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31 August 2017
Dana Heinrich
Office of Chief Counsel / Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Sent Via Email: Dana.Heinrich@waterboards.ca.gov

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.¹

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.

¹ 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