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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By Vicki Daybell

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

PESTICIDE ACTION NETWORK NORTH AMERICA, et al., Petitioners, vs. CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION, et al., Respondents, ARYSTA LIFESCIENCE NORTH AMERICA, LLC, Real Parties In Interest.	RG10553804 ORDER RE: *IN CAMERA* REVIEW OF DOCUMENTS AT ISSUE IN MOTION TO AUGMENT ADMINISTRATIVE RECORD

Petitioners filed the instant action alleging violations of the California Environmental Quality Act ("CEQA") and Food & Agriculture Code in issuing a decision to register pesticides containing methyl iodide, as well as violations of the Administrative Procedure Act ("APA") in promulgating emergency regulations related to methyl iodide usage. Petitioners seek to augment the administrative record to include certain documents that were excluded from the certified record of the

proceedings by Respondents on the grounds that they were irrelevant, protected by the deliberative process privilege, or both. Petitioners contend that those documents are not properly excluded and that Respondents are attempting to create a sanitized record that eliminates documents that do not support Respondents' decision.

The Court, in its order dated July 13, 2011, determined that the documents excluded from the record were relevant to the proceedings here because they were part of the entire body of evidence before the decisionmakers. They were among the types of documents the Legislature determined should be included in the record for administrative review under CEQA for the decision here, by analogy to Public Resource Code §21167.6(e), based upon the descriptions of the categories to which they were responsive. As to the claims of protection from disclosure under the deliberative process privilege, the Court ordered that the documents withheld on that basis be presented for *in camera* review.

The Court having now conducted a thorough *in camera* review of the documents submitted rules as stated herein.

I. The Deliberative Process Privilege

The deliberative process privilege is a common law privilege, not codified in the California Evidence Code but deriving from federal authorities, in particular authorities interpreting the federal Freedom of Information Act. The privilege derives from the policy of "protecting the 'decision making processes of government agencies.'" (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1340, citing *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 150.) The concern underlying the policy is that

"'frank discussion of legal or policy matters' might be inhibited if 'subjected to public scrutiny,' and that "efficiency of Government would be greatly hampered" if, with respect to such matters, government agencies were "forced 'to operate in a fishbowl.'" (*Id.,* citing *EPA v. Mink* (1973) 410 U.S. 73, 87 and *NLRB v. Sears, Roebuck & Co* 421 U.S. 132, 150.)

The privilege protects from disclosure materials reflecting deliberative or policy-making processes, as opposed to purely factual, or investigative materials, unless disclosure of the factual materials would itself expose the deliberative process. (*Times Mirror, supra,* 53 Cal.3d at 1340 citing cases.) Indeed, even purely factual documents may be covered by the privilege -- that is, excluded from public disclosure -- if they are "inextricably intertwined with policy-making processes." (*Id. at* 1342, citing cases) Thus, the key question in determining whether materials are covered by the privilege is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (*Id.*) Even if the content of a document is purely factual, it may nonetheless be considered exempt from public scrutiny if it is "actually ... related to the process by which policies are formulated." (*Jordan v. United States Dept. of Justice* (D.C.Cir.1978) 591 F.2d 753, 774.)

The California Supreme Court in *Times Mirror* noted that the distinction between facts and privileged deliberative opinion easily blurs such that, for instance, summaries of evidence prepared by staff for the head of the Environmental Protection Agency, containing only factual material, were determined nevertheless to be reflective

of the staff person's evaluative judgment of what was significant in the facts, and therefore revealed the decisionmaking process itself. (*Id.*, citing *Montrose Chemical Corporation of California v. Train* (D.C.Cir.1974) 491 F.2d 63, 67-71.)

In appellate decisions subsequent to *Times Mirror*, courts have clarified that the privilege extends to documents revealing "the mental processes by which a given decision was reached, [including] the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (*San Joaquin Local Agency Formation Com'n v. Superior Court* (2008) 162 Cal.App.4th 159, 170-72.) However, the caselaw has also held that the privilege does not preclude disclosure of documents revealing the "working [, though unwritten] law" of the agency and the standards it employs in its decisionmaking, even if such documents tangentially reveal the decisionmaking process. (See *RLI Ins. Co. Group v. Superior Court* (1996) 51 Cal.App.4th 415, 436-37, 438-39.)

The burden is on the party seeking to withhold documents based upon the privilege to show why they should be withheld. (See *Environmental Protection Agency v. Mink* (1973) 410 U.S. 73, 93.)

All the cases interpreting the deliberative process privilege recognize that it is a qualified privilege. A leading federal evidence treatise indicates that the privilege should only rarely bar disclosure where there is a countervailing interest in disclosure of the information. As the authors state:

One reason why the deliberative process privilege will never be congruent with the Freedom of Information Act exemption is that the privilege is only a qualified one, that is, in deciding whether to uphold a claim of privilege, the court must balance the government's claimed need for secrecy against the court's own need for evidence to resolve a dispute before it. The person seeking disclosure under the F.O.I.A. need show no need for the evidence and the abstract public interest in open government will never weigh as heavily with courts as the concrete needs of a litigant seeking justice. Moreover, the F.O.I.A. exemption has a second rationale beyond the candor rationale that supports the privilege; that is, the interest in preventing premature disclosure of government actions. This second rationale applies largely to pending decisions and will seldom be applicable to a disclosure in litigation.

The deliberative process privilege should seldom be upheld in a case where there is any need for the evidence because it rests on such a puny instrumental rationale. The purpose of the privilege, we are told, is to "encourage free exchange of ideas during the process of deliberation and policy making" and thus to "prevent injury to the quality of agency decisions." It rests upon two dubious empirical assumptions. The first is that government bureaucrats "will not feel free to express their opinions fully and candidly when they fear that their views will be made public." The second is that "effective and efficient governmental decision making depends on the free and uninhibited flow of ideas." However, as is true of the same "candor rationale" advanced for the executive privilege, the enthusiasts for the privilege never trouble to explain how a bureaucrat who does not think his civil service status is enough protection against public criticisms of his ideas will be encouraged to speak out by a privilege that is under the control of the political head of the agency who will be only too happy to waive the privilege when it serves his need to scapegoat his underlings for bad advice and thus avoid political responsibility for bad agency decisions.

(26A Fed. Prac. & Proc. Evid. (Wright, Graham, et al., 1st ed.) §5680 [internal citations omitted].)

So, for instance, in *Citizens for A Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, the appellate court found that "[i]f the records sought pertain to the conduct of the people's business there is a public interest in disclosure. . . [t]he weight of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate." (*Id.* at 715.) There, the request was for inspection and monitoring reports by state official regarding county enforcement of pesticide use laws, including the preliminary reports upon which final action was based. The court found it "incontestible" that the preliminary reports were matters in which the public's interest in disclosure was grave and substantial. (*Id.*) Further, the court held that facts in the agency's files, and even *opinions* of a "purely factual" nature, are not covered by the privilege. (*Id.* at 716-17.) The court concluded that facts in the underlying inspection reports observing illegal pesticide use practices, noting that an airstrip was a "disaster area," and stating that an inspection target "violates the regulations on a regular basis [and t]he county has done very little in making this applicator comply" were all factual matters that were required to be disclosed.[1]

It is plain from the court's review of the applicable authorities that whether the deliberative process privilege applies is a highly fact-specific analysis, that bright lines cannot be drawn, and that the qualified nature of the privilege requires the court to

[1] While this case preceded *Times Mirror*, it was not overruled, criticized or limited in that decision or in subsequent California decisions.

weigh competing interests to determine whether disclosure should be allowed in spite of the documents' revealing the process of deliberation.

II. The Purposes of CEQA and Scope of the Record in CEQA Review

The caselaw concerning limitations on disclosure pursuant to the deliberative process privilege appears to be in tension with, if not at times completely contrary to, the case law and the policies underlying CEQA. CEQA was enacted by the Legislature to ensure "'that environmental considerations play a significant role in governmental decision-making.'" (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.) It is, essentially, an environmental full-disclosure statute. (*Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491, 502.) Members of the public hold a "privileged position" in the CEQA process; they are not removed from the decisionmaking process, but are an essential part of it. (*Concerned Citizens of Costa Mesa, supra*, 42 Cal.3d at p. 936). As stated by the Supreme Court in *Concerned Citizens of Costa Mesa*:

> CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process. In short, a project must be open for public discussion and subject to agency modification during the CEQA process. This process helps demonstrate to the public that the agency has in fact analyzed and considered the environmental implications of its action.

(Id. at 936 [internal citations omitted].)

The requirement of an EIR in CEQA "protects not only the environment but also informed self-government." (*Laurel Heights Improvement Assn. v. Regents of*

University of California (1988) 47 Cal.3d 376, 391-92.) Compliance with the EIR and disclosure provisions of CEQA is therefore required in order for the public to make an "independent, reasoned judgment" about a proposed project. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) The EIR is intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86; 14 CCR § 15003(d).) "Because the EIR must be certified or rejected by public officials, it is a document of accountability. . . [i]f CEQA is scrupulously followed, *the public will know the basis on which its responsible officials either approve or reject environmentally significant action*, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights, supra,* 47 Cal.3d 376, 391-92 [emphasis added].)

Under the CEQA Guidelines, the purposes of judicial review of EIRs include disclosing agency analyses, checking for accuracy, detecting omissions and discovering public concerns, among others. (See 14 CCR §15200.) In cases involving judicial review of a CEQA decision, the statutes and regulations thereunder contemplate "that the administrative record will include pretty much everything that ever came near a proposed development *or* to the agency's compliance with CEQA in responding to that development." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 7. [emphasis in original].) Public Resources Code section 21167.6 requires that the administrative record include "staff reports and related documents," "proposed decisions or findings submitted to the decisionmaking body. . . by its staff,"

"documents. . . cited or relied on" in the findings of the decisionmakers, as well as "all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division." (Cal. Pub. Res. §21167(e)(3), (8), (10).)[2] As the appellate court in *County of Orange* went on to explain:

> [s]ignificantly, the statute seeks to include materials not only relating to the "project," but also relating to "compliance" with CEQA. (Indeed, such material is usually listed in juxtaposition to material related to the "project," e.g., "*All* staff reports and related documents prepared by the respondent public agency *with respect to its compliance* with the

[2] Pub. Resources Code, § 21167.6 -- added by SB 749 in 1994 -- states:
(e) The record of proceedings shall include, but is not limited to, all of the following items:
(1) All project application materials.
(2) All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with
(continued. . .)
respect to the action on the project.
(3) All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the respondent agency pursuant to this division.
(4) Any transcript or minutes of the proceedings at which the decisionmaking body of the respondent public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the respondent public agency that were presented to the decisionmaking body prior to action on the environmental documents or on the project.
(5) All notices issued by the respondent public agency to comply with this division or with any other law governing the processing and approval of the project.
(6) All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.
(7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project.
(8) Any proposed decisions or findings submitted to the decisionmaking body of the respondent public agency by its staff, or the project proponent, project opponents, or other persons.
(9) The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in paragraph (3), cited or relied on in the findings or in a statement of overriding considerations adopted pursuant to this division.
(10) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division.
(11) The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation.

> substantive and procedural requirements" of CEQA "and *with respect to the action on the project.*" (§ 21167.6, subd. (e)(2).) Compliance necessarily envisions a review process that transcends the finished "project." If a project has been modified in response to the CEQA process, the logical inference is that the "process works" and the statute is being complied with.

(*County of Orange, supra*, 113 Cal.App.l4th at 10. [emphasis in original].) Failure by the agency to certify a complete and accurate record of the entire body of documents considered by the agency decisionmaker would "defeat. . . one of the basic purposes of CEQA—to disclose to the public the reasons for a project's approval if the project has significant environmental effects." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 372-73.) "The error is prejudicial 'if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 355-56, quoting *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721–722.)

So, for instance, in *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, the appellate court determined that a report not technically required to be included in the administrative record was improperly and prejudicially excluded where that report was considered by the agency in determining the mitigation measures to be taken. Refusal to disclose and include the report on the grounds that it was "private" deprived the public of information necessary to understand the agency's proposed decision. The court stated:

> Reference to a report of unknown content, which the CDF refuses to divulge, cannot constitute a sufficient answer to an environmental objection under the *Gallegos* test. . . . [p]ublic disclosure of the report was not required by section 21080.5. [But t]his does not end the inquiry. . . Although the report was not explicitly incorporated within the THP by reference, the plan de facto incorporates the report by referring to it as the substantive basis for its site-mitigation measures. In effect, both the plan and CDF's response essentially say, "See the report" in reply to the issue of site mitigation; under these circumstances, the nondisclosure of the report is fundamentally unfair to the rights of the public. We therefore hold that although not specifically required to prepare a report, neither a logging company nor CDF may simply cite the report and fail to provide substantive, detailed responses to environmental objections regarding the report's subject matter. If the company or CDF rely on the report in this fashion and are unwilling to respond sufficiently to satisfy *Gallegos* without disclosure, then the report must be disclosed.

(*Id.* at 628-30.)

In short, CEQA compliance requires that the public be included in the deliberative process, and that the administrative record include the evidence that was part of that deliberative process. To be sure, the record is limited to that which was "before the agency." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571-72 [CEQA review of regulatory scheme required review of "the whole record" before the agency].) But the matters to be disclosed, and thus the matters to be included in the record, are quite broad and appear to tread on territory otherwise covered by the deliberative process privilege. Indeed, the typical CEQA administrative record contains a great deal of "behind-the-scenes" communications among staff and decisionmakers. (See *Schellinger Bros. v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1253 A large portion of the administrative record. . . is devoted to 'correspondence' generated by the project. Much of it is the sort of routine, behind-the-

scenes notes, letters, and emails among officials, attorneys, and consultants"].) It is just those kinds of communications that the deliberative process privilege was, broadly speaking, designed to shield from disclosure, but which CEQA requires to be disclosed in order to fulfill its mandate of fully-informed decisionmaking and public input.

III. Harmonizing the Purposes of CEQA with the Deliberative Process Privilege

How then to reconcile CEQA with the deliberative process privilege? No published decision directly addresses the question of whether deliberative process materials can be excluded from an administrative record on the basis of deliberative process privilege. The Third District Court of Appeal in *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1221 has held that the 1994 amendments to Section 21167.6 were not meant to, and do not, abrogate the attorney-client or work product privileges, either expressly or impliedly. However, the Court did not address the deliberative process privilege or any other qualified privilege. While it is true that nothing in CEQA expressly overrides the deliberative process privilege, this does not end the inquiry, as it is equally clear that there is no statutory or case authority holding that the deliberative process privilege overrides the statutory disclosure mandates of CEQA.

Further, the application of the privilege appears to depend not only on the factual context, but on the legal context in which it is asserted. *Times Mirror* and its progeny describe the scope of the privilege in the context of a Public Records Act request; the analysis would appear to be different when the person seeking the information is a party

to pending litigation. (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1124-25.) The caselaw concerning the deliberative process privilege is almost exclusively within the context of the state Public Records Act or its federal analog. In the seminal authority, *Times Mirror*, the documents were sought for unspecified purposes not in connection with other litigation. A request was made under the California Public Records Act, and the State asserted an exemption under Government Code §§6254(*l*) and 6255.

Here, the documents are sought to be included as part of the administrative record concerning judicial review of a decision by an administrative agency. Judicial review requires that the record consider all the evidence that was actually before the decisionmaker in approving a project. (*Western States, supra,* 9 Cal.4th 571.) While not exactly congruent, since discovery is rarely permitted in mandate actions (*id.*), the interests in "disclosure" here are more akin to a litigant in a traditional civil case seeking discovery than they are to member of the public seeking documents under the Public Records Act. (Cf. *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1124-25 [exemption contained in Public Records Act did not apply to discovery in civil litigation, Evidence Code §1040 is the exclusive means of asserting privilege to protect governmental secrecy].)[3] And although the civil discovery threshold is lower (i.e., may lead to admissible evidence) than the standard for inclusion in the administrative record

[3] Evidence Code §1040, the official information privilege, protects information acquired in confidence by a governmental entity where "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Respondents assert that Evidence Code §1040 has no relevance in these proceedings because this is not traditional civil litigation, but a mandamus action.

(i.e., relevant and before the agency), the purposes of the two rules are similar -- to understand the entire body of evidence pertinent to a question before the court. Not all "relevant" evidence will be included in the record, since it must also have been before the agency to be part of the record for review. The matters at issue are decidedly different from what might be subject to disclosure in response to a Public Records Act request.

Finally, "[n]ot every disclosure which hampers the deliberative process implicates the deliberative process privilege [; o]nly if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence." (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172.) The court must determine whether the interests in nondisclosure "clearly outweigh" the interest in disclosure even if the documents appear to disclose the deliberations of the agency, and CEQA's strong policy in favor of an open and public policymaking process must be factored into that weighing[4].

The Court notes that a leading treatise on CEQA addresses the tension between the deliberative process privilege and the broad scope of documents to be included in a CEQA administrative record. (Remy, Thomas, Moose & Manley, Guide to CEQA (2006 11th ed.) ["Remy, *Guide to CEQA*"] at 861- 67.) The commentators there

[4] Moreover, here, unlike in *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1075, the concern for hampering the deliberative process is diminished because the Court is reviewing the agency's basis for a decision already made, not ordering positions and proposals to be disclosed prior to a final decision.

conclude that the phrase "all internal agency communications" in section 21167.6(e)(10) cannot be read literally to require inclusion of administrative draft documents never released to the public, particularly where they are not normally permanently retained. (Cf. Gov't Code §6254(a) [agencies need not disclose "[p]reliminary drafts, notes or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure"].) Likewise they conclude that such internal communications cannot include "proposed decisions or findings" that were never "submitted to the decisionmaking body" by agency staff, lest the inclusion be inconsistent with Section 21167.6(e)(8)'s language.

Arguably, the inclusion by the Legislature of broad "catch-all" language in subpart 10 was intended to do precisely what the commentators argue against -- include all such documents not covered in the preceding specific categories. Indeed, Section 21167.6(e) begins by stating "[t]he record of proceedings shall include, *but is not limited to, all* of the following items. . .." (21167.6(e) [emphasis added].) Subpart 10 itself reads:

> Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and *either made available to the public during the public review period or included in the respondent public agency's files on the project*, and *all* internal

agency communications, including staff notes and memoranda *related to the project or to compliance with this division.*

(21167.6(e)(10) [emphasis added].)

The commentators further argue that it would be anomalous if a petitioner could not obtain documents falling within the deliberative process privilege by filing a Public Records Act request, but could obtain those documents by filing a CEQA lawsuit against the same agency. (Remy, *Guide to CEQA*, at 863.) The Court finds nothing anomalous about applying a different analysis, and weighing of different interests, based upon whether a petition for review of a CEQA decision is or is not pending. (Cf. *Marylander, supra.*)

IV. Application to the Documents Reviewed *In Camera* Herein

From the above, the Court discerns some principles for determining whether the documents listed in the privilege log by DPR should be excluded from the administrative record herein on the basis that they are shielded by the deliberative process privilege:

1. Is the document relevant to action on the project or to CEQA process compliance?

2. Was the document presented to or available to the decisionmaker(s)?

3. Does the document contain facts, factual/expert opinions, or a statement of the standards or rules applied by the agency? If so, are these portions severable from any portions that reveal the internal thinking or recommendations of the agency staff or decisionmakers?

4. If there are entire documents, or portions thereof, that reveal the internal thinking or recommendations of the agency staff, does the public's interest in disclosure outweigh the interests in nondisclosure?

Having reviewed the documents carefully, the Court finds as a general matter that the vast majority of them are not covered by the deliberative process privilege because they do not expose the motives or internal thought processes of the agency's decisionmakers or staff per se. Disclosure and inclusion of these documents in the administrative record of the decision under review here appears unlikely to chill candid communications between staff persons, or staff persons and their superiors, concerning the facts they reported or their fact-based opinions of the possible alternatives or mitigations to remedy any perceived environmental impacts. The documents are primarily technical, scientific evaluations of the consequences of use of a chemical pesticide or are internal drafts and revisions of such evaluations. The other broad category of document is preliminary drafts of responses to comments. They arguably appear to be protected by the deliberative process privilege either because they are staff recommendations advising some level of decisionmaker how to phrase the agency's response to a comment from the public or from another governmental entity.[5]

Even if the documents could be said to reveal the deliberative process, the public's interest in disclosure under these circumstances clearly outweighs the interest

[5] Further, it is unclear whether the documents at issue would necessarily be exempted from disclosure under the Public Records Act. Government Code §6254(a) exempts:"[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, *if the public interest in withholding those records clearly outweighs the public interest in disclosure*." (emphasis added) The Court has no information about whether these records are retained in the ordinary course by Respondents.

in keeping them confidential. The documents are important to an understanding of the decision to permit the use of the pesticide at issue in this litigation. The documents demonstrate the care and consideration taken by the agency in its study of the use of the pesticide and of the limitations of its use. The documents show the full scope of the evidence before the agency in reaching its decision. The purposes of CEQA, along with the serious import to the public at large in the CEQA project at issue, outweigh DPR's interest in nondisclosure.

As to the specific documents listed in Respondents' privilege log, the Court finds as follows:

A. Documents Argued to Be "Deliberation Before Proposed Decisions to Register Products Containing Methyl Iodide"

- AGO-1 -- "Memorandum re: Potential Mitigation Measures for Possible Registration of Methyl Iodide"

This is a memorandum from Susan Edmiston, the Chief of the Worker Health and Safety Branch of the Pesticide Programs Division of the Department of the Pesticide Regulation ("DPR"), to her immediate supervisors, Marylou Verder-Carlos, the Assistant Director of the Pesticide Programs Division, and Charles ("Chuck") Andrews, the Associate Director of the Pesticide Programs Division, with carbon copies to Joseph Frank and Linda O'Connell who are not identified as staff or otherwise. The memorandum is not protected by the deliberative process privilege. The content of the memorandum is a staff person's report of possible CEQA and health and safety mitigation measures. It does not disclose any mental processes, motivations, reasoning, or deliberations by any decisionmaker or by any non decision-maker. It is a technical

document evaluating possible mitigations. It is a staff report, internal to the agency and related to the Project. Its inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with staff some 10 months before the final decision was made by the decisionmakers here.

- AGO-2 -- "Memorandum re: Additional Potential Methyl Iodide Mitigation Strategies Pre-Decisional; For Internal Use Only"

This memo was also from Susan Edmiston to Chuck Andrews and Marylou Verder-Carlos. It is not a document that is protected by the deliberative process privilege. First, the title is a misnomer, since there are no strategies discussed therein. Second, the document is a technical, fact-gathering document by a staff person compiling information about a CEQA project and relaying that information to her supervisors. It was not drafted by a decisionmaker, nor sent directly to one. It does not disclose any decisionmaker's motives, thought processes, reasoning, or deliberations. Its inclusion in the administrative record will not chill the effectiveness of any decisionmaker's consultations with staff and will not chill the effectiveness of any staff person compiling such a fact-gathering document.

- AGO-3 -- "Mitigation Recommendations For Idomethane Registration; Pre-Decisional Document For Internal Use Only"

This document is a laundry-list of comparison charts, with commentary on the statistical evidence in the charts by, apparently, DPR staff. This document is annotated as "Pre-decisional Document-Internal Discussion Only." There is no indication on the document itself of the author or authors, or to whom it was distributed. It is a staff report concerning possible mitigations and their correlation charts. This document is

not protected by the deliberative process privilege. It does not disclose the motives, mental processes, or reasoning of any decisionmaker. It is a staff report regarding facts that ought be considered by the decisionmaker, along with staff's fact-based opinion of the effectiveness of some of the restrictions on use type mitigations. It does not appear to have been drafted by a decisionmaker, nor do Respondents represent that it was. Its inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with staff or staff's ability to perform their duties. Indeed, CEQA requires evaluation of feasible mitigation options.

- AGO-4 -- "Idomethane Registration Decision Options"

This document is a forty-four page document summarizing facts regarding registration of iodomethane and four end-use products of Real Party Arysta. It is not signed and there is no indication on its face of its author or to whom it was directed; Respondents represent that it was authored by Marylou Verder-Carlos and sent to Chuck Andrews, Chris Reardon, DPR Deputy Director, Mary-Ann Warmerdam, DPR Director, and Polly Frenkel, Chief Counsel in the Office of Legal Affairs. The document contains background facts regarding registration, as well as recommendations from other agencies concerning registration, and DPR's responses to those recommendations. The vast majority of the document (38 pages) summarizes and compares scientific data on toxicity, including a catalog of mitigation options and their associated the scientific data. It includes comments from within the agency and a summary of comments from others—another state agency, a federal agency's public reviewers, the Real Party in Interest and a scientific review committee. The document

gives no information whatever of the motives, mental process, or reasoning of the author or recipient(s). Taking the document as a whole, it appears to be a staff compilation of data to be used by a decisionmaker in that decisionmaker's evaluation of the issue. The inclusion of the document in the administrative record will not chill the candor or effectiveness of the decisionmaker's consultations with staff or agency staff's ability to perform their jobs.

- AGO-5 -- "E-Mail and Attachment Requesting Comments on Draft of Notice of Proposed Decision to Register Pesticide Products Containing Methyl Iodide"

This is an e-mail and attachment including a draft Notice of Proposed Decisions. It includes comments on the draft language, although it is not clear whose comments they are. The vast majority of the comments are simply drafting notes that address the clarity of the writing or the explanations in the draft document. Some comments could, however, be viewed as strategic or revealing the commenter's thought process. Based upon that determination, the Court finds that this document does contain deliberative process material. Notwithstanding the presence of a small amount of deliberative process material, the public's interest in disclosure outweighs the interest in nondisclosure, and therefore the Court finds that the deliberative process privilege does not shield the document from inclusion in the administrative record of these proceedings.

- AGO-6 -- "E-Mail Requesting Comments on Draft Notice of Proposed Decisions to Register Pesticide Products Containing Methyl Iodide"

This is an e-mail and attachment from Marylou Verder-Carlos to Gary Patterson, Chief of the Medical Toxicology Branch, seeking his input on drafting an explanation to include in a draft document (Notice of Proposed Decision). The e-mail portion of the document discloses the thought process of Marylou Warmerdam, the decisionmaker in this matter, at least as understood by Verder-Carlos.

The Court finds that this document does contain deliberative process material. However, the public's interest in disclosure outweighs the interest in nondisclosure, and therefore the Court finds that the deliberative process privilege does not shield the document from inclusion in the administrative record of these proceedings.

B. Documents Argued to Be "Deliberation on Responses to Comments Received on Proposed Decision to Register Products Containing Methyl Iodide" (AGO-7 through AGO- 13)

This group of documents is comprised of emails, some with and some without attachments, seeking staff input on the agency's responses to public comments on its announced proposed decision to register the pesticides at issue.

- AGO-7 is an e-mail that purports to include an attachment with recommendations for a study to address groundwater concerns. It does not include the stated attachment.
- AGO-8 is an e-mail with comments and attaching a draft response to public comments on the agency's proposed decision regarding groundwater concerns.
- AGO-9 is an e-mail cover sheet and the response of DPR's Enforcement Branch to comments made by Petitioners concerning DPR's proposed registration decision.

- AGO-10 is an e-mail with an attached draft response to comments raised by Petitioners and others concerning the proposed registration decision.
- AGO-11 and AGO-12 are e-mails containing draft language for responses to public comments by Petitioner, sent from Marylou Verder-Carlos to Gary Patterson for review and comment.
- AGO-13 is an e-mail with an attached draft response compiling responses to all comments to public comments and being circulated for review and input from Marylou Verder-Carlos to Sue Edmiston, Nan Gorder, Gary Patterson and John Sanders.

The Court does not agree that these e-mails and attachments contain deliberative process material. They are fact-based opinions generated by staff in response to public comments. Indeed, it is notable that, although they precede the *final* decision, all these documents were generated after the agency publicly noticed its proposed decision regarding registration. The documents concern responses to public comments on that proposed decision. Thus, the chances of their disclosure revealing confidential deliberations in the making of the registration decision is, at best, attenuated. These documents do not disclose the decisionmakers' thought process and motives. To the extent they reveal the agency's process of determining how to respond to comments, they disclose little more than the final, public response to comments would. Their inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with staff. Moreover, the public's interest in disclosure outweighs the agency's interest in non-disclosure.

C. Documents Argued to Be "Deliberation on Draft Methyl Iodide Labels and Suggested Changes for Final Labels"

- AGO-14 -- "Memorandum on Worker Safety Review on Draft Methyl Iodide Labels -- Review Conducted for Decisionmaker Consideration"

This document is a memorandum from Sue Edmiston to Steve Rhodes. While the description in the privilege log states the Title/Document Description is "review conducted for decisionmaker consideration," there is nothing in the document that supports that title or description. It is a staff report evaluating the labels submitted by the pesticide manufacturer for DPR approval. This document might best be analogized to a zoning staff report evaluating whether a proposed building development might (or might not) be consistent with a City's zoning law and what might (or might not) be required of the applicant to satisfy a City's zoning law. It is a fact-based analysis rather than a policy recommendation. It does not disclose the mental processes of the decisionmakers, and its inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with agency staff.

- AGO-15 -- "E-mail Transmitting Review and Comments on Draft Methyl Iodide Labels"

This document is an e-mail with thirteen-page attachment from Randy Segawa to Ann Prichard (Chief of the Pesticide Registration Branch), Chuck Andrews, John Sanders (Chief of the Environmental Monitoring Branch), Sue Edmiston and other staff members. The e-mail describes the attachment and itemizes a "to do" list of tasks that need completion regarding draft labels. The attachment includes comments on draft methyl iodide labels from a branch of the Pesticide Programs Division of the DPR. It

also contains information from the Real Party in Interest, and comments from the sender on that information. This is a report from employees far from the decisionmaker(s), directed to their supervisors. It is an internal agency communication or memorandum related to the Project. Most of the comments are just drafting suggestions for clarity of language -- correcting typographical errors and the like. None of the comments are strategic or revealing of the agency/decisionmaker's thought process. Its inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with agency staff.

- AGO-16 -- "Memorandum on Worker Safety Review of Draft Labels: Review Conducted for Decisionmaker Consideration"

This document is a Memorandum from the Chief of the Worker Health and Safety Branch of the DPR to an employee of the DPR's Registration Branch. While the description in the privilege log states the Title/Document Description is "review conducted for decisionmaker consideration," there is nothing in the document that supports that title or description.

This document is a staff report evaluating the labels submitted by the pesticide manufacturer for DPR approval. Like AGO-14, it is similar to a zoning compliance staff report. It is a fact-based analysis rather than a policy recommendation. It does not disclose the mental processes of the decisionmakers, and its inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with agency staff.

- AGO-17 -- "Working Paper, Comments of Marylou Verder-Carlos on Label Review"

This document is comprised of a draft of comments relating to Arysta's proposed labels. Neither the author nor the recipient are apparent from the face of the document, though the privilege log indicates that the author was Marylou Verder-Carlos and the recipient was Chuck Andrews. It appears to be the work of one person with margin notes/comments by another person making suggestions regarding clarity of language, completeness of content, or identification of areas where additional information needs be compiled. The document itself lists issues relating to the proposed product labels.

The document does not disclose the mental process, motivations, or deliberations of any decisionmaker in the agency. Its inclusion in the administrative record will not chill the candor or effectiveness of the decisionmakers' consultations with agency staff. Moreover, to the extent any portion of the document might trigger the deliberative process privilege, the public's interest in disclosure outweighs the interest in nondisclosure, and therefore the Court finds that the deliberative process privilege does not shield the document from inclusion in the administrative record of these proceedings.

- AGO-18 to AGO-21 -- "Comments on Draft [Labels] for Internal Discussion"

These three documents appear to be proposed revisions to other documents. The titles do not include the language found in the privilege log of "for internal discussion." The identification of the author is not found on the face of any of the documents and the recipient is not found on the face of the documents. The majority of the comments are

in the nature of typographical, grammatical or clarity corrections. The body of the documents does not disclose the mental process, motivations, or deliberations of any decisionmaker in the agency.

CONCLUSION

Based upon the foregoing, the Court finds:

1. The great majority of the documents do not contain deliberative material that would trigger the deliberative process privilege, even if this were a Public Records Act request for documents. And, as to those few items that do contain deliberative process material, the interest in public disclosure clearly outweighs the agency interest in non-disclosure under the circumstances.

2. Separate and independent of the evaluation summarized in the preceding paragraph, applying solely the deliberative process privilege standards, the matter before the Court involves augmentation of a CEQA administrative record to include the documents. The statutory provisions of CEQA would generally require inclusion of all these documents in the administrative record, begging the question of whether the deliberative process privilege provides an exception to those requirements. It does not. The principles and rules applicable to CEQA can only be harmonized with the qualified deliberative process privilege to require that these documents be included in the administrative record. Not only does the deliberative process privilege not apply to the documents here, but if it did, the harmonized consideration of the CEQA principles and the qualified privilege rules leads to this ruling that the documents must be included in the administrative record.

The Court therefore ORDERS that the administrative record in this matter shall be augmented to include the documents produced for *in camera* review. Respondents shall produce copies of the documents to Petitioners no later than August 18, 2011, and the augmented electronic administrative record shall be lodged with the Court by August 18, 2011, to include these documents.

IT IS SO ORDERED.

DATED: 8/11/11

Frank Roesch
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER RE: IN CAMERA REVIEW OF DOCUMENTS AT ISSUE IN MOTION TO AUGMENT ADMINISTRATIVE RECORD to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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I declare under penalty of perjury that the same is true and correct.
Executed on August 15, 2011.

By: Vicki Daybell
Vicki Daybell, Deputy Clerk
Department 31