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BEFORE THE

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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16 In re State Water Resources Control Board | AMENDED MOTION FOR
Petition Requesting Changes in Water Rights | DISQUALIFICATION OF HEARING
17 of the Department of Water Resources and | OFFICERS FELICIA MARCUS AND TAM
U.S. Bureau of Reclamation for the California | DODUC
18 WaterFix Project.

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1 The San Luis & Delta-Mendota Water Authority (“Water Authority”) hereby moves for
2 disqualification of Hearing Officers Felicia Marcus and Tam Doduc. This motion is made on the
3 ground that the Hearing Officers have predetermined a critical issue that will be before them in
4 this proceeding. The Water Authority makes this motion with reluctance and only after significant
5 consideration. However, the law is clear. When a judge, in court or an administrative
6 adjudication, has predetermined an issue, the judge must be disqualified to protect the due process
7 rights of all parties. It is far better for all involved that this proceeding not go forward with the
8 taint of a due process violation that would require the result of months of hearings to later be set
9 aside by a court.

10 **Summary Of Background Facts**

11 This proceeding concerns a joint petition by the United States Bureau of Reclamation
12 (“Reclamation”) and California Department of Water Resources (“DWR”) requesting the addition
13 of points of diversion and redirection to permits they hold for operation of the Central Valley
14 Project (“CVP”) and State Water Project (“SWP”), respectively. The proposed permit changes are
15 for the California WaterFix project.

16 The predetermined issue involves “appropriate Delta flow criteria.” The Delta Reform Act
17 mandates that the State Water Resources Control Board (“State Water Board”) include
18 “appropriate Delta flow criteria” in any order approving a change in point of diversion for the
19 CVP or SWP from the southern Delta to a point on the Sacramento River. Water Code, §
20 85086(c)(2). In a formal order issued on February 11, 2016, before hearing any evidence on the
21 merits, the Hearing Officers revealed that they have already reached a significant conclusion
22 regarding appropriate Delta flow criteria. In their order, the Hearing Officers conclude: “The
23 appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may
24 well be more stringent than petitioners’ preferred project.” Hearing Officers’ Ruling on Pre-
25 Hearing Conference Procedural Issues (“February Order”), p 4 (emphasis added). The Hearing
26 Officers did not qualify or caveat their conclusion in any way. The February Order reveals they
27 have already decided to impose “more stringent” flow criteria.

28 In response to the February Order, several parties to the proceeding complained about this

1 predetermination by the Hearing Officers. The petitioners, Reclamation and DWR, requested that
2 the statement be removed from the February Order. February 23, 2016 letter, p. 2. The State
3 Water Contractors made a similar request, explaining:

4 [The] conclusion was made without considering any evidence, making any
5 findings, or basing the decision on evidence and findings. As such, the Water
6 Board's conclusion is pre-decisional, appears to be biased, and constitutes an abuse
of discretion.

7 February 22, 2016 letter, p. 2. The San Joaquin Tributaries Authority agreed. It wrote that the
8 Hearing Officers "improperly reached factual and legal conclusions, without an evidentiary
9 hearing, on the issue of 'appropriate Delta flow criteria' required by Water Code section 85086."
10 February 24, 2016 letter, p. 1.

11 Like the State Water Contractors, the Coalition for a Sustainable Delta requested that the
12 Hearing Officers issue a revised order. February 29, 2016 letter, pp. 1-2. The Coalition wrote:

13 The contention that a fair hearing requires a neutral and unbiased decision maker is
14 a fundamental component of a fair adjudication...." (*BreakZone Billiards v. City of*
15 *Torrance* (2000) 81 Cal.App.4th 1205, 1234.) Where, as here, due process requires
16 an administrative hearing, an individual has the right to a tribunal "which meets at
17 least currently prevailing standards of impartiality." (*Wong Yang Sung v. McGrath*
(1950) 339 U.S. 33, 50.) Biased decision makers are constitutionally impermissible
and even the probability of unfairness is to be avoided. (*Withrow v. Larkin* (1975)
421 U.S. 35, 47; *In re Murchison* (1955) 349 U.S. 133, 136.)

18 The South Delta Water Agency ("South Delta") did not dispute that the Hearing Officers
19 had predetermined the issue of "appropriate flow criteria." It instead attempted to justify the
20 conclusion. South Delta argued the predetermination is appropriate based on the State Water
21 Resources Control Board's 2010 report titled: "Development of Flow Criteria for the Sacramento-
22 San Joaquin Delta Ecosystem" ("2010 Flow Criteria Report"). February 23, 2016 letter, p. 2.
23 Contra Costa County and Contra Costa County Water Agency joined in the response by South
24 Delta. February 25, 2016 letter, p. 1.

25 The Hearing Officers responded on March 4, 2016, in their "Ruling on Revised Hearing
26 Schedule, Revised NOIs, Electronic Service" ("March Order"). The March Order provided three
27 responses. First, the Hearing Officers characterize their conclusion that "appropriate Delta flow
28 criteria will be more stringent" as a "preliminary view." Second, the Hearing Officers state that

1 their conclusion is supported by the 2010 Flow Criteria Report. And third, the Hearing Officers
2 cite the periodic review of the Water Quality Control Plan for the San Francisco Bay/Sacramento-
3 San Joaquin Delta Estuary (Bay-Delta Plan), which was conducted in 2009, as further supporting
4 their conclusion. March Order, p. 4. Respectfully, none these responses are adequate. None of
5 these responses cure the due process violation caused by the Hearing Officers’ predetermination of
6 a critical issue raised in this proceeding.

7 **The Hearing Officers Have Predetermined The Appropriate Flow Issue**

8 The Statement In The February Order Was Not “Preliminary”

9 The March Order characterizes the statement that “[t]he appropriate Delta flow criteria will
10 be more stringent than petitioners’ current obligations and may well be more stringent than the
11 petitioners’ preferred project.” as a “preliminary view.” But nothing in the February Order
12 indicates it was a “preliminary view.” Rather, it was a considered statement in a formal order
13 disposing of an objection to these proceedings.

14 In the February Order, the Hearing Officers responded to arguments made at a pre-hearing
15 conference that the State Water Board cannot holding hearings on or decide the change petition
16 until it first updates the Bay-Delta Plan. The Hearing Officers explained:

17 The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act)
18 establishes additional requirements related to the WaterFix that are distinct and
19 separate from the Bay-Delta Plan. The Delta Reform Act requires that any order
20 approving the water right change petition must include “appropriate Delta flow
21 criteria.” Those flow criteria must be informed by flow criteria to protect the Delta
22 ecosystem, which the State Water Board developed in 2010.... We do not interpret
23 “appropriate Delta flow criteria” to mean the same thing as either existing or
24 revised water quality objectives. Determination of appropriate flow criteria for
25 purposes of this proceeding will entail a balancing of the need for flows to protect
26 water quality in the Bay-Delta and the need for water to meet the demands of the
27 State Water Project (SWP) and Central Valley Project (CVP). The flow criteria
28 imposed as a condition of any approval would be an interim requirement until
Phases 2 and 3 of the Bay-Delta Plan update and subsequent implementation
processes are complete, at which point the flow criteria would be revisited.

26 February Order, p. 4. Following this explanation, the Hearing Officers’ concluded: “The
27 appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may
28 well be more stringent than the petitioners’ preferred project.” *Id.* Nothing in this or any other

1 text of the February Order suggests that this conclusion was a “preliminary view.” The statement
2 is deliberate, clear, and unequivocal. Characterizing the statement as a “preliminary view” three
3 weeks later and only after complaints have been lodged does nothing to dispel the conclusion that
4 the Hearing Officers have already decided this issue.

5 *The State Water Board Did Not Previously Decide The Issue In The 2010 Flow Criteria Report*

6 The March Order says the statement in the February Order that the flow criteria will be
7 more stringent than existing criteria was “informed by” the 2010 Flow Criteria Report. March
8 Order, p. 4. But the State Water Board did not say in that report that “more stringent” flow criteria
9 are appropriate.

10 As stated in the March Order, the 2010 Flow Criteria Report does provide: “The best
11 available science suggests that current flows are insufficient to protect public trust resources.” *Id.*,
12 p. 2. That statement, however, does not necessarily reflect a conclusion by the State Water Board
13 that more flow is appropriate. In the 2010 Flow Criteria Report, the State Water Board recognized
14 that flow criteria “should reflect the frequency, duration, timing, and rate of change of flows, and
15 not just volumes or magnitudes.” *Id.*, p. 5. Further, the State Water Board recognized that it did
16 not consider other important factors in the 2010 Flow Criteria Report, including:

- 17 • The impact of outflow on other public trust resources and the measures for
18 the protection of those resources, such as requiring sufficient water for cold water
pool in reservoirs to maintain temperatures in Delta tributaries. *Id.*, p. 2.
- 19 • The broad range of public interest matters, including economics, power
20 production, human health. *Id.*
- 21 • Feasibility of the public trust criteria and consistency with the public
22 interest and welfare requirements, and the effects of flow measures on non-aquatic
resources (such as habitat for terrestrial species). *Id.*, p. 3.

23 Presumably because of the factors not considered, and in recognition that conditions in and our
24 understanding of the Bay-Delta is constantly changing, the State Water Board explained:

25 If the DWR and/or the USBR in the future request the State Water Board to amend
26 the water right permits for the State Water Project (SWP) and/or the Central Valley
27 Project (CVP) to move the authorized points of diversion for the projects from the
28 southern Delta to the Sacramento River, Water Code section 85086 directs the State
Water Board to include in any order approving a change in the point of the
diversion of the projects appropriate Delta flow criteria. At that time, the State

1 Water Board will determine appropriate permit terms and conditions. That
2 decision will be informed by the analysis in this report, but will also take many
3 other factors into consideration, including any newly developed scientific
4 information, habitat conditions at the time, and other policies of the State, including
the relative benefit to be derived from all beneficial uses of water. The flow criteria
in this report are not pre-decisional in regard to any State Water Board action.

5 *Id.*, pp. 3-4 (emphasis added). It continued:

6 The flow criteria represent a technical assessment only of flow and operational
7 requirements that provide fishery protection under existing conditions. The flow
8 criteria contained in this report do not represent flows that might be protective
9 under other conditions. The State Water Board recognizes that changes in existing
10 conditions may alter the need for flow. Changes in existing conditions that may
11 affect flow needs include, but are not limited to, reduced reverse flows in Delta
channels, increased tidal habitat, improved water quality, reduced competition from
invasive species, changes in the point of diversion of the SWP and CVP, and
climate change.

12 *Id.*, p. 4 (emphasis added). Notably, the 2010 Flow Criteria Report carefully caveated that it was
13 based on then “existing conditions.” That was six years ago. And the facilities to be built as part
14 of the WaterFix project would not become operational for some 10-15 years from now.
15 Necessarily, the criteria in the 2010 Flow Criteria Report cannot be relied upon without also
16 considering new scientific information and changes in physical, chemical and biological
17 conditions arising since 2010. Hence, the 2010 Flow Criteria Report should have informed the
18 Hearing Officers that much more analysis was needed before reaching a conclusion, rather than
19 the conclusion drawn from the report, that new flow criteria “will be more stringent” than current
20 criteria.

21 *The State Water Board Did Not Previously Decide The Issue In The Periodic Review Of The Bay-*
22 *Delta Plan*

23 The March Order suggests that the periodic review of the 2006 Bay-Delta Water Quality
24 Control Plan, which was commenced in 2008 and completed in 2009, supports the
25 predetermination by the Hearing Officers.

26 The periodic review resulted in State Water Board staff recommending:

27 [T]he State Water Board consider changes to the Delta outflow objective, or
28 alternatively Delta inflow from the Sacramento Basin, based on available
information as part of its review and possible revision of the Bay-Delta Plan.

1 2009 Periodic Review of the 2006 Water Quality Control Plan for the San Francisco
2 Bay/Sacramento-San Joaquin Delta Estuary, p. 17. The water quality objectives were set in 2006,
3 and the review was based on data available as of 2009. This recommendation for further review
4 was supported by a very general discussion of some of the science available at the time, some of
5 the regulations, and some of the data. That discussion could be read to support higher outflow at
6 times. *Id.*, p. 18 (discussing X2). That discussion, however, could also be read to support no
7 change or reductions in the quantity of water dedicated to outflow; but changes for example in the
8 timing of outflow. *Id.*, pp. 18-19 (discussing PPIC report). It could be read to suggest changes to
9 bring water quality objectives more in line with the biological opinions issued after 2006. A
10 recommendation by staff to consider changes to existing water quality objectives is far short of a
11 conclusion that changes are required, let alone a conclusion about what specific changes should
12 be. No such conclusions should be drawn before either this proceeding or the process water
13 quality planning proceedings have been completed.

14 **Due Process Requires Recusal Of The Hearing Officers**

15 Government Code section 11425.40 provides that “[t]he presiding officer is subject to
16 disqualification for bias, prejudice, or interest in the proceeding.” The court in *State Water*
17 *Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, explained that “[t]he contention that a
18 fair hearing requires a neutral and unbiased decision maker is a fundamental component of a fair
19 adjudication....” (*Id.* at 840, quoting *Breakzone Billiards v. City of Torrance* (2000) 81
20 Cal.App.4th 1205, 1234.) “Bias, unlike other deprivations of due process which may be clearly
21 determined on the record, is generally an invisible influence and for that reason must be
22 particularly guarded against.” *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781,
23 802.

24 The Hearing Officers have demonstrated bias in this proceeding. The “appropriate Delta
25 flow criteria” is an issue they must decide in this proceeding, at the conclusion of all the evidence.
26 But before hearing any evidence, they have declared in their February Order that “the appropriate
27 Delta flow criteria will be more stringent than petitioners’ current obligations and may well be
28 more stringent than the petitioners’ preferred project.” That is a definitive statement regarding a

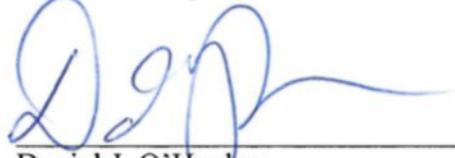
1 significant issue, not an expression of a "preliminary view" as claimed by the March Order. If
2 anything, the efforts in the March Order to justify the conclusion as correct based on the 2010
3 Flow Criteria Report and the 2009 periodic review only serve to confirm that this is a firmly-held
4 conviction.

5 In sum, the February Order shows that the Hearing Officers have predetermined a critical
6 issue before them. The statements in the March Order cannot alter that fact. Such a predisposition
7 cannot exist within any quasi-judicial proceeding, including this very important proceeding on the
8 petition requesting water right changes required for the WaterFix project. For these reasons, the
9 law requires that the Hearing Officers recuse themselves. The proceedings should be stayed
10 pending the appointment of new Hearing Officers.

11 Dated: March 21, 2016

Respectfully submitted,

12 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
13 A Professional Corporation

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15 By: 
16 Daniel J. O'Hanlon
17 Attorneys for San Luis & Delta-Mendota Water
18 Authority
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STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

AMENDED MOTION FOR DISQUALIFICATION OF HEARING OFFICERS FELICIA MARCUS
AND TAM DODUC

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated March 15, 2016, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	<p>I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:</p> <p>Method of Service: _____</p>
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I certify that the foregoing is true and correct and that this document was executed on 3/21/16
Date

Signature: 

Name: Daniel J. O'Hanlon
Title: Attorney
Party/Affiliation: SLDMWA
Address: 400 Capitol Mall, 27th Floor
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