

## CWFhearing

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**From:** mbrodsky@cruzio.com  
**Sent:** Friday, January 22, 2016 11:36 AM  
**To:** CWFhearing  
**Cc:** Alan Lilly; Ryan Bezerra; Jennifer Patterson; Aaron Ferguson; Andrew Hitchings; Amy Aufdemberge; Alex Peltzer; Barbara Barrigan-Parilla; Barry Sgarrella; Barbara Daly; Brian Johnson; Ronald Forbes; Brett Baker; Joan Buchanan; Kyle Jones; Wilcox, Carl@Wildlife; Cathleen Galgiani; Trent Hager; Marian Norris; Curtis Creel; Craig Johns; Colin Bailey; Conner Everts; David Aladjem; daniel@kaydix.com; Dustin Cooper; Deidre Des Jardins; Anna Swenson; Guy, David@norcalwater.org; Dan Kelly; David Orth; doug@stocktonchamber.org; Douglas Headrick; Brad & Emily Pappalardo; eofficer@cvcwa.org; Erik Gustafson; Erick Soderlund; Espe Vielma; Brandie Owusu-Spencer; Fred Etheridge; Jonathan Salmon; Mitch Avalon; George Torgun; Gustavo Medina; Ger Vang; info@californiadelta.org; Mizell, James@DWR; Jeff Davis; Jill Duerig; Jennifer Spaletta; Herrick, John @aol.com; S. Dean Ruiz; Jim Cox; Minton, Jonas; John Luebberke; Tara Mazzanti; McManus, John @goldengatesalmon.org; Rubin, Jon@sldmwa.org; Joe Robinson; Martha Lennihan; Kirby Brill; kharrigfeld@herumcrabtree.com; Kurtis C. Keller; Kathy Mannion; Kevin O'Brien; Kate Poole; awearn@nrdc.org; bobker@bay.org; rzwilling@defenders.org; dobegi@nrdc.org; Katelyn Roedner Sutter; Frank Ruhstaller; Lauren Caster; Gregory Adams; Jennifer Buckman; Thomas Esqueda; kelweg1@aol.com; mlarsen@kdwcd.com; sdalke@kern-tulare.com; mhagman@lindmoreid.com; sae16@lsid.org; fmorrissey@orangecoveid.org; sgeivet@ocsnet.net; roland@ssjmud.org; jph@tulareid.org; Luis Magana; Linda Sheehan; mgilkey@tlbwsd.com; Michael B. Jackson; Chris Shutes; Bill Jennings; Barbara Vlamis; Carolee Krieger; Mark Krause; Marcos Kropf; Motecuzoma Sanchez; Michael Frost; Matthew Stone; Van Zandt, Michael@hansonbridgett.com; nknotd@sanjoaquinrtd.com; Brenda Rose; Meserve, Osha@semlawyers.com; rmburness@comcast.net; Pogledich, Philip@yolocounty; Paul Minasian; Patrick Porgans; Paul Simmons; Paul Weiland; Philip Williams; Roger Mammon; Ron Bernal; Robert Cheng; Rebecca Sheehan; Ryan Hernandez; Stephen Siptroth; Ryan.Wulff@noaa.gov; Stefanie Morris; Steve Rotherth; Steve Saxton; Meredith Nikkel; Mark Atlas; Shapiro, Scott @downeybrand.com; Nicole Suard; Stephan Volker; Terri Crain; Tom Gohring; Trent Orr; Tomas Torres; Tim O'Laughlin; Martha Vielma; Wes Rhea; Femlen, William@solanocounty.com; Mike Savino; Hengsothea Ung; Ryan Camero; Rogene Reynolds; Cynthia Lau; Bob Wright; Valerie Kincaid

**Subject:** cwf hearing  
**Attachments:** Delta Alliance cwf hearing pre hearing conference agenda requestcomplete.pdf

Please find attached complete request from Save the California Delta Alliance, et al, to add an item to the pre hearing conference agenda. We are experiencing server difficulties this morning and sent a partial version earlier. This document is complete and being served on all parties.

This being sent from an alternate email address. Our email address for service remains [michael@brodskylaw.net](mailto:michael@brodskylaw.net).

We hope to have our server difficulties corrected shortly.

Sincerely,  
Michael A. Brodsky

January 22, 2016

VIA EMAIL

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

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

State Water Resources Control Board  
Division of Water Rights  
P.O. Box 2000  
Sacramento, CA 95812

Re: California WaterFix  
Pre-Hearing Conference

**Request to Add Procedural Issue to  
Pre-Hearing Conference Agenda and  
Request for Ruling by Hearing Officers from  
Protestants Save the California Delta Alliance, et al.**

Dear Hearing Officers Marcus and Doduc:

Pursuant to the Board's Pre-Hearing Conference Agenda, dated January 15, 2016, ("Agenda") and the Notice of Petition, dated October 30, 2015, ("Notice") Protestants Save the California Delta Alliance, Janet McCleery, Michael McCleery, Frank Morgan, and Captain Morgan's Delta Adventures, LLC, ("Delta Alliance" or "Protestants") hereby request that the following item be placed on the agenda and ruled on by the Hearing Officers:

**Should the Board segregate WaterFix flow criteria (Water Code § 85086 (c)(2)) from the adversarial proceedings and determine Waterfix flow criteria as an integral part of the 2006 Water Quality Control Plan update?**

As a practical matter, after a \$15,000,000,000 investment in the tunnels/new point of diversion approach to managing Delta flows, California WaterFix will determine the practicality

of all future Delta water quality objectives. If WaterFix is approved before the 2006 WQCP is updated, WaterFix will effectively displace the WQCP as the master planning tool for Delta water quality objectives. This is the wrong approach. The WQCP should guide subsidiary individual projects, not the other way around.

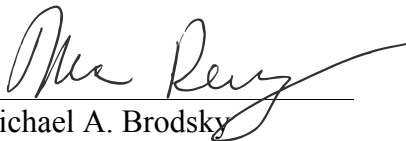
Setting the de facto WQCP flow objectives through the adversarial California WaterFix process is not appropriate. *See* Friends of the River, et al., Written Comments for January 28, 2016, Pre-Hearing Conference 15 (January 21, 2016) (commenting on unfairness of setting Delta flow policy through adversarial proceedings).

Flow criteria for WaterFix may be appropriately combined with and considered in a non-adversarial update of the WQCP. *See* Water Boards Ex Parte Communications Questions and Answers Document 5 (“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”) (citing *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006)) (emphasis added) (Attachment One).

We respectfully suggest that under the circumstances present here, the only appropriate course is to segregate WaterFix flow criteria determinations from the adversarial proceedings and combine them with the WQCP update.

We look forward to discussing this suggestion with you further at the Pre-Hearing Conference.


Respectfully,

  
Michael A. Brodsky

# **ATTACHMENT ONE**

## 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.

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<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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## 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.





**LIST OF PARTICIPANTS**  
**California WaterFix Petition Hearing**  
**(Scheduled to Commence on April 7, 2016)**

**REVISED SERVICE LIST**  
**(Dated January 15, 2016)**

**Table 1- Service List of Parties to Exchange Information**  
**(Parties Participating in Direct Testimony, Cross-Examination or Rebuttal)**

<b>Parties Participating in Part I (May also be Parties in Part II)</b>			
<b>THE FOLLOWING PARTIES MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)</b>			
<b>Party or Participant</b>	<b>Authorized Representative/ Attorney</b>	<b>Authorized Representative's Affiliation</b>	<b>Email Address of Authorized Representative/ Attorney</b>
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Glenn-Colusa Irrigation District (GCID)	Andrew M. Hitchings	Somach, Simmons & Dunn	ahitchings@somachlaw.com
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The San Joaquin Tributaries Authority (SJTA), Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, and City and County of San Francisco	Tim O' Laughlin & Valerie Kincaid	O'Laughlin & Paris, LLP	towater@olaughlinparis.com; vkincaid@olaughlinparis.com

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**THE FOLLOWING PARTY MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The party listed below must be served a hard copy, pursuant to the rules specified in the hearing notice.)**

<b>Party or Participant</b>	<b>Authorized Representative/ Attorney</b>	<b>Mailing Address of Authorized Representative/ Attorney</b>
Clifton Court, L.P.	Suzanne Womack & Sheldon Moore	3619 Land Park Drive Sacramento, CA 95818

**Parties Participating in Part II Only (Must also be Served in Part I)**

**THE FOLLOWING PARTIES MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)**

<b>Party or Participant</b>	<b>Authorized Representative/ Attorney</b>	<b>Authorized Representative's Affiliation</b>	<b>Email Address of Authorized Representative/ Attorney</b>
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Trout Unlimited	Brian Johnson		bjohnson@tu.org
California Department of Fish and Wildlife	Carl Wilcox		carl.wilcox@wildlife.ca.gov
Environmental Water Caucus	Conner Everts		connere@gmail.com
Sierra Club California	E. Robert Wright & Kyle Jones		bwright@friendsoftheriver.org; kyle.jones@sierraclub.org
Planning & Conservation League	Jonas Minton		jminton@pcl.org
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**Table 2 - Interested Persons**  
**(Persons Intending to Make Policy Statements Only)**

**PARTIES IN TABLE 1 ARE NOT REQUIRED TO SERVE THE FOLLOWING INTERESTED PERSONS WITH WRITTEN TESTIMONY, EXHIBITS, AND OTHER DOCUMENTS**

**Interested Persons Participating in Part I (May also be Interested Persons in Part II)**

<b>Party or Participant</b>	<b>Authorized Representative/ Attorney</b>	<b>Authorized Representative's Affiliation</b>	<b>Email Address of Authorized Representative/ Attorney</b>
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Desert Water Agency	Mark Krause		mkrause@dwa.org
Kern County Water Agency	Curtis Creel		ccreel@kcwa.com
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Mojave Water Agency	Kirby Brill		kbrill@mojavewater.org
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