To: Moffatt, Brett[Moffatt.Brett@epa.gov]
From: Engelman, Alexa
Sent: Tue 12/23/2014 8:12:05 PM
Subject: RE: Problem with Joint Proposal

Ex. 5 - Attorney Client

Have a great holiday!

From: Moffatt, Brett
Sent: Monday, December 22, 2014 5:48 PM
To: Engelman, Alexa
Subject: FW: Problem with Joint Proposal
Importance: High

Alexa,

I just saw this (after getting knocked off email earlier today) and see you were not cc'd.

Ex. 5 - Attorney Client

Thanks for handling the petition issue with HQ!

Brett

From: Reeves, Bruce@DOC [mailto:Bruce.Reeves@conservation.ca.gov]
Sent: Monday, December 22, 2014 2:25 PM

To: Quast, Sylvia
Cc: Moffatt, Brett; Wyels, Philip@Waterboards; Bishop, Jonathan@Waterboards; Bohlen, Steven@DOC; Nechodom, Mark@DOC; Marshall, Jason@DOC; Turner, Justin@DOC; Quast, Sylvia; Diamond, Jane; Findley, Timothy@DOC; St. Michel, Graham@DOC
Subject: Problem with Joint Proposal
Importance: High

Sylvia,

Time for reflection on a plan can, more often than not, end up revealing flaws that aren't immediately appreciated. This appears to be the case with point number 3 of the "Joint Proposal" email Phil sent in following last Friday's phone conference. We have a serious pragmatic and conceptual concern that came up as we were trying to formulate possible language for some of the enforcement orders that are contemplated to be issued under the plan under discussion.

Point number three, while labeled as dealing with aquifers "historically treated as exempt," otherwise appears to simply assume that those aquifers are, in fact and in how they will be treated, not exempt. This will be very problematic when the time comes to issue orders to current injectors in the 11 aquifers. What will DOGGR say is the basis for those orders? If, by the time shut in orders must be issued in the 11 aquifers, USEPA were to take a firm public position that the aquifers are not exempt, we could presumably issue orders in accordance with that position. But if USEPA makes no such statement, and we issue the orders anyway, it is not clear what the orders will say about the status of the 11 aquifers. If we expressly or impliedly deny their exempt status in the orders, we are likely to be greeted with significant objections and litigation stating that our orders belie a significant historic record that indicates the primacy delegation was, in fact, predicated on the 11 aquifers being exempt.

As it is currently written, Point 3 contemplates that "The Water Boards and DOGGR will work with EPA to evaluate these eleven aquifers based on current data." But there is no clear statement of what this review will look like, what it will culminate in, or whether it will, in short, be meaningful. Instead, Point 3 goes

on to say, in essence, that the 11 aquifers will functionally, if not formally, be treated by all as currently not exempt:

…If any portion of these aquifers meets the criteria for exemption and the Water Boards determine that injection into the aquifer will not adversely affect existing or potential beneficial uses of groundwater, DOGGR will prepare and submit an exemption request to EPA. The evaluation and subsequent decision for these eleven aquifers will be completed within 24 months. In the interim, injection wells into these aquifers will follow the requirements of 1.a and 1.b, above.

We will obviously need to discuss this further, as we have made it clear that the status of these aquifers is a point of contention for us. Therefore, in your coming letter, please do not characterize our proposal as "joint" as it pertains to point number 3. I regret that I did not appreciate the net effect of that language earlier. The fault is mine alone.

Bruce Reeves

Chief Counsel

Department of Conservation

801 K Street, 24th Floor

Sacramento, CA 95814

(916) 323-6733

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