



THE METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA

*Office of the General Counsel*

## **Via Federal Express and Email**

June 6, 2018

Brenna Norton  
Food & Water Watch  
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Re: Notice of Brown Act Violation and Demand, and California Public Records Act Request,  
Dated May 7, 2018

Dear Ms. Norton and Mr. Snyder:

In accordance with Government Code section 54960.1(c)(2) and section 54960.2(b), the Metropolitan Water District of Southern California (“Metropolitan”) responds to your notice and demand letter dated May 7, 2018 (the “Notice”), which alleges violations of the Ralph M. Brown Act, California Government Code section 54950 *et seq.* In letters dated May 17 and 31, 2018 (enclosed), Metropolitan provided initial responses to the request under the California Public Records Act included in your May 7 letter (“CPRA Request”), and Metropolitan further responds with enclosures to this letter.<sup>1</sup>

The Notice alleges two categories of Brown Act violations relating to Metropolitan’s Board of Directors’ April 10, 2018 action authorizing an increase in Metropolitan’s funding of California WaterFix (or “CWF”) and related actions. First, the Notice alleges that Metropolitan violated Government Code section 53635.7 by failing to agendize the borrowing component of

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<sup>1</sup> Metropolitan has enclosed many public records received from custodians to date directly relating to the allegation of serial communications in violation of the Brown Act. To the extent that additional responsive documents are collected, they will be provided as part of the rolling production of documents referenced in Metropolitan’s May 31, 2018 letter to you.

the CWF action as a separate item of business, and thereby violated Government Code section 54954.2. It demands that Metropolitan cease and desist from any such future violations.

Second, the Notice alleges that members of Metropolitan's Board of Directors engaged in serial communications directly and with intermediaries in advance of the April 10 meeting, in violation of Government Code section 54952.2(b). It demands that Metropolitan rescind its April 10 vote authorizing increased funding of CWF and related actions, and disclose all serial communications relating to this vote prior to any future discussion or action on the item. It further demands that Metropolitan refrain from any future serial communications outside of a public meeting on any item of Metropolitan business.

Metropolitan has reviewed these matters and responds below.

### **The Alleged Violations of Government Code Sections 53635.7 and 54954.2**

The April 10 meeting agenda did not violate the Brown Act.

The Notice alleges that Metropolitan violated Government Code section 53635.7 by failing to agendize the borrowing component of the CWF action as a separate item of business. Agenda item 8-7, Option 2, as presented to the Board for consideration on April 10, included a bulleted option to

[a]uthorize funding of up to \$86 million for further contributions for study, review, planning, engineering, design, and other preconstruction capital costs for the California WaterFix subject to a reimbursement agreement with DWR acceptable to the General Manager and General Counsel that provides for repayment upon DWR's first bond issuance. . . .

This agenda item comports with Government Code section 53635.7, which specifies that "[i]n making *any decision that involves borrowing* in the amount of one hundred thousand dollars (\$100,000) or more," a governing body shall discuss that "*decision* as a separate item of business . . ." Cal. Gov't Code § 53635.7 (emphasis added). Section 53635.7 does not require that an agenda separately itemize each step in an item of business that includes a borrowing component. Rather, it merely provides that any *decision* that involves borrowing \$100,000 or more be separately agendized. That clearly happened here.

Indeed, the legislative history demonstrates that section 53635.7 was intended to prohibit a governing body from approving significant borrowing expenditures through a consent calendar

or other process lacking deliberation or discussion. In committee reports accompanying Senate Bill 109, which became Government Code section 53635.7, the Legislature described this statute as a reaction to the 1994 Orange County bankruptcy, charging that it was intended to compel local officials to “deliberate borrowing amounts of \$100,000 or more as separate agenda, *not consent items* . . .” Sen. Local Government Com., Analysis of Sen. Bill No. 109 (1995-1996 Reg. Sess.) as amended Aug. 28, 1996, p. 2 (emphasis added).

The Notice does not contend, nor could it, that CWF was approved by the Board of Directors as a consent item. Thus, there is no violation of Government Code section 53535.7. For the same reason, there is no violation of Government Code section 54954.2.

### **The Alleged Violation of Government Code Section 54952.2(b)**

Your contention that due to serial communications, Metropolitan violated the Brown Act in connection with the April 10 meeting authorizing increased funding of CWF and related actions, must be examined in the full context of the robust public dialogue that has accompanied CWF since its inception.

#### *The Origins of California WaterFix*

California WaterFix is the product of decades of planning, analyses and public feedback. A conveyance facility in the Sacramento-San Joaquin Delta (the “Delta”), as proposed in CWF, has been in the works as far back as the 1960’s. These efforts gained momentum in August 2000, when the CALFED Bay-Delta Program released a report outlining a new 30-year joint effort by federal and state agencies to improve the ecosystem, water supply reliability, water quality, and levee stability in the Delta.

The planning process continued in 2006 with the initiation of the Bay Delta Conservation Plan (“BDCP”) planning process, the predecessor of CWF. BDCP was a far-reaching and ambitious plan aimed at addressing issues of conveyance and ecosystem restoration in one project. Like CWF, BDCP called for a dual conveyance system, with delivery facilities located both north and south of the Delta.<sup>2</sup>

Since 2008, over 600 briefings, public meetings, and workgroups have been held throughout California to provide information and solicit input on BDCP and, ultimately, CWF. As a result, the proposed conveyance facilities have been subjected to an unprecedented level of

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<sup>2</sup> In April 2015, the conveyance and ecosystem components of BDCP were separated into what is now known as California WaterFix and California EcoRestore.

analyses, review and scrutiny for more than a decade. Over this period, more than 100 alternatives have been considered, 19 of which were analyzed in detail in the environmental impact reports/environmental impact statements (“EIR/EIS”) that were developed collaboratively by the Department of Water Resources (“DWR”), the United States Bureau of Reclamation (“Reclamation”), state and federal fish and wildlife agencies, water contractors, nongovernmental organizations, agricultural stakeholders and the general public. The Final EIR/EIS, which DWR certified on July 21, 2017, exceeds 50,000 pages in length, excluding comment letters.

The public has participated at every step of the process. The feedback on the various EIR/EIS is instructive. Over the last five years, DWR and Reclamation have received and responded to tens of thousands of comments from the public. In December 2013, the agencies issued the initial Draft EIR/EIS for BDCP, leading to over 18,000 comments from the public, including a comment letter from Food & Water Watch (“FWW”). After DWR and Reclamation reviewed this feedback and held over 12 public meetings throughout California, they issued a revised and partially Recirculated Draft EIR/Supplemental Draft EIS in July 2015, leading to over 12,000 new comments, including two letters submitted by FWW. By the time the final EIR/EIS was issued, members of the public and other stakeholders had submitted over 49,000 total pages of comment letters.

### *Metropolitan’s Involvement*

Metropolitan and its staff have devoted countless hours to ensuring the proposed project serves Metropolitan’s Member Agencies’ interests and needs. Over this period, the staff has kept the Board of Directors and the public apprised of CWF’s status and progress.

Since 2006, Metropolitan’s staff has provided monthly updates to various committees of the Board of Directors in noticed public meetings. CWF and its alternatives have been the subject of several Board retreats and in-depth workshops that were also noticed public meetings. These include full-day workshops held on multiple occasions to review key aspects of CWF and solicit input and direction from Board members. In 2017 alone, the staff presented three white papers to the Board and the public, each focusing in detail on a different aspect of CWF, which were then explained and discussed in public meetings.

Metropolitan has invited and received feedback from the public throughout this process. In the last year alone, the public has addressed the Board of Directors, including its committees, by voicing hundreds of public comments at Board meetings. The below events from the last year are illustrative:

- September 26, 2017: The Board of Directors convened a special meeting to discuss CWF. Over the course of the nearly five-hour meeting, 66 members of the public, including Ms. Norton, provided comments to the Board. The staff provided presentations about the history of Metropolitan's involvement with CWF, proposed implementation agreements, key questions, and other issues. At that meeting, at least eight Board members spoke about CWF.
- October 10, 2017: The Board of Directors convened a regular meeting to discuss and vote on Metropolitan's role in supporting and financing CWF (agenda item 8-4). Over the course of the meeting, which lasted over three hours, 43 members of the public, including Ms. Norton, provided comments to the Board. At the conclusion of the lengthy discussion, the Metropolitan Board voted in favor of Option 1, expressing support for CWF and authorizing Metropolitan to participate in financing up to 25.9% of overall project costs, and certain related actions.
- February 12, 2018: The Board of Directors' Water Planning and Stewardship Committee held a meeting to update members on CWF. At the meeting, Metropolitan's staff reviewed the State's recent actions relating to a change in the scope of CWF and the impact on water supply and potential costs to Metropolitan. Staff responded to questions regarding the potential impact of the proposed staged approach on project costs, the EIR process, Central Valley Project ("CVP") water contractor participation, benefits associated with project participation and non-participation, design configuration, possible water transfers, and potential stage 2 funding participation. Members of the public were offered the opportunity to speak.
- February 27, 2018: The Board of Directors' Special Committee on Bay-Delta convened a meeting to provide an update on CWF. Five members of the public, including Ms. Norton, provided comments to the committee. The staff provided presentations and addressed questions from the committee, which involved issues such as reverse flow impacts and the staged implementation approach, Joint Powers Authority participants, the potential for Metropolitan to provide increased funding of CWF cost, project capacity, and other issues.
- March 13, 2018: The Board of Directors convened a public hearing to discuss Metropolitan's property tax rate limitations and proposed rates and charges through 2020, as part of its regular meeting. During the public hearing, of the 20 public comments 13 members of the public, including Ms. Norton, provided comments to the Board relating to CWF.
- March 27, 2018: The Board of Directors convened a special meeting to conduct a public Board workshop to discuss CWF. At the workshop, staff gave a detailed presentation that summarized the October 2017 Board Action and subsequent developments, discussed allocation of project costs and

benefits, explored possible alternatives for financing construction of the full project, and reviewed the key terms of proposed implementation agreements. During the workshop, which lasted approximately 2.5 hours, 18 members of the public, including Ms. Norton, provided comments to the Board. At the workshop, at least 13 Board members spoke about CWF.

- April 10, 2018: The Board of Directors convened a regular meeting to discuss and vote on options that included expressing support for staged CWF implementation or to increase Metropolitan's funding of the full CWF (agenda item 8-7).<sup>3</sup> During the meeting, which lasted over four hours, 68 members of the public, including Ms. Norton, provided comments to the Board. The Board voted 61% to 39% in favor of Option 2, authorizing Metropolitan to finance up to 64.6% of total CWF project costs in order to enable the full project, as approved in the October 2017 vote, to be constructed, and to authorize certain related actions.

At every step, Metropolitan's directors have engaged in lively discussion with a range of views expressed and have invited feedback from members of the public. In fact, Metropolitan understands that Ms. Norton or other FWW representatives have addressed the Board of Directors on no fewer than 33 occasions over the last seven years.

#### *Member Agencies' Involvement*

Metropolitan is a cooperative of 26 cities, municipal water districts and one county water authority (collectively, "Member Agencies"), whose representatives comprise Metropolitan's Board of Directors. The Member Agencies or their sub-agencies serve approximately 19 million residents across six Southern California counties. In advance of Metropolitan's votes on October 10, 2017 and April 10, 2018, various Member Agencies and other public agencies within Metropolitan's service area conducted noticed public meetings in their own districts relating to CWF. They represent another level of the public's significant participation and involvement in CWF and its funding.

As with the meetings at Metropolitan, there was an opportunity for public comment and, in many cases, the public, including Ms. Norton, attended and provided input to the legislative bodies of the Member Agencies and other public agencies in connection with their determination

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<sup>3</sup> Following the October 2017 vote, federal CVP water contractors declined to participate in funding CWF. DWR subsequently announced that it would explore the option of constructing the project in stages, based on available funding. Metropolitan studied this staged implementation approach, including at the February 27 meeting and March 27 workshop, and included it as one of the options on April 10.

of whether to pass resolutions supporting CWF. For example, at the Pasadena City Council meeting on September 18, 2017, Ms. Norton and nine other members of the public provided comments before the City Council voted unanimously to support CWF. At the Glendale City Council meeting on September 19, 2017, Ms. Norton and four other members of the public provided comments before the City Council voted unanimously to support CWF.

In the days leading up to the vote on April 10, 2018, there continued to be extensive public discourse surrounding CWF. Representatives from Member Agencies and other local stakeholders submitted dozens of support letters in the week immediately preceding the April 10 vote. At least 75 such letters are available to view on Metropolitan's website, which were posted for public review before the April 10 meeting.<sup>4</sup> In addition, a number of Member Agencies, and other public agencies, including the Central Basin Municipal Water District, Long Beach Board of Water Commissioners, Municipal Water District of Orange County, San Gabriel County Water District, the City of Burbank, and the City of Villa Park discussed CWF at public meetings and invited public feedback before voting to support CWF in advance of Metropolitan's April 10 vote.

These are several of many examples of open public meetings and discourse where Member Agencies engaged the public and invited its feedback on CWF, its significance for California's water delivery infrastructure, and its potential impact on water policy statewide.

### *Media Coverage*

The California WaterFix has been among the most scrutinized infrastructure projects in California history. Between September 1, 2017 and April 10, 2018, Metropolitan is aware of at least 333 television segments and radio stories that aired in California covering CWF. All of these stories ran in the months leading up to the April 10 vote. They collectively reached many millions of Californians.

Importantly, in advance of the April 10 meeting, the press reported on what the Notice describes as evidence of the alleged serial communications by certain board members. Such evidence was thus known to the public before the April 10 vote.

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<sup>4</sup> See California WaterFix Toolkit, <http://www.mwdh2o.com/DocSvcsPubs/WaterFix/statements-newsletters-press-releases-and-white-papers.html>.

*Analysis of Alleged Brown Act Violation*

Metropolitan acknowledges that some members of Metropolitan's Board engaged in private communications and stated their own perspectives to other members of the Board in advance of the April 10 meeting. In numerous cases, directors and/or the Member Agencies they represent had also publicly stated their perspectives before and/or after these communications in public meetings, resolutions, and publicly posted correspondence before the April 10 meeting. As noted above, documentation responsive to the CPRA Request collected to date relating to the communications that occurred outside of the April 10 meeting are enclosed. The substance of the communications is generally consistent with previous votes cast and public statements previously made by the involved directors and/or their agencies prior to the private comments. Because the directors involved had previously voted in favor of CWF and, in many cases, made other public statements in support of CWF, the private comments outside of the public's view did not deprive the public of its opportunity to participate in the analyses, review and scrutiny of CWF, its funding and the alternatives. The private comments did not constitute the reaching of a consensus regarding CWF outside of the public's view.

A comparison of the votes taken on October 10, 2017, when Metropolitan's Board first approved CWF and authorized funding up to 25.9% of overall project costs, versus April 10, 2018, when the Board authorized funding up to 64.6% of overall project costs, reinforces the open and public nature of Metropolitan's decision-making process. Only four delegates changed their votes: (1) two of the five delegates from Los Angeles changed their votes from "Yes" to "No"; and (2) two of the four delegates from San Diego County Water Authority changed their votes from "Abstain" to "No."<sup>5</sup>

In enacting the Brown Act, the Legislature declared: "It is the intent of the law that the actions of public commissions, boards and councils and the other public agencies in this State be taken openly and that their deliberations be conducted openly." The approved conveyance facilities have been subjected to an unprecedented level of analysis, review and scrutiny for more than a decade. Along the way, the public's feedback has been solicited and taken into account.

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<sup>5</sup> On March 28, prior to the April 10 vote, the City of Los Angeles City Council at a regular meeting passed a resolution opposing increased costs for CWF for the City's rate payers providing the public with information that the Los Angeles delegates may not support increased funding for CWF. Indeed, the enclosed Los Angeles Times article dated April 9, 2018 states that the City of Los Angeles and the San Diego County Water Authority were expected to vote no on April 10.

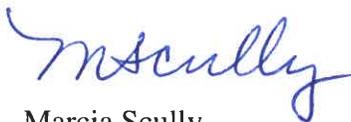
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Metropolitan disagrees with the contentions in the Notice. Nevertheless, to ensure that there is no question concerning the validity of the Board's consideration of, and its April 10 vote on, whether to authorize increased funding of CWF to ensure the construction of the full project the Board previously voted to support and fund in October 2017, Metropolitan has decided that this matter will be presented to the Board of Directors anew for consideration and a vote at its regular meeting on July 10, 2018. In advance of the meeting, Metropolitan will publicly disclose all of the alleged serial communications relating to the April 10 vote. In addition, Metropolitan will advise the members of Metropolitan's Board to refrain from any discussion of the matter prior to the July 10 meeting that could potentially be viewed as violating the Brown Act. Metropolitan continues to welcome open discussion and public engagement on this critical issue of modernizing and improving the State Water Project water delivery infrastructure on which Metropolitan's Member Agencies rely.

Given that the Board will consider Metropolitan's increased funding of CWF and related actions anew at the July 10, 2018 meeting, any legal action based on the allegations in the Notice prior to the July 10 action would be both premature and moot. We request that you allow the continued public discourse and new Board action regarding CWF to take place.

Should you have any further questions, please direct all communications regarding your Notice to me. I can be reached by phone at (213) 217-6115 or by email at [mscully@mwdh2o.com](mailto:mscully@mwdh2o.com).

Very truly yours,



Marcia Scully  
General Counsel

MS:jmm

Enclosures

cc: Metropolitan Board of Directors  
Metropolitan Member Agencies