



March 10, 2021

Chair Lana Peterson and Board Members
Santa Ana Regional Water Quality Control Board
Attn: Julio Lara
3737 Main Street, Suite 500 Riverside, CA 92501-3339

RE: Ex Parte Communication Comment

Sent via electronic submission to: RB8-PoseidonHB.comments@Waterboards.ca.gov

Dear Chair Peterson and Board Members:

The California Coastkeeper Alliance and Orange County Coastkeeper work to protect water quality throughout the state for the benefit of California communities and ecosystems. We write to comment on the February 11, 2021 Disclosures of Ex Parte Communications¹ from the California Regional Water Quality Control Board, Santa Ana Region Members Letitia Clark, Joe Kerr, Kris Murray, and Lana Ong Peterson that disclosed prohibited ex parte communications regarding the Proposed Huntington Beach Desalination Facility pursuant to Government Code sections 11430.40 and/or 11430.50.²

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. The Administrative Procedure Act provides for the conduct of administrative adjudication proceedings of state agencies. The act generally prohibits, during a pending proceeding, communication regarding any issue in the proceeding to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate, except as specified.³

Prohibited ex parte communications can have a number of consequences. A prohibited ex parte communication may be grounds for disqualifying the board member from participating in the adjudicative proceeding.⁴ A prohibited ex parte communication could also be used as a basis for a subsequent legal challenge to the board's adjudicative action, *especially if the communication is not properly disclosed and the board member participates in the proceeding.*⁵ The Administrative Procedure Act also authorizes a

¹ Santa Ana Regional Water Quality Control Board, BOARD MEMBERS' DISCLOSURES OF EX PARTE COMMUNICATIONS REGARDING THE PROPOSED HUNTINGTON BEACH DESALINATION FACILITY AND NOTICE OF OPPORTUNITY TO COMMENT, February 11, 2021; *available at* https://www.waterboards.ca.gov/santaana/public_notices/docs/2021/Ex_Parte_Disclosures_and_Notice_of_Opportunity_to_Comment.pdf.

² California Coastkeeper Alliance and Orange County Coastkeeper reserve the right to rely on any other comments submitted on this item, and specifically supports and adopts by reference the comments submitted by Azul.

³ Gov. Code, § 11430.10.

⁴ Michael Lauffer, Chief Counsel, State Water Resources Control Board: OFFICE OF CHIEF COUNSEL, EX PARTE COMMUNICATIONS QUESTIONS AND ANSWERS DOCUMENT, April 25, 2013, pg. 10; *available at* https://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

⁵ *Id* (emphasis added).

water board to sanction a person violating the prohibition on ex parte communications, although this is likely to be used only for egregious or recurring violations.⁶

Santa Ana Regional Water Board Members Murray, Kerr, Peterson and Clark should be disqualified from the Poseidon – Huntington Beach adjudicative proceeding. The APA states that a presiding officer in an adjudicative proceeding is subject to disqualification for bias, prejudice, or interest in the proceeding.⁷ A presiding officer also may be disqualified because of receipt of a prohibited ex parte communication.⁸ The law is clear that ex parte communications to Water Board Members is prohibited from pending adjudicative proceedings. The evidence is indisputable that Secretary Blumenfeld communicated with Santa Ana Board Member’s Murray, Kerr, and Peterson in regard to the Poseidon – Huntington Beach project. It is also indisputable that the Poseidon – Huntington Beach NPDES/WDR consideration is a pending adjudicative action. Evidence also suggests that Secretary Blumenfeld was communicating to the Santa Ana Board Members that the Poseidon – Huntington Beach project was important to the Governor as part of the Water Resiliency Portfolio. And evidence suggests that Water Board legal counsel was aware of these communications likely as early as August 5th, yet disclosure of the prohibited ex parte communications was not disclosed until February 11th, 2021 – over 6 months later. Additionally, Board Member Clark received campaign donations from the Los Angeles/Orange Counties Building and Construction Trades Council (Council) on August 19th, 2020. She was appointed to the Santa Ana Regional Water Board on October 21st, 2021, where she then knew or should have been aware of the pending Poseidon – Huntington Beach adjudicative hearing, and as such, she should be disqualified for having a financial conflict.

A. The Proposed Huntington Beach Desalination Facility is a Pending Adjudicative Action.

According to the State Water Board’s own Ex Parte Guidance⁹, ex parte communications are prohibited for pending adjudicative actions. The ex parte communications prohibition for adjudicative proceedings originates in court decisions and has been codified in Chapter 4.5 of the Administrative Procedure Act.

Individual discharge permits are a judicial function barred from ex parte communications. Regional Boards routinely determine the rights and duties of individual dischargers.¹⁰ In this regard, the boards perform a judicial function.¹¹ The judicial function manifests itself when the boards adopt permits and conditional waivers or take enforcement actions.¹²

Adjudicative actions are those actions where the water boards make a decision after determining specific facts and applying laws and regulations to those facts.¹³ Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons.¹⁴ Adjudicative proceedings include, but are not limited to,

⁶ *Id.*

⁷ Gov. Code, § 11425.40(a).

⁸ Gov. Code, § 11430.60; State Water Resources Control Board, IN THE MATTER OF EXTENSION OF ORDER WR 95-6 OR EQUIVALENT TEMPORARY COMPLIANCE WITH THE 1995 WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION PERMITTEES AND LICENSEES, Order: WR 99 – 002, March 3, 1999.

⁹ Michael Lauffer, Chief Counsel, State Water Resources Control Board: OFFICE OF CHIEF COUNSEL, EX PARTE COMMUNICATIONS QUESTIONS AND ANSWERS DOCUMENT, April 25, 2013; *available at* https://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

enforcement actions and permit issuance.¹⁵ For example, any person who proposes to discharge waste to waters of the state must apply for a discharge permit. The proceeding to consider whether to issue the permit and the conditions to include in the permit would be adjudicative.¹⁶ The State Water Board provides a list of common water board actions that are adjudicative proceedings. These include National Pollutant Discharge Elimination System (NPDES) permits and Waste Discharge Requirements (WDRs).¹⁷ The Poseidon Huntington Beach proceeding is for the permit issuance of a combined NPDES/WDR. The Poseidon-Huntington Beach proceeding is clearly an adjudicative proceeding.

B. The Governor and CalEPA Secretary are Prohibited from Ex Parte Communications regarding the Proposed Huntington Beach Desalination Facility.

According to the State Water Board's own Ex Parte Guidance, the Governor's Office, including the California Environmental Protection Agency (CalEPA) Secretary, is subject to the rules prohibiting ex parte communications. The prohibition on ex parte communications extends to any "person" attempting to communicate with a board member about an issue in a pending adjudicative proceeding.¹⁸ The APA broadly defines person to include "an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character."¹⁹ As a result, essentially anyone expressing an interest in a water board action and attempting to communicate with a board member is subject to the prohibition on ex parte communications in adjudicative proceedings.²⁰ This broad prohibition includes persons representing other government officials and agencies (local, state, or federal) who are subject to the Administrative Procedure Act's prohibition on ex parte communications if they attempt to communicate with a water board member about a pending adjudicative proceeding.²¹

C. Board Members Kerr, Murray, and Peterson Should Be Disqualified from Participating in the Poseidon – Huntington Beach Adjudicative Proceeding Due to Receipt of Prohibited Ex Parte Communications.

A prohibited ex parte communication may be grounds for disqualifying the board member from participating in the adjudicative proceeding.²² Additionally, a prohibited ex parte communication could be used as a basis for a subsequent legal challenge to the board's adjudicative action, especially if the communication is not properly disclosed and the board member participates in the proceeding.

The APA states that a presiding officer in an adjudicative proceeding is subject to disqualification for bias, prejudice, or interest in the proceeding.²³ A presiding officer also may be disqualified because of receipt of a prohibited ex parte communication.²⁴ If the presiding officer is disqualified, the record pertaining to the prohibited communication may be sealed by order of the disqualified presiding officer so that the succeeding presiding officer will not see it.²⁵

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 10.

²³ Gov. Code, § 11425.40(a).

²⁴ *Id.*

²⁵ Gov. Code, § 11430.60; State Water Resources Control Board, IN THE MATTER OF EXTENSION OF ORDER WR 95-6 OR EQUIVALENT TEMPORARY COMPLIANCE WITH THE 1995 WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY CALIFORNIA DEPARTMENT OF WATER

The State Water Board may order reconsideration on all or part of a decision or order adopted by the State Water Board upon petition by any interested person.²⁶ California Water Board regulations lists the following causes for reconsideration:

1. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
2. The decision or order is not supported by substantial evidence;
3. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
4. Error in law.²⁷

The ex parte disclosures seem to be crafted by the Water Board's legal counsel in an attempt to limit exposure. Each disclosure came with the exact identical statement: "I did not initially consider these conversations as ex parte communications and was not aware that they could be considered as such. In an abundance of caution, I am disclosing these conversations as ex parte communications..." Given the six-month delay in disclosure, coupled with the carefully crafted disclosures clearly aided by Water Board attorneys, it is doubtful we will ever know what was truly communicated prior to the Poseidon – Huntington Beach adoption hearing. Despite the carefully worded disclosures, the pattern of communications demonstrates that the CalEPA Secretary - as an extension of the Governor's Office - hoped to convey to the Board Members that time was of the essence to make a "very important decision" and that the Poseidon – Huntington Beach Desalination Facility fits into the "administration's commitment to water quality and statewide water resilience consistent with the release of the Water Resilience Portfolio." Basically, it was communicated to Water Board Members that the Poseidon – Huntington Beach project was important to the Governor and it was time to move forward with the regulatory process.

These disclosures are part of a larger systemic problem. These disclosures are only part of a wider set of improprieties that have tainted objectivity by the Regional Board and have detrimentally harmed the public's trust in our government. The public is only being told what the Board Members are telling us through legally crafted disclosures. The disclosed ex parte communications themselves are just the "tell" for the likelihood that other communications have occurred and have not been disclosed. People generally do not text people they randomly speak with in order to ask questions about how things are going. The hearing was being live-streamed and there were likely dozens of people in the audience that the Governor's Office could have asked for an update from. By communicating with the Regional Board Members directly during an adoption hearing for an adjudicative proceeding, an innocuous question like, "When are you voting" is really a clever reminder of prior conversations or a previously communicated interest by the Governor.

1. Joe Kerr Should be Disqualified from Participating in the Poseidon – Huntington Beach Adjudicative Proceeding.

Between July 29, 2020 and July 31, 2020, Member Kerr exchanged text messages and had two telephone conversations with Secretary Blumenfeld.²⁸ On July 29th, the Secretary expressed that "the Board had *a very important decision* before it concerning the proposed Poseidon Huntington Beach Desalination

RESOURCES AND UNITED STATES BUREAU OF RECLAMATION PERMITTEES AND LICENSEES, Order: WR 99 – 002, March 3, 1999.

²⁶ Wat. Code, § 1122.

²⁷ Cal. Code Regs., tit.23, § 768.

²⁸ Supra note 1.

Facility.²⁹ The Secretary also “asked when [Member Kerr] thought the Board would make a decision...”.³⁰ On July 30th, Secretary Blumenfeld “again inquired when [Member Kerr] thought the Board may reach a decision.”³¹

These communications indicate that Secretary Blumenfeld was interested in a decision to be made.

2. Kris Murray Should be Disqualified from Participating in the Poseidon – Huntington Beach Adjudicative Proceeding.

On or about August 5, 2020, Kris Murray received a telephone call from Secretary Blumenfeld.³² The Secretary expressed “the administration’s commitment to water quality and statewide water resilience consistent with the release of the Water Resilience Portfolio.”³³ In doing so, Secretary Blumenfeld “mentioned the proposed Poseidon Huntington Beach Desalination Facility in this context.”³⁴ Ms. Murray responded that she was “aware of the administration’s commitment to water resilience and acknowledged that desalination is one of the water supply diversification options discussed in the Water Resilience Portfolio.”³⁵

The communication between Ms. Murray and Secretary Blumenfeld was not just a courtesy check-in to see how the Member was holding up. It is clear from Ms. Murray’s disclosure that the substantive issue of desalination as part of the Governor’s Water Resilience Portfolio was discussed. While the public will never know exactly what was said, the disclosure suggests that Poseidon – Huntington Beach was an important project for the Governor. This type of illegal ex parte pressure is exactly the type of communication to be avoided by the requirements of the APA.

These communications are more troubling given Ms. Murray’s demonstrated bias and predetermined position regarding the outcome of the Poseidon – Huntington Beach project. On February 8, 2019, Ms. Murray participated in her first Santa Ana Regional Water Board meeting as a member of the Board, where she disclosed previous events where she spoke in direct support of ocean desalination, and the Poseidon – Huntington Beach ocean desalination project, on the following occasions:

- Feb. 2018: Santa Ana Regional Water Quality Control Board Meeting
- Oct. 2017: State Lands Commission Hearing
- July 2013: Orange County Water District

Despite stating that she has not advocated for or against a specific project, that she has no bias, and “does not have a predetermined position on the project,”³⁶ Ms. Murray has a demonstrated history of directly supporting the project. For example, during the October 2017 State Lands Commission hearing, Ms. Murray spoke beyond the scope of the agenda topic – the project’s Environmental Impact Report – and directly supported the project, stating that “it will create thousands of jobs, millions in new tax revenue, but most importantly will ensure billions of gallons in fresh drinking water, which is essential to our quality of life,

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Santa Ana Regional Water Quality Control Board, February 8, 2018 hearing, available at <https://cal-span.org/unipage/?site=cal-span&owner=RWQCB-SA&date=2019-02-08>.

to our quality of our economy, and the quality of our communities.”³⁷

Critically, Ms. Murray’s most recent public support of the project took place exactly one year prior to her first day serving on the Santa Ana Regional Water Board – where Ms. Murray spoke before the very Board she sits on now, the Santa Ana Regional Water Board, in support of ocean desalination and indicated that she would make herself available to Board members and staff regarding the “technical capacity” of the project.

Prior to an agenda item before the Santa Ana Regional Water Board concerning the proposed Poseidon – Huntington Beach ocean desalination project, Ms. Murray disclosed she had previously received campaign contributions from Poseidon and did not have a disqualifying financial interest in the project. While Ms. Murray did not receive campaign contributions from Poseidon within twelve months of the Regional Water Board meeting, Ms. Murray received \$2,000 from Southern California Pipe Trades District Council 16 (Committee ID # 760715) and \$2,000 from Sprinkler Fitters United Assoc 709 (Committee ID # 901643) on the date of the first Santa Ana Regional Water Board meeting in which Ms. Murray served in an official capacity: February 8, 2019. Ms. Murray received an additional \$2,000 from UA Journeymen & Apprentices Local #250 (Committee ID # 743959) on March 1, 2019. It is well known and documented that at least one of these labor unions stand to benefit from the Poseidon – Huntington Beach ocean desalination project.³⁸ Ms. Murray further received \$2,000 on March 1, 2019 from OC Tax PAC (Committee ID # 1288619), a well-known supporter for the Poseidon – Huntington Beach ocean desalination project.

These multiple conflicts, along with the now disclosed prohibited ex parte communications, result in an insurmountable bias that insists that Ms. Murry be disqualified from deciding on the Poseidon – Huntington Beach adjudicative proceeding.

3. Lana Peterson Should be Disqualified from Participating in the Poseidon – Huntington Beach Adjudicative Proceeding.

On July 29, 2020, Member Peterson exchanged a few text messages and had a telephone conversation with Secretary Blumenfeld.³⁹ Similar to other disclosed ex parte communications, Secretary Blumenfeld “mentioned the administration’s commitment to water quality and statewide water resilience consistent with the release of the Water Resilience Portfolio and its *importance to the Governor*.”⁴⁰ The disclosure goes on to state that Secretary Blumenfeld “mentioned the proposed Poseidon Huntington Beach Desalination Facility and noted that the Board had a big meeting coming up on the project.”⁴¹

Again, this call was not just a simple check-in. Even from the legally crafted disclosure, it is clear the Secretary was calling to remind Member Peterson that this project was important to the Governor. The communication was specifically about Poseidon’s proposed facility as it purportedly relates to the administration’s policy goals.⁴²

³⁷ California State Lands Commission, October 19, 2017 meeting transcript, *available at* https://www.slc.ca.gov/Meeting_Transcripts/2017_Documents/10-19-2017_Transcripts.pdf.

³⁸ See e.g., Seawater Desalination: Huntington Beach Facility (accessed December 10, 2019), *available at* <https://www.hbfreshwater.com/supporters.html>.

³⁹ Supra note 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Supra note 6, at 10.

4. Member William Ruh Should Not Be Disqualified but the Indirect Attempts to Communicate Only Further the Impropriety that has Occurred with this Adjudicative Action.

Several attempts to communicate with Member Ruh furthers the impropriety of the Poseidon – Huntington Beach adjudicative proceeding. The Administrative Procedure Act prohibits “direct or *indirect*” communications to water board members about an issue in a pending adjudicative proceeding.⁴³

In the ex parte disclosures, Member Kerr admits that “Secretary Blumenfeld encouraged [him] to reach out to Santa Ana Water Board Chair Bill Ruh on the anticipated timeframe. I stated that I did not have Chair Ruh’s phone number and Secretary Blumenfeld said he would text it to me.”⁴⁴ Secretary Blumenfeld did provide Member Kerr with Ruh’s cell phone number and Kerr left a voicemail attempting to determine the anticipated timeframe from Secretary Blumenfeld.⁴⁵ This type of indirect communication is also barred by the APA.

Poseidon also attempted indirect communications with Member Ruh. According to Orange County Coastkeeper’s Public Records Act request and response, on August 27th, Scott Maloni emailed Hope Smyth to ask: “When are you scheduled to talk to Chairman Ruh?”. Hope responded that her meeting with the Chair was scheduled for that day at 3:30. Mr. Maloni then responded with “Today? Ok. Let me know if anything comes out of your call this afternoon that you want me to address in the letter.” Poseidon does not get any special privileges to know “if anything comes out of” a call between Regional Board staff and the Chair of the Regional Water Board deciding on the applicant’s NPDES/WDR permit. That again is an indirect and prohibited communication.

D. Santa Ana Water Board Member Leticia Clark Should be Disqualified for Bias and a Financial Conflict of Interest.

To promote fairness and just decision-making within our government, California law provides that a presiding officer of an administrative adjudication is subject to disqualification for bias, prejudice, or interest in a proceeding.

- (a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:

...

- (5) The presiding officer⁴⁶ is subject to disqualification for bias, prejudice, or interest as provided in Section 11425.40.⁴⁷

This disqualification for bias, prejudice, or interest applies to all Water Board members, given that the State and Regional Water Boards perform adjudicative actions where a decision is reached after determining specific facts and applying laws and regulations to those facts. Adjudicative proceedings include, but are not limited to, enforcement actions and permit issuance.⁴⁸ Regional Board Members are thus subject to conduct rules under the California Government Code, specifically the Administrative Adjudication Bill of Rights, and may be disqualified and/or recused from specific Regional Water Board actions if evidence is presented that demonstrates a Board Members’ bias or prejudice in the outcome of a

⁴³ *Id.*, at 4.

⁴⁴ *Supra* note 1.

⁴⁵ *Id.*

⁴⁶ Gov. Code § 11405.80 (“Presiding officer” means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding).

⁴⁷ Gov. Code § 11425.10 (“Administrative Adjudication Bill of Rights”).

⁴⁸ SWRCB OCC, Transmittal of Ex Parte Communications Questions and Answers Document (April 25, 2013), *available at* https://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

specific action.

According to Ms. Clark's ex parte disclosure, in or about April 2020, she had an in-person conversation with Ernesto Medrano of the Los Angeles/Orange Counties Building and Construction Trades Council (Council).⁴⁹ Mr. Medrano of the Council has testified often in support of the Poseidon – Huntington Beach project. According to the July 2020 Adoption Hearing transcript, Mr. Medrano stated that "[t]his project is important" and boasted that "[t]his is the seventh time that the building trades have addressed this Board [asking to 'approve this project']".⁵⁰

During her conversation, Mr. Medrano discussed Poseidon Water's proposed Huntington Beach Desalination Facility (Facility). Ms. Clark disclosed that "Mr. Medrano discussed the Council's *goal of providing jobs* to its members and touched on project labor agreements in general."⁵¹ Specific to the proposed Facility, Mr. Medrano mentioned that *the proposed Facility was one of several projects that would create a lot of jobs for the Council's members.*"⁵² The disclosure is clear that the Council supported the Poseidon project. We do not claim that Ms. Clark's communication with the Council was prohibited, but it does raise concerns of bias under Government Code § 11425.10.

The perceived bias coupled with Ms. Clark's financial conflict should disqualify her from the Poseidon – Huntington Beach adjudicative proceeding. Santa Ana Water Board Member Leticia Clark has received campaign contributions from the Council within the last 365 days and should be disqualified from the Poseidon – Huntington Beach adjudicative proceeding. Under Government Code Section 84308:

"Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars (\$250) from a party or from any participant shall disclose that fact on the record of the proceeding. *No officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7.*"

According to Ms. Clark's 497 Contribution Form, she received a campaign contribution of \$1,000 (in excess of \$250) from the Council on August 19, 2020.⁵³ Ms. Clark was appointed to the Santa Ana Regional Water Quality Control Board on October 21st, 2021⁵⁴, which as of that date, she knew or should have known that her campaign contribution from the Council qualified as a financial conflict in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months. As such, Ms. Clark should be disqualified from the Poseidon – Huntington Beach adjudicative proceeding.

⁴⁹ Supra note 1.

⁵⁰ Transcript pgs. 185-186.

⁵¹ Supra note 1.

⁵² Supra note 1.

⁵³ <https://www.tustinca.org/DocumentCenter/View/4130/Clark-for-Council-2020>

⁵⁴ Office of Governor Newsom, Governor Newsom Announces Appointments 10.21.20; available at <https://www.gov.ca.gov/2020/10/21/governor-newsom-announces-appointments-10-21-20/>

E. Additional Questions Arising from the February 12th OC Register Story We Want Answered on the Administrative Record.

(1) Who authorized Secretary Blumenfeld to contact Board Members? And on what grounds?

In the February 12th O.C. Register story entitled, Regulators on Poseidon Desalination Plant Received Calls that are Likely Prohibited⁵⁵ (*This story was updated Saturday, Feb. 13*), Secretary Blumenfeld said that he regularly communicates with board members under his purview as a regular course of business and that *he got the greenlight from CalEPA lawyers* to make the calls to the regional board members at the time of the Poseidon hearings last summer.⁵⁶ This is surprising to hear since Michael Lauffer, Chief Counsel for the Office of Chief Counsel, wrote the 2013 Ex Parte Memo titled “EX PARTE COMMUNICATIONS QUESTIONS AND ANSWERS DOCUMENT”.⁵⁷ Who gave Secretary Blumenfeld the “greenlight” to make calls to the Regional Board Members? And on what grounds was that justified given the clear guidance from the State Water Board’s Chief Counsel expressly prohibiting these types of communications?

The Office of Chief Counsel is clear in its Ex Parte Guidance that “ex parte communications are prohibited for pending adjudicative actions.” The Guidance is clear that NPDES and WDR proceedings are adjudicative. The evidence is clear that the Poseidon – Huntington Beach NPDES/WDR proceeding was pending – he called in the middle of the hearing itself – and the project was obtaining a NPDES/WDR making it adjudicative. The Office of Chief Counsel’s Guidance is also clear that nobody is above the law:

“[T]he prohibition on ex parte communications extends to *any person* attempting to communicate with a board member about an issue in a pending adjudicative proceeding...essentially *anyone* expressing an interest in a water board action and attempting to communicate with a board member is subject to the prohibition on ex parte communications in adjudicative proceedings. This broad prohibition includes *persons representing other government officials* and agencies (local, state, or federal) who are subject to the Administrative Procedure Act’s prohibition on ex parte communications if they attempt to communicate with a water board member about a pending adjudicative proceeding.”⁵⁸

According to the Office of Chief Counsel’s own Ex Parte Guidance, these communications were objectively prohibited. The issue of whether these communications are allowable is not open for debate – it is black and white obvious that these communications were prohibited. Furthermore, it is concerning that all of the Water Board Members’ disclosures include the exact same legally crafted statement:

“I did not initially consider these conversations as ex parte communications and was not aware that they could be considered as such. In an abundance of caution, I am disclosing these conversations as ex parte communications...”

It is concerning that the Office of Chief Counsel would give Secretary Blumenfeld the “greenlight” to make calls to Regional Board Members during an adoption hearing for a pending adjudicative

⁵⁵ Orange County Register, Regulators on Poseidon Desalination Plant Received Calls that are Likely Prohibited, February 12, 2021 and updated on February 13, 2021; available at <https://www.ocregister.com/2021/02/12/regulators-on-poseidon-desalination-plan-received-calls-that-probably-are-prohibited/>.

⁵⁶ *Id.*

⁵⁷ Supra note 6.

⁵⁸ *Id.* at 8.

proceeding. It is also concerning that all the three Water Board Members that disclosed these ex parte communications did not know that phone calls and text message in the middle of an Adoption Hearing for a pending adjudicative proceeding was an ex parte communication. And finally, it is deeply concerning that these communications were only disclosed “in an abundance of caution.” Communications from the CalEPA Secretary to Regional Water Board Members conveying that the Poseidon – Huntington Beach project was of “importance to the Governor” during the middle of an Adoption Hearing for a pending adjudicative proceeding is a serious violation of the APA.

(2) When was Ms. Sablan first made aware of the ex parte communications from Secretary Blumenfeld to Santa Ana Regional Board Members?

The Ex Parte Guidance explains that “water board members should contact the Office of Chief Counsel with questions about ex parte issues. A regional water board member should contact the attorney assigned to represent the member’s region or the assistant chief counsel for regional board services.” When was Ms. Sablan first informed of these communications? The O.C. Register story states “[Secretary Blumenfeld] said he originally planned calls to other members of the regional board but after again conferring with the lawyers and telling them that he’d mentioned the Poseidon issue, *the lawyers revised their advice.*” The last disclosed communication was to Member Murray on August 5th. As mentioned, the Secretary planned to call others but was prevented due to a change in advice from the lawyers. This would mean Ms. Sablan and/or other Water Board attorneys were notified – before the August 7th hearing – that ex parte communications were taking place.

Since the Water Board attorneys knew of the ex parte communications before the August 7th Adoption Hearing, why were these illegal communications not disclosed at the hearing? The Regional Water Board was expected to vote on the highly controversial Poseidon – Huntington Beach at the August 7th Adoption Hearing without the disclosure of these ex parte communications. The three Water Board Members, and Ms. Sablan as Legal Counsel for the Santa Ana Regional Water Board, had a duty to disclose these communications prior to the potential adoption of a project that had illegal ex parte communications as part of the adjudicative proceeding.

That the ex partes communications were disclosed only when pending Public Records Act requests threatened to expose them anyway further diminishes the Regional Board’s credibility as an impartial government decision-maker. On July 30, 31, and August 7 2020, in the days following the ex parte communications and months before they were disclosed, Board Members heard from interested parties and members of the public, and questioned staff and the applicant regarding the Regional Board’s tentative order for Poseidon’s project. No legal or procedural requirements prevented the Regional Board from making a decision immediately after that hearing, and none of the information disclosed regarding the ex parte communications would have been on the record or known to the public at that time.

(3) Why did it take six months to disclose such an obvious illegal communication?

The O.C. Register article states that “As for the more than six-month delay in making the communications public, Blumenfeld said he would have liked to see the issue come out earlier and it was the upcoming hearing on Poseidon in April that prompted the disclosures by his staff.”⁵⁹ Why did Water Board legal counsel wait six months to disclose such serious violations of the APA? We are not aware of any rule that requires the disclosure of prohibited communications as part of the release of a regulatory package – such as the release of a revised permit. In fact, the only guidance we are aware requires *permissive* ex parte

⁵⁹ Supra note 33.

communications to be disclosed within seven working days from the communication.⁶⁰ This is for permissive ex parte communications. If permissive communications must be disclosed within seven working days, there is no justification for why serious violations of the APA were not disclosed for six months.

We know from responsive files obtained in connection with Orange County Coastkeeper's Public Records Act request that Ms. Sablan knew of the ex parte disclosures on at least December 7th, 2020. At the latest, these violations should have been disclosed and noticed to the public on December 8th, 2020. They were not disclosed until February 11, 2021. The impermissible ex parte communications were not disclosed within the required time for permissible ex parte communications. It is clear that the disclosures were strategically withheld.

(4) Meetings between CalEPA and Poseidon leading up to the August 7th Adoption Hearing Make the Ex Parte Communication Violations Even More egregious.

From Orange County Coastkeeper's Public Records Act response, we know that several meetings were held between CalEPA and Poseidon leading up to the August 7th Adoption Hearing. According to PRA records, CalEPA (Kristin Peer) met with Regional Board staff and Poseidon on August 5th. Then again on August 6th, CalEPA (Kristin Peer) met with State Water Board staff and Poseidon on August 6th. While the subject of those meetings was not disclosed, it is clear from the August 7th Adoption Hearing that CalEPA was meeting with Poseidon to broker a deal on the mitigation section of the Poseidon – Huntington Beach NPDES/WDR Permit. According to Hope Smyth's presentation on August 7th, at 20 minutes and 8 seconds into the recorded hearing, Ms. Smyth mentions CalEPA being part of the mitigation negotiations.⁶¹ Then again at 22 minutes and 50 seconds, Ms. Smyth explains that "Again, these discussions have been happening with the discharger and EPA."⁶² Importantly, the mitigation section of the Poseidon-Huntington Beach permit seemed to be the remaining sticking point for the Santa Ana Regional Board Members leading up to the August 7th Adoption Hearing. These negotiations between CalEPA and Poseidon further demonstrate that getting the Poseidon – Huntington Beach permit adopted at the August 7th hearing was important to the Governor and make the already serious APA violations even more problematic.

To remedy the effect of the ex parte communications, the Board Members in question must be disqualified from further participation in proceedings and decisions related to the Poseidon project. The APA's prohibition on ex parte communications is grounded in "constitutional principles of due process and fundamental fairness."⁶³ 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," are "not subject to rebuttal or comment[.]" and "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."⁶⁴ Disclosure of prohibited ex parte communications is a mandatory remedy for violations of the APA, and if the ex parte communication "causes bias or prejudice... there

⁶⁰ Ex Parte communications are allowed for Pending General Orders – but disclosure is required within seven days. According to State Water Board guidance, EX PARTE DISCLOSURE REQUIREMENTS FOR PENDING GENERAL ORDERS, "Water Board staff must receive the disclosure within seven (7) working days after the board member receives the communication."

⁶¹ August 7th, 2021 Hearing Video Recording; available at: <https://cal-span.org/unipage/?site=cal-span&owner=RWQCB-SA&date=2020-08-07>.

⁶² *Id.*; <https://cal-span.org/unipage/?site=cal-span&owner=RWQCB-SA&date=2020-08-07>.

⁶³ Supra Note 6, at 2.

⁶⁴ Supra note 6, at 2.

may be grounds for disqualification.”⁶⁵ The permissive remedy of disqualification is “intended as [a] tool[] to remove the effect of an ex parte communication.”⁶⁶

It is also highly likely that the ex parte communications caused bias or prejudice on the part of the Board Members’ who received them. Secretary Blumenfeld is a cabinet-level political appointee who head the agency that oversees the State and Regional Water Boards. His communications with Regional Board members regarding Poseidon’s proposed facility demonstrate an interest in the Regional’s Board’s pending decision within the highest levels of state government. Any assertion that no bias or prejudice was imbued concerning the matter that was the subject to the communications and pending before the Regional Board when Secretary Blumenfeld contacted the Board Members is untenable. Former Board Member Willian Von Blasingame’s appointment was not renewed after he expressed apprehension about the project. His termination is, no doubt, a warning to the rest. Disqualification of Board Members Kerr, Murray, and Peterson is appropriate and necessary.

Santa Ana Regional Water Board Members Murray, Kerr, Peterson and Clark should be disqualified from the Poseidon – Huntington Beach adjudicative proceeding. The APA states that a presiding officer in an adjudicative proceeding is subject to disqualification for bias, prejudice, or interest in the proceeding.⁶⁷ A presiding officer also may be disqualified because of receipt of a prohibited ex parte communication.⁶⁸ The law is clear that ex parte communications to Water Board Members is prohibited from pending adjudicative proceedings. The evidence is indisputable that Secretary Blumenfeld communicated with Santa Ana Board Member’s Murray, Kerr, and Peterson in regard to the Poseidon – Huntington Beach project. It is also indisputable that the Poseidon – Huntington Beach NPDES/WDR consideration is a pending adjudicative action. Evidence also suggests that Secretary Blumenfeld was communicating to the Santa Ana Board Members that the Poseidon – Huntington Beach project was important to the Governor as part of the Water Resiliency Portfolio. And evidence suggests that Water Board legal counsel was aware of these communications likely as early as August 5th, 2021, yet disclosure of the prohibited ex parte communications was not disclosed until February 11th, 2021 – over 6 months later. Additionally, Board Member Clark received campaign donations from the Los Angeles/Orange Counties Building and Construction Trades Council (Council) on August 19th, 2020. She was appointed to the Santa Ana Regional Water Board on October 21st, 2021, where she then knew or should have been aware of the pending Poseidon – Huntington Beach adjudicative hearing, and as such, she should be disqualified for having a financial conflict. Therefore, Santa Ana Regional Water Board Members Murray, Kerr, Peterson and Clark should be disqualified from the Poseidon – Huntington Beach adjudicative proceeding.

Sincerely,

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California Coastkeeper Alliance

Sarah J. Spinuzzi
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Orange County Coastkeeper
Inland Empire Waterkeeper
Coachella Valley Waterkeeper

⁶⁵ SWB Opinion (95-6) 4

⁶⁶ (95-6) citing -> (See Law Revision Commission Comments, 1995 Addition, for section 11430.60; see also 25 Cal. Law Revision Com. Rep. 55 (1995).)

⁶⁷ Gov. Code, § 11425.40(a).

⁶⁸ Gov. Code, § 11430.60; State Water Resources Control Board, IN THE MATTER OF EXTENSION OF ORDER WR 95-6 OR EQUIVALENT TEMPORARY COMPLIANCE WITH THE 1995 WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY/SACRAMENTO-SAN JOAQUIN DELTA ESTUARY CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION PERMITTEES AND LICENSEES, Order: WR 99 – 002, March 3, 1999.