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Via Email

Felicia Marcus, Chair and Co-Hearing Officer
Tam Doduc, Member and Co-Hearing Officer
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
CWFhearing@waterboards.ca.gov

Re: Comments on California Water Fix Pre-Hearing Conference

Dear Ms. Marcus and Ms. Doduc:

On behalf of the Coalition for a Sustainable Delta (Coalition), we respectfully request that the State Water Resources Control Board (Board) reconsider at least three aspects of its California WaterFix Project (Project) Pre-Hearing Conference Ruling (Ruling) issued by the Board on February 11, 2016. Specifically, as set forth in further below, the Coalition objects to the following: (1) a portion of the Ruling improperly infringes on the due process rights of the California Department of Water Resources and the U.S. Bureau of Reclamation (Petitioners) and other stakeholder parties, including the Coalition; (2) the Board's decision to stagger the submission of evidence improperly prejudices Petitioners; and (3) the Ruling inappropriately allows Part 1 of the hearing to encompass uses of water that extend beyond the definition of legal users of water, including flood control issues and environmental justice issues.

1. The Ruling Improperly Infringes On Petitioners' Due Process Rights.

"The contention that a fair hearing requires a neutral and unbiased decision maker is a fundamental component of a fair adjudication...." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1234.) Where, as here, due process requires an administrative hearing, an individual has the right to a tribunal "which meets at 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.)

In the Ruling, the Board states the following:

"The appropriate Delta flow criteria will be more stringent than petitioners' current obligations and may well be more stringent than the petitioners' preferred project."

(Ruling at p. 4, emphasis added.) This statement reflects a pre-commitment to a result that is entirely improper and infringes on the due process rights of Petitioners. (*BreakZone Billiards v. City of Torrance, supra*, 81 Cal.App.4th at p. 1236 ["[A] commitment to a result (albeit, perhaps, even a tentative commitment), ... will be found violative of due process."].) This statement also does not reflect an impartial decision maker, as is required to comply with fundamental principles of due process. (*Morongo Band of Mission Indians v. State Water Res. Control Bd.* (2009) 45 Cal. 4th 731, 737 [A due process violation may be demonstrated, "not only by proof of actual bias, but also by showing a situation 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"], citing *Withrow v. Larkin, supra*, at p. 47.) Because the Board's statement was made without consideration of any evidence, and reflects a prejudgment on behalf of the Board that is inconsistent with due process, the Coalition requests that the Board issue a revised Ruling to correct this error. (*Applebaum v. Bd. of Directors* (1980) 104 Cal. App. 3d 648, 657-58 ["Due process questions are raised when the administrative agency's initial view of the facts ... as a practical or legal matter forecloses fair and effective consideration of the merits at an adversary hearing leading to the ultimate decision. (citation).].)

2. The Board's Decision To Stagger The Submission Of Evidence Improperly Prejudices Petitioners.

While the Coalition recognizes that the Board has discretion to tailor the proceedings appropriately to the particular matter before the Board, the Board should nonetheless conduct proceedings "with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board." (Cal. Code Regs., tit. 23, § 648.5, subd. (a).) The Board has expressly recognized that Petitioners have already provided a tremendous amount of information for the parties to review and consider. (Ruling at p. 5-6.) Despite this, the Board intends to allow a staggered briefing schedule, which provides Project opponents with additional time to review Petitioners' evidence before presenting their own cases in chief. This approach is problematic for three reasons. First, this results in a delay to the process that is unnecessary. Project opponents do not need any additional time beyond the amounts originally contemplated by the Board because, as the Board notes, the information already available for review is substantial.

Second, the briefing scheduling is contrary to the Board's policy of discouraging the introduction of surprise testimony and exhibits. (Cal. Code Regs., tit. 14, § 648.4, subd. (a).) Given that Petitioners are forced to present their evidence first, opponents will have every opportunity to strategize regarding how to present their own testimony and exhibits, which is an opportunity not provided to Petitioners.

Finally, the deficiencies that Project opponents identified in order to persuade the Board to provide them with additional time mischaracterize the Board's role in adjudicating the water rights change petition. That is, opponents contend that operational matters should be

addressed as part of the proceeding. However, this is inaccurate. Rather, the operation of the Project will remain discretionary, provided certain permit terms are complied. It is the responsibility of the Board to put in place those permit conditions. Beyond that, it will be up to Petitioners to determine how operations should satisfy those conditions.

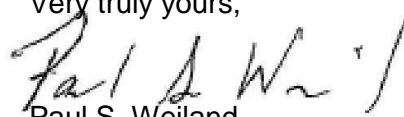
In sum, the foregoing reasons undermine the Board's rationale for allowing staggered briefing. The Coalition therefore requests that the Board revise the Ruling to provide for the traditional briefing schedule, so as to not provide Project opponents with an unfair advantage.

3. Part 1 Of The Hearing Should Be Strictly Limited To Addressing Water Right And Water Use Impacts.

In pertinent part, the Ruling states "Part 1 focusses on human uses of water (water right and water use impacts) and Part 2 focuses on environmental issues. Part 1 can address human uses that extend beyond the strict definition of legal users of water, including flood control issues and environmental justice concerns." (Ruling at p. 10.) The Coalition objects to the Board's decision to broaden the definition of "legal users of water" to include flood control issues and environmental justice concerns. Such issues and concerns more appropriately relate to environmental issues, which will be the focus of Part 2 of the hearing. Indeed, the Board originally stated that Part 1 of the hearing will focus on "agricultural, municipal and industrial uses of water and associated legal users of water." (Notice of Petition at p. 2.) This is the more appropriate scope for Part 1 of the hearing, and the Coalition requests that the Board revise the Ruling to specify that water right and water use impacts are the sole focus of Part 1; other concerns, including those relating to flood control issues and environmental justice, will be addressed in Part 2.

Thank you for your consideration of the foregoing requests. Please don't hesitate to contact me with questions.

Very truly yours,



Paul S. Weiland
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