



August 16, 2021

Gloria Gray, Chair
Metropolitan Water District of Southern California
700 North Alameda Street
Los Angeles, CA 90012-2944

Sent via email to: rcaastro@mwdh2o.com, BoardExecutiveSecretary@mwdh2o.com

RE: Request that "Update on Proposed Voluntary Agreements for Delta Operations" be Discussed in Open Session as Required by the Brown Act (Agenda Item 10-1)

Dear Chairwoman Gray and Members of the Board:

On behalf of the Natural Resources Defense Council, Los Angeles Waterkeeper, and Defenders of Wildlife, we are writing to notify you that discussion of the "Update on Proposed Voluntary Agreements for Delta Operations" that is proposed to be heard in closed session at the Board of Directors as part of Item 10-1 would violate the Brown Act. While the other matters identified for discussion in closed session under agenda item 10-1 constitute matters in existing litigation for which closed session is appropriate, the proposed voluntary agreements are not a matter of existing or pending litigation to which closed session discussion for advice of legal counsel is authorized under the Brown Act. Therefore, we request that this item be moved to open session or removed from the meeting agenda and not discussed in closed session.

First, the proposed voluntary agreements do not constitute a proposal to settle litigation, but instead are proposals for an agreement or memorandum of understanding by a wide range of water districts to support an administrative proposal that would be submitted to the State Water Resources Control Board for review and evaluation as part of the Board's quasi-legislative, regulatory process to update the Bay-Delta Water Quality Control Plan. MWD's February 23, 2021 presentation to the Bay-Delta Committee similarly admitted that "If agreement is reached, Voluntary Agreement would be presented to SWRCB as an alternative to analyze in the Substitute Environment Document." MWD's presentation correctly notes that this would be as part of a regulatory, quasi-legislative process at the SWRCB, not a quasi-adjudicatory proceeding at the SWRCB. Neither the SWRCB's regulatory update of the Bay-Delta Water Quality Control Plan nor the negotiations over an alternative to present to the SWRCB in that proceeding constitutes "litigation" under the Brown Act. See Cal. Gov. Code § 54659.9(c).

Second, the ongoing meetings and negotiations with State agencies regarding a voluntary agreement in the Bay-Delta includes numerous water districts that are neither a party to the litigation referenced in MWD's meeting notice nor a party to any such existing or pending litigation, precisely because these negotiations are not discussions that pertain to settlement of litigation. The inclusion of non-parties in

these discussions waives any claims of attorney-client privilege for these materials and discussions. Similarly, these meeting materials and other documents are not exempt from disclosure under the Brown Act. In addition, we understand that several of these meetings and discussions included staff from the State Water Contractors. The State Water Contractors have asserted that they are not a public agency subject to the Brown Act, and therefore any documents or materials that are disclosed to staff of the State Water Contractors are not exempt from disclosure as “interagency or intra-agency memoranda that are not retained in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” Cal. Gov. Code §6254(a).

Third, MWD staff have repeatedly discussed the voluntary agreements in open session, and MWD staff have never claimed that these discussions were privileged or related to existing or pending litigation. That includes presentations by MWD staff at various committee meetings of the Board, including on February 23, 2021, February 25, 2020, March 11, 2019, and January 7, 2019. Similarly, pursuant to NRDC’s 2018 Public Records Act request, the State of California has disclosed materials from prior voluntary agreement meetings. The State has also publicly released documents relating to the Voluntary Agreement Framework in 2018, 2019, and 2020, and none of these documents have claimed that the discussions were privileged or confidential or a proposed settlement of litigation.

There is a broad public interest in disclosure of the proposed voluntary agreements. Keeping these discussions and related documents secret only adds to public skepticism and distrust of this process, and conservation groups, fishing organizations, Tribes, and the public all have a right to know what is going on behind closed doors.

We are unaware of any valid basis for holding this discussion in closed session and doing so appears to clearly violate the Brown Act. Therefore, we request that the “Update on Proposed Voluntary Agreements for Delta Operations” be moved to open session or removed from the agenda and not discussed in closed session. Removing the discussion of this item from closed session would also demonstrate the commitment of MWD staff and Board Members to transform Metropolitan’s culture to become more transparent and inclusive.

Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Rachel Zwillinger
Defenders of Wildlife



Bruce Reznik
Los Angeles Waterkeeper