



May 7, 2018

Rosa Castro, Board Administrator
Jeffrey Kightlinger, General Manager

Metropolitan Water District of Southern California
700 North Alameda Street
Los Angeles, CA 90012

NOTICE OF BROWN ACT VIOLATION

DEMAND TO CURE OR CORRECT pursuant to Gov. Code §54960.1

and

DEMAND TO CEASE AND DESIST pursuant to Gov. Code §54960.2

REQUEST FOR PUBLIC RECORDS

Dear Board of Directors,

We write on behalf of Food and Water Watch (“FWW”) and the First Amendment Coalition (“FAC”) to call your attention to violations of the Ralph M. Brown Act, Government Code section 54950 *et seq.*, by the Board of Directors of the Metropolitan Water District of Southern California (the “District”). This letter serves as a demand to cure and correct and cease and desist the practices constituting such violations, and as a request for public records pursuant to the California Public Records Act, Government Code section 6250 *et seq.*

In its meeting on April 10th, the District took action via a formal vote of approval to implement the California WaterFix; authorize the General Manager to execute certain agreements and agreement amendments related to financing, pre-construction and construction activities for California WaterFix; and authorize General Manager to negotiate draft terms and conditions for one or more multi-year transfers of State Water Project water supplies.

However, this vote was nothing more than a rubber stamp, and was a result of multiple serial communications between members of the Metropolitan Water District Board of Directors, both directly and with intermediaries, including Governor Brown. These communications were intended to lead to and actually resulted in a collective concurrence among a majority of the board members to approve the actions ultimately rubber stamped at the April 10th Board Meeting.

The Brown Act was designed ensure that local government agencies conduct the public's business openly and publicly, and that the public has an opportunity to meaningfully engage in the decision of the legislative body. Because this process took place behind closed doors, the public was prevented from witnessing and participating in the decision-making process, in clear violation of the Brown Act.

These serial meetings violate the Brown Act's prohibitions on serial meetings. (See Gov. Code § 54952.2(b) [prohibiting "a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body"].) The serial communications were themselves violations of the Brown Act, irrespective of any formal action being taken after they occurred. (*Id.*; See also.; 216 *Sutter Bay Associates v. County of Sutter* (1997) 58 Cal. App. 4th 860, 877.)

The facts substantiating these violations have been widely reported.

An April 11 article in the *Voice of San Diego*¹ stated (italics are added for emphasis): "Last Monday, Metropolitan staff called a press conference to announce the agency would abandon plans to build two tunnels and spend \$5 billion to build just one. But a few of Metropolitan's 38 board members, led by *Brett Barbre of the Municipal Water District of Orange County, decided to see if they could find the votes anyway. After Metropolitan staff seemed to throw in the towel, Barbre said he expressed his "strong dismay" and then called Steve Blois, a Metropolitan board member from Ventura County. Then they started making calls, trying to sell other board members on the idea of paying \$11 billion for two instead of \$5 billion for one. By the middle of last week, it seemed like they might be on to something.* Perhaps there were enough water agencies in Southern California willing to stomach the risk."

Another article in the *Voice of San Diego* on April 19^{th2} stated: "Brett Barbre, a Metropolitan board member from Orange County who whipped votes in favor of the project, said it had support from about 52 percent of the board going into the weekend. That was enough to pass, but barely. 'What we were lacking was cushion and the elusive 60 percent,' he said in an email. The governor made calls before Tuesday's vote and helped get that number up to 61 percent."

And in *LA Times* article that appeared on April 9^{th3} MWD director Brett Barbre stated: "I think it's very close, ..."They just need to get 11% more and they can kill us."

¹ <https://www.voiceofsandiego.org/topics/government/tunnel-vision-what-the-big-water-vote-means/>

² <https://www.voiceofsandiego.org/topics/government/sacramento-report-how-jerry-brown-helped-get-the-tunnels-deal-across-the-finish-line/>

³ <https://www.latimes.com/local/lanow/la-me-tunnels-vote-20180409-story.html>

Brown Act violations are further evidenced by MWDOC Director Larry Dick's comment at their April 5th Municipal Water District of Orange County meeting that: "April 10th is Tuesday, we should be voting on this. *I happen to know from the best bookmaker at MWD, that says we have a guaranteed win on the two tunnels at 51.67%*"

At MWDOC's April 19th Water Policy Dinner with Karla Nemeth Brett Barbre explained how Neemeth worked very closely with MWD and Governor Brown to make phone calls prior to the vote. One of the phone calls he recounts is about the Glendale representative on the MWD board, Zareh Sinanyan, who "never shows up at the MWD board anyway for meetings... I had tried calling him, no response. Blois tried calling him, no response. Kightlinger, no response. *The only person that was able to get a hold of him was the Governor. And I'm not going to tell you what he did to get a hold of him.*" And Barbre in the same meeting also, introduced Director Stephen J. Faessel from Anaheim as the "MWD director that put them over 50% for the twin tunnels."

MWD's board adopted action was contrary to its own professional staff recommendation, an option according to its staff that was placed on at the 11th hour, increased Southern California ratepayer's financial obligation by \$5.6 billion with zero water supply benefit for the region.

After three hours of public testimony with a large contingency of ratepayers raising concerns, MWD Director Gloria Gray moved the option that was not recommend by staff, and the board chair would not allow substitute motions.

In addition to the serial meeting violations described above, the agenda items were deficient. Government Code section 53635.7 requires that the posted agenda must contain "a brief general description of each item of business to be transacted or discussed at the meeting..." For any "decision that involves borrowing" \$100,000 or more, the item must be "discuss[ed], consider[ed] and deliberate[ed]" as "a separate item of business." The revenue bond authorization for WaterFix will exceed \$100,000, and was required to be agenized and discussed separately. Because it was not properly agenized, the Board's actions also violated Government Code section 54954.2.

Note that Government Code section 54952.6 defines "action taken" for the purposes of the Act expansively, i.e. as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

CURE AND CORRECT DEMAND

Pursuant to Government Code §54960.1, you have 30 days from the receipt of this demand to cure and correct the challenged actions by:

1. Rescind the actions taken by Metropolitan's Board of Directors on April 10, 2018 to approve to implement the California WaterFix; authorize the General Manager to

execute certain agreements and agreement amendments related to financing, pre-construction and construction activities for California WaterFix; and authorize General Manager to negotiate draft terms and conditions for one or more multi-year transfers of State Water Project water supplies; and “RESOLUTION 9238 OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA AUTHORIZING DISTRICT’S FINANCIAL SUPPORT OF CALIFORNIA WATERFIX AND AUTHORIZING THE GENERAL MANAGER TO NEGOTIATE, EXECUTE AND DELIVER VARIOUS FINANCING IMPLEMENTATION AGREEMENTS AND RELATED DOCUMENTS” and “RESOLUTION 9239 OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA AUTHORIZING DISTRICT’S PURCHASE OF CAPACITY INTEREST IN THE CALIFORNIA WATERFIX, THE FINANCING OF SUCH PURCHASE, AND OTHER ARRANGEMENTS, AND AUTHORIZING THE GENERAL MANAGER TO NEGOTIATE, EXECUTE AND DELIVER VARIOUS AGREEMENTS AND DOCUMENTS RELATED THERETO.” Copies of all resolutions are linked below⁴

2. In order to provide a meaningful opportunity for informed public participation by members of the public, the Board must identify and publicly disclose the substance of any and all of the serial communications relating to the Board’s April 10th vote, as described above, prior to any future discussion or action on this item.

If you fail or refuse to cure and correct as demanded, we may seek judicial invalidation of the challenged actions pursuant to §54960.1, in which case, we will also seek an award of court costs and reasonable attorney fees pursuant to Government Code §54960.5.

CEASE AND DESIST DEMAND

The Brown Act also provides a separate and distinct remedy allowing an interested person to “commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations,” “to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body.” Government Code §54960.

In order to avoid litigation to force the Board into compliance, FWW and FAC demand that the Board cease and desist from the practices set forth above, which impair the public’s ability to participate in its government. Namely, the Board must acknowledge the Brown Act violations set forth above by making an unconditional commitment to refrain from the following practices in the future:

1. Refrain from any future serial communications outside of a public meeting on any item of business within its subject matter jurisdiction; and,

⁴ <http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003738339-1.pdf>
<http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003738366-1.pdf>
<http://edmsidm.mwdh2o.com/idmweb/cache/MWD%20EDMS/003738367-1.pdf>

2. Agree to agendaize any decision that involves borrowing \$100,000 or more as a separate item of business.

Pursuant to Government Code §54960.2, you have 30 days from the receipt of this cease and desist demand to provide an “unconditional commitment” that the Board will refrain from engaging in the practices described above at any time in the future. The unconditional commitment must be approved by the Board in open session at a regular or special meeting as a separate item of business, and not on its consent agenda. If you fail or refuse to cease and desist as demanded, we may file an action pursuant to Government Code §54960, in which case, we will seek an award of court costs and reasonable attorney fees pursuant to Government Code §54960.5.

REQUEST FOR PUBLIC RECORDS

Pursuant to the California Public Records Act, Government Code section 6250 et seq. (“CPRA”) we request that the District disclose the following:

- (1) All communications between members of the Board of Directors of the Metropolitan Water District, their staff, and any third parties, relating to the District’s April 10 decision to implement WaterFix between August 2017 and April, 10 2018; including use of personal mobile phones, text messages, personal emails, and personal and professional calendars
- (2) All documents relating to the District’s April 10 decision to implement WaterFix, including but not limited to any transcript, audio/video recording, and minutes of the closed session.

If any portion of the records requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. If you believe that any express provision of law exists to exempt from disclosure all or a portion of the requested records requested, you must notify us of the reasons for the determination not later than 10 days from your receipt of this request letter. (Gov. Code § 6253(c).) Any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing. (Gov. Code § 6255(b).)

Sincerely,

Brenna Norton
Senior Organizer
Food & Water Watch

David Snyder
Executive Director
First Amendment Coalition

CC: Metropolitan Water District Board of Directors
Marcia Scully, General Counsel