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State Water Resources Control Board

TO: Santa Monica Bay Restoration Commission

FROM: Frances L. McChesney
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DATE: August 15, 2011

SUBJECT: PROCEDURES AND PRACTICES OF THE SANTA MONICA BAY RESTORATION COMMISSION

The Santa Monica Bay Restoration Commission (Commission) has received questions and comments from the public about various practices, procedures, and actions of the Commission, asserting that the Commission is acting inconsistent with applicable laws or governing documents. The purpose of this Memorandum is to provide background information about the Commission, to advise you about the Commission's compliance with the applicable laws and documents, and to provide related recommendations.

Background

In 1988, the State of California and the United States Environmental Protection Agency (U.S. EPA) established the Santa Monica Bay Restoration Project (Project) as a National Estuary Program under the provisions of Section 320 of the federal Clean Water Act. The Project was designated by U.S. EPA as an agency to plan for the Santa Monica Bay's restoration and to oversee implementation of the Santa Monica Bay Restoration Plan (Bay Restoration Plan). (Pub. Res. Code §30988(c).) The National Estuary Program is designed to promote collaborative watershed-based partnerships in order to develop and implement a comprehensive conservation and management plan that addresses the range of environmental problems facing the estuary, while recognizing and balancing the needs of the local community. Implementation of the comprehensive Bay Restoration Plan, approved by the State of California and the U.S. EPA in 1995, is a primary mission of the Commission.

Senate Bill 57 (Hayden), Statutes 2000, Chapter 983, signed by Governor Davis on September 29, 2000, created within the State Water Resources Control Board (State Water Board) the Project. Senate Bill 57 required that the Secretary for Environmental Protection, in consultation with the Secretary of the Resources Agency and the Project, make recommendations for measures to coordinate state policies to restore Santa Monica Bay.

Enactment of legislation and development of a non-regulatory, locally based state entity to facilitate coordination of state programs on behalf of Santa Monica Bay was recommended.

Senate Bill 1381 (Kuehl), Statutes 2002, Chapter 598, followed upon Senate Bill 57 and the recommendations of the report to the Legislature, and renamed the Project as the Santa Monica Bay Restoration Commission (Cal. Pub. Res. Code §§ 30988-30988.3). Although Senate Bill 1381 requires the State Water Board to provide administrative services to the Commission, the Commission possesses independent authority to execute the duties required by Senate Bill 1381. Senate Bill 1381 calls for development of a Memorandum of Understanding (MOU) that ensures the coordination of state programs affecting Santa Monica Bay, that delineates the authority of the Commission and its governance structure with respect to the implementation of those state programs, and that prescribes the Commission's membership.

The mission of the Commission is to restore and enhance the Santa Monica Bay through actions and partnerships that improve water quality, conserve and rehabilitate natural resources, and protect the bay's benefits and values. The Commission supports actions to monitor, assess, coordinate, and advise the activities of state programs and oversee funding that affects the beneficial uses, restoration and enhancement of Santa Monica Bay and its watersheds. (Pub. Res. Code §30988(d).) The Commission is a non-regulatory, locally based state entity that independently executes its duties. Its membership includes federal, state and local public agency officials and employees and representatives of other stakeholder interests. The enabling statute provides that governance structure shall be set forth in the MOU. (Pub. Res. Code § 30988.2(b)(1).) As set forth in the MOU, the Commission is composed of the Governing Board, the Bay Watershed Council, and a Technical Advisory Committee. The Governing Board is the key decision-making authority of the Commission.

The Santa Monica Bay Restoration Foundation (Foundation) is the non-profit partner of the Commission. Formed in 1991, the Foundation raises and expends funds for research, education, planning, cleanup efforts, and other priorities identified in the Bay Restoration Plan. The Foundation Board of Directors is diverse and comprised of community members, local government and agency representatives, and members of the Commission's Governing Board. The Foundation supports the work of the Commission, with a focus on obtaining and expending funds not otherwise available to the Commission. As stated in the Commission's Annual Work Plan, the Foundation serves as the primary fiscal agent for federal funding provided for Commission activities. The Foundation receives the bulk of its funding in the form of a U.S. EPA grant pursuant to the federal Clean Water Act section 320.

Claims of the Public

1. Members of the public[1] have asserted that it is improper for the Commission to use a private website (i.e., a ".org" website) to provide information and notices regarding its meetings. They also have asserted that use of the private website for public notices of the Commission "brings into question the legitimacy of Bagley-Keene notification to the public." They have asserted that staff has "acknowledged improper practices" to this effect.

[1] For example: Note to SMBRC Commissioners, from Grassroots Coalition, Patricia McPherson, patriciamcpherson1@verizon.net (June 16, 2011).

Response: The Bagley-Keene Open Meetings Act (Bagley-Keene Act) (Gov't Code §§ 11120-11132) applies to the Commission. The Bagley-Keene Act requires with respect to notice of its meetings:

> "The [Commission] shall provide notice of its meeting to any person who requests that notice in writing. Notice shall be given and also made available on the Internet at least 10 days in advance of the meeting, and shall include the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting. The written notice shall additionally include the address of the Internet site where notices required by this article are made available." (Gov't Code § 11125)

The Commission has complied with the Bagley-Keene Act. The Bagley-Keene Act does not specify that the Internet site must be a "public" site, only that the notice includes certain information and that it inform the public of the address of the Internet site. The Commission has used www.santamonicabay.org as its informational website for several years. There is nothing in state law that precludes the use of this site. The allegation that this is improper lacks legal support and is without merit. Staff did not acknowledge any impropriety. Rather, staff acknowledged that the current website is large and, in order to simplify the ability of Governing Board members and members of the public to find Governing Board schedules, agendas, et al., the Commission was developing a ".gov" website - www.smbrc.ca.gov - with basic information, which includes a link to www.santamonicabay.org that has more detailed information and documents. The staff has now established the new ".gov" website. Governing Board agendas had been posted on the ".org" website and now are also being posted on the new www.smbrc.ca.gov website. Commission staff provides multiple methods of distribution of the agenda and related information including posting, multiple emails, and physical posting at the Commission/Regional Water Board office, all consistent with the Bagley-Keene Act.

2. Members of the public have asserted that the content of the website is questionable because the information is written by "private individuals that are employed by the private 501(c)(3) known as the SMBR Foundation." They also have asserted that use of federal NEP money for the ".org" website "appears to be a misuse of public funds."

Response: This assertion is made without legal support or understanding of the structure of the Commission. As noted above, the Commission was established by legislation in 2002. The statute expressly authorizes the Commission to "[e]nter into contracts and joint powers authority agreements, as necessary, to carry out the purposes of the commission." In addition, the State Water Board is required to provide administrative services to the Commission.[2]

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[2] "The Santa Monica Bay Restoration Project is hereby renamed the Santa Monica Bay Restoration Commission. The commission shall independently execute the duties described in this section, and the State Water Resources Control Board shall provide administrative services to the commission." (Pub. Res.

(footnote continued on next page)

To carry out its mission, the Commission establishes an Annual Work Plan, which is approved and funded by U.S. EPA and other sources. The Annual Work Plan sets forth the budget, which includes contract services with staff of the Foundation, which is funded by U.S. EPA grants and other grants, to perform a variety of administrative functions. In addition, the State Water Board provides funding for staff at the Los Angeles Regional Water Quality Control Board to provide services to the Commission and for legal support from the State Water Board's Office of Chief Counsel. The Foundation has been providing funding and services to support the mission of the Commission dating back to when the Commission was still the Santa Monica Bay Restoration Project, and there is nothing in the statute creating the Commission suggesting that the Legislature intended that this arrangement should not continue. The ".org" website is managed by the staff of the Foundation, clearly an appropriate function to effectuate the stated statutory objectives of the Commission pursuant. The website is included in the Annual Work Plan, described as a communicative tool in the Work Plan. This is clearly not a misuse of public funds.

3. Members of the public have asserted that the Commission and the Foundation have not provided the Public Private Partnership (PPP) agreements or contracts and conflict of interest information and agreements that are cited as necessary by the state and federal authorities, e.g., the Bureau of Land Management and that there is not a proper PPP agreement between the Commission and the Foundation. They further state that "Foundation members are literally running the state agency" that is not seen in any other PPP. They also assert that "Foundation directors" use state email addresses, "misrepresenting themselves as employees of the State Water Board."

Response: The Commission operates in accordance with the statute establishing the Commission in 2002, which essentially renamed the "Santa Monica Bay Restoration Project" as the "Santa Monica Bay Restoration Commission" and made clear that the Commission "shall independently execute its duties" as described in the statute. The statute did not change the historical functions. The Commission specifically has the authority to "[r]equest and receive federal, state, local, and private funds from any source, and expend those moneys for the restoration and enhancement of Santa Monica Bay and its watershed" and "[e]nter into contracts and joint powers authority agreements". (Pub. Res. Code § 30988.2(c)(3).) As set forth in the Commission's Annual Work Plan, various sources of funding are used to carry out the objectives of the Commission. The primary source of funding is a grant from U.S.EPA directly to the Foundation, which is used to pay staff of the Foundation to carry out the business of the Commission. Nothing in the statute establishing the Commission prevents the Commission from accepting services from the Foundation or from other entities.

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Code § 30988.2(a).) There is nothing in this statute that makes the State Water Board the exclusive provider of services to the Commission.

The relationship and partnership between the Commission and Foundation has long been established, was long-ago approved, and has been continuously funded. The assertion by members of the public that the BLM model is somehow a controlling requirement is a conclusion made without legal support and has no merit.

The relationship and partnership between the Commission and Foundation was established in the Bay Restoration Plan at the inception of the Commission's creation, and is re-affirmed in the Annual Work Plan. The Commission's approval of the Work Plan, which includes a description of the partnership, the budget, and how the federal, state, local, and private funds will be used, has continuously been approved in a public process. This Work Plan is approved annually first by the Commission Governing Board, then by U.S. EPA, which approval is manifest in the issuance by U.S. EPA of the annual implementation grant to the Foundation. The Annual Work Plan expressly states that the Foundation is the fiscal agent for the Commission and provides an annual working budget that expressly provides for the hiring of certain staff to carry out the Commission's Bay Restoration Plan.

As noted above, the Commission's establishing legislation expressly states that the State Water Board shall provide administrative services to the Commission. These administrative services include computer and technical support, which includes use of State Water Board email addresses. Historically, the use of such email addresses have not been restricted to only State Water Board employees, as contractors have used them for particular projects. The statute clearly contemplates that the Commission will operate with funds and support of various federal, state, local and private entities.

With respect to conflicts of interest, the Commission has adopted a Conflict of Interest Code that has been approved by the Fair Political Practices Commission. The Commission is in compliance with its Conflict of Interest Code.

4. Members of the public have asserted that since several directors of the Foundation are directors of the Commission and its Executive Committee, this arrangement creates a conflict of interest where the members of the Commission vote to approve grants that are carried out by the Foundation.

Response: Existing law does not preclude members of the Commission's Governing Board from also being members of the Foundation Board of Directors. The members of the Commission are governed by the Fair Political Practices Act (Gov't Code § 81000, et seq.), which sets forth detailed requirements with respect to conflicts of interest of members of public agencies. In summary, the Act states that no public official may participate in, or attempt to influence, a governmental decision in which he/she knows he/she has a disqualifying conflict of interest, specifically a financial conflict. As a brief summary, the regulations of the Fair Political Practices Commission set forth a series of rules to determine whether a conflict of interest exists. In general, there is no conflict where there is:

1. No economic interest of a board member or his/her family in a business entity or real property affected by the grant.

2. No sources of income to the board member or his/her family are contained in the grant.
3. The grant is not a source of gift to the board member or his/her family.

One of the Commission's responsibilities as set forth in the statute is to award and administer grants for the restoration and enhancement of the Santa Monica Bay and its watershed. The award of grants does not result in money being distributed to board members of either the Commission or the Foundation, nor any of their family members. Grants awarded by the Commission do not result in gifts or a source of income for the board members or their family members. Therefore, there is no conflict of interest.

The California Government Code also addresses the issue of conflicts with respect to nonprofit organizations. Government Code section 1091.5, subdivision (a)(12) states:

> "Nonprofit Organization Supporting Public Resources – An officer, director, or employee has a non-interest in the contracts of a nonprofit, tax-exempt corporation where the corporation has as one of its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, and where the officer, director or employee is acting on behalf of the corporation pursuant to an agreement between the corporation and a public agency to provide services related to such resources."

The officers, directors, and employees of the Commission and the Foundation do not have an interest, i.e., do not have a conflict of interest, in the grants awarded to the Foundation since the primary purpose of the Foundation is the conservation, preservation, or restoration of resources for public benefit and the directors, officers, and employees of the Foundation are acting on behalf of the Foundation pursuant to an agreement between the Foundation and the Commission.

5. Members of the public have asserted that because an account in the California State Treasury exists for the Commission, that all funds coming to the Commission are required to go into that account. They cite as an example the Foundation's receipt of funds from the California Energy Commission that they assert should have gone into the State Treasury account.

Response: The commenters are correct that the statute creating the Commission did establish an account in the State Treasury for the Commission. The statute states that funds appropriated by the legislature for the Commission are to be deposited into the State Treasury. The statute, however, did not provide the Commission with any state funding and the Legislature has not appropriated any funds for the Commission. Should the Commission receive any funds in the future, it is aware that those funds need to be managed in compliance with the Centralized State Treasury System. (Gov't. Code §§ 16300 et. seq.)

As set forth in the Annual Work Plan, the Commission's budget is based on funds from the U.S. EPA and the Foundation. The Commission receives federal funding through the U.S. EPA's National Estuary Program. The annual Work Plan describes the Foundation as its fiscal agent and funding for the National Estuary Program is deposited

in the Foundation account. Further, the State Water Board provides the required in-kind services as previously noted.

The Energy Commission funds referred to by the commenter involved a directive by the California Energy Commission to a private entity to provide funds for restoration activities overseen by the Commission. The private entity provided a check made payable to the Foundation in order for it to carry out the restoration activities of the Commission and its partners in the National Estuary Program. These activities must be consistent with the Bay Restoration Plan. Since the Foundation is the fiscal agent with regard to carrying out the Bay Restoration Plan, this private funding was deposited in the Foundation account.

The Foundation did not simply appropriate and spend these funds. The funds are used to award grants. All grants awarded from these funds were first approved by the Commission's Governing Board in a public hearing. Further, the grant awards went to a variety of different entities, including other non-governmental organizations and local governments. This is fully supported by agendas, staff reports, Governing Board resolutions, and grant agreements.

6. Members of the public have alleged improprieties with regard to the activities of the "Bay Watershed Council." They cite a lack of minutes of meetings of the Bay Watershed Council, a failure to follow the "Rules and Regulations" that "were established in the late 80's as part of the NEP program," and that there has been a misrepresentation as to the use of the NEP process.

Response: As noted above, the Santa Monica Bay Restoration Project was established in 1988. The Bay Watershed Council was the deliberative body of the Project between 1995 and 2002. In 2002, the Legislature enacted legislation renaming the Santa Monica Bay Restoration Project as the Santa Monica Bay Restoration Commission. The statute required the creation of MOU to ensure the coordination of the state programs affecting Santa Monica Bay and to delineate the authority of the Commission and its governance structure with respect to the implementation of those state programs. The governance structure set forth by the MOU, which has been recognized and supported by both the U.S. EPA and the State Water Board, replaces any previous governance structure of the Project. The statute does not provide for the continuation of the Bay Watershed Council as part of the governance structure of the Commission. Thus, references to the by-laws of a previous, now non-existent structure with no current force and effect, are not controlling on the Commission.

The MOU establishes the Bay Watershed Council as the broad stakeholder body of the Commission with the responsibility to provide advice to the Governing Board on restoration priorities. It is not the governing body of the Commission. It is the Governing Board, not the Bay Watershed Council, that provides ultimate approval of grants. Bay Watershed Council members may be engaged in Commission processes on an ongoing basis as set forth in the MOU. The Commission's frequent stakeholder meetings, the 2008 process to update the Bay Restoration Plan, and other symposia not only incorporate the membership of the Bay Watershed Council, but other members of the general public as well.

7. Members of the public have asserted that they have been excluded from participation in Commission business, have not received responses to Public Records Act requests for documents, have not been granted presentation time at the Commission's board meetings, and that the website does not include documents providing accountability with respect to use of public funds.

> Response: The commenters assertions are not accurate. With respect to public participation, members of the public have been provided the opportunity to comment on Commission business at public meetings and to speak with Commission members and staff. As noted in Item 1, above, it requires the Commission to provide a notice containing the agenda, but does not direct how the agenda is created. The meetings of the Commission typically include a public comment opportunity. With respect to Public Records Act requests, Commission staff and State Water Board counsel have responded, and continue to respond, to numerous Public Records Act requests and provided requested documents or provided the opportunity to review responsive documents. Commission staff is also working with other state and federal agencies regarding similar Public Records Act and Freedom of Information Act requests from the same members of the public. Documents are provided on the Intranet and by making requests to staff. The Bagley-Keene Act does not obligate the Commission to place items on the agenda solely upon the request of the public. With respect to accountability, public documents are readily available on the websites and/or upon request. In addition, the National Estuary Program is overseen by the U.S. EPA, which conducts regular audits of the Commission activities, including activities of the Foundation.

Conclusions and Recommendations

As discussed in this Memorandum, the assertions by members of the public that the Commission, the Foundation, and/or staff are not complying with applicable laws are generally not factually accurate and are not based on correct interpretations of applicable law. They have provided no information supporting a conclusion that the Commission has acted inconsistent with the applicable laws or governing documents. However, it is worth noting that the governance structure and activities of the Commission are complex and can be difficult to understand by the general public. I recommend that the Commission take certain actions to clarify documents and information provided to the public. For example, the current MOU includes some incorrect references to the Bay Watershed Council and its bylaws and should be revised. The Commission should provide information on the Commission's website to clarify the relationship between the Commission, U.S. EPA, the Foundation, and other public and private entities.

If you have any questions, please contact me at fmcchesney@waterboards.ca.gov or at (916) 341-5174.

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