



April 6, 2022

Via email

Virginia Madueno, Vice Chair,
Delta Stewardship Council

Stephen Brandt, Chair,
Delta Independent Science Board

Laurel Larsen,
Delta Lead Scientist

Re: Delta Independent Science Board coordination and administration

Dear Vice Chair Madueno, Chair Brandt, and Dr. Larsen:

This letter is with respect to the Delta Stewardship Council's coordination with and administration of the Delta Independent Science Board (DISB). The recent amendment to the authorizing statute for the DISB states "notwithstanding being appointed and administered by the Delta Stewardship Council," the DISB members "shall exercise their scientific judgment and perform the functions set forth in this section independently from the council." (Wat. Code § 85280(a)(4).)

This letter formalizes our objection to the proposal in item 6 of the DISB's April 8, 2022 meeting agenda which states the DISB will "discuss its current role with the Delta Science Strategy, including the potential to incorporate the Delta ISB thematic reviews into the strategy."¹ The meeting packet does not include a written description of this proposal. Additionally, this proposal appears on its face to violate the specific legislative intent of Water Code section 85280(a)(4) which requires the members of the DISB to exercise independent exercise of scientific judgment. Lastly, it appears the Bagley-Keene Open Meeting Act requirements (Gov. Code §§ 11120 et. seq.) have not been followed as to the manner in which the item was proposed, discussed, and put on the DISB agenda.

We strongly support inclusion of the DISB members in the Delta Science Program's drafting and reviewing the Delta Science Plan, the Science Action Agenda, and the State of Bay-Delta Science. The Delta Science Program should also incorporate the recommendations in

¹ Delta Independent Science Board. 2022. [Meeting Notice of the Delta Independent Science Board. Friday, April 8, 2022. https://deltacouncil.ca.gov/pdf/isb/meeting-notice/2022-03-28-isb-meeting-notice.pdf](https://deltacouncil.ca.gov/pdf/isb/meeting-notice/2022-03-28-isb-meeting-notice.pdf).

the DISB's thematic reviews in all its activities. However, the DISB's reviews are part of the DISB's formal "oversight of the adaptive management, monitoring, and assessment programs that support adaptive management of the Delta." (Wat Code 85082(c).) To properly exercise oversight, the DISB must perform its reviews independently of the collaborative Delta Science Program. Funding for the DISB statutorily mandated duties, including holding workshops and do outreach on DISB reviews must be given as needed, without any strings attached.

At the March 2022 DISB meeting, the Chair reported he has been meeting monthly with the Delta Stewardship Council Chair and the Delta Lead Scientist. It is our understanding the Chair uses these meetings to implement the DISB's 2020 operating guidelines², which state that the duties of the Chair include:

- Coordinating with the Lead Scientist and Delta Science Program staff to prepare agendas for Delta ISB meetings
- Coordinating with the Lead Scientist and Delta Science Program staff after meetings to approve meeting summaries for distribution

We respectfully point out that the Delta Stewardship Council Chair or Vice Chair are *not* "Delta Science Program staff," and that involvement of DSC members or staff in preparing the agenda for the DISB meetings is contrary to the mandate in Water Code section 85280(a)(4) that the DISB "shall... perform its functions independently of the council."

We are requesting that the Lead Scientist and DISB Chair ensure that coordination is done with appropriate transparency. It appears that no one has recognized these ongoing meetings are meetings of an advisory group as defined by the Bagley-Keene Open Meeting Act (Gov. Code § 11121(c).) With respect to interpretation of this section, the Attorney General has stated,

"When a body authorizes or directs an individual to create a new body, that body is deemed to have been created by formal action of the parent body even if the individual makes all decisions regarding composition of the committee..."

Finally, the body will probably be deemed to have acted by formal action whenever the chair of the body, acting in his or her official capacity, creates an advisory committee. Ultimately, unless the advisory committee is created by staff or an individual board member, independent of the body's authorization or desires, it probably should be viewed as having been created by formal action of the body."

We also respectfully request that all ongoing coordinating meetings between the DISB Chair or members fully comply with Gov. Code §§ 11120 et. seq.) As we previously wrote to the DISB Chair³,

² Delta Independent Science Board. 2020. [Operating Guidelines](https://deltacouncil.ca.gov/pdf/isb/2020-06-12-isb-operating-guidelines.pdf). <https://deltacouncil.ca.gov/pdf/isb/2020-06-12-isb-operating-guidelines.pdf>.

³ California Water Research, 2022. Letter to Delta Independent Science Board Chair re: Statutory and Constitutional Transparency Requirements, April 5, 2022.

Transparency, i.e. the peoples' right of "access to information" and to "the meetings" and "the writings" is crucial, in view of the extent and intricacy of collaboration and communication between the DISB, the Delta Science Program, the Delta Stewardship Council, and state and federal agencies. The people are entitled to be certain the DISB is complying with the law and that Board members do, in fact, "exercise their scientific judgment and perform the functions set forth in this section independently from the council." (Wat. Code § 85280(a)(4), supra.) Transparency is the process given to the people to ensure compliance.

Further, we request the Delta Stewardship Council Chair ensure that the Council members and staff fully comply with the Bagley-Keene Open Meeting Act requirements in any further discussions with Council members.

At the June 24, 2021 Delta Stewardship Council meeting, Council member Christy Smith stated that Council members have been getting regular briefings on the DISB contract situation:

I would like to reiterate what other members have expressed here, and we certainly appreciate Deirdre's diligence on this issue and her concern. And we have been briefed. We do regular check ins with the Executive Officer and have been given details on how the bill is progressing.

Provision of "regular check ins" by the Executive Officer to a quorum of Delta Stewardship Council members outside of a noticed meeting constitutes a violation of the Bagley-Keene Open Meeting Act, since SB 821 was on the Delta Stewardship Council meeting agenda.

The Attorney-General's guidance on serial meetings states, in part⁴:

... problems arise if there are systematic communications through which a quorum of the body acquires information or engages in debate, discussion, lobbying, or any other aspect of the deliberative process, either among themselves or between board members and the staff.

Conversations that advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications that contribute to the development of a concurrence as to action to be taken by the body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members of state bodies should avoid serial communications of a substantive nature that involve a quorum of the body. In conclusion, serial meeting issues will arise most commonly in connection with rotating staff briefings, telephone calls or e-mail communications among a quorum of board members. In these situations, part of the deliberative process by which

⁴ California Attorney General's Office. 2018. [A Handy Guide to The Bagley-Keene Open Meeting Act 2004: 2018 update](https://www.sco.ca.gov/Files-ARD/BudLeg/Bagley-Keene%20Open%20Meeting%20Act%20Requirements.pdf). <https://www.sco.ca.gov/Files-ARD/BudLeg/Bagley-Keene%20Open%20Meeting%20Act%20Requirements.pdf>.

information is received and processed, mulled over and discussed, is occurring without participation of the public. (Emphasis added.)

Just remember, serial-meeting provisions basically mean that what the body cannot do as a group it cannot do through serial communications by a quorum of its members.

(p. 5, emphasis added.)

Finally, we note the Bagley-Keene Open Meeting Act has specific mandates for transparency with respect to writings distributed to all, or a majority, of all members of the Delta Stewardship Council (Gov. Code §§ 11125.1(a) and (b).)

We request that all writings which have been distributed to all, or a majority of all, of the members of the DSC in the past month, including communications from the Delta Lead Scientist and Delta Stewardship Council staff, be listed on the DSC website. Furthermore, we request whenever a writing is distributed to all, or a majority of all, of the members of the DSC, that said writing(s) be listed on the DSC website.

Thank you for your attention to this essential administrative issue,



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