

Memorandum

To : MEMBERS
Ecosystem Roundtable
CALFED Bay-Delta Program

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Subject : State Open Meeting Act Requirements

This memorandum, prepared at the request of your staff, summarizes the **Bagley-Keene Open Meeting Act** ("the Bagley-Keene Act" or "the Act"). (Cal. Gov. Code § 11120, et seq.) The Bagley-Keene Act governs the conduct of meetings held by state-created deliberative bodies such as the Ecosystem Roundtable. This memo is not intended to serve as an exhaustive guide to the Act but, rather, a summary of some provisions with which you need to be familiar. Along with this memo, we are providing a copy of the California Attorney General's 1989 pamphlet, Open Meeting Laws, together with the 1996 supplement to that pamphlet. These materials offer a great deal more information about the Bagley-Keene Act, together with the text of the Act itself.

This memo also briefly summarizes the **Federal Advisory Committee Act** ("FACA"). (5 U.S.C. App. 2, § 1 et seq.) Since the Ecosystem Roundtable and the CALFED Bay-Delta Program of which it is an element are in part created under federal law, this federal statute also applies to Ecosystem Roundtable meetings.

Ecosystem Roundtable members or staff may in the future have questions about the application of the Bagley-Keene Act or FACA which are not specifically addressed either in this memo or the accompanying materials. You should feel free to direct any such questions to the undersigned if and when they arise.

I. THE BAGLEY-KEENE ACT

A. Purpose and Scope

The purpose of the Bagley-Keene Act is to require that virtually all aspects of the decision-making process by a multi-member state body be conducted in public. The Act represents the Legislature's determination that the balance

between public access to the activities of a public body and the need for secret, candor, debate, and information-gathering should generally be struck in favor of public access. This law has been interpreted to mean that the deliberative processes of multi-member bodies, including discussion, debate and the acquisition of information, be open and available for public scrutiny. Unless a specific statutory or court-made exception authorizing a closed session can be found, the matter must be conducted in public regardless of its sensitivity. Courts have traditionally interpreted the limited exceptions to the Act for closed sessions very narrowly. At the same time, courts liberally interpret the provisions of the Act related to openness and public access.

B. To Whom Does the Act Apply?

The Bagley-Keene Act applies to multi-member state bodies which are required to meet by law or which are created by executive order. (§§ 11121, 11123.) The Act does not apply to individual decision-makers who are not members of boards or commissions. For example, agency or department heads who meet with advisors, staff, colleagues, or anyone else are not covered by the requirements of the Act. Nor would the Act apply to Ecosystem Roundtable members who meet with third parties in a capacity separate from their membership on the Ecosystem Roundtable. Finally, the Act does not apply to the judicial branch of government or to the California Legislature. (§ 11121(a).)

C. What is a Meeting?

In general, a meeting under the Act is defined as any gathering, formal or informal, of a quorum of the body at which information about the business of the body is received, discussed or voted upon. Meals, seminars, conferences, and serial communications may be included. (42 Ops. Cal. Atty. Gen. 61 (1963); 61 Ops. Cal. Atty. Gen. 220 (1978).) First, if communications to the body or among members of the body are part of the deliberative or information-acquisition process, the public usually has a right to be involved. Second, if a quorum of a body ultimately receives information or participates in a deliberation, directly or indirectly, a meeting generally has occurred. Third, serial or rotating meetings through a series of telephone calls or other communications by which a quorum of the council becomes involved in the information-acquisition or deliberative process are prohibited unless the notice and public access provisions of the Act have been satisfied. Finally, the Act limits application of the less-than-a-quorum exception to advisory committees by providing that all advisory committees of three members or more are covered by the open meeting provisions. (§ 11121.8.)

D. Notice and Agenda Requirements.

1. Meetings Requiring 10-Day Notice.

The Act requires decision-making and advisory bodies such as the Ecosystem Roundtable to provide written notice of the time, date, location and agenda for meetings at least 10 days before the meeting to all who request the information. (§ 11125.) The specific agenda for state decision-making bodies (such as the State Water Resources Control Board) must provide a description of each item of business to be transacted or discussed so that interested members of the public will be capable of understanding the nature of each such item. (67 Ops. Cal. Atty. Gen. 84 (1984).) As a general rule, an item not appearing on the agenda may not be discussed or voted upon. However, when an item is raised by a member of the public, the body may accept testimony and discuss the item so long as no action is taken until a subsequent meeting. (§ 11125(a).)

An advisory committee such as the Ecosystem Roundtable must follow the same 10-day notice requirements, but the notice need provide only a brief, general description of the business to be transacted or discussed. This differs from the specific agenda requirements set forth for all other state bodies. Notice of meetings of the entire Roundtable may also constitute notice of any sub-committee meetings, so long as the specific time and place of the sub-committee's meeting is announced during the open and public Roundtable meeting, and provided that the sub-committee meeting is conducted within a reasonable time of, and nearby, the meeting of the Roundtable as a whole. (§ 11125(d).)

2. Meetings Not Requiring 10-Day Notice.

The Act allows for emergency meetings under specified conditions. (§§ 11125.5.) Emergencies are defined very narrowly. None would probably apply to the Ecosystem Roundtable. Unless a situation qualifies as an enumerated emergency, the standard 10-day notice and agenda requirements must be followed.

3. Closed Sessions.

The Act identifies several circumstances in which a state body may hold a "closed session," i.e., a meeting or portion of a meeting from which members of the public may legally be excluded. Such circumstances include personnel decisions regarding public employees; litigation matters requiring confidential communications with the public body's legal counsel; and discussions with the body's negotiator regarding pending real estate transactions. (§ 11126.) With the possible exception of pending real estate transactions, none of

the enumerated reasons for closed sessions would appear to apply to the Ecosystem Roundtable.

Even if a closed session is authorized under the Act, the state body must comply with the agenda requirements identified above.

E. The Public's Rights While Attending Meetings.

A member of the public may attend a meeting of the Ecosystem Roundtable or other state body without having to register or give other information as a condition of attendance. (§ 11124.) Any sign-in sheet must clearly state that completion of the document is voluntary. A member of the public may tape record a meeting. A member of the public may be excluded from a meeting if he or she is clearly disruptive. If all of the public is excluded from a meeting for disruption, members of the media not involved in the disturbance must be permitted to attend the meeting as continued. (§ 11126.5.)

A member of the public has the right to directly address the state body on each agenda item before or during the discussion or consideration of the item. (§ 11125.7.) The state body may adopt reasonable regulations to ensure the purpose of this section is carried out, including regulating the total amount of time allocated for public comment on particular issues and for each individual speaker.

F. Penalties and Remedies for Violation of the Act.

Criminal penalties, civil injunctive relief and the award of attorney's fees are provided to assist enforcement of the Act. In addition, most actions taken in violation of the Act may be declared null and void by a reviewing court. (§§ 11130, 11130.3, 11130.7.)

II. THE FEDERAL ADVISORY COMMITTEE ACT

FACA is intended by the United States Congress to control the advisory committee process and to open to public scrutiny the manner in which private individuals and groups advise federally-sponsored public agencies. FACA defines advisory committees to include any "committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" established by law, the President, or a federal agency. The Ecosystem Roundtable qualifies as an advisory committee under FACA.

Under FACA, all advisory committee meetings are public. Members of the public have a right to attend, appear before, or file statements with an advisory committee, subject to reasonable rules prescribed by the Administrator of the U.S. Department of General Services. Records, reports, transcripts,

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minutes, appendixes, working papers, drafts, studies, agenda, or other documents given to an advisory committee are to be available for public inspection. An advisory committee under FACA must keep detailed minutes of each meeting. There are additional reporting, accounting, and federal agency coordinating requirements spelled out in the provisions of FACA.

FACA requires an advisory committee such as the Ecosystem Roundtable to publish a notice including the meeting's purpose, time, location, agenda, and any exemptions to the federal Freedom of Information Act (5 U.S.C. § 552(B)). The notice must be published in the Federal Register at least 15 calendar days in advance of the meeting. In exceptional circumstances less than 15 days notice may be given, but the justification for such abbreviated notice must be included in the meeting notice in the Federal Register. (Since FACA's 15-day notice requirement is longer than the Bagley-Keene Act's 10-day notice period, the Ecosystem Roundtable should follow the longer federal requirement. Where, as here, applicable state and federal meeting rules differ, the Ecosystem Roundtable should comply with the more stringent of the two.)

CONCLUSION

These are the basic state and federal legal requirements governing the Ecosystem Roundtable's meetings. Again, if you have specific questions, I will be happy to answer them.



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attachs.

cc: Cindy Darling
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CALFED Bay-Delta Program (w/attachs.)