phone call.

Please let me know if you have any follow-up questions.

Thanks,

-Dana

**From:** Bogdan, Kenneth [M.@DWR](#)  
**Sent:** Tuesday, October 04, 2016 11:01 AM  
**To:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards  
**Cc:** Yee, Marcus@DWR; 'Pierre, Jennifer'; [Chandra.Chilmakuri@CH2M.com](#)  
**Subject:** RE: Appendix 5E

Hi here are the edits to the Intro that we discussed this morning. It's in track and some of the underlying edits were ones Jennifer had made in discussions after we sent you the appendix, I made additional ones on top of that. Hopefully its clear(er) now.

p.s. MARCUS please forward to Rick Wilder – I don't seem to have his e-mail.

Ken

# Attachment 10

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**From:** Yee, Marcus@DWR  
**Sent:** Wednesday, September 21, 2016 5:27 PM  
**To:** Riddle, Diane@Waterboards  
**Cc:** Bogdan, Kenneth [M.@DWR](#)  
**Subject:** Appendix 5E

Hi Diane,  
I just left you a voicemail.

DWR just received the attached screencheck version of App 5e. Recognizing that time is of the essence, I'm sending this right away. Please note that DWR has not had a chance to review this version, so Ken and I will be reviewing concurrently with you.

Please give me a call or let me know a good time to reach you so that we can discuss a follow-up meeting.

-marcus

---

Marcus L. Yee | Department of Water Resources | 📞 (916) 651-6736

# Attachment 11

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**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Tuesday, June 21, 2016 8:42 AM  
**Subject:** RE: Appendix 5E Discussion

Kyle, that sounds good. I'll get the Goto meeting setup and get back to you once we figure out our availability. -marcus

---

**From:** Ochendusko, Kyle@Waterboards  
**Sent:** Tuesday, June 21, 2016 8:15 AM  
**To:** Yee, Marcus@DWR <Marcus.Yee@water.ca.gov>  
**Cc:** Riddle, Diane@Waterboards <Diane.Riddle@waterboards.ca.gov>; Heinrich, Dana@Waterboards <Dana.Heinrich@waterboards.ca.gov>; Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Chandra Chilmakuri <Chandra.Chilmakuri@CH2M.com>  
**Subject:** RE: Appendix 5E Discussion

Marcus,

Diane and I spoke yesterday about some of the visuals you presented. Is it possible to see those again? Emailing the presentation or doing a WebEx (not Skype) would work.

Respectfully,

Kyle Ochendusko  
Senior Water Resource Control Engineer  
Division of Water Rights  
State Water Resources Control Board  
Phone: (916) 319-9142

---

**From:** Yee, Marcus@DWR  
**Sent:** Tuesday, June 21, 2016 8:11 AM  
**To:** Ochendusko, Kyle@Waterboards  
**Cc:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards; Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); Chandra Chilmakuri  
**Subject:** RE: Appendix 5E Discussion

Sounds great, Kyle.

I was just about to send you a message. Let me check with Chandra and get back to you.

You okay with a call?

-m

# Attachment 12

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**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Friday, June 10, 2016 4:27 PM  
**Subject:** RE: CWF Appendix 5E Follow-up

Great. Thanks, Diane. We like to discuss the modelling, but I suspect it will be a short call.

Chandra, please set up a phone line and send out an invite for a ten minute conference call for us.

Thanks,  
marcus

---

**From:** Riddle, Diane@Waterboards  
**Sent:** Friday, June 10, 2016 12:10 PM  
**To:** Yee, Marcus@DWR <Marcus.Yee@water.ca.gov>  
**Cc:** Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Heinrich, Dana@Waterboards <Dana.Heinrich@waterboards.ca.gov>; Ochendusko, Kyle@Waterboards <Kyle.Ochendusko@waterboards.ca.gov>  
**Subject:** RE: CWF Appendix 5E Follow-up

I'm out next week and Dana is out the following. Is it primarily modeling you would like to present or text? If it is text to address the legal issues Dana raised, I think you can meet without me. If it is modeling, I would prefer to be there and could do a webex late Thursday (4-5 maybe).

---

**From:** Yee, Marcus@DWR  
**Sent:** Friday, June 10, 2016 7:08 AM  
**To:** Riddle, Diane@Waterboards  
**Cc:** Bogdan, Kenneth [M.@DWR](#); Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards  
**Subject:** CWF Appendix 5E Follow-up

Hi Diane,  
We'd like to follow up with you on Appendix 5E. I know this may be a bit of a stretch, but I thought I'd throw it out there just in case.  
Any chance you guys might be available on Wednesday (6/15) from 11-12 for a check-in. We could make it a Webex.  
-marcus

Marcus L. Yee  
Department of Water Resources

Sent from my mobile device.

# Attachment 13



 Mon 4/18/2016 4:38 PM  
Bogdan, Kenneth M.@DWR  
internal review draft of Appendix 5E

To: Heinrich, Dana@Waterboards

 You forwarded this message on 4/21/2016 2:33 PM.

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.doc File

Hi Dana,

Sorry this is late in coming. In preparation for our meeting on Thursday, attached please find a write up of the impact discussion for the additional modeling prepared for the SWB. This is ICF's response to your request for only "low end" operational analysis. The modeling for the high end operations has not been completed, pending our discussion on Thursday, and the write up for the appendix would proceed after the analysis was completed.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852



# Attachment 14

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Delete McAfee Anti-Spam Respond Move Tags Editing Zoom

SR  
Mon 9/14/2015 1:14 PM  
Satkowski, Rich@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=SA TKOWSKI, RICH@WATD43B5F7C-71B5-4656-ABF7-07E2049A01>  
Room 1710 Reserved for Addendum Meeting

To

Tripp,

For the petition addendum meeting on Tuesday from 10-10:30 am, I reserved Room 1710 in the Cal EPA Building from 10-11 am (if you need a room).

Rich

Rich Satkowski,  
Bay-Delta Program  
Division of Water Rights  
State Water Resources Control Board  
1001 "I" Street  
Sacramento, CA 95814  
Phone: (916) 341-5439  
FAX: (916) 341-5400  
E-mail: [rich.satkowski@waterboards.ca.gov](mailto:rich.satkowski@waterboards.ca.gov)  
Web: [www.waterboards.ca.gov](http://www.waterboards.ca.gov)



Accepted: Technical and Procedural Details of Petition Addendum - Meeting Response

File Meeting Response

Delete Reply Reply All Forward More Meeting Meeting Notes Move Actions Mark Unread Categorize Tags Follow Up Translate Find Related Select Zoom

Mon 9/14/2015 1:42 PM

Heinrich, Dana@Waterboards

Accepted: Technical and Procedural Details of Petition Addendum

To Mizell, James@DWR

When Tuesday, September 15, 2015 10:00 AM-10:30 AM (UTC-08:00) Pacific Time (US & Canada).

Location TBD - State Water Board offices

**i** We couldn't find this meeting in the calendar. It may have been moved or deleted.  
Heinrich, Dana@Waterboards has accepted this meeting.

I think it's okay to meet to discuss mapping issues. I don't think we need to talk first, but let me know if you'd like me to call you this afternoon.

**From:** [Riddle, Diane@Waterboards](mailto:Riddle.Diane@Waterboards)  
**To:** [Olson, Samantha@Waterboards](mailto:Olson.Samantha@Waterboards); [Heinrich, Dana@Waterboards](mailto:Heinrich.Dana@Waterboards); [Bogdan, Kenneth M.@DWR](mailto:Bogdan.Kenneth.M.@DWR); Satkowski, Rich@Waterboards; Gerlach, John@Waterboards; Enos, Cassandra@DWR  
**Subject:** WaterFix EIR discussion  
**Start:** Monday, January 04, 2016 11:00:00 AM  
**End:** Monday, January 04, 2016 12:30:00 PM  
**Location:** Cal EPA room 1410 or 916-[REDACTED]

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**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Wednesday, January 20, 2016 6:13 PM  
**To:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards  
**Cc:** Enos, Cassandra@DWR; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com); Pierre, Jennifer; Heinrich, Dana@Waterboards; Satkowski, Rich@Waterboards; Gerlach, John@Waterboards  
**Subject:** RE: follow up on CEQA

Hi Diane – thanks for the dates/times. It looks like Cassandra and I are free during the Monday 2 – 4 time frame. Jennifer would be available by phone. I am not sure about Chandra’s availability yet.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

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**From:** Riddle, Diane@Waterboards  
**Sent:** Wednesday, January 20, 2016 12:29 PM  
**To:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); Heinrich, Dana@Waterboards  
**Cc:** Enos, Cassandra@DWR; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com); Pierre, Jennifer; Heinrich, Dana@Waterboards; Satkowski, Rich@Waterboards; Gerlach, John@Waterboards  
**Subject:** RE: follow up on CEQA

Hi Ken,  
Thanks for following up. How about any of the following:  
Friday 1/22: 1-3  
Monday 1/25: 2-4  
Tuesday 1/26: 3-4:30

---

**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Wednesday, January 20, 2016 11:54 AM  
**To:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards  
**Cc:** Enos, Cassandra@DWR; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com); Pierre, Jennifer  
**Subject:** follow up on CEQA

Hi Diane and Dana – I think it would be good to follow up on our discussion related to CEQA. Can you suggest some times in the next week or so that you and your staff would be available to meet either here at Bonderson Building or your offices?

Thanks,

**From:** [DWR 422 - Meeting Room \(Bonderson\)](#)  
**To:** [Pierre, Jennifer](#); [Chandra.Chilmakuri@CH2M.com](#); [Riddle, Diane@Waterboards](#); [Heinrich, Dana@Waterboards](#); [Bogdan, Kenneth M.@DWR](#); Enos, Cassandra@DWR; Satkowski, Rich@Waterboards; Gerlach, John@Waterboards  
**Subject:** FW: Preparation of the Final EIR/EIS  
**Start:** Monday, January 25, 2016 2:00:00 PM  
**End:** Monday, January 25, 2016 4:00:00 PM  
**Location:** Room 422

---

FYI

-----Original Appointment-----

From: DWR 422 - Meeting Room (Bonderson)  
Sent: Thursday, January 21, 2016 11:31 AM  
To: DWR 422 - Meeting Room (Bonderson); Bogdan, Kenneth HYPERLINK "mailto:M.@DWR"M.@DWR  
Subject: Preparation of the Final EIR/EIS  
When: Monday, January 25, 2016 2:00 PM-4:00 PM (UTC-08:00) Pacific Time (US & Canada).  
Where: Room 422

Preparation of the Final EIR/EIS

Monday, January 25, 2016

2:00 pm | Pacific Standard Time (San Francisco, GMT-08:00) | 1 hr

HYPERLINK "[REDACTED]"Join WebEx meeting

Meeting number:

[REDACTED]

Join by phone

Call-in toll-free number (Verizon): 1-(866) [REDACTED] (US)

Call-in number (Verizon): 1-(203) [REDACTED] (US)

HYPERLINK "[REDACTED]"  
[REDACTED] "Show global numbers

Host access code: [REDACTED]

Attendee access code: [REDACTED]

HYPERLINK "[REDACTED]"Add this meeting to your calendar.  
(Cannot add from mobile devices.)

Can't join the meeting? HYPERLINK "https://resources.webex.com/resources/mc"Contact support.

IMPORTANT NOTICE: Please note that this WebEx service allows audio and other information sent during the session to be recorded, which may be discoverable in a legal matter. You should inform all meeting attendees prior to recording if you intend to record the meeting.



 Mon 4/18/2016 4:38 PM  
Bogdan, Kenneth M.@DWR  
internal review draft of Appendix 5E

To: Heinrich, Dana@Waterboards

 You forwarded this message on 4/21/2016 2:33 PM.

 App\_5E\_SWRCB Permit\_ES\_ADMINISTRATIVE DRAFT\_internal not for distribution.doc  
.doc File

Hi Dana,

Sorry this is late in coming. In preparation for our meeting on Thursday, attached please find a write up of the impact discussion for the additional modeling prepared for the SWB. This is ICF's response to your request for only "low end" operational analysis. The modeling for the high end operations has not been completed, pending our discussion on Thursday, and the write up for the appendix would proceed after the analysis was completed.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852



File Meeting Help Tell me what you want to do

Delete No Response Required Respond Meeting Notes Calendar Create New Move Mark Unread Categorize Follow Up Translate Find Related Select Zoom

None  
Unknown  
WaterFix modeling

Required Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards; Chandra.Chilmakuri@CH2M.com; Bogdan, Kenneth M. @DWR; Pierre, Jennifer; Gerlach, John@Waterboards

As the meeting organizer, you do not need to respond to the meeting.

When Thursday, April 21, 2016 3:30 PM-5:30 PM Location Bonderson Building

Ken,  
I'm assuming that you will reserve the meeting room and send us the room number.  
Thanks,  
John

**Cc:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards  
**Subject:** RE: Water Board modeling for WaterFix

Thanks Ken.

It sounds as if the meeting should include more than technical staff as the issues likely go beyond pure technical issues.

Given the different statements that I've read, could you please clarify what modeling will be relied on for the case-in-chief for each of the three phases of the hearing - 1A, 1B, and 2. It's not clear to me from the tables in the March 11, 2015 letter from DWR and Reclamation to the SWRCB how the WaterFix RDEIR/SDEIS modeling for water quality (DSM2 16 year period) and the BA modeling for endangered species (82 year period) are being used in the various hearing phases.

Based on what I can see on Diane's Outlook calendar, could we set up a meeting at 11 am on Thursday April 21<sup>st</sup>?

Thank you,

John

---

**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Monday, April 11, 2016 9:10 AM  
**To:** Gerlach, John@Waterboards; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Subject:** RE: Water Board modeling for WaterFix

Hi John and Chandra – just to clarify (I am sure I wasn't clear with Dana since modeling is not my specialty!), Chandra has not run the latter end H4 analysis and wanted to talk with you on several assumptions (including whether to use the 2015 version of Calsim). I'd like to be part of the discussion as there are a few things that may weigh into the decisions on moving forward with the modeling. I have also been the bottle neck on the impact analysis side of things and can give an update about that too.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

---

**From:** Gerlach, John@Waterboards  
**Sent:** Monday, April 11, 2016 7:21 AM  
**To:** [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Cc:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Subject:** Water Board modeling for WaterFix

Hi Chandra,

Ken mentioned to one of our attorneys that you had completed some additional modeling for the Water Boards scenario using H4 as the baseline. Dianne Riddle asked me to contact you so that you could provide some technical

specifics to me about the new modeling. Our discussion will be focused on the modeling and not the effects analysis. My third hand information is that while the H3 baseline was based on the 2010 version of CalSim2 that the H4 baseline might be based on the 2015 version of CalSim2. We'd also like to know if both runs used the same analysis period, say ELT, and whether there are any other different assumptions.

After you bring me up to speed on the new modeling Diane would like a meeting with the larger group to discuss the CEQA effects analysis based on the modeling. I don't know the status of those efforts but if they have been completed Diane would like to set something up for late next week as she is out of town this week.

If you have an questions please feel free to give me a call.

Thanks,

John

=====  
John Gerlach, Ph.D., J.D. | Senior Environmental Scientist  
State Water Resources Control Board | Division of Water Rights  
1001 "I" Street, 14th Floor | Sacramento, CA 95814  
[John.Gerlach@waterboards.ca.gov](mailto:John.Gerlach@waterboards.ca.gov)  
P: (916) 341-5394

---

**From:** Bogdan, Kenneth M.@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BOGDAN, KENNE5220383A-43A9-484A-83D8-5C3482B931580F4>  
**Sent:** Tuesday, May 24, 2016 5:40 PM  
**Subject:** RE: CWF Appendix 5E Meeting

Hi,

I wanted to confirm the approach to modeling for the Appendix:

- Model SWRCB Scenario 2 (consistent with H4) based on 2015 CalSim II
- Devise a rule such that Oroville is not depleted significantly while meeting Apr – May outflow requirements under Scenario 2.
- Update SWRCB Scenario 1 (consistent with H3) using 2015 CalSim II

Also, while looking at modeling results of various scenarios, we thought it might be best to update the 1500cfs minimum exports assumption to make it “either minimum exports to meet the south of Delta deliveries including delivery losses, deliveries to exchange contractors and CVP south of Delta refuge level 2, or 1500cfs for health and safety needs, whichever is greater”. This update will eliminate shortages to the required delivery categories and make the SWRCB Scenario 1 consistent with other modeling output.

Please let us know if this accurately reflects our discussion and if you are o.k. with the updated rule for south of Delta deliveries.

Thanks,

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

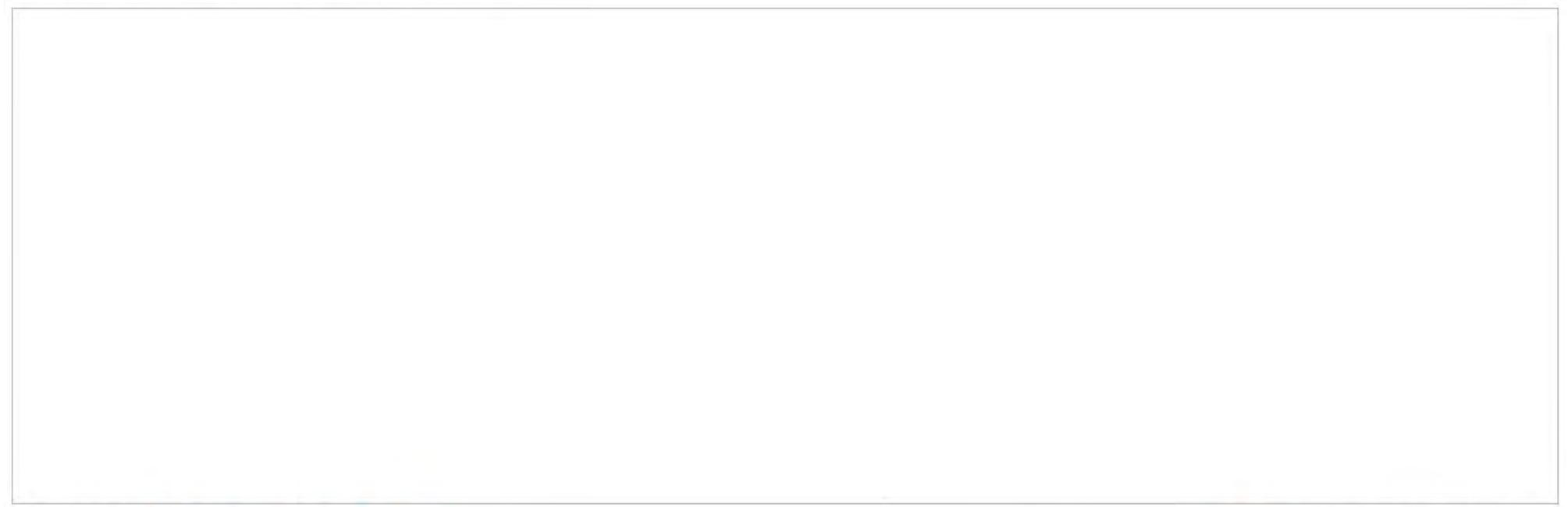
-----Original Appointment-----

**From:** Yee, Marcus@DWR  
**Sent:** Friday, May 13, 2016 4:26 PM  
**To:** Yee, Marcus@DWR; DWR 422 - Meeting Room (Bonderson); Heinrich, Dana@Waterboards; Riddle, Diane@Waterboards; Ochendusko, Kyle@Waterboards; 'Pierre, Jennifer'; 'Chandra.Chilmakuri@CH2M.com'; Bogdan, Kenneth M.@DWR  
**Subject:** CWF Appendix 5E Meeting  
**When:** Thursday, May 26, 2016 10:00 AM-12:00 PM (UTC-08:00) Pacific Time (US & Canada).  
**Where:** Bonderson 422

Delete Accept Tentative Decline Propose New Respond Meeting Notes Calendar Create New Move Mark Unread Categorize Follow Up Translate Find Related Select Zoom

None  
YM Yee, Marcus@DWR <Marcus.Yee@water.ca.gov>  
**CWF Appendix 5E Meeting**  
**Required** DWR 422 - Meeting Room (Bonderson); Heinrich, Dana@Waterboards; Riddle, Diane@Waterboards; Ochendusko, Kyle@Waterboards; 'Pierre, Jennifer'; 'Chandra.Chilmakuri@CH2M.com'; Bogdan, Kenneth M.@DWR

**When** Thursday, May 26, 2016 10:00 AM-12:00 PM **Location** Bonderson 422



1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

---

**From:** Heinrich, Dana@Waterboards  
**Sent:** Friday, May 27, 2016 10:58 AM  
**To:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Cc:** Riddle, Diane@Waterboards; Mizell, James@DWR; Ochendusko, Kyle@Waterboards  
**Subject:** RE: confirming submittal process for Tuesday for California WaterFix

Hi Ken. That is consistent with my recollection, and sounds like a reasonable game plan. You had also mentioned the possibility of uploading your submittals to your own FTP site as a back-up so that the other parties can access them on Tuesday even if there are problems with timely upload to our site. Is that still part of your plan?

Also, and I guess this is a question for Tripp, did Kyle remind you of the requirements to provide opening statements in writing (20 pages max, 12 point Arial font) and written summaries of written, direct testimony? Those are also due at the same time as your written testimony and exhibits. We wanted to make sure you didn't overlook those requirements because they were contained in earlier rulings.

-Dana

---

**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Friday, May 27, 2016 9:31 AM  
**To:** Heinrich, Dana@Waterboards  
**Cc:** Riddle, Diane@Waterboards; Mizell, James@DWR  
**Subject:** confirming submittal process for Tuesday for California WaterFix

Hi Dana,

I am sending this to confirm what we discussed yesterday regarding the process for DWR and Reclamations' submittal of the testimony and exhibits on Tuesday May 31. We will be creating a hard drive to walk over to your offices on Tuesday before 12:00 p.m., that will include all of our testimony and exhibits (including a cover letter giving an update on CEQA/NEPA and an outline of our intended organization for our case-in-chief; amended witness list; index of the testimony; and testimony and exhibits, including statements for all our experts for direct and cross). Where our exhibits are consistent with the State Water Board's posted exhibit document list, we will reference the exhibit number and not resubmit those documents.

Starting the morning on Tuesday, we will also be attempting to upload all of this information on the State Water Board's FTP site for the change petition hearing in order to provide service to parties, but acknowledge that, based on past experience, the entire upload may not occur by 12:00 p.m. on Tuesday May 31. We will make every effort to ensure that service to the parties occurs within a reasonable amount of time after submittal to the State Water Board. We will also be posting service to Clifton Court Forebay in the mail on Tuesday.

Thank you,

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

---

**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Friday, June 10, 2016 4:27 PM  
**Subject:** RE: CWF Appendix 5E Follow-up

Great. Thanks, Diane. We like to discuss the modelling, but I suspect it will be a short call.

Chandra, please set up a phone line and send out an invite for a ten minute conference call for us.

Thanks,  
marcus

---

**From:** Riddle, Diane@Waterboards  
**Sent:** Friday, June 10, 2016 12:10 PM  
**To:** Yee, Marcus@DWR <Marcus.Yee@water.ca.gov>  
**Cc:** Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Heinrich, Dana@Waterboards <Dana.Heinrich@waterboards.ca.gov>; Ochendusko, Kyle@Waterboards <Kyle.Ochendusko@waterboards.ca.gov>  
**Subject:** RE: CWF Appendix 5E Follow-up

I'm out next week and Dana is out the following. Is it primarily modeling you would like to present or text? If it is text to address the legal issues Dana raised, I think you can meet without me. If it is modeling, I would prefer to be there and could do a webex late Thursday (4-5 maybe).

---

**From:** Yee, Marcus@DWR  
**Sent:** Friday, June 10, 2016 7:08 AM  
**To:** Riddle, Diane@Waterboards  
**Cc:** Bogdan, Kenneth [M.@DWR](#); Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards  
**Subject:** CWF Appendix 5E Follow-up

Hi Diane,  
We'd like to follow up with you on Appendix 5E. I know this may be a bit of a stretch, but I thought I'd throw it out there just in case.  
Any chance you guys might be available on Wednesday (6/15) from 11-12 for a check-in. We could make it a Webex.  
-marcus

Marcus L. Yee  
Department of Water Resources

Sent from my mobile device.

**From:** [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**To:** [Yee, Marcus@DWR](mailto:Yee.Marcus@DWR); [Bogdan, Kenneth M.@DWR](mailto:Bogdan.Kenneth.M.@DWR); [Riddle, Diane@Waterboards](mailto:Riddle.Diane@Waterboards); [Heinrich, Dana@Waterboards](mailto:Heinrich.Dana@Waterboards); [Ochendusko, Kyle@Waterboards](mailto:Ochendusko.Kyle@Waterboards); [Jennifer.Pierre@icfi.com](mailto:Jennifer.Pierre@icfi.com)  
**Subject:** App 5E  
**Start:** Thursday, June 16, 2016 4:00:00 PM  
**End:** Thursday, June 16, 2016 5:00:00 PM  
**Location:** Skype Meeting

---

All,

Please join for a quick call to check in on the App 5E modeling.  
Please use the following conference line, and skype link for webcast:

Call in: 1- [REDACTED]  
Pin: [REDACTED]

Thanks,  
Chandra

.....  
à HYPERLINK "[REDACTED]"Join Skype Meeting  
This is an online meeting for Skype for Business, the professional meetings and communications app formerly known as Lync.

[!OC([1033])!]  
.....

**Kuenzi, Nicole@Waterboards**

---

**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Thursday, June 16, 2016 4:30 PM  
**Subject:** RE: App 5E-- new web conference info

1. Please join my meeting.

[https://global.gotomeeting.com/join/\[REDACTED\]](https://global.gotomeeting.com/join/[REDACTED])

2. Join the conference call:

[REDACTED] code: [REDACTED]

Meeting ID: [REDACTED]

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-----Original Appointment-----

**From:** [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com) [<mailto:Chandra.Chilmakuri@CH2M.com>]  
**Sent:** Friday, June 10, 2016 4:33 PM  
**To:** [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com); Yee, Marcus@DWR; Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards; [Jennifer.Pierre@icfi.com](mailto:Jennifer.Pierre@icfi.com)  
**Subject:** App 5E  
**When:** Thursday, June 16, 2016 4:00 PM-5:00 PM (UTC-08:00) Pacific Time (US & Canada).  
**Where:** Skype Meeting

All,

Please join for a quick call to check in on the App 5E modeling.  
Please use the following conference line, and skype link for webcast:

Call in: [REDACTED]  
Pin: [REDACTED]

Thanks,  
Chandra

.....  
[→ Join Skype Meeting](#)

This is an online meeting for Skype for Business, the professional meetings and communications app formerly known as Lync.

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**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Tuesday, June 21, 2016 8:42 AM  
**Subject:** RE: Appendix 5E Discussion

Kyle, that sounds good. I'll get the Goto meeting setup and get back to you once we figure out our availability. -marcus

---

**From:** Ochendusko, Kyle@Waterboards  
**Sent:** Tuesday, June 21, 2016 8:15 AM  
**To:** Yee, Marcus@DWR <Marcus.Yee@water.ca.gov>  
**Cc:** Riddle, Diane@Waterboards <Diane.Riddle@waterboards.ca.gov>; Heinrich, Dana@Waterboards <Dana.Heinrich@waterboards.ca.gov>; Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Chandra Chilmakuri <Chandra.Chilmakuri@CH2M.com>  
**Subject:** RE: Appendix 5E Discussion

Marcus,

Diane and I spoke yesterday about some of the visuals you presented. Is it possible to see those again? Emailing the presentation or doing a WebEx (not Skype) would work.

Respectfully,

Kyle Ochendusko  
Senior Water Resource Control Engineer  
Division of Water Rights  
State Water Resources Control Board  
Phone: (916) 319-9142

---

**From:** Yee, Marcus@DWR  
**Sent:** Tuesday, June 21, 2016 8:11 AM  
**To:** Ochendusko, Kyle@Waterboards  
**Cc:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards; Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); Chandra Chilmakuri  
**Subject:** RE: Appendix 5E Discussion

Sounds great, Kyle.

I was just about to send you a message. Let me check with Chandra and get back to you.

You okay with a call?

-m

----- Original message -----

From: "Ochendusko, Kyle@Waterboards" <[Kyle.Ochendusko@waterboards.ca.gov](mailto:Kyle.Ochendusko@waterboards.ca.gov)>

Date: 6/21/2016 8:07 AM (GMT-08:00)

To: "Yee, Marcus@DWR" <[Marcus.Yee@water.ca.gov](mailto:Marcus.Yee@water.ca.gov)>

Cc: "Riddle, Diane@Waterboards" <[Diane.Riddle@waterboards.ca.gov](mailto:Diane.Riddle@waterboards.ca.gov)>, "Heinrich, Dana@Waterboards" <[Dana.Heinrich@waterboards.ca.gov](mailto:Dana.Heinrich@waterboards.ca.gov)>

Subject: Appendix 5E Discussion

Marcus,

Can we get a meeting with DWR to discuss Appendix 5E? Diane and I are free the following times this week:

Thursday 10:30 -1, and after 4

Friday anytime

Respectfully,

Kyle Ochendusko  
Senior Water Resource Control Engineer  
Division of Water Rights  
State Water Resources Control Board  
Phone: (916) 319-9142

**From:** [Christine Shay](#)  
**To:** [Yee, Marcus@DWR](#); [Riddle, Diane@Waterboards](#); [Chandra.Chilmakuri@CH2M.com](#); [Bogdan, Kenneth M.@DWR](#); [Heinrich, Dana@Waterboards](#); [Ochendusko, Kyle@Waterboards](#)  
**Subject:** Appendix 5E Discussion  
**Start:** Friday, June 24, 2016 10:00:00 AM  
**End:** Friday, June 24, 2016 11:00:00 AM  
**Location:** Conference Call

---

Fri, Jun 24, 2016 10:00 AM - 11:00 AM Pacific Daylight Time  
Please join my meeting from your computer, tablet or smartphone.  
<https://global.gotomeeting.com/join/██████████>  
Join the conference call.  
(888) ██████████ Code: ██████████

---

**From:** Heinrich, Dana@Waterboards  
**Sent:** Wednesday, July 13, 2016 11:10 AM  
**To:** Bogdan, Kenneth M.@DWR  
**Subject:** RE: Hi Diane, I sent you an invite for an App 5E follow-up meeting based on availability from Kyle.

I think she's working from home, so she should be fine. Thanks, Ken.

---

**From:** Bogdan, Kenneth M.@DWR  
**Sent:** Wednesday, July 13, 2016 11:01 AM  
**To:** Heinrich, Dana@Waterboards  
**Subject:** RE: Hi Diane, I sent you an invite for an App 5E follow-up meeting based on availability from Kyle.

She cc-d me on her acceptance of the invite – thanks for checking in with her. I believe it is a call in only meeting anyway, so she can call from wherever she is. It is webex though so hopefully she will have access to a computer (and wifi!).

---

**From:** Heinrich, Dana@Waterboards  
**Sent:** Wednesday, July 13, 2016 10:49 AM  
**To:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Subject:** RE: Hi Diane, I sent you an invite for an App 5E follow-up meeting based on availability from Kyle.

Diane said she plans to attend, probably by phone.

---

**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Tuesday, July 12, 2016 1:11 PM  
**To:** Heinrich, Dana@Waterboards  
**Subject:** FW: Hi Diane, I sent you an invite for an App 5E follow-up meeting based on availability from Kyle.

Hi Dana - I think it is critical that Diane be at this meeting - anything you can do to help get her there would be appreciated. We are at the final stages in preparing the Final EIR and this is the last substantive issue that needs to be completed .

Thanks!

---

**From:** Yee, Marcus@DWR  
**Sent:** Tuesday, July 12, 2016 1:00 PM  
**To:** Riddle, Diane@Waterboards  
**Cc:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Subject:** Hi Diane, I sent you an invite for an App 5E follow-up meeting based on availability from Kyle.

Hopefully, the time will work for you.  
-marcus

**From:** [Yee, Marcus@DWR](mailto:Yee.Marcus@DWR)  
**To:** [Riddle, Diane@Waterboards](mailto:Riddle.Diane@Waterboards); [Heinrich, Dana@Waterboards](mailto:Heinrich.Dana@Waterboards); [Ochendusko, Kyle@Waterboards](mailto:Ochendusko.Kyle@Waterboards); [Bogdan, Kenneth M.@DWR](mailto:Bogdan.Kenneth.M.@DWR); [Stein, Russell@DWR](mailto:Stein.Russell@DWR); ["Chandra.Chilmakuri@CH2M.com"](mailto:Chandra.Chilmakuri@CH2M.com); ["Pierre, Jennifer"](mailto:Pierre.Jennifer); [Wilder, Richard](mailto:Wilder.Richard)  
**Subject:** California WaterFix Appendix 5E  
**Start:** Thursday, July 14, 2016 3:00:00 PM  
**End:** Thursday, July 14, 2016 3:30:00 PM  
**Location:** Goto Meeting Details Included

---

California WaterFix Appendix 5E

Thu, Jul 14, 2016 3:00 PM - 3:30 PM Pacific Daylight Time

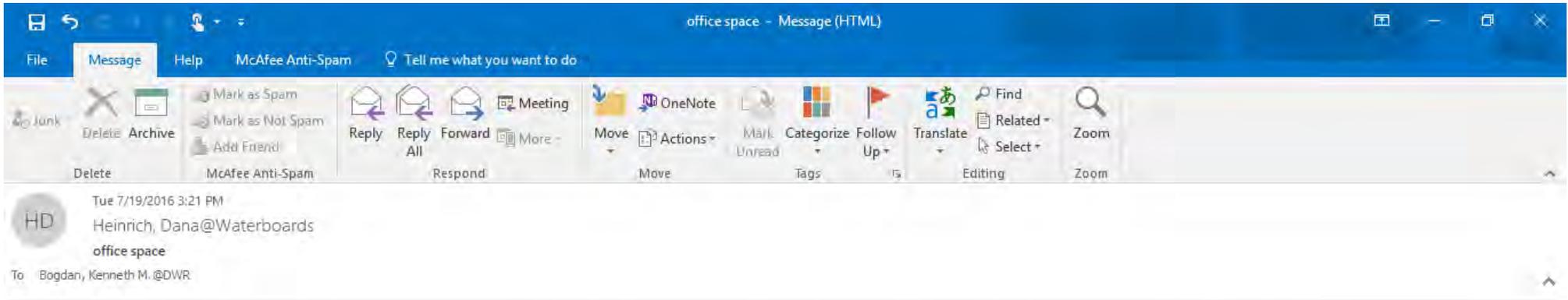
Please join my meeting from your computer, tablet or smartphone.

<https://global.gotomeeting.com/join/██████████>

Join the conference call.

Conference Call: 1(888)██████████ Code: ██████████

First GoToMeeting? Try a test session: <http://help.citrix.com/getready>



Hi Ken. Nice talking to you today. Another thought, if renting space is an option. The Retro Lodge across the street on H rents office space. Seems like it would be ideal if DWR can afford it.

Dana Heinrich  
Staff Attorney IV  
State Water Resources Control Board  
Office of Chief Counsel  
1001 I Street  
Sacramento, CA 95814  
(916) 341-5188  
[Dana.Heinrich@waterboards.ca.gov](mailto:Dana.Heinrich@waterboards.ca.gov)



---

**From:** Lauffer, Michael@Waterboards  
**Sent:** Wednesday, August 17, 2016 11:54 AM  
**To:** Hutzel, Michelle@EPA  
**Cc:** Arbuckle, Kimberly@CNRA; Bogdan, Kenneth M.@DWR; Burns, Gordon@EPA  
**Subject:** Re: Meeting/call request - Karla Nemeth Re: Delta

I can adjust times tomorrow and Friday to make any of those blocks work.

-maml

MICHAEL A.M. LAUFFER, CHIEF COUNSEL  
STATE WATER RESOURCES CONTROL BOARD  
1001 I STREET, 22ND FLOOR  
SACRAMENTO, CA 95814-2828

PHONE: 916.341.5183  
FACSIMILE: 916.341.5199  
[michael.lauffer@waterboards.ca.gov](mailto:michael.lauffer@waterboards.ca.gov)

For tips on what you can do to save water, visit  
<http://saveourwater.com/>

On Aug 17, 2016, at 11:37 AM, Hutzel, Michelle@EPA <[Michelle.Hutzel@calepa.ca.gov](mailto:Michelle.Hutzel@calepa.ca.gov)> wrote:

Below in red works for Gordon

**MICHELLE HUTZEL** (916) 323-2515  
*Every Californian should conserve water. Find out how at: <http://saveourwater.com>*

---

**From:** Arbuckle, Kimberly@CNRA  
**Sent:** Wednesday, August 17, 2016 11:28 AM  
**To:** Lauffer, Michael@Waterboards; Bogdan, Kenneth M.@DWR; Burns, Gordon@EPA  
**Cc:** Hutzel, Michelle@EPA  
**Subject:** Meeting/call request - Karla Nemeth Re: Delta

Hello,

Karla would like to get you all together or on the phone asap for 30 minutes regarding the delta. Would you please let me know which times blocks below work for you?

Today 8/17 – 1 – 1:30, 3 – 3:30 – **not available**  
8/18 – 8 – 10, 10:30 – 11, 12 – 5 – **available from 8-9:30 – 4:30-5**  
8/19 – 8 – 9, 11 – 5 – **8-9; 1-5**

Thank you,



Thu 8/18/2016 7:14 AM  
NK Nemeth, Karla@CNRA  
Re: Call Re: Delta

To: Lauffer, Michael@Waterboards

Cc: Bogdan, Kenneth M. @DWR; Burns, Gordon@EPA; Hutzler, Michelle@EPA; Michael.s.jewell@usace.army.mil

Michael, Friday is fine.

Mike Jewell....I think Ken Bogdan was working to set up a call with just the three of us related to 404 permit.

Thanks all.

On Aug 17, 2016, at 5:39 PM, Lauffer, Michael@Waterboards <[michael.lauffer@waterboards.ca.gov](mailto:michael.lauffer@waterboards.ca.gov)> wrote:

Any chance this can be reset to Friday? Gordon and I had a general conversation that makes me think we should have an OCC attorney from the water board who is not on the WaterFix advisory team participate in this initial meeting.

Unfortunately, our best candidate appears to have a conflict tomorrow afternoon.

-maml

MICHAEL A.M. LAUFFER, CHIEF COUNSEL  
STATE WATER RESOURCES CONTROL BOARD  
1001 I STREET, 22ND FLOOR  
SACRAMENTO, CA 95814-2828

**Kuenzi, Nicole@Waterboards**

---

**From:** Yee, Marcus@DWR </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=YEE, MARCUS0860BB66-1D2A-47B6-93F5-A93D119281DE74B>  
**Sent:** Tuesday, October 04, 2016 9:02 AM  
**Subject:** RE: Appendix 5E

Sorry, it looks like we lost a "2"

Code: [REDACTED]

---

**From:** Riddle, Diane@Waterboards  
**Sent:** Tuesday, October 04, 2016 9:01 AM  
**To:** Yee, Marcus@DWR <[Marcus.Yee@water.ca.gov](mailto:Marcus.Yee@water.ca.gov)>; Bogdan, Kenneth [M.@DWR](mailto:M.@DWR) <[Kenneth.Bogdan@water.ca.gov](mailto:Kenneth.Bogdan@water.ca.gov)>; 'Jennifer.Pierre@icfi.com' <[Jennifer.Pierre@icfi.com](mailto:Jennifer.Pierre@icfi.com)>; 'Chandra.Chilmakuri@CH2M.com' <[Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)>  
**Cc:** 'Pierre, Jennifer' <[Jennifer.Pierre@icf.com](mailto:Jennifer.Pierre@icf.com)>; Ochendusko, Kyle@Waterboards <[Kyle.Ochendusko@waterboards.ca.gov](mailto:Kyle.Ochendusko@waterboards.ca.gov)>; Heinrich, Dana@Waterboards <[Dana.Heinrich@waterboards.ca.gov](mailto:Dana.Heinrich@waterboards.ca.gov)>  
**Subject:** RE: Appendix 5E  
**Importance:** High

There is a number missing in the call in below. Can you please send the full number.

-----Original Appointment-----

**From:** Yee, Marcus@DWR  
**Sent:** Thursday, September 22, 2016 2:25 PM  
**To:** Yee, Marcus@DWR; Riddle, Diane@Waterboards; Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); 'Jennifer.Pierre@icfi.com'; 'Chandra.Chilmakuri@CH2M.com'  
**Cc:** 'Pierre, Jennifer'; Ochendusko, Kyle@Waterboards; Heinrich, Dana@Waterboards  
**Subject:** Appendix 5E  
**When:** Tuesday, October 04, 2016 9:00 AM-11:30 AM (UTC-08:00) Pacific Time (US & Canada).  
**Where:** Web Conference-

**Appendix 5E Meeting**

Tue, Oct 4, 2016 9:00 AM - 11:30 AM Pacific Daylight Time

**Please join my meeting from your computer, tablet or smartphone.**

[https://global.gotomeeting.com/join/\[REDACTED\]](https://global.gotomeeting.com/join/[REDACTED])

Join the conference call. Conference Line: [REDACTED] Code: [REDACTED]

First GoToMeeting? Try a test session: <http://help.citrix.com/getready>

**Kuenzi, Nicole@Waterboards**

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**Subject:** Appendix 5E  
**Location:** Web Conference-

**Start:** Tue 10/4/2016 9:00 AM  
**End:** Tue 10/4/2016 11:30 AM  
**Show Time As:** Tentative

**Recurrence:** (none)

**Meeting Status:** Not yet responded

**Organizer:** Yee, Marcus@DWR  
**Required Attendees:** Riddle, Diane@Waterboards; Bogdan, Kenneth M.@DWR  
(Kenneth.Bogdan@water.ca.gov); 'Jennifer.Pierre@icfi.com';  
'Chandra.Chilmakuri@CH2M.com'  
**Optional Attendees:** Pierre, Jennifer; Ochendusko, Kyle@Waterboards; Heinrich, Dana@Waterboards

**Appendix 5E Meeting**

Tue, Oct 4, 2016 9:00 AM - 11:30 AM Pacific Daylight Time

**Please join my meeting from your computer, tablet or smartphone.**<https://global.gotomeeting.com/join/██████████>

Join the conference call. Conference Line: ██████████ Code: ██████████

First GoToMeeting? Try a test session: <http://help.citrix.com/getready>

Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

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**From:** Heinrich, Dana@Waterboards  
**Sent:** Monday, October 10, 2016 4:56 PM  
**To:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR); Riddle, Diane@Waterboards; Ochendusko, Kyle@Waterboards  
**Cc:** Yee, Marcus@DWR; 'Pierre, Jennifer'; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Subject:** RE: Appendix 5E

Ken and company,

Attached are some edits to the intro. Thank you for fixing the mischaracterization of Boundary 1. The comment concerns the revisions to the SWRCB staff scenario that was analyzed in the DEIR. I think the intro would benefit from a brief description of the changes we have made. I was hoping that Diane could fill that in, but she's out this week and I don't want to hold this up. I figure someone on your team is equally capable of providing that piece. I did not make any edits to the impact analysis section. I assume you all are working on that based on our phone call.

Please let me know if you have any follow-up questions.

Thanks,

-Dana

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**From:** Bogdan, Kenneth [M.@DWR](mailto:M.@DWR)  
**Sent:** Tuesday, October 04, 2016 11:01 AM  
**To:** Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards; Ochendusko, Kyle@Waterboards  
**Cc:** Yee, Marcus@DWR; 'Pierre, Jennifer'; [Chandra.Chilmakuri@CH2M.com](mailto:Chandra.Chilmakuri@CH2M.com)  
**Subject:** RE: Appendix 5E

Hi here are the edits to the Intro that we discussed this morning. It's in track and some of the underlying edits were ones Jennifer had made in discussions after we sent you the appendix, I made additional ones on top of that. Hopefully its clear(er) now.

p.s. MARCUS please forward to Rick Wilder – I don't seem to have his e-mail.

Ken

Kenneth M Bogdan  
Senior Staff Counsel  
Office of Chief Counsel  
CA Department of Water Resources

11th Floor  
1416 9th Street  
Sacramento CA 95814  
Office 916.651.2988  
Cell 916.607.7852

# Attachment 15

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## State Water Resources Control Board

October 18, 2017

***By E-Mail***

Mr. Patrick Porgans  
Porgans/Associates  
P.O. Box 60940  
Sacramento, CA 95860  
[pp@planetarysolutionaries.org](mailto:pp@planetarysolutionaries.org)

Dear Mr. Porgans:

This letter responds to your request received on September 1, 2017, pursuant to Government Code § 6250 et seq., for public records in the files of the State Water Resources Control Board (State Water Board). The State Water Board staff has identified public records that are responsive to your request, attached to the e-mail transmitting this letter.

Your request included the following categories of records:

1. "*Ex parte* correspondence, since the Change Petition was submitted on August 26, 2015, between the Department of Water Resources and [State Water] Board staff about modeling for the [State Water] Board for determination of 'appropriate Delta flow criteria' under Water Code section 85086."
2. "Any *ex parte* correspondence since the Change Petition was submitted on August 26, 2015, between the Department of Water Resources and [State Water] Board staff about the Boundary 1 and Boundary 2 scenarios that were introduced by the Department of Water Resources in modeling for Part 1 of the WaterFix hearing."
3. "Any *ex parte* correspondence, since the Change Petition was submitted on August 26, 2015, regarding scheduling of Part 1 or Part 2 of the WaterFix Change Petition hearing."

In response to your request, the Board is producing all e-mail in the possession of the Board using the following criteria: (1) sent since August 26, 2015; (2) related to the WaterFix proceeding; (3) not sent to the service list for the proceeding; and (4) a staff person from the Department of Water Resources appears in the "to" field and a staff person or board member from the State Water Board appears in the "from" field, or a staff person from the Department of Water Resources appears in the "from" field and a staff person or board member from the State Water Board appears in the "to" field. The State Water Board did not identify any correspondence other than e-mail that fits these criteria.

As explained in a preliminary response to your request dated September 11, 2017, the Administrative Procedure Act (APA) prohibits direct or indirect communications to the hearing officer and other State Water Board Members regarding any substantive or controversial procedural issue in an adjudicative proceeding without notice and opportunity for all parties to participate in the communication. The APA does not prohibit ex parte communications concerning non-controversial, procedural issues. I have reviewed the emails responsive to your request and determined that none of them constitute prohibited ex parte communications. Most of the emails concerned non-controversial, procedural issues. Several of the emails concern the modeling and analysis of a WaterFix Project operational scenario contained in Appendix 5E of the Final Environmental Impact Report (EIR) for the project. In order to ensure that the Final EIR would be adequate for the State Water Board's use as a responsible agency under the California Environmental Quality Act (CEQA), State Water Board staff asked DWR to analyze a scenario that increases Delta outflow without impacting cold water pool resources. State Water Board staff communicated with DWR staff only to the extent necessary to provide direction concerning the modeling and analysis of the scenario described in Appendix 5E of the Final EIR. To the extent that any substantive issues were discussed, they were not conveyed to the State Water Board Members, and therefore no prohibited, indirect ex parte communications occurred.

Conference call-in numbers and passcodes included in twenty-four of the documents being produced have been redacted. I have determined that this information is not responsive to your request and is exempt from disclosure pursuant to the balancing test under Government Code section 6255. Redaction of this information outweighs the public's interest in disclosure by protecting confidential teleconference lines that are not probative to the substance of the communication. No other documents have been withheld from disclosure based on an assertion of privilege, and this production completes the State Water Board's response to your request for records.

If you have any questions in the meantime or require further information, please contact me at (916) 322-4142 or at [nicole.kuenzi@waterboards.ca.gov](mailto:nicole.kuenzi@waterboards.ca.gov).

Best Regards,

*/s/ Nicole L. Kuenzi*

Nicole L. Kuenzi  
Attorney  
State Water Resources Control Board

# Attachment 16

## Enclosure D

### INFORMATION CONCERNING APPEARANCE AT THE CALIFORNIA WATERFIX HEARING

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 Board is available upon request or may be viewed at the State Water Board's web site: [http://www.waterboards.ca.gov/laws\\_regulations](http://www.waterboards.ca.gov/laws_regulations).

Unless otherwise determined by the hearing officers, each party may make an opening statement, call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. At the discretion of the hearing officers, parties may also be afforded the opportunity to present closing statements or submit briefs. The State Water Board encourages parties with common interests to work together to make the hearing process more efficient. The hearing officers reserve the right to issue further rulings clarifying or limiting the rights of any party where authorized under applicable statutes and regulations.

Parties must file any requests for exceptions to procedural requirements in writing with the State Water Board and must serve such requests on the other parties. To provide time for parties to respond, the hearing officers 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.

2. **SETTLEMENTS:** In hearings involving an unresolved protest between a protestant and a water right petitioner, those persons will be designated as parties in the hearing. (Cal. Code Regs., tit. 23, § 648.1, subd. (b).) Other persons who file a Notice of Intent to Appear in the hearing, may also be designated as parties. In such cases, the parties whose dispute originates the action may at their discretion meet privately to engage in settlement discussions, or may include other persons. If the original parties resolve the dispute, the hearing officers will determine whether or not to continue the hearing, after allowing all remaining parties the opportunity to comment on any proposed settlement. The Executive Director or the State Water Board may approve a settlement in the absence of a hearing, notwithstanding the lack of consent of parties besides the protestant and the petitioners.
3. **PARTIES:** The current parties to the hearing are the Department of Water Resources and U.S. Bureau of Reclamation.

Additional parties may be designated in accordance with the procedures for this hearing. Except as may be decided by specific rulings of the hearing officers, any person or entity who timely files a Notice of Intent to Appear indicating the desire to participate beyond presenting a policy statement shall be designated as a party. The hearing officers may impose limitations on a party's participation. (Gov. Code, § 11440.50, subd. (c).) Persons or entities who do not file a timely Notice of Intent to Appear may be designated as parties at the discretion of the hearing officers, for good cause shown, and subject to appropriate

conditions as determined by the hearing officers. Except as specifically provided in this notice or by ruling of the hearing officers, 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 access hearing documents at the website listed in the hearing notice.

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).)

- a. Policy statements are not subject to the pre-hearing requirements for testimony or exhibits, except that interested persons are requested to file a Notice of Intent to Appear, indicating clearly an intent to make a policy statement only.
  - b. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 7, for details regarding electronic submittal of policy statements.
- 5. NOTICE OF INTENT TO APPEAR:** Persons and entities who seek to participate as parties in this hearing must file a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear in a timely manner may be interpreted by the State Water Board as intent not to appear.

**Interested persons who will not be participating as parties, but instead presenting only non-evidentiary policy statements should also file a Notice of Intent to Appear.** The Notice of Intent to Appear must state the name and address of the participant. Except for interested persons who will not be participating as parties, the Notice of Intent to Appear must also include: (1) the name of each witness who will testify on the party's behalf; (2) a brief description of each witness' proposed testimony; and (3) an estimate of the time (not to exceed the total time limit for oral testimony described in section 9, below) that the witness will need to present a brief oral summary of his or her prior-submitted written testimony. (See section 6, below.) Parties who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear.<sup>15</sup> Parties who decide not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the State Water Board and the other parties as soon as possible.

The State Water Board intends to exchange information with and between parties electronically for this hearing to the extent possible. If you are unable to submit or receive electronic information, please check the appropriate box on the Notice of Intent to Appear and contact the hearing team by Tuesday, January 5, 2016, at (916) 319-0960 or by email at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov). (See section 7, below.)

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<sup>15</sup> A party is not required to present evidence as part of a case-in-chief. Parties not presenting evidence as part of a case-in-chief will be allowed to participate through opening statements, cross-examination, and rebuttal, and may also present closing statements or briefs, if the hearing officers allow these in the hearing.

The State Water Board will send a service list of parties to each person who has submitted a Notice of Intent to Appear. The service list will indicate if any party is unable to receive electronic service. If there is any change in the hearing schedule, only those parties on the service list, and interested persons that have filed a Notice of Intent to Appear expressing their intent to present a policy statement only, will be informed of the change.

- 6. WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, 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 such testimony in writing.<sup>16</sup> Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. 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.

Each party shall submit to the State Water Board an electronic copy of each of its exhibits. With its exhibits, each party must submit a completed Exhibit Identification Index. **You should receive an electronic reply from [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) confirming that your email was received. If you do not receive a reply, please resubmit your exhibits immediately or contact the hearing team at (916) 319-0960.** Each party shall also serve a copy of each exhibit and the exhibit index on every party on the service list. A statement of service with manner of service indicated shall be filed with each party's exhibits.

The exhibits and indexes for Part I of 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**. The hearing officers will establish the deadline for exhibits and indexes for Part II of this hearing at a later date. The State Water Board may interpret failure to timely submit such documents as a waiver of party status.

All hearing documents that are timely received will be posted on the Bay-Delta Program's webpage identified in the hearing notice.

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
- b. The hearing officers have discretion to receive into evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A party offering an exhibit by reference shall advise the other parties and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the party relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.

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<sup>16</sup> The hearing officers 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.

- c. A party seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other parties prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a party waives the opportunity to obtain a copy of the exhibit, the party sponsoring the exhibit will not be required to provide a copy to the waiving party. Additionally, with the permission of the hearing officers, such exhibits may be submitted to the State Water Board solely in electronic form, using a file format readable by Microsoft Office 2003 software.
- d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
- e. 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.

- 7. ELECTRONIC SUBMISSIONS:** To expedite the exchange of information, reduce paper use, and lower the cost of participating in the hearing, participants should submit hearing documents to the State Water Board in electronic form and parties should agree to electronic service.

Any documents submitted or served electronically must be in Adobe Portable Document Format (PDF), except for Exhibit Identification Indexes, which should be in a format supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 50 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) with a subject of “**California WaterFix Hearing.**” Electronic submittals to the State Water Board of documents greater than 50 megabytes in total size should be submitted on a compact disc (CD). Each electronically submitted exhibit must be saved as a separate PDF file, with the name in lower case lettering.

- 8. STAFF EXHIBITS:** A list of State Water Board staff exhibits proposed to be offered into evidence as exhibits by reference is included with this notice. (See Cal. Code Regs., tit. 23, §§ 648.3, 648.5, subd. (a)(4).) Hearing participants should not submit exhibits that are already listed as staff exhibits. Additional or modified staff exhibits relevant to the key issues may be proposed by the exhibit due dates for parts 1 and 2 of the hearing.
- 9. PRE-HEARING CONFERENCE:** The State Water Board has scheduled a pre-hearing conference, as identified in the hearing notice, to discuss the scope of the hearing, the status of any protests, and any other appropriate procedural issues.
- 10. ORDER OF PROCEEDING:** Hearing officers 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. The time limits specified below may be changed by the hearing officers, for good cause.
- a. **Policy Statements Within the Evidentiary Hearing:** Policy statements 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 **five (5) minutes** or such other time as established by the hearing officers.

- b. **Presentation of Cases-In-Chief:** Each party who so indicates on a Notice of Intent to Appear may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement, oral testimony, introduction of exhibits, and cross-examination of the party's witnesses. The hearing officers may allow redirect examination and recross examination. The hearing officers 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. Oral opening statements will be limited to **twenty (20) minutes** per party. A party may submit a written opening statement before the hearing or during the hearing, prior to their case-in-chief. Any policy-oriented statements by a party should be included in the opening statement.
- ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to **twenty (20) minutes** to summarize or emphasize their written testimony on direct examination. Each party will be allowed up to **one (1) hour total** to present all of its direct testimony.<sup>17</sup>
- 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 officers will decide whether the party's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to **one (1) hour** per witness or panel of witnesses. The hearing officers have discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Ordinarily, only a party or the party's representative will be permitted to examine a witness, but the hearing officers may allow a party to designate a person technically qualified in the subject being considered to examine a witness.
- iv. **Redirect and Recross Examination:** Redirect examination may be allowed at the discretion of the hearing officers. Any redirect examination and recross examination permitted will be limited to the scope of the cross-examination and the redirect examination, respectively. The hearing officers may establish time limits for any permitted redirect and recross examination.
- 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.
- c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officers will allow parties to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented by another party.

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<sup>17</sup> The hearing officers may, for good cause, approve a party's request for additional time to present direct testimony during the party's case-in-chief. The hearing officers may allow additional time for the oral direct testimony of the witness if the witness is adverse to the party presenting the testimony and the hearing officers are satisfied that the party could not produce written direct testimony for the witness.

Rebuttal testimony and exhibits need not be submitted prior to the hearing, although the hearing officers may require submittal of rebuttal testimony and exhibits before they are presented in order to improve hearing efficiency. Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

- d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times, if appropriate, the hearing officers may allow oral closing statements or legal arguments or set a schedule for filing legal briefs or written closing statements. If the hearing officers authorize the parties to file briefs, an electronic copy of each brief shall be submitted to the State Water Board, and shall be served on each of the other participants on the service list. 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.

**11. EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, 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 our website at:  
[http://www.waterboards.ca.gov/laws\\_regulations/docs/exparte.pdf](http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf).

**12. 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.

# Attachment 17

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## State Water Resources Control Board

July 22, 2016

### VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST AND INTERESTED PERSONS LIST](#)

### CALIFORNIA WATERFIX HEARING - EVIDENTIARY OBJECTIONS AND OTHER PROCEDURAL MATTERS

This letter responds to evidentiary objections received in the hearing on the joint water right change petition (petition) filed by the Department of Water Resources (DWR) and the U.S. Department of Interior (collectively petitioners) for the California WaterFix Project. In our ruling dated June 10, 2016, we extended the deadline for motions to disqualify any of petitioners' witnesses in part 1A of the hearing, or to exclude a witness's testimony, in whole or in part, until July 12, 2016. Parties were also encouraged, but not required, to submit any other procedural or evidentiary objections by the July 12, 2016 deadline. This included objections concerning petitioners' exhibits, or objections that go to the weight that should be afforded petitioners' testimony or exhibits, but not their admissibility. Given the limited amount of time, we advised the parties that written rulings on any objections might not be issued before the hearing begins.

We received numerous objections by the extended deadline. Many of the parties objected to petitioners' written testimony and exhibits that are based on computer modeling for the California WaterFix project. In addition, many parties objected to testimony concerning legal issues or documents. Several parties also objected on the grounds that petitioners have not provided adequate information concerning proposed project operations. In addition, several parties objected to the testimony of DWR's secondary witnesses. DWR submitted a master response to similar objections on July 20, 2016.

We appreciate the parties' timely written submittals. Upon review, and with the exception of specific issues discussed below, we have determined that it is not necessary to rule on the objections at this time. It is not necessary to rule on some of the objections before petitioners present their case in chief, including cross-examination, any re-direct examination, and any re-cross examination. We have not accepted petitioners' exhibits into the record yet, and expect petitioners to offer their exhibits into evidence upon completion of their case-in-chief. (See Notice of Petition and Hearing (October 30, 2016), p. 35, Enclosure D at 10(b).) Consistent with past practice in hearings before the State Water Resources Control Board (State Water Board), some objections may be addressed orally in the course of the hearing, when petitioners move to enter their testimony and exhibits into the record after their case in chief, or in the final order taking action on the petition.

### **Adequacy of Project Description**

In our February 11, 2016 ruling, we agreed to stagger the order of submittals, requiring petitioners to present their cases in chief first (Part 1A of the hearing) and allowing other parties to submit the written testimony and exhibits for their cases in chief at a subsequent date (Part 1B of the hearing). The purpose of this arrangement was to allow petitioners to describe the proposed project in a more succinct and accessible format to the extent possible, and gave the other parties additional time to review and prepare their own submittals. While the other parties still have specific and various criticisms of petitioners' evidence and testimony, we disagree with those parties who contend that petitioners' case-in-chief is insufficient to allow parties to meaningfully participate in Part 1 of the hearing.

We recognize that petitioners bear the burden of establishing that the proposed changes will not injure other legal users of water. As we stated in our February ruling, however, not all uncertainties can or need to be resolved before beginning the hearing. In fact, the purpose of this hearing is to resolve some of the issues concerning how the proposed project would be operated. At this point, any remaining uncertainty concerning the proposed project and its effects should be raised in the hearing process, including but not limited to cross-examination, and the protestants' cases in chief.

### **Objections to Testimony of DWR's Secondary Witnesses**

On direct, petitioners propose to present eight lead expert witnesses to cover five subject areas. These lead witnesses and additional secondary witnesses that assisted with the direct testimony will then be made available for cross-examination. DWR has submitted minimal written, direct testimony for the secondary witnesses. A number of parties objected to and moved to disqualify petitioners' secondary witnesses because they had not submitted their testimony in advance of the hearing. These arguments appear to result from a misunderstanding of petitioners' proposed process for presenting their case in chief.

All parties are encouraged to present direct testimony in a succinct and organized manner, and petitioners' approach is acceptable. The parties are correct that State Water Board policy discourages the introduction of surprise testimony and exhibits. (Cal. Code Regs., tit. 23, § 648.4, subd. (a).) Accordingly, the Hearing Notice provides that all direct testimony must be submitted in advance of the hearing. On direct, witnesses may not testify outside the scope of their written testimony. DWR has not given any indication, however, that it intends to have its secondary witnesses present any additional direct testimony, and we will not permit them to do so. Moreover, making the secondary witnesses available for cross-examination should serve to improve the hearing record. During cross-examination, parties may ask questions of witnesses on any relevant matter, even if it was not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) Given the scope and complexity of the subject matter, it is not unreasonable that multiple individuals have participated in the development of evidence and these individuals should be made available to answer any questions the other parties may have regarding that evidence.

### **Objections Based on Issues Already Decided**

In their objections, a number of parties raised issues that we addressed following the pre-hearing conference concerning the timing of this hearing relative to other regulatory processes, including environmental review under the California Environmental Quality Act and the National

Environmental Policy Act , compliance with the federal Endangered Species Act and the California Endangered Species Act , and the pending update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary These arguments have been reviewed and considered and addressed in our February 11 ruling, and will not be reexamined.

Some parties raised new arguments concerning the timing of the hearing based on the Sacramento County Superior Court's recent ruling setting aside the Delta Plan developed by the Delta Stewardship Council pursuant to the Delta Reform Act. (*Delta Stewardship Council Cases*, JCCP No. 4758.) Nothing in the superior court's ruling, however, alters our previous statements concerning the State Water Board's compliance with the Delta Reform Act. The Delta Reform Act requires that any order approving the water right change petition for the WaterFix Project must include "appropriate Delta flow criteria." Those flow criteria must be informed by flow criteria to protect the Delta ecosystem, which the State Water Board developed in 2010. As set forth in the hearing notice, what constitutes "appropriate Delta flow criteria" is key hearing issue number 3.d., which will be considered during Part 2 of the hearing. The State Water Board is not required to certify that action on the petition complies with the Delta Stewardship Council's Delta Plan. (Wat. Code, § 85057.5, subd. (b)(1) [exempting a regulatory action of a state agency from the definition of a "covered action" that requires certification of compliance with the Delta Plan.; see also Wat. Code, §§ 85031, subd. (c) & 85320, subd. (g).)

### **Ex Parte Communications**

Please remember that ex-parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Parties must provide a copy of any correspondence to the hearing team concerning substantive or controversial procedural issues to all of the parties listed in Table 1 of the service list located here: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml). Any such correspondence must also be accompanied by a Statement of Service form.

If you have questions regarding this letter, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY*

Felicia Marcus, State Water Board Chair  
WaterFix Project Co-Hearing Officer

*ORIGINAL SIGNED BY*

Tam Doduc, State Water Board Member  
WaterFix Project Co-Hearing Officer

# Attachment 18

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**State Water Resources Control Board**

**NOTICE OF PETITION  
REQUESTING CHANGES IN WATER RIGHTS OF  
THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION  
FOR THE CALIFORNIA WATERFIX PROJECT<sup>1</sup>**

**AND**

**NOTICE OF PUBLIC HEARING AND PRE-HEARING CONFERENCE  
TO CONSIDER THE ABOVE PETITION**

**A Pre-hearing Conference  
will commence on Thursday, January 28, 2016 at 9:00 a.m.  
and continue, if necessary, on Friday, January 29, 2016  
at  
Joe Serna Jr.-CalEPA Building, Byron Sher Auditorium  
1001 I Street, Second Floor, Sacramento, CA**

**PART I  
of this Hearing will commence on  
Thursday, April 7, 2016 at 9:00 a.m.  
at  
Joe Serna Jr.-CalEPA Building, Byron Sher Auditorium  
1001 I Street, Second Floor, Sacramento, CA  
and continue, as necessary, as indicated  
on the dates and at the locations shown on Enclosure A**

**PART II  
of this Hearing will commence following completion of environmental and  
endangered species act compliance for the project  
with dates to be noticed in the future**

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<sup>1</sup> The counties that could be affected by the Petition are: Alameda, Butte, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Imperial, Kern, Kings, Los Angeles, Madera, Merced, Napa, Orange, Placer, Riverside, Sacramento, San Benito, San Bernardino, San Diego, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Shasta, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Ventura, Yolo, and Yuba. These are the counties in which the Department of Water Resources and U.S. Bureau of Reclamation operate the State Water Project and federal Central Valley Project, respectively. The stream systems that could be affected by the Petition are Sacramento River upstream of the Sacramento-San Joaquin Delta and downstream of Shasta Dam, Trinity River downstream of Lewiston Dam, Clear Creek downstream of Whiskeytown Dam, Feather River downstream of Oroville Dam, American River downstream of Folsom Dam, Old River tributary to San Joaquin River, and Sacramento-San Joaquin Delta Channels tributary to Suisun Bay. Stream systems that are not affected by SWP and CVP operations under the California WaterFix would not be affected by this Petition. These are the sources of water for the subject permits.

State Water Resources Control Board  
Division of Water Rights  
Attn: California WaterFix Hearing Staff

By Mail: P.O. Box 2000, Sacramento, CA 95812-2000

By Hand Delivery: Joe Serna Jr.-CalEPA Building  
1001 I Street, 2<sup>nd</sup> Floor, Sacramento, CA 95814

**ALL HAND DELIVERED SUBMITTALS** should be Date and Time stamped by the Division of Water Rights' Records Unit on the second floor of the Joe Serna, Jr.-CalEPA Building at the above address prior to 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 Division of Water Rights' Records Unit will be considered late and may not be accepted by the hearing officers.

### **IF YOU HAVE ANY QUESTIONS**

During the pendency of this proceeding, there shall be no *ex parte* communications between State Water Board members or State Water Board hearing team staff and any of the other participants regarding substantive or controversial procedural matters within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters (Gov. Code, § 11430.20, subd. (b)) should be directed to the California WaterFix hearing team by email at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) or at (916) 319-0960.

### **WEBCAST OF PRE-HEARING CONFERENCE AND HEARING**

Broadcasts of the pre-hearing conference and water right hearing will be available via the internet and can be accessed at: <http://www.calepa.ca.gov/broadcast/>.

### **RECEIVING FUTURE COMMUNICATIONS**

If you would like to receive additional information regarding the State Water Board's activities related to the California WaterFix Project, please sign up for the State Water Board's California WaterFix email distribution list at:

[www.waterboards.ca.gov/resources/email\\_subscriptions/swrcb\\_subscribe.shtml](http://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.shtml).

**If you do not sign up for this email distribution list and do not submit a Notice of Intent to Appear for the hearing, you will not receive further notices regarding this matter.**

### **PARKING, ACCESSIBILITY, AND SECURITY**

A map to the Joe Serna Jr. -CalEPA Building (CalEPA Building) and parking information are available at <http://www.calepa.ca.gov/EPABldg/location.htm>. The CalEPA Building is accessible to people with disabilities. Individuals who require special accommodations at the CalEPA Building are requested to contact Tanya Cole, Equal Employment Opportunity Office, at (916) 341-5880.

Due to enhanced security precautions at the Joe Serna Jr.-CalEPA Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Depending on their destination and the building's security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any

**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING  
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

Letter of December 28, 2017, to Michael Laufer in Follow Up to Patrick Porgans Public Records Act Request of August 31, 2017

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated December 22, 2017, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

I certify that the foregoing is true and correct and that this document was executed on December 28, 2017 at Capitola, California.

Signature: 

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010