

## MEMORANDUM

TO: Long Term Planning Stakeholders Group

FROM: Natural Heritage Institute

RE: Federal and State Open Meeting Laws

DATE: May 3, 1995

The Bay-Delta Long Term Planning Stakeholders Group (hereafter "Stakeholders Group" or "Group") has requested an analysis of whether the Federal Advisory Committee Act ("FACA") and/or California's open meeting laws might apply to its activities. The Group's membership and organization have yet to be formalized or solidified, and so we have addressed a range of potential scenarios. This memorandum briefly sets forth the pertinent provisions of FACA,<sup>1</sup> the Ralph M. Brown Act ("Brown Act"),<sup>2</sup> governing meetings of California local agencies, and the Bagley-Keene Open Meeting Act ("BAKA"),<sup>3</sup> governing meetings of California state agencies, and analyzes their potential application to the Stakeholders Group. Finally, it presents recommendations for how the Group may best function in compliance with relevant federal and state laws.

### I. EXECUTIVE SUMMARY

The Stakeholders Group is an informal, unchartered association of private parties and local agency representatives. The Group is interested in developing long-term solutions to water quality and supply problems in the Bay-Delta region, and some but not all of its current members were signatories to the December 15, 1994 Bay-Delta

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<sup>1</sup> 5 U.S.C. App. 2.

<sup>2</sup> Government Code section 54950 et seq.

<sup>3</sup> Government Code Section 11120 et seq.

accord. The Group anticipates that it will work closely with CALFED<sup>4</sup> and the Bay-Delta Advisory Council ("BDAC"). BDAC is intended to serve as the central vehicle for public participation in CALFED's planning process and will be a federally chartered advisory committee under FACA. CALFED has indicated that BDAC also will comply with state open meeting laws. The questions raised by the Group regarding the application of federal and state open meeting laws to itself depend on (1) its composition and activities and (2) its relationships with CALFED and BDAC.

We have concluded that FACA probably does not require the Stakeholders Group to be chartered as a FACA committee as long as certain conventions are observed. Similarly, California's open meeting laws for local and state agencies are unlikely to apply to the Group, but actions or activities of the Group or its members could bring these statutes to bear. The federal and state acts are summarized below and discussed in greater detail in the body of the memorandum.

#### A. Federal Advisory Committee Act

At first glance, the Stakeholders Group does not appear to be a candidate for FACA treatment. It is not organized or controlled by the federal government, and is in fact a voluntary initiative of private and local entities. Its current intent is to develop consensus-based solutions to the Bay-Delta morass independent of CALFED's activities. Moreover, the mere fact that CALFED officials may periodically attend Stakeholder meetings is insufficient to subject the Group to FACA.

Nevertheless, FACA could apply to the Stakeholders if the Group is construed by a court to be an "advisory committee" within the meaning of that Act. Indicia of advisory committee status could include direct contacts where CALFED seeks the advice of the Group as a "preferred source of information." Although meetings between the Stakeholders and CALFED are characterized as "public," they have been effectively limited to Stakeholders and thus may give rise to the impression that CALFED is inappropriately relying on a non-chartered advisory committee. The Group's activities could be vulnerable to a FACA challenge if it appears that CALFED is accepting recommendations from the Group directly.

To the extent that the Group wishes to remain unencumbered by FACA's requirements, it may undertake two related courses of action. First, the Stakeholders may reconstitute themselves as a "working group" of BDAC. Under this scenario, the

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<sup>4</sup> CALFED is a partnership of the Governor's Water Policy Council ("Council") and the Federal Ecosystem Directorate ("Club FED") organized for the purpose of developing a long-term solution to the problems affecting public values in the Bay-Delta Estuary.

Stakeholders' recommendations would be submitted to BDAC, a chartered FACA advisory committee, for its formal review and approval prior to submission to CALFED. Although the case law is limited, the federal courts appear to have determined that task forces serving essentially as "staff" to formal advisory committees are not required to be separately chartered under FACA. Second, the Group can erect more definitive barriers between itself and CALFED. Even if reconstructed as BDAC "staff," a court may look behind that exterior if it seems to be an artifice erected for the purpose of avoiding FACA. If it appears that BDAC is simply rubber stamping the recommendations of the Stakeholder Group, or that the Group is transmitting its advice directly to the federal decision-makers, a court could conclude that the Group is itself subject to FACA.

A conservative course would call for the Group to avoid direct meetings and communications with CALFED outside of the BDAC process. It probably would not be inappropriate for the Stakeholders Group to attend meetings between BDAC and CALFED in order to provide clarifying information regarding BDAC proposals. The Group also may want to suggest to CALFED that conferences with the Stakeholders Group be duly noticed as public meetings. As indicated above, however, individual CALFED officials may periodically attend Stakeholder meetings to provide information without implicating FACA. Finally, if the Stakeholder Group adopts some type of informal charter, it would be prudent for such a document to clarify the Group's view of itself as proceeding independently of the CALFED planning process, with its formal recommendations to be considered by CALFED only after BDAC's approval.

## B. State Open Meeting Laws

### 1. The Brown Act

The Brown Act provides that actions of local agencies, including boards and commissions, must be conducted openly. Since it does not serve a local agency, the Stakeholders Group would not appear to fall within the statutory definition. However, Brown Act requirements may attach to committees created by certain actions of local agencies. Although the case law is limited, relatively trivial actions of local agencies can operate to transform the Stakeholders Group into an entity subject to the Brown Act. If the Group wishes to remain unencumbered by the Act's open meeting requirements, local agency stakeholders should be cognizant of certain Brown Act constraints:

(a) If local agency representatives are "appointed" or "designated" to the Stakeholders Group by formal action of their respective legislative bodies, the Group itself may be considered a "legislative body" of those agencies, and thus subject to the Brown Act. Local agencies participating in the Group may want to refrain from taking

action which could be construed as relying on the recommendations of the Stakeholders Group.

(b) The Brown Act may also attach if representatives to the Group include members of a local agency's legislative body. Directors, board members, or other elected officials fall into this category. Such personnel may attend meetings and exchange information with Group members, so long as they do not employ any information acquired at such meetings for the purpose of making a recommendation to their respective agencies' boards or legislative bodies.

(c) If members of the legislative bodies of local agencies do participate as members of the Stakeholders Group, and the Group receives financial support from such agencies, the Brown Act may apply to the Group. Financial support could include provision of meeting facilities and/or administrative support staff.

## 2. The Bagley-Keene Open Meeting Act ("BAKA")

BAKA is similar to the Brown Act but applies to state agencies. A potentially significant BAKA issue could arise for the Stakeholder Group if BDAC is found to be a "state body." As indicated above, for FACA purposes it would be useful to establish the Stakeholders Group as a BDAC task force. BDAC has not been formally established as yet, but it is our current understanding that it will be a federally chartered advisory committee with its members appointed by the Secretary of the Interior, thus serving as federal appointees. It is also anticipated by the current version of the federal charter that BDAC members will be selected by the Governor and the California Water Policy Council. In addition, CALFED determined, at least initially, that BDAC should operate in full compliance with BAKA. Thus, some may view BDAC as a "state body" under BAKA.

If BDAC is a state body subject to BAKA, and then "creates by formal action" the Stakeholder Group as a working group of BDAC, the Group could then be considered to be an advisory commission to a state body, thus falling itself within the ambit of BAKA. Unlike the federal statute which does not require formal charter for working groups, state open meetings requirements may attach even to working groups of advisory committees when these groups are formally designated in some way. (See *infra* section III.B.) The limited case law and regulations provide no clear guidance on this issue.

There are several avenues to avoiding this potential FACA/BAKA conflict. First, the issue does not arise if BDAC is not a state body. Therefore, to the extent feasible, the state may structure its appointments to clarify that BDAC is not a state body for

BAKA purposes. Second, BAKA appears to attach to a committee such as the Stakeholders Group only if it is "created by formal action." BDAC may be able to recognize the Stakeholders Group (for FACA purposes) without formally establishing it as an advisory committee. This would be consistent with the independent genesis of the Stakeholders Group. A memorandum of agreement among the stakeholders regarding the purpose and organization of the Group could be helpful in clarifying its relationship to BDAC for purposes of both federal and state advisory committee act statutes.

Apart from the BDAC-designation issue, the Stakeholders Group does not appear to implicate BAKA since state agencies are not participants. BAKA would apply to the Group if two conditions are met: (1) State agency personnel participate as members the Group in their "official capacities," (*i.e.*, they are appointed to the group, and their respective agencies "exercise control" over their actions as Group members); and (2) the Stakeholders Group receives financial support of some kind from the state agency members of the Stakeholders Group.

Finally, some concerns have been raised about the propriety of overlapping membership between BDAC and the Stakeholders Group. Neither the federal nor state acts deal with this issue directly and the case law and regulations provide no additional guidance. On the one hand, overlapping membership would support the FACA concept of the Stakeholder Group serving as "staff" to BDAC instead of as a separate advisory committee to CALFED. On the other, membership overlaps may tend to support the view of these groups acting in concert as a limited cabal. We conclude that there is no clear legal ramification associated with either course.

## II. FACA ANALYSIS.

### A. FACA Overview.

FACA was enacted in 1972 in order "to control the growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government'."<sup>5</sup> FACA's stated purposes include:

- (1) to provide standards and uniform procedures governing the establishment, operation and duration of advisory committees;
- (2) to keep Congress and the public informed about the number, purpose, membership, activities, and cost of advisory committees; and
- (3) to insure that the function of advisory committees is advisory only, and that all matters under their consideration are determined by the official or officer concerned.<sup>6</sup>

In enacting FACA, Congress' primary concern "was with advisory committees formally organized which the President or an executive department or official directed to make recommendations on an identified governmental policy for which specified advice was being sought."<sup>7</sup> To carry out its objectives, FACA imposes specific requirements and limits on such advisory committees. For example, they must be specifically authorized and formally chartered. Their membership must be "fairly balanced," and their recommendations not "inappropriately influenced" by the appointing agency or special interests.<sup>8</sup> Of particular interest to the Stakeholders Group, FACA committees must hold open and noticed meetings, comply with detailed

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<sup>5</sup> Ass'n of Amer. Phys. and Surgeons v. Clinton, 997 F.2d 898, 902-03 (D.C. Cir. 1993), quoting 5 U.S.C. App. 2, § 2(a).

<sup>6</sup> 5 U.S.C. App. 2, § 2(b).

<sup>7</sup> Nader v. Baroody, 396 F. Supp. 1231, 1234 (D.D.C. 1975).

<sup>8</sup> 5 U.S.C. App 2, Sec. 5(b)-(c), 9(a); National Anti-hunger Coalition v Executive Committee, 711 F.2d 1071, 1073 (D.C. Cir. 1983).

recordkeeping requirements, and make documents available for public review.<sup>9</sup>

B. Application of FACA.

With certain exceptions not relevant here, FACA requirements apply to all groups that qualify as "advisory committees" under the act.<sup>10</sup> FACA defines "advisory committee" in relevant part as:

[A]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . (A) established by statute or reorganization plan, . . . or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government.<sup>11</sup>

Thus, the threshold question is whether the group in question falls within the broad definition of "advisory committee." This is a highly fact-specific analysis. As indicated above, we conclude that the Stakeholders Group could be perceived as an advisory committee, but may organize its activities to remove itself from of this category, should it determine to do so.

1. Interpreting the terms "established" and "utilized".

In determining whether a particular council is an "advisory committee" within the meaning of FACA, the key question is whether the council was "established" by statute or "established" or "utilized" by a federal agency. FACA does not define the terms "established" or "utilized," but the case law and regulations provide guidance.

In light of FACA's somewhat limited purposes, the courts have been wary to give the terms "establish" and "utilize" their broadest, plain meaning interpretation. The

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<sup>9</sup> 5 U.S.C. App 2, Sec. 10-11; Food Chemical News v Dep't. of Health and Human Services, 980 F.2d 1468, 1472 (D.D.C. 1992).

<sup>10</sup> FACA does not apply to any committee composed wholly of full-time officers of the federal government; the Advisory commission on Intergovernmental Relations; the Commission on Government Procurement; advisory committees of the Central Intelligence Agency and the Federal Reserve System; local civic groups rendering a "public service with respect to a federal program"; and state or local committees, councils, boards, commissions or similar groups established to advise state or local officials or agencies. 5 U.S.C. App. 2, §§ 3(2), 4(b), (c).

<sup>11</sup> 5 U.S.C. App. 2, § 3(2).

courts have recognized that to do so "would effectively stifle the daily intercourse between the government and the rest of the nation" by extending FACA's requirements "to virtually any convocation of two or more persons from whom any federal official desired information."<sup>12</sup> Such "a literalistic reading [of the statute] would catch far more groups and consulting arrangements than Congress could conceivably have intended."<sup>13</sup> Thus, "although [the] reach [of FACA] is extensive, . . . it was [not] intended to cover every formal and informal consultation between . . . an Executive agency and a group rendering advice."<sup>14</sup>

Therefore, the term "established" has been construed narrowly to mean only those agencies "directly established" by an agency.<sup>15</sup> Likewise, "utilized" encompasses only those "groups organized by, or closely tied to, the Federal Government, thus enjoying quasi-public status."<sup>16</sup> In other words, the Groups must be "so 'closely tied' to an agency as to be amenable to 'strict management of agency officials'."<sup>17</sup> This "actual management or control" standard is a "stringent" one.<sup>18</sup> In addition, the General Services Administration has defined the term "utilized" by regulation as follows:

Utilized . . . as referenced in the definition of "Advisory committee" . . . means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or

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<sup>12</sup> N.R.D.C. v. Herrington, 637 F. Supp. at 118-19.

<sup>13</sup> Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 463-64 (1989).

<sup>14</sup> Id. at 453.

<sup>15</sup> Lombardo v. Handler, 397 F. Supp. 792, 797 (D.D.C. 1975).

<sup>16</sup> Public Citizen, 491 U.S. at 461; see also Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048, 1051 (D.D.C. 1974) (holding that ad hoc committee of industry representatives subject to FACA because FACA was designed to avoid industry dominance of governmental officers and agencies) and Natural Resources Defense Council v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986) (holding that group of nuclear physicists consulting with the Secretary of Energy not subject to FACA because "the purpose of FACA was to suppress an evil which does not lurk in this particular case").

<sup>17</sup> Food Chemical News v. Young, 900 F.2d 328, 332-33 (D.C. Cir. (1990), quoting Public Citizen, 491 U.S. at 461-62.

<sup>18</sup> Washington Legal Found. v. U.S. Sentencing Comm'n, 17 F.3d 1446, 1450-51 (D.C. Cir. 1994).

recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.<sup>19</sup>

Thus, any group serving as a "preferred source" of advice or recommendations for a federal agency on a specific issue may be construed to be an "advisory committee" for FACA purposes.

2. Is the Stakeholders Group "established" or "utilized" by a federal agency?

The Stakeholders Group, whatever its final form, will not be "established" by CALFED,<sup>20</sup> since it was initiated and will be organized and directed by the Stakeholders themselves. Therefore, the key analytical question is whether the Stakeholders Group is "utilized" by CALFED. The answer to this question in turn depends upon the Group's relationship to CALFED, and how that relationship is perceived.

An association of representatives from private organizations and local government agencies which is organized and controlled exclusively by those individuals for the purpose of developing the group's *own* policy recommendations is clearly not subject to FACA.<sup>21</sup> This holds even if the group is organized for the purpose of influencing a federal agency decision, and even if federal agency officials are occasionally invited to attend group meetings, as long as the group's advice and recommendations are given the same weight as other members of the general public and are not the sole source of information relied upon by the federal agency. For example, the federal government has concluded that the Restoration Fund Roundtable is not

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<sup>19</sup> 41 C.F.R. § 101-6.1003.

<sup>20</sup> This analysis assumes that CALFED is a "federal agency" for purposes of FACA. FACA incorporates the APA definition of "agency" as "each authority of the government of the United States." This definition is broad enough to encompass CALFED.

<sup>21</sup> Natural Resources Defense Council v. Environmental Protection Agency, 806 F. Supp. 275 (D.D.C. 1992) (holding that Governor's Forum on Environmental Management not subject to FACA because the governors were solely responsible for convening meetings, setting agendas, and drafting proposals); Consumers Union of the United States v. Dep't of Health, Education and Welfare, 409 F. Supp. 473 (D.D.C. 1973) (holding that meetings between the FDA and representatives of the Cosmetic, Toiletry and Fragrance Association (CTFA) were not subject to FACA because the Food and Drug Administration was simply "responding and reacting to a CTFA-initiated and CTFA-administered program").

subject to FACA.<sup>22</sup>

However, a group of private individuals and agencies convened at a federal agency's formal request, or in response to its solicitation of information, for the purpose of submitting recommendations on a policy matter pending before the agency would be subject to FACA.<sup>23</sup> In Food Chemical News, the Bureau of Alcohol, Tobacco and Firearms "obtained the preliminary views of representatives of interested industry and consumer committees" regarding proposed amendments to federal alcohol labelling and advertising regulations. It did so by scheduling separate meetings with these groups to discuss the regulations and to obtain the groups' "comments and suggestions." These meetings preceded publication of the proposed rules in the Federal Register. The court held the groups were being "utilized" by a federal agency in order to obtain advice, reasoning that:

The subject matter of the meetings in question involved serious and much-debated public health issues . . . . The Government's consideration of such sensitive issues must not be unduly weighted by input from the private commercial sector.<sup>24</sup>

The Stakeholders Group and CALFED have the opportunity to structure their relationship to implicate or avoid FACA. The Group may choose to pattern itself after the Roundtable and develop recommendations on its own initiative independently of CALFED. Under this approach, the Group is unlikely to be perceived as being "utilized" by CALFED because it would not be subject to CALFED's "actual management and control."<sup>25</sup>

On the other hand, continuation of certain aspects of the Group's close coordination with CALFED's formal activities could give rise to FACA concerns. For example, the Stakeholders Group has met several times with the CALFED agency team

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<sup>22</sup> See letter from D. Nawi, Regional Solicitor of the Interior to T. Graff, Environmental Defense Fund, dated Mar. 30, 1995. The Restoration Fund Roundtable is a stakeholder initiated and controlled group organized for the purpose of developing recommendations on the funding, management and operation of the Restoration Fund of the Central Valley Project Improvement Act. Membership in the Roundtable is by invitation only, and its meetings are not open to the general public. The group meets on a regular basis and occasionally invites federal officials to attend its meetings.

<sup>23</sup> Food Chemical News v. Davis, 378 F. Supp. 1048 (D.D.C. 1974).

<sup>24</sup> Id. at 1051-52.

<sup>25</sup> Washington Legal Foundation, 17 F.3d at 1450-51; see also Food Chemical News, 900 F.2d at 332-33.

to discuss and coordinate long term planning issues and strategies. Although these joint sessions have been characterized as public meetings at which CALFED is simply imparting information to the Stakeholders Group, these meetings may give rise to at least the appearance that the Stakeholder Group is functioning as a *de facto* advisory committee. In addition, the Stakeholders Group itself at least initially may have understood that one of its primary functions was to collaborate with and advise CALFED during the course of its long-term planning process. These facts distinguish the Stakeholders Group from the Roundtable, which has maintained more distance from federal entities charged with administering the Restoration Fund.

The above factors could influence a court to conclude that the Stakeholders Group is in fact being "utilized" by CALFED because it is "closely tied to the Federal Government, thus enjoying quasi-public status."<sup>26</sup> This conclusion would be strengthened if CALFED appears to regard the Stakeholders Group as "a preferred source from which to obtain advice or recommendations on a specific issue or policy."<sup>27</sup> Finally, as in Food Chemical News, the subject matter of the Stakeholder/CALFED meetings involves "serious, much-debated and sensitive" questions, another factor which could weigh in favor of subjecting the Stakeholders Group to FACA's open meeting and public participation requirements.<sup>28</sup>

### 3. Stakeholder Group FACA Compliance Options.

The Stakeholder Group has two related avenues for avoiding FACA violations. First, the Group may reconstitute itself a task force or working group of BDAC, which will be a formally chartered FACA advisory committee. Second, it also would be prudent to erect more definitive barriers between the Stakeholders Group and CALFED.

In American Physicians,<sup>29</sup> the D.C. Circuit analyzed the FACA implications for a working group associated with an advisory panel. The lower court concluded that the working group was not subject to FACA reasoning that it was simply "staff" to the formal advisory panel. The appellate court remanded for further consideration of the facts but appeared to agree with this theory in principle:

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<sup>26</sup> See Public Citizen, 491 U.S. at 461.

<sup>27</sup> See 41 C.F.R. § 101-6.1003.

<sup>28</sup> See Food Chemical News, 378 F. Supp. at 1051.

<sup>29</sup> 997 F.2d 898 (D.C.Cir. 1993).

[W]here the top levels of the outside advisory groups were covered by FACA ... there is less reason to focus on subordinate advisors or consultants who are presumably under the control of the superior groups. It is the superior groups, after all, that will give the advice to the government, and which, in accordance with the statute, must be "reasonably" balanced. But when the Task Force itself is considered part of the government . . . we must consider more closely FACA's relationship to the working group.<sup>30</sup>

Similarly, in National Anti-Hunger Coalition v. Executive Com., the court held that three task forces established to assist the Executive Committee of the President's Private Sector Survey on Cost Control were not subject to FACA. The task forces were organized to "gather information, perform studies, and draft reports and recommendations," which were transmitted to a subcommittee for review, and then to the full Executive Committee for its approval.<sup>31</sup> Both the Executive Committee and its subcommittee were chartered as advisory committees under FACA. The circuit court reasoned:

On the basis of the record before it, the court's characterization of the task forces as the Executive Committee's "staff" and its conclusion that the task forces are "not provid[ing] advice directly to the President or any agency" [citation omitted] were perfectly defensible. At that time, it appeared that the task force reports and recommendations would be exhaustively reviewed and revised by the Executive Committee - the entity nominally responsible for advising the President and federal agencies.<sup>32</sup>

Thus, it appears that if the Stakeholders Group operates as a BDAC working group, and its recommendations are submitted to BDAC for review and approval prior to submission to CALFED, FACA probably would not apply to the Stakeholders Group.

It must be emphasized, however, that if the Stakeholder Group reports directly to CALFED its status as a BDAC task force is unlikely to shield it from a FACA complaint. At least one court has been troubled by evidence of "working groups"

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<sup>30</sup> Id., 996 at 913. Note that in this case the advisory panel itself, the President's Task Force on National Health Care Reform, was not subject to FACA because it fell under the exemption for committees constituted of entirely full-time federal employees.

<sup>31</sup> 711 F.2d 1071, 1072.

<sup>32</sup> 997 F.2d at 1075.

reporting directly to agency decision makers:

[N]ew evidence suggests both that task force reports are transmitted directly to federal decision makers before they are made publicly available and that the subcommittee of the Executive Committee is merely "rubber-stamping" the task forces' recommendations with little or no independent consideration. *Either of these facts, if true, might well have led the District Court to conclude that the task forces themselves were subject to the requirements of the FACA.*<sup>33</sup>

Thus, close coordination between the Stakeholders Group and CALFED could render the Group an "advisory committee" under FACA, regardless of the Group's relationship to BDAC. A conservative approach would be for the Group to limit its direct contacts with CALFED to formally noticed public meetings where CALFED provides information to, and solicits the views of, the public *as a whole*. It would be prudent as well for the Stakeholders Group to view itself as proceeding independently of the CALFED planning process, with its formal recommendations to be considered by CALFED only after review and approval by BDAC. Communication between the Group and CALFED should be no different from CALFED's communications with the general public. Individual members of CALFED may, however, periodically attend Stakeholder Group meetings to provide information without implicating FACA.<sup>34</sup>

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<sup>33</sup> National Anti-Hunger Coalition at 1075-76 (emphasis added).

<sup>34</sup> D. Nawi letter to T. Graff dated Mar. 30, 1995; Consumer's Union, 409 F. Supp. 473.

### III. STATE OPEN MEETING STATUTES ANALYSIS

#### A. Application of the Ralph M. Brown Act<sup>35</sup>

The Brown Act was enacted in 1953 to ensure that the actions and deliberations of local agencies, including commissions and boards, are conducted openly. (§ 54950.) The Act provides that "all meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency." (§ 54953.) The Act defines "local agency" as:

[A] county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, *or any board, commission or agency thereof* or other local public agency."

(§ 54951 (emphasis added)).

Although several stakeholder organizations are local districts under the Brown Act, the Group which is currently an informal, voluntary association of self-selected parties, does not on its face fall under this definition.<sup>36</sup> However, certain actions of the local agency members of the group could operate to transform the Stakeholders Group into a "local agency" for Brown Act purposes. The Brown Act encompasses a broad definition of "legislative bodies" subject to the Act. This category includes not only governing bodies of local agencies, (§ 54952(a)), but also:

"commission[s], committee[s], board[s] or other bod[ies] of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution or formal action of a legislative body.

§ 54952(b). This second definition appears to have the greatest potential relevance to the Stakeholders Group. Although the case law is limited, the plain language of the Act suggests that all official advisory committees to local agencies could be themselves construed as "legislative bodies" of those agencies.

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<sup>35</sup> If an agency is covered by the Brown Act, it is by definition not covered by BAKA. (Gov. Code, § 11121(b).) Accordingly, the applicability of the Brown Act is here analyzed first. All citations in this section are to the California Government Code unless otherwise indicated.

<sup>36</sup> For example, Water Code, section 34150 *et seq.*, governing the formation of water districts, requires a resolution passed by a county board; Public Utilities Code, section 11561 *et seq.*, governing the formation of municipal utility districts, requires county boards to submit the question whether to establish such districts to a general referendum.

In general, advisory commissions are not subject to the Brown Act unless created by "formal action" of a local agency's legislative body. (§ 54952(b).) However, virtually any type of official action by a local agency's legislative body with regard to a board or commission may be sufficient to invoke the Brown Act, including formal designation of representatives to sit on such commissions. For example, in Joiner v Sebastopol, the court found that the Brown Act applied to a small committee of local officials who were designated to serve by a city council. The court held that such designation constituted "formal action" rendering the committee a "legislative body" for Brown Act Purposes.<sup>37</sup> Similarly, in Frazer v Dixon Unified School District, the court held that an advisory committee was created by "formal action" when a school board requested and authorized a superintendent to appoint a committee under certain circumstances.<sup>38</sup> The committee was thus subject to the Brown Act. Moreover, at least one case has held that a panel's status as an "advisory committee" to an agency is not affected by the number of representatives from that agency participating on the panel, nor by the fact that the panel's existence depends upon the participation of other agencies.<sup>39</sup> Another factor weighing in this determination is whether the local agency has sent a representative to sit on a committee for the purpose "reporting back" recommendations to the agency's governing body for use in making legislative or regulatory decisions. However, this factor should tend to weigh against Brown Act application since the Stakeholders Group was formed for the purpose of developing Bay-Delta water quality and supply solutions, and not to advise local agencies.

It probably would be prudent for local agency stakeholders to ensure that their membership in the Group remains informal. In this regard, they should consider whether their respective legislative bodies have "appointed" or "designated" representatives to the Stakeholder Group through some type of formal action for the purpose of gathering facts and making recommendations back to those legislative bodies. As discussed above, it may be desirable for BDAC, once it is formed, to recognize the Stakeholder Group as a working group for FACA purposes. Such designation would have Brown Act ramifications only if BDAC itself is constituted as a local agency. (§ 54952(b).) It is our understanding at this point that BDAC, whatever its final form, is unlikely to fall within the Brown Act's definition of a local agency. Therefore, in light of current information, it does not appear that the Stakeholders

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<sup>37</sup> 125 Cal. App. 3d 799, 805 (1979).

<sup>38</sup> 18 Cal. App. 4th 781, 792-793 (1993). Compare Farron v City and Cty of San Francisco, 216 Cal. App. 3d 1071, 1975 (1989)(mayor's advisory committee not subject to Brown Act because not created by formal action of the Board of Supervisors).

<sup>39</sup> Joiner v Sebastopol, 125 Cal. App. 3d 799, 805 (1985).

Group would be subject to California's Brown Act requirements based on its future relationship with BDAC.

Finally, the Group should also be cognizant of the last definition of "legislative bodies" which subjects the Brown Act to entities that receive funds from a local agency when the legislative body of that agency appoints one of its own members to the governing board of the entity.<sup>40</sup> The Stakeholder Groups is probably not sufficiently formal to constitute an "entity" for purposes of this definition, nor has it appointed any type of governing board. Nevertheless, it probably would be judicious for members of local agency legislative bodies (board members or directors) to refrain from serving as representatives to the Group. For the same reason, the Group could refrain from receiving funds from local agencies. Local agency board members and directors may attend Stakeholder Group meetings to exchange information without Brown Act ramifications, however, so long as they maintain their status as "non-members" of the Group.

**B. Application of BAKA**

BAKA was enacted in 1967 to ensure that the actions of state agencies be taken openly. (§ 11120.) Specifically, BAKA provides that: "All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body." (§ 11123.) As with the Brown Act, the applicability of BAKA to the Stakeholders Group is a question of statutory interpretation. The Act defines a "state body" as:

1. Any state board, commission, or similar multimember body of the state which is required by law to conduct official meetings and every commission created by executive order. (§ 11121.)<sup>41</sup>
2. Any board, commission, committee, or similar multimember body which exercises any authority of a state body delegated to it by that state body. (§ 11121.2.)

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<sup>40</sup> The third definition of a "legislative body" under the Brown Act includes any committee or "other multimember body that governs a private corporation or entity that either: (1) is created by the elected legislative body [to exercise authority delegated to it by the elected representatives]; or (2) receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing by the legislative body of the local agency." § 54952(c).

<sup>41</sup> Section 11121 specifically provides, however, that the courts, the legislature, higher education labor relations boards, and various other insurance and public health control boards are not "state bodies" under BAKA.

3. Any board, commission, committee, or similar multimember body on which a member of a body which is a state body serves in his or her official capacity as a representative of such state body and which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation. (§ 11121.7.)
4. Any advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multi-member advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons. (§ 11121.8.)

The most relevant of these definitions to the Stakeholders Group is § 11121.8. Although the Stakeholders Group was not created by "formal action" of a state body, a § 11121.8 issue could arise if: (1) the Stakeholders Group is formally designated as a working group of BDAC; and (2) BDAC is itself found to be a "state body" under BAKA. BDAC would fall into this category to the extent that it is "an advisory body of a state body, if created by formal action of the state body or of any member of the state body." (§ 11121.8.)

As indicated above, it is our current understanding that BDAC will be chartered as a federal advisory committee appointed by the Interior Department and would not have formal status as a state entity. However, certain factors could tend to mark BDAC as a state body for BAKA purposes. For example, BDAC will be an advisory committee to CALFED and is expected to report to the California Water Policy Council, the state partner in CALFED. The Council was created by Executive Order of Governor Wilson on February 1, 1991 as a "drought action team."<sup>42</sup> Since "state bodies" include "every commission created by executive order" (§ 11121) the Council is almost certainly a "state body" for BAKA purposes. Thus, to the extent that the Council takes formal action in formulating BDAC, BDAC itself may be considered a "state body." This perception may be reinforced by the preliminary determination that BDAC will voluntarily submit to BAKA requirements. Under this scenario, formal action by BDAC designating the Stakeholders Group as a work group could subject the Group to BAKA.

We have discovered limited guidance on the question of how far BAKA goes in attaching itself to advisory committees of advisory committees. However, a 1992 Attorney General Opinion indicates BAKA does not apply to "multi-member bodies

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<sup>42</sup> Per telephone conversation with Bob Potter, Chief Deputy Director, Department of Water Resources, April 18, 1995.

which are created by an individual decision maker."<sup>43</sup> Thus, if BDAC members are selected by a single state office instead by formal action of a state body, BDAC could fall outside the "state body" ambit. Nevertheless, a conservative reading of the Act suggests that if the Stakeholders Group elects to operate without BAKA constraints, it should not be formally designated as a BDAC work group. Assuming that state courts would borrow from the precedents established under similar provisions of the Brown Act,<sup>44</sup> BAKA probably would not attach to the Stakeholder Group if BDAC refrains from taking formal action sanctioning or designating the Group. For example, BDAC may be able to informally seek the counsel of the Stakeholder Group as a task force or staff.

The other statutory definitions of state body are less germane. The definitions under §§ 11121 and 11121.2 appear to be inapplicable to the Stakeholder Group.<sup>45</sup> Section 11121.7 is similar to the Brown Act § 54952(c)(2) discussed above regarding local agency participation on committees. The BAKA analysis is somewhat different than that under the Brown Act since state agencies will not be participating in the Stakeholder Group. Thus, Section § 11121.7 is probably inapplicable.

A question arises as to whether the presence of state agency personnel at a Group meeting or state financial support could invoke BAKA. Case law indicates that mere attendance by agency officials is insufficient to convert a committee into a state body, where the state official's function is to "answer questions and to assist in handling of whatever matters [are] before the committee" and where such officials "[have] no authority to vote, and [do] not participate in the deliberations of the committee."<sup>46</sup> Thus, periodic attendance by state agency personnel at Stakeholders meetings for informational exchange or assistance is unlikely to implicate BAKA.

However, a BAKA problem could arise for the Group if state agency personnel attend Stakeholder meetings in their official capacity and the Group receives some type

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<sup>43</sup> 75 Op.Atty.Gen.263 (1992). In this case, the Attorney General found that a particular board reporting only to a "single state officer" was outside the scope of the state open meeting act requirements.

<sup>44</sup> See discussion of § 54952(b) of the Brown Act supra.

<sup>45</sup> See Torres v. Board of Com'rs of Housing Authority, 89 Cal.App.3d 545, 550 ("The placement of Government Code section 11120 and its history is persuasive indication that the State Act was meant to cover executive departments of the state government.").

<sup>46</sup> Funeral Sec. Plans, Inc. v State Bd. of Funeral Directors, 21 Cal. App. 4th 1444, 1461 (1993). At least one court has found that a member of a state body must be appointed to the group in question in order to "represent the interests of his appointing entity." Farron v San Francisco, 216 Cal. App. 3d 1071, 1076 (1989).

of financial support from the state. In Funeral Sec. Plans, Inc., the court found that providing per diem compensation to state employees and private citizens serving on an advisory committee transformed the group into a state body for BAKA purposes. The Court relied upon an Attorney General opinion holding that: "Under section 11121.7, when a second body is financed by a 'state body,' and a member thereof qua member serves on that second body, the open meeting requirements attach to and follow that member to the second body."<sup>47</sup> Note, however, that simply receiving financial support from a state agency, without more, will not implicate BAKA. For example, the Attorney General has determined that meetings of a "task force" comprised of private citizens to render advice on public policy issues could receive state support without becoming subject to BAKA since no state employees served on the group.<sup>48</sup>

#### IV CONCLUSION

Depending upon its final configuration and future relationships with CALFED and BDAC, the Stakeholders Group may implicate federal and/or state open meeting statutes. The Group has the opportunity to structure its composition and activities to serve the CALFED planning process, but should proceed with a high degree of sensitivity to open meeting laws. We make the following general recommendations:

1. The Group should avoid activities and contacts with CALFED tending to suggest that it is functioning as an "advisory committee" to that body.
2. The Group should consider structuring its interaction with BDAC as a linked working group.
3. The attendance of federal and state employees at Stakeholder meetings should be clearly limited in scope and purpose to avoid the suggestion that these agencies are actually participating members of the Group.
4. Local agency members of the Group would be advised to conduct their own analyses to determine how best to design their participation in conformance with Brown Act requirements.

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<sup>47</sup> 21 Cal. App. 4th at 1416.

<sup>48</sup> "The task force in question is comprised of private individuals. No one is a member of the task force who is 'a member of a body which is a state body ... [serving] in his or her official capacity as a representative of such state body.'" 75 Op.Atty.Gen. 263 (1992). Note that although "appointed" by the State Insurance Commissioner, the task force, Section 11121.8 was found not to apply since the Commissioner did not fall under the definition of "state body" himself. Id.