MEETING NOTICE AND AGENDA

MANAGEMENT COMMITTEE for the
Central Coast Areas of Special Biological Significance Regional Dischargers Monitoring Program (ASBS RMP)

DATE: March 24, 2015
TIME: 10:00am
LOCATION: MRWPCA Board Room, 5 Harris Court, Bldg D, Monterey, California
CALL IN NUMBER: 1-619-326-2772; Participant Access Code – 675-7310

NOTE: Under the terms and conditions of the Memorandum of Understanding for the Central Coast Areas of Special Biological Significance Dischargers Monitoring Program, the Management Committee (MC) was created to provide overall Program management, coordination, review, oversight, guidance and direction with respect to the Program. The MC is to consider compliance, with majority concurrence of the Program Members (listed below as Member Dischargers), as the primary objective in managing, approving, reviewing Program tasks and budget. The MC is comprised of one representative from each of the Permittees. Stakeholder feedback may either be provided during the “Public Comment” agenda item or the Program Secretary (Program Administrator’s Representative) may be contacted regarding any questions or feedback for the Management Committee.

OFFICERS:
Chairperson: Tricia Wotan, City of Monterey
Vice-Chairperson: Dawn Mathes, Pebble Beach Company

MEMBER DISCHARGERS:
Caltrans
City of Monterey
County of Monterey
Pebble Beach Company

City of Carmel-by-the-Sea
City of Pacific Grove
County of San Mateo
Monterey Bay Aquarium
Stanford University Hopkins Marine Station

STAFF: MRWPCA
CONTRACTOR: Applied Marine Sciences

AGENDA Page #
1. Call to Order / Roll Call n/a
2. Public Comments n/a
3. Consent Agenda
   a. Approve Meeting Minutes for February 11, 2015 Meeting (Attach. 1) 2
4. Information and Discussion Items
   a. Discussion of Year 1 Monitoring Report n/a
   b. Update on Proposed Comments to the Draft Statewide Reference Conditions Report (Attach. 2) 6
   c. Update on Memorandum of Agreement Extension Amendment and Discussion of Potential Year 3 Collaboration n/a
   d. Discussion of Brown Act Protocols regarding Closed Session (Attach. 3) 8
5. Management Committee Members Comments n/a
6. Schedule Next Meeting n/a
7. Adjournment n/a
Central Coast Areas of Special Biological Significance
Regional Dischargers Monitoring Program
(ASBS RMP)
Regular Meeting Minutes
For February 11, 2014

1. CALL TO ORDER / ROLL CALL:
   a. The meeting was called to order at approximately 9:38am by Condit (MRWPCA) and roll call was performed.

MEMBERS:
      Caltrans – Bhaskar Joshi, Ram Gupta (Conf. call)
      City of Carmel-by-the-Sea – Sharon Friedrichsen, Bob Jaques
      City of Monterey – Tricia Wotan
      County of Marin – Rob Carson (Conf. call)
      County of Monterey – Tom Harty
      City of Pacific Grove – Anastazia Aziz, Pilar Chavez (Conf. call)
      County of San Mateo – Julie Casagrande (Conf. call)
      Monterey Bay Aquarium – Kelleen Harter
      Pebble Beach Company – Dawn Mathes
      Stanford University Hopkins Marine Station – Chris Patton

STAFF:
      MRWPCA – Jeff Condit

ADDITIONAL:
      Katherine Faick – State Water Resources Control Board (Conf. call)
      Patty Cubanski – State Parks (Conf. call)
      Dane Hardin – Applied Marine Sciences
      Bridget Hoover, Lisa Emanuelson – Monterey Bay National Marine Sanctuary
      Brian Currier – Sacramento State Office of Water Programs (Conf. call)
      Karen Worcester – Regional Water Quality Control Board (Conf. call)
      Ken Schiff – Southern California Coastal Water Research Project

2. PUBLIC COMMENTS:
   a. None.

3. CONSENT AGENDA
   a. Approve Meeting Minutes from December 18, 2014 Meeting

   Action: On a motion by Harty (County of Monterey), seconded by Harter (Monterey Bay Aquarium), Management Committee approved the Consent Agenda (10 to 0).

4. INFORMATION AND DISCUSSION ITEMS:
   a. Update on Monitoring Effort and Progress
      i. Update on Year 1 Monitoring Report
         Hardin (Applied Marine Sciences) presented a Powerpoint presentation with an update on the monitoring effort to date and the Year 1 Monitoring Report. For compliance purposes, receiving water exceedences will require load reductions. Hardin posed a question of how well load reductions will eliminate exceedences. Based on a relatively few numbers of test cases, the most problematic contaminants appear to be the following: trace metals, nutrients, fecal indicator bacteria, PAHs.
Hardin’s preliminary findings include:

- The relationships between contaminant loads and receiving water concentrations vary among ASBS
  - Some ASBS will be more amenable to reducing ocean contaminant concentrations via load reductions than will others
- The relationship between contaminant loads and receiving water concentrations are not consistent among contaminants
  - FIBs appear to be most amenable to reducing ocean concentrations via load reductions
  - Reductions of trace metal and nutrient concentrations via load reductions appear to be especially problematic

Hardin explored his initial findings of cadmium: there have been instances where there is a high concentration in the receiving water, although there was no concentration of cadmium in the discharge. How would a Permittee bring receiving water into compliance by reducing loads in this instance? Sources of cadmium include natural bedrock and car crank cases, not necessarily anthropogenic. There may need to be a future discussion with the State Water Board on whether Permittees can be held responsible for natural background sources. An extended discussion ensued.

Faick (State Water Resources Control Board) mentioned that the ASBS regions were identified by the State Water Board to have a need for higher protection requirements. The Ocean Plan prohibits discharges to the ASBS. The Special Protections allow for Permittees to determine whether Permittees are impacting the ASBS, with the intent of meeting natural water quality.

Hardin discussed the origins of the identifications of the ASBS sites in the 1970s. The designations at the time were done based on biological resources of the area, without the inclusion of water quality studies. This may be an area of concern to be discussed in the future.

The group agreed to meet following the release of the Year 1 Monitoring Report.

ii. Progress Update of Applied Marine Sciences Contract
Condit presented a Staff Report with an update on the progress of the Applied Marine Sciences contract, including a financial breakdown of the costs to date for the five components of the contract (A, B, C, D, and Mooring Field). Hardin noted that monitoring efforts have been more labor intensive than originally anticipated, leading to higher labor costs than budgeted for. In spite of this, he stands by the original budget to complete the program, primarily due to cost savings from an adjusted sampling schedule amid drought conditions. Hardin posed an item for future consideration: in the event that there is a budget surplus over the course of the program, would the group be interested in pursuing special studies to dig deeper into the data? Special studies could include studies on PAHs, metals, or source tracking.

b. Availability of Draft Statewide Reference Conditions Report
Schiff (Southern California Coastal Water Research Project) announced the availability of his draft Statewide Reference Conditions Report. The State Water Board originally contracted with SCCWRP to direct grant funds toward supporting Regional Monitoring. The funding was used to fund Reference Site data collection. This report summarizes the Reference Site data as well as analyzes the foundation for the 85 percentile. The report allows for a comparison of
the Central Coast Reference Data with the Reference Data from the Northern and Southern regions. The group reached consensus that it is important to provide comments on the report as it will impact future permit compliance. A Sub-Committee was formed including Mathes (Pebble Beach Company), Patton (Hopkins Marine Station), Hoover (National Marine Sanctuary), and Hardin. The Sub-Committee will meet to generate comments and recommendations to bring back to the group during a March Sub-Committee meeting.

c. Clarification from State Water Board Regarding Business Inspections
Faick clarified previous comments from the State Water Board regarding business inspections required under the Special Protections. The Special Protections state “The minimum inspection frequency for commercial facilities (e.g. restaurants) shall be twice during the rainy season.” Faick mentioned the intent of the requirement was to perform similar inspections as those for Fat, Oil, and Grease programs currently completed under the MS4 Phase II Permit by jurisdictions, with increased frequency due to the Special Protections requirements. Wotan (City of Monterey) described the process being pursued by the City of Monterey. Faick requested that Wotan email a description of this process that she can use to further clarify this requirement for Permittees.

d. Update on Proposed State Water Board Bacteria Objective
Condit presented a Staff Report regarding the State Water Board’s proposed amendments to the statewide Water Quality Control Plans for Inland Surface Waters, Enclosed Bays and Estuaries and the Ocean Waters of California (Ocean Plan). The proposed amendments include updated water quality objectives for bacteria to protect human health for the beneficial use of water contact recreation (REC 1) in fresh and marine waters. The Staff Report included proposed comments provided by the City of Carmel for the group’s consideration.

The group reached consensus to send a comment letter by the Feb. 20 deadline on behalf of the Central Coast ASBS RMP. The group directed Condit to field comments from members and compose a draft letter for review prior to forwarding to the State Water Board.

e. Discussion of the Future of the Central Coast ASBS RMP
i. Feedback from SWRCB regarding Year 3 Requirements
Faick clarified that the intent of the Special Protections was to require an initial two year monitoring program. Additional monitoring is required for those Permittees that identify exceedences within their ASBS, for the specific parameters that are in exceedance.

ii. Open Discussion on Next Steps for the Central Coast ASBS RMP
Condit mentioned that there are actually two items up for discussion regarding the future of the Central Coast ASBS RMP, a short-term administrative consideration and a long-term collaboration consideration:

1. The existing Memorandum of Agreement (MOA) terminates on June 30, 2015. This term will need to be extended in order to complete the Year 2 scope of work under the Applied Marine Sciences contract. A draft MOA Extension Amendment is included for consideration as an Action Item.
2. Is there interest from the group to continue this collaboration through Year 3 and, possibly, beyond?

Wotan mentioned that she was interested in extending the existing MOA to complete the work with Applied Marine Sciences. As for the future of the group, is it possible to continue as a committee under the MOA of the Monterey Regional Stormwater Management Program? This option could provide a regional framework within an existing collaboration that is also regulated by the Phase II Permit.
Patton offered that it may be beneficial for the group to continue to collaborate as future requirements are unknown but typically follow a 5-year cycle. There may be opportunities for cost efficiencies and information exchange.

Carson (County of Marin) supported extending the current MOA, though offered an extension to December 31, 2016, in the event that additional work is needed up to that time. Casagrande (County of San Mateo) agreed with this timeframe but was unsure how the County of San Mateo would fit in with a longer term collaboration. Joshi (Caltrans) felt that it may be beneficial to collaborate on the implementation of BMPs in the future.

5. ACTION ITEMS:
   a. Approval of an Extension Amendment for the Existing Central Coast ASBS RMP Memorandum of Agreement
      Condit presented a Staff Report including a proposed Extension Amendment.
      
      ➢ **Action:** On a motion by Wotan, seconded by Mathes, Management Committee moved to approve the Extension Amendment with the provision that the Memorandum of Agreement be extended to December 31, 2016 (10 to 0).

   b. Nomination and Election of Officers (Chair and Vice-Chair)
      
      ➢ **Action:** On a motion by Harty, seconded by Patton, Management Committee nominated and elected Wotan as Chair and Mathes as Vice-Chair (10 to 0).

6. MANAGEMENT COMMITTEE REPORTS:
   c. County of Marin – Carson advised the group that we may wish to discuss specific items in Closed Session in future meetings. The group concurred and directed Condit to research the Brown Act rules regarding Closed Session and report back to the group. Carson thanked Hardin for his efforts during the past storm event.
   d. City of Pacific Grove – Aziz mentioned that Pacific Grove is currently updating their Local Coastal Program.

7. ADJOURNMENT:
   a. **Schedule Next Meeting:** Condit will coordinate the next meeting following the release of the Year 1 Report.
   
   b. The meeting was adjourned at 11:31am.
Central Coast Areas of Special Biological Significance Regional Dischargers Monitoring Program (ASBS RMP)

March 24, 2015

Southern California Coastal Water Research Project
Attn: Ken Schiff, Deputy Director
3535 Harbor Blvd., Suite 110
Costa Mesa, CA 92626-1437

Subject: Near-Coastal Water Quality at Reference Sites Following Storm Events – Comments and Recommendations

Dear Ken:

The Central Coast Areas of Special Biological Significance Regional Dischargers Monitoring Program (ASBS RMP) is submitting comments we have heard and compiled from our member agencies regarding your draft report entitled, Near-Coastal Water Quality at Reference Sites Following Storm Events. We compliment you on the quality of the report and thank you for providing our Management Committee the opportunity to provide feedback. We look forward to continuing this spirit of collaboration as our respective regions continue to make progress on permit requirements under the Special Protections.

Please consider the following comments/recommendations:

1. “Robust” vs. “Initial,” Draft Page 5, Discussion Section, Paragraph 1
   “This study has produced a robust data set for setting natural water quality guidelines....”
   Our members recommend the use of the term “initial” as opposed to “robust” due to the limited amount of data that has been collected to date when considering the vast scale and variability inherent in characterizing naturally-occurring water quality in the ocean. We view this current analysis as an important first step in understanding near-coastal water quality, with additional studies needed to confirm the initial analysis. We encourage further analysis to be undertaken following the collection of reference site samples during Year 2 of the Central Coast ASBS Regional Monitoring Program.

2. Comparing “near-shore” concentrations to “off-shore” concentrations; “apples to oranges,” Draft Page 6, Discussion Section, Paragraph 6
   We question the comparison of near-coastal samples collected during the current program with the State of California’s “background” seawater concentrations which were “measured during the 1970s at distances far from shore during dry weather.” The analysis represents an ‘apples to oranges’ comparison and does not hold up under scrutiny to determine natural water quality.

3. “Results indicated a complete lack of toxicity and undetectable levels of anthropogenic constituents (i.e., current use pesticides) at ocean reference sites,” Draft Page 1, Abstract
   Table 3 indicates the number of reference site samples identified as outliers. These outliers, which include Central Coast reference site samples for Total Organophosphorus Pesticides, Pyrethroid Pesticides, Total PAH, Ammonia, and Nitrate, are subsequently removed from Table 4 and the entire analysis. This appears to contradict statements that the reference sites “indicated a complete lack of toxicity and undetectable levels of anthropogenic constituents.”
Also, as noted by our technical consultant, Dane Hardin, we encourage you to review samples collected on November 20, 2013, as site samples may have included low concentrations of synthetic pesticides.

Due to these inconsistencies, we recommend the removal of the following statements:
- Draft Page i, Abstract: “Results indicated a complete lack of toxicity and undetectable levels of anthropogenic constituents (i.e., current use pesticides) at ocean reference sites.”
- Draft Page 4, Results: “Several constituents were not detected in any sample from reference sites along the California coast following storm events (Table 4). These constituents included organophosphorus and pyrethroid pesticides.”

In addition, this example demonstrates an inaccuracy that could be the result of the methodology of representing non-detects at one half of the detection limit as opposed to representing non-detects at zero.

4. “Differences in detection limits,” Draft Page 4, Results Section, Paragraph 5
Our members noted that differences existed between detection limits used by the different laboratories analyzing the samples, resulting in higher detection limits for the Central Coast region than the Northern and Southern regions. We question whether this will ultimately result in an impact on compliance requirements for the Central Coast region. This again demonstrates a flaw in the methodology of representing non-detects at one half of the detection limit as opposed to representing non-detects at zero.

4. “Data analysis followed four steps,” Draft Page 3, Data Analysis
While the Data Analysis section references four steps for data analysis, only three steps are included.

5. “85th Percentile as Conservative Approach,” Draft Page 6, Discussion Section Paragraph 4
We appreciate your recommendations for state regulators regarding options for ranking and prioritizing which guideline exceedances to enforce based on frequency and magnitude. Although possibly outside the scope of this report, our members feel this section may provide an opportunity to stress the unfortunate fact that 15% of data sets near ASBS discharges will automatically exceed the natural water quality guidelines by the design of the 85th percentile standard. This calls into question the mandatory pollutant load cuts these exceedances require as an effective and fair approach.

Thank you for your consideration of these comments.

Sincerely,

Jeff Condit
Program Manager, ASBS RMP
the person to participate in the public meeting consistent with the Americans with Disabilities Act. (§§ 54954.1, 54954.2, 54957.5.) Legislative bodies may go beyond the minimal requirements of the Act and provide greater public access to their meetings. (§ 54953.7.) Elected legislative bodies may impose greater access requirements on agencies under their jurisdiction. (§ 54953.7.)

CHAPTER VI.

PERMISSIBLE CLOSED SESSIONS

1. Introduction

A. Narrow Construction

Under the Brown Act, closed sessions must be expressly authorized by explicit statutory provisions. Prior to the enactment of section 54962, the courts and this office had recognized impliedly authorized justifications for closed sessions. (Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41.) However, that legislation made it clear that closed sessions cannot be conducted unless they are expressly authorized by statute. Although confidential communication privileges continue to exist in other statutes such as the Public Records Act and Evidence Code section 1040, these provisions no longer can impliedly authorize a closed session.

Since closed sessions are an exception to open meeting requirements, the authority for such sessions has been narrowly construed. The law evinces a strong bias in favor of open meetings, and court decisions and opinions of this office have buttressed that legislative intent. (§ 54950.) The fact that material may be sensitive, embarrassing or controversial does not justify application of a closed session unless it is authorized by some specific exception. (Rowen v. Santa Clara Unified School District (1981) 121 Cal.App.3d 231, 235.) Rather, in many circumstances these characteristics may be further evidence of the need for public scrutiny and participation in discussing such matters. (See Civ. Code, § 47(b) [regarding privileged publication of defamatory remarks in a legislative proceeding].)

In 61 Ops.Cal.Atty.Gen. 220, 226 (1978), we concluded that meetings of the Board of Police Commissioners could not, as a general proposition, be held in closed session, even though the matters to be discussed were sensitive and the commission considered their disclosure contrary to the public interest.
The Act does not contain a general exemption for quasi-judicial deliberations, and this office concluded that such an exemption was not generally authorized by implication. In 71 Ops.Cal.Atty.Gen. 96, 106 (1988), this office concluded that the deliberations of a hearing board of an air pollution control district, after it has conducted a public hearing on a variance, order of abatement or permit appeal, must be conducted in public. The opinion further stated that the board was prohibited from conducting such deliberations in a closed session with the board’s counsel or the board’s attorney member. Similarly, in 57 Ops.Cal.Atty.Gen. 189, 192 (1974), this office opined that county boards of education could not meet in closed session to deliberate when deciding appeals from decisions of local school boards refusing to enter into interdistrict attendance agreements.

B. Semi-Closed Meetings

In 46 Ops.Cal.Atty.Gen. 34, 35 (1965), this office also concluded that meetings could not be semi-closed. Thus, certain interested members of the public may not be admitted to a closed session while the remainder of the public is excluded. Nor would it be proper for an investigative committee of a grand jury performing its duties of investigating the county’s business to be admitted to a closed session. (Cal.Atty.Gen., Indexed Letter, No. IL 70-184 (October 9, 1970).) As a general rule, closed sessions may involve only the membership of the body in question plus any additional support staff which may be required (e.g., attorney required to provide legal advice; supervisor or witnesses may be required in connection with disciplinary proceeding; labor negotiator required for consultation). Persons without an official role in the meeting should not be present.

C. Secret Ballots

Secret ballots are expressly prohibited by section 54953(c). This office has long disapproved secret ballot voting in open meetings and the casting of mail ballots. Thus, items under consideration which are not subject to a specific closed meeting exception must be conducted in a fully open forum. (68 Ops.Cal.Atty.Gen. 65 (1985).) One aspect of the public’s right to scrutinize and participate in public hearings is their right to witness the decision-making process. If votes are secretly cast, the public is deprived of a portion of its right. (See also 59 Ops.Cal.Atty.Gen. 619, 621-622 (1976).) However, it is the view of this office that members of a body may cast their ballots either orally or in writing so long as the written ballots are marked and tallied in open session and the ballots are disclosable public records.
D. Confidentiality of Closed Session

Section 54963 provides that a person may not disclose confidential information that has been acquired by attending a proper closed session to a person not entitled to receive it, unless the disclosure is authorized by the legislative body.

For purposes of this section, “confidential information” means a communication made in a closed session that is specifically related to the basis for the legislative body to meet lawfully in closed session.

If this prohibition is violated, it may be enforced by relying upon current available legal remedies including the following:

- Injunctive relief to prevent the disclosure of confidential information.

- Disciplinary action against an employee who has willfully disclosed confidential information in violation of this prohibition. Such disciplinary action must be first preceded by training or notice of the prohibition.

- Referral of a member of a legislative body who has willfully disclosed confidential information to the grand jury.

However, section 54963 provides that no action may be taken against a person for any of the following:

- Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts that are necessary to establish the illegality of an action taken by a legislative body or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were ultimately to be taken by the legislative body.

- Expressing an opinion concerning the propriety or legality of actions taken by a legislative body in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

- Disclosing information acquired by being present in a closed session that is not confidential information.

- Disclosing information under the whistle blower statutes contained in Labor Code section 1102.5 or Government Code section 53296.
(See Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 335, fn. 9 [where the court found that the contents of a closed session were privileged information and applied Evidence Code 1040(b)(1), which provides an absolute privilege for confidential government information to prevent compelled disclosure in a civil proceeding]; 76 Ops.Cal.Atty.Gen. 289, 290-291 (1993); 80 Ops.Cal.Atty.Gen. 231, 235 (1997).)

2. **Authorized Exceptions**

All closed sessions must be conducted pursuant to expressly authorized statutory exceptions. (§ 54962.) As stated previously, the closed session exception to open meeting laws has been narrowly construed by the courts.

A. **Personnel Exception**

The purpose of the personnel exception is to avoid undue publicity or embarrassment for public employees and to allow full and candid discussion of such employees by the body in question. (Fischer v. Los Angeles Unified School Dist. (1999) 70 Cal.App.4th 87, 96; San Diego Union v. City Council (1983) 146 Cal.App.3d 947, 955; 61 Ops.Cal.Atty.Gen. 283, 291 (1978).) Accordingly, the Act provides for closed sessions regarding the appointment, employment, evaluation of performance, discipline or dismissal of a public employee. (§ 54957.)

In Gillespie v. San Francisco Pub. Library Comm’n (1998) 67 Cal.App.4th 1165, the Library Commission conducted a closed-session meeting to consider appointment of a new city librarian. Although the mayor actually makes the appointment, the city charter requires the Library Commission to participate in the appointment process. The court held that the Commission’s closed-session meeting under the personnel exception for the purpose of nominating three candidates for consideration by the mayor was proper.

In 80 Ops.Cal.Atty.Gen. 308, 311 (1997), this office concluded that the personnel exception could be utilized by an advisory committee created by a school district to provide it with recommendations on the employment of a new superintendent after conducting interviews and deliberations on the applicants. However, a body may not conduct a closed session where it is not assigned responsibility in connection with the decision. Accordingly, this office concluded that a county board of education may not conduct a closed session on a personnel decision where that decision rested solely with the superintendent, and not with the board. (85 Ops.Cal.Atty.Gen. 77 (2002).)

Under the Act, an employee may request and require a public hearing where the purpose of the closed session is to discuss specific charges or complaints against the employee. Under the Act, the employee must be given at least 24-hour written notice...
of any meeting to hear specific charges or complaints against the employee, or any action taken at the meeting will be null and void. (§ 54957.)

In *Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, 100, the court determined that an employee had the right to receive the 24-hour notice only when the body was considering complaints and charges brought by a third person or an employee. The court specifically distinguished these hearings concerning complaints or charges from closed-session meetings to consider the appointment, employment, evaluation of performance, discipline or dismissal of an employee. In these latter instances, the court indicated that the body need not provide 24-hour notice to the individuals in question. Thus, when complaints or charges are not pending, this office opined that the Act permits the holding of a closed session to discuss an employee’s job performance irrespective of the employee’s desires. (61 Ops.Cal.Atty.Gen. 283, 291(1978).

In *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902, 909-910, the court found that an employee evaluation could – be comprehensive or focus on specific instances of conduct; include consideration of the process to be followed in conducting the evaluation; provide feedback to the employee; and, establish goals for future performance.

In *Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, 101-102, the court concluded that charges or complaints brought against a person generally involve something in the nature of an accusation. An evaluation of performance conducted in the normal course of the employer’s business usually does not involve communications resembling an accusation. Thus, a review of a probationary employee to determine whether permanent status will be conferred does not involve complaints or charges since no cause need be shown, no reason given and no appeal granted. Under these circumstances, the employee has no right to be present in a closed session to consider whether to grant permanent status. (See also 78 Ops.Cal.Atty.Gen. 218 (1995) [review of evaluation and denial of tenure]; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876 [review of evaluation and dismissal of nontenured employee].) These reviews of probationary teachers retain their evaluative nature even though allegations of misconduct may be a part of the evaluation. These citations are in contrast to *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, where the school superintendent brought a complaint against a teacher before the school board in a context unrelated to a performance evaluation. In that case, the court found that the 24-hour notice was required.

In *Bollinger v. San Diego Civil Service Comm.* (1999) 71 Cal.App.4th 568, an employee was demoted. The demotion was appealed and a hearing officer conducted a hearing and prepared a report for the full reviewing body to consider in closed session. The employee contended that he should have been provided with 24-hour notice of the hearing officer’s report and his right to make the hearing public. The court concluded that the body was not hearing complaints or charges, but was merely
deliberating after a proper evidentiary proceeding had been conducted by the hearing officer. The court found that the employee had the opportunity to contest or present any information during the hearing, and therefore, neither due process nor the Brown Act required that he receive notice prior to the closed session. The court found that, as a general matter, the language of the Act and the legislative history supported the conclusion that a body may deliberate in closed session after a public hearing to hear charges and complaints.

Care must be exercised to analyze the status of the individual involved in a closed session subject to the personnel exception. If the person is not an “employee,” all action must be taken in public session. The Act defines the term “employee” to include an officer or an independent contractor who functions as an officer or an employee, but shall not include any elected official, member of a legislative body or other independent contractors. (§ 54957.) Thus, the personnel exception not only applies to civil service employees or their equivalent, it includes department heads and other high-ranking local officers. The exception applies to such officials irrespective of whether they are appointed to an office or merely serve by contract (e.g., contract city attorney). The key issue is whether the individual functions under the normal supervision and reporting requirements for an officer or employee, as opposed to that of an independent contractor who performs a task free of such day to day constraints. Accordingly, an independent contractor who performs a study or constructs a building or project must be selected in an open session of the legislative body. (See, e.g., Rowen v. Santa Clara Unified School District (1981) 121 Cal.App.3d 231, 233 [which concluded under prior law that discussions regarding the qualifications of an independent contractor to sell surplus land for the district should have been conducted in public].)

In no case does the term “employee” include elected officers or persons appointed to fill a vacancy of an elected office. Elected officers who are separately appointed to preside over their boards are not employees within the meaning of the Act. Therefore, complaints against such presiding officers may not be discussed in a closed session. (See also 61 Ops.Cal.Atty.Gen. 10 (1978).)

The courts and this office have consistently maintained that the personnel exception must be used in connection with the consideration of a particular employee. The exemption is not available for across-the-board decisions or evaluations of employees, classifications and salary structures. In Santa Clara Federation of Teachers v. Governing Board (1981) 116 Cal.App.3d 831, 846, the court concluded that a board’s consideration of a hearing officer’s decision concerning teacher layoff policy must be conducted in open session.

In 63 Ops.Cal.Atty.Gen. 153 (1980), we concluded that abstract discussions concerning the creation of a new administrative position and the workload of existing positions
were inappropriate for a closed session. However, had the workload discussions involved the evaluation of the performance of specific employees, a closed session would have been proper for that portion of the discussion.

In *Lucas v. Board of Trustees* (1971) 18 Cal.App.3d 988, 990, the court determined that a decision not to rehire a district superintendent of a high school district was properly made in closed session. Also, in 59 Ops.Cal.Atty.Gen. 532, 536 (1976), we concluded that the use of a closed session by a school district governing board to discuss and evaluate the performance of its superintendent was appropriate. In both situations, the superintendent was found to be an “employee.”

In *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, the court broke new ground in delineating the subjects which are appropriate for consideration in closed sessions under the personnel exception. There, the court considered whether the city council could meet in closed session to discuss the job performances and salary levels of certain employees. The court concluded that a closed session was appropriate for the purpose of reviewing an employee’s job performance and making the threshold decision of whether any salary increase should be granted. However, all discussions concerning the amount of any salary increase should be held in public session.

The court specifically rejected the argument that the terms “employment” or “performance” as used in section 54957 should be interpreted to include salary level determinations. The court stated, “Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification.” (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.) The court stated that although an individual’s job performance could be considered in closed session, there were a variety of other factors that must be considered in determining the appropriate salary level (e.g., availability of funds; other funding priorities; relative compensation of similar positions elsewhere, both inside and outside of the jurisdiction).

The *San Diego Union* decision has now been codified in section 54957, which states, “[C]losed sessions held pursuant to this section shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.” Although the amount of any proposed increase in an employee’s compensation may not be considered in closed session, the employee’s job performance may be discussed in closed session, including the threshold decision of whether the employee should receive a raise.

To the extent there are bona fide negotiations between a legislative body and an unrepresented individual who is a current or prospective employee of the body, the body may meet with its representative to provide instructions on how to conduct the negotiations. (§ 54957.6.) However, if the board is merely setting the salary without

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entering into bona fide negotiations, this section is inapplicable. The instructions to
the negotiator may include consideration of an agency’s available funds and funding
priorities, insofar as such discussions relate to providing instructions to the local
agency’s negotiator. However, closed sessions under section 54957.6 may not include
a final decision concerning an unrepresented employee’s compensation.

B. Pending Litigation and the Attorney-Client Privilege

(1) Historical Background

In 1953, the Legislature enacted the Act but did not make any provisions for
closed sessions in connection with litigation or the attorney-client privilege. In 1968, the court, in Sacramento Newspaper Guild v. Sacramento County Bd.
of Suprs. (1968) 263 Cal.App.2d 41, 57, reasoned that the Act was not intended
to impliedly repeal preexisting and well-established laws relating to privileges
and confidentiality. Accordingly, the attorney-client privilege impliedly
authorized closed sessions for legislative bodies to confer with their attorneys.

In 1984, the Legislature enacted SB 2216, chapter 1126, which added section
54956.9 to the Act. That section expressly authorized closed sessions in
connection with pending litigation and created specific procedures and
definitions for implementing these closed sessions.

In 1987, the Legislature enacted SB 200, chapter 1320, to provide that the
expressly authorized exemption regarding pending litigation is the exclusive
expression of the attorney-client privilege for purposes of conducting closed-
session meetings. The legislation also provided that no closed session may be
held unless it is expressly authorized by statute. (§ 54962.) This provision
means that other confidentiality privileges may not be relied upon as implicit
authorization for closed sessions.

(2) Pending Litigation Exception

The codified pending litigation exception relating to local bodies is contained
in section 54956.9. This section authorizes bodies to conduct closed sessions
with their legal counsel to discuss pending litigation when discussion in open
session would prejudice the agency in that litigation. “Litigation” includes any
adjudicatory proceeding, including eminent domain, before a court,
administrative body, hearing officer or arbitrator. For the purpose of this
section, litigation is pending when any of the following occurs: litigation to
which the agency is a party has been initiated formally (§ 54956.9(a); 69
initiates an adjudicatory proceeding]; the agency has decided or is meeting to
decide whether to initiate litigation (§ 54956.9(c); or in the opinion of the legislative body on advice of its legal counsel, there is a significant exposure to litigation if matters related to specific facts and circumstances are discussed in open session (§ 54956.9(b)(1). Agencies are also authorized to meet in closed session to consider whether a significant exposure to litigation exists, based on specific facts and circumstances. (§ 54956.9(b)(2); see 71 Ops.Cal. Atty.Gen. 96, 105 (1988) [mere possibility of judicial review does not constitute significant exposure to litigation based on existing facts and circumstances].) For purposes of section 54956.9(b)(1) and (b)(2), “existing facts and circumstances” are specifically defined in section 54956.9(b)(3), along with the requirement to disclose certain information regarding the facts and circumstances prior to the holding of a closed session. (See Chapter IV, part 4(B) of this pamphlet for a description of the disclosure requirements.)

Existing facts and circumstances which create a significant exposure to litigation consist only of the following:

- The agency believes that facts creating significant exposure to litigation are not known to potential plaintiffs. (§ 54956.9(b)(3)(A).

- Facts (e.g., an accident, disaster, incident, or transaction) creating significant exposure to litigation are known to potential plaintiffs. (§ 54956.9(b)(3)(B).)

- A claim or other written communication threatening litigation is received by the agency. (§ 54956.9(b)(3)(C).)

- A person makes a statement in an open and public meeting threatening litigation. (§ 54956.9(b)(3)(D).)

- A person makes a statement outside of an open and public meeting threatening litigation, and an agency official having knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting. (§ 54956.9(b)(3)(E).)

Prior to conducting a closed session under the pending litigation exception, the body must state on the agenda or publicly announce the subdivision of section 54956.9 which authorizes the session. If litigation has already been initiated, the body must state the title of the litigation unless to do so would jeopardize service of process or settlement negotiations. (§ 54956.9(c).)

In 75 Ops.Cal. Atty.Gen. 14, 20 (1992), this office concluded that the pending litigation exception could be invoked by a body to deliberate upon or take
action concerning the settlement of litigation. The court, in *Sacramento Newspaper Guild*, stated:

“In settlement advice, the attorney’s professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears.” *(Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 56.)*

Elaborating on this reasoning, this office’s opinion concluded:

“Unless section 54956.9 were given a strained and unnatural construction, the wording of the statute permits individual members of a legislative body not only to deliberate and exchange opinions with counsel but also among themselves in the presence of counsel. As we noted in 69 Ops.Cal.Atty.Gen. 232, 239, *supra*, the pending litigation exception fills the need to discuss confidentially with counsel ‘the strength and weaknesses of the local’ agency’s position in the litigation. And as articulated by the court in *Sacramento Newspaper Guild, Inc., supra*, with respect to both ‘settlement and avoidance of litigation,’ these are ‘particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences.’ (263 Cal.App.2d at p. 56.)” *(75 Ops.Cal.Atty.Gen. 14, 18-19 (1992).)* (Original emphasis.)

The opinion went on to state that a body:

“. . . must be able to confer with its attorney and then decide in private such matters as the upper and lower limits with respect to settlement, whether to accept a settlement or make a counter offer, or even whether to settle at all. These are matters which will depend upon the strength and weakness of the individual case as developed from conferring with counsel. A local agency of necessity must be able to decide and instruct its counsel with respect to these matters in private.” *(75 Ops.Cal.Atty.Gen. 14, 19-20 (1992).)*

This interpretation is supported by section 54957.1(a)(3), which requires the body to disclose settlements where the body accepts a signed settlement agreement in closed session unless the agreement must be approved by another party or the court. Under the pending litigation exception, it appears that a
body generally must be a party or a potential party to litigation in order to meet in closed session with its attorney. In addition, it is possible that a legislative body may receive advice from its legal counsel concerning the body’s participation in litigation as an amicus curiae, even though the language of section 54956.9 does not clearly authorize a closed session in such circumstances. (§ 54957.1.) When a government entity such as a city or a county is sued, or when government officials such as a city council or a board of supervisors are sued in their official capacities, questions may arise concerning what other city or county entities or officials may be considered parties for purposes of the pending litigation exception. 67 Ops.Cal.Atty.Gen. 111, 116-117 (1984), which was issued prior to the enactment of section 54956.9, suggests that when the county is a party to a lawsuit, an advisory body to the board of supervisors on the general subject matter of the lawsuit also may be a party or a potential party for the purposes of conducting a closed-session meeting to receive advice from its attorney.

In 69 Ops.Cal.Atty.Gen. 232 (1986), this office considered the circumstances in which a decision by one city body to meet in public on matters related to pending litigation waived the right of all other bodies of that city to conduct closed sessions concerning the same pending litigation. Our opinion concluded that one city body’s decision to meet in public session regarding pending litigation is not necessarily a bar to other city bodies who wish to exercise their right to confer with their attorney in closed session. Specifically, we concluded that the city public works board did not and could not waive the city council’s right to meet with its attorney in closed session.

Lastly, it should be emphasized that the purpose of the pending litigation exception is to permit a body to meet with its attorney under certain defined circumstances. If the attorney is not present (either in person or by teleconference means), the closed session may not be conducted. It should also be emphasized that the purpose of the exception is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions. (71 Ops.Cal.Atty.Gen. 96, 104-105 (1988).)

Since the purpose of the pending litigation exception is to protect confidential attorney-client communications, our opinion in 62 Ops.Cal.Atty.Gen. 150 (1979) continues to be applicable insofar as it concluded that nonconfidential communications between an attorney and his or her client are not protected. In that opinion, two boards which were adversaries in a lawsuit, along with their counsel, sought to meet in closed session for purposes of negotiating a settlement to that lawsuit. Thus, it was the negotiations, rather than confidential communications between the lawyer and the client, which the
bodies sought to protect. Accordingly, we concluded that a closed session was not appropriate for these negotiations.

This office also concluded that Evidence Code section 1152 (which renders inadmissible for the purpose of proving liability, evidence of the conduct or statements of a litigant during settlement negotiations) does not authorize the holding of a joint closed session between two legislative bodies, engaged in litigation against each other, for the purpose of conducting settlement negotiations. Section 1152 has as its purpose the fostering of settlements of disputes rather than the protection of confidential communications. (62 Ops.Cal.Atty.Gen. 150, 154-155 (1979).)

Settlement negotiations, however, may be conducted by the attorneys for the respective litigating bodies, and a closed session, pursuant to the pending litigation exception, may be held by each body to consult with its attorney about the settlement. (62 Ops.Cal.Atty.Gen. 150, 154-155 (1979).)

It is important to remember that the requirements of the pending litigation exception only apply to communications in the context of a meeting. Written one way confidential attorney-client advice is not a meeting, and therefore, is not subject to the Brown Act. (Roberts v. City of Palmdale (1993) 5 Cal.4th 363; see page 15 of this pamphlet.) Also, negotiations conducted by a limited term ad hoc advisory committee comprised solely of less than a quorum of the body is not subject to the Act. (See page 5 of this pamphlet.) To the extent that either of these avenues is pursued one must be careful to avoid serial communications that would constitute a violation of the Act. (See page 11 of this pamphlet.)

C. Real Property Negotiations Exception

The Act contains provisions concerning the circumstances under which a body may meet in closed session to grant authority to its negotiator concerning the price and terms of payment in real property negotiations. (§ 54956.8.) Since the Act requires the body to report, at the conclusion of the closed session, the approval of an agreement concluding real property negotiations where the body’s action renders the agreement final, the body’s power to grant authority to its negotiator also includes the power to finalize any agreement so negotiated. (§§ 54956.8 and 54957.1.)

The exception for real property negotiations permits the body to meet in closed session to advise its negotiator concerning the “price” and “terms of payment” in connection with the purchase, sale, lease or exchange of property by or for the agency. In Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, the court indicated that the purpose for the exception arises out of the realities of the commercial market place and the need
to prevent the person with whom the local government is negotiating from sitting in on the session at which the negotiating terms are developed. (Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 331; see also Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904.)

The closed session, however, must be preceded by an open session in which the body identifies the real property in question, the individual who will act as its negotiator, and the persons with whom its negotiator may negotiate. In 73 Ops.Cal.Atty.Gen. 1, 5 (1990), this office concluded that a district interested in purchasing property could not identify 700 prospective parcels, but must specifically identify the actual parcels subject to negotiation so that the public would have the opportunity to voice any objection to the proposed transaction. Eminent domain proceedings are not subject to section 54956.8, and a body may hold closed sessions to discuss eminent domain proceedings with its attorney under the pending litigation exception.

Depending on the circumstances, the agency may designate a member of the body, a staff person, the agency’s attorney or another person to serve as its negotiator.

D. Labor Negotiations Exception

The Act provides for closed sessions to enable a legislative body to meet with its negotiator concerning discussions with employee organizations and unrepresented employees regarding salaries and fringe benefits. (§ 54957.6(a).) However, prior to the closed session, the body must meet in open session and identify its negotiators. The purpose of the closed session is to permit the body to review its position and instruct its negotiator concerning the conduct of labor negotiations with current or prospective employees. During the closed session, the legislative body may approve an agreement concluding labor negotiations with its represented employees. (See § 54957.1(a)(6).) However, closed sessions with the negotiator may not include final action on the proposed compensation of one or more unrepresented employees.

The scope of the closed session held with the negotiator pursuant to section 54957.6 is limited to issues concerning salaries, salary schedules, and compensation paid in the form of fringe benefits. In addition, for represented employees, the legislative body also may grant authority to its negotiator concerning any other matter within the statutorily-provided scope of representation. Closed session discussions under the labor negotiations exception may include consideration of an agency’s available funds and funding priorities, so long as such discussions relate to providing instructions to the local agency’s designated negotiator. It should be emphasized that the labor negotiations exception applies only to actual bona fide labor negotiations, and a closed session may not be conducted where a legislative body merely wishes to set the salary of an employee.
The body may appoint from its membership one or more members constituting less than a quorum, to act as its negotiator, with whom it may meet and confer in closed session under the provisions of section 54957.6. (57 Ops.Cal.Atty.Gen. 209, 212 (1974).) However, if a body decides to conduct its meet-and-confer sessions itself without using a negotiator, the legislative body may not meet in closed session to review and decide upon its bargaining position. (57 Ops.Cal.Atty.Gen. 209, 212 (1974).) In addition, the legislative body as a whole may meet in closed session with a state conciliator who has intervened in the negotiations. (§ 54957.6(a); see also, 51 Ops.Cal.Atty.Gen. 201 (1968).)

For purposes of section 54957.6, the term “employee” not only refers to rank and file, but also includes an officer or an independent contractor who functions as an officer or employee. The term “employee” does not include any elected official, member of a legislative body, or other independent contractors. (§ 54957.6(b).)

E. Public Security Exception

The Act permits local agencies to meet in closed session with the Attorney General, district attorney, agency counsel, sheriff, or chief of police or their deputies, or a security consultant or a security operations manager on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public’s right of access to public services or public facilities. (§ 54957.)

F. License Application Exception

The Act establishes special provisions for the consideration of license applications by persons with criminal records. (§ 54956.7.)

3. Minute Book

The Act provides for the discretionary keeping of a minute book with respect to closed sessions. (§ 54957.2.) The minute book is confidential and shall be available only to members of the legislative body or to a court in connection with litigation involving an alleged violation of the Act during a closed session. (§ 54957.2.) Neither the minute book nor the information which it memorializes may be released by the body’s members. (Cal.Atty.Gen., Indexed Letter, No. IL 76-201 (October 20, 1976).) However, the minutes of an improper closed session are not confidential. (Register Div. of Freedom Newspapers, Inc. v. County of Orange (1984) 158 Cal.App.3d 893, 907-908.)
Under the Act, the recording of closed sessions is authorized by section 54957.2 only to the extent that such recording is accomplished with the knowledge or consent of the other participants in the closed session, pursuant to the requirements of Penal Code section 632. (62 Ops.Cal.Atty.Gen. 292 (1979).)

CHAPTER VII.

PENALTIES AND REMEDIES FOR VIOLATION OF THE ACT

If a person or member of the media believes a violation of open meeting laws has occurred or is about to occur, he or she may wish to contact the local body, the attorney for that body, a superior agency or the district attorney. If such contacts are not successful in resolving the concerns, the complainant may wish to consider one of the remedies or penalties provided by the Legislature to combat violations of the Act. These include criminal penalties, civil injunctive relief and the award of attorney’s fees. In addition, with certain statutory exceptions, actions taken in violation of the Brown Act may be declared null and void by a court.

1. Criminal Penalties

The Act provides criminal misdemeanor penalties for certain violations. Specifically, the Act punishes attendance by a member of a body at a meeting where action is taken in violation of the Act, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled. (§ 54959.) The term “action taken” as defined by section 54952.6 includes a collective decision, commitment or promise by a majority of the members of a body. The fact that the decision is tentative rather than final does not shield participants from criminal liability; whether “action” within the meaning of the statute was taken would be a factual question in each case. (61 Ops.Cal.Atty.Gen. 283, 292-293 (1978).) Mere deliberation without the taking of some action will not trigger a criminal penalty.

2. Civil Remedies

A. Injunctive, Mandatory or Declaratory Relief

The Act provides two distinct types of civil remedies:

(1) Injunction, mandamus or declaratory relief to prevent or stop violations or threatened violations. (§ 54960.)

(2) Action to void past acts of the body. (§ 54960.1.)