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April 4, 2016

Via Email to:

CWFhearing@waterboards.ca.gov

Hearing Chair Tam Doduc
Hearing Officer Felicia Marcus
State Water Resources Control Board

Re: Response to California WaterFix Amended Motion for Disqualification of Hearing Officers Felicia Marcus and Tam Doduc

Dear Hearing Chair Doduc and Hearing Officer Marcus:

INTRODUCTION

Joint protestants Friends of the River and Sierra Club California hereby respond to the amended motion filed by San Luis & Delta-Mendota Water Authority (Movants) on March 21, 2016, to disqualify California Water Fix Hearing Officers Felicia Marcus and Tam Doduc (Hearing Officers). Movants claim that the statement in the February 11, 2016 Order that: “The appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may well be more stringent than petitioners’ preferred project” demonstrates predecisional bias requiring disqualification of the Hearing Officers. Petitioners and State Water Contractors had earlier attacked the same statement. (Motion, p. 2). Movants call for the Hearing Officers to recuse themselves from further participation in the Change Petition proceeding on the California WaterFix Delta Water Tunnels. Movants also request a stay in the proceedings pending the

appointment of new Hearing Officers. On March 29, 2016, the San Joaquin Tributaries Authority (SJTA) chimed in to support the motion to disqualify. SJTA adds to the alleged grounds for disqualification the contention that Chair Marcus' prior tenure with the Natural (not "National") Resources Defense Council (NRDC) "could create an appearance of bias and impartiality" in these proceedings.

What comes next, a party claiming that the participation of any of the Board members creates an appearance of bias and absence of impartiality because they were all appointed by a Governor who wants the Water Fix?

It will become clear from what follows that we disagree strongly with what the Board and the Hearing Officers have been doing and we seek a change in course. But we do not accompany our disagreement with disqualification motions. Disagreement does not mean that those with whom one disagrees are biased or are improperly pre-determining issues.

The Motion to disqualify is additional evidence that it is not possible to conduct a fair and rational hearing on the Change Petition. We disagree that the Hearing Officers must recuse themselves. We instead request that the Hearing Officers or State Water Board dismiss or cancel the Change Petition proceeding and make the Board's first priority the development of "more stringent" "Delta flow criteria" by updating the Bay-Delta Estuary Water Quality Control Plan (Bay-Delta Plan). Saying that "appropriate Delta flow criteria will be more stringent" is *not* predecisional bias. It is proper recognition of the law and undeniable facts.

IT IS NOW EVEN MORE CLEAR THAT THE BAY-DELTA PLAN MUST BE UPDATED BEFORE COMMENCING THE HEARING ON THE PETITION

Many protestants have raised the need to update the Bay-Delta Plan first. As stated by the Environmental Justice Coalition for Water (EJCW), Restore the Delta, and the Environmental Water Caucus in their joint letter of January 22, 2016 addressing procedural issues associated with the Pre-Hearing Conference:

Policy should govern plumbing and precede construction. When a house is to be built, its plumbing facilities are mapped out and sized in advance of its construction. Professional builders do not build first, then plan later. That is a recipe for mistakes, poor management, increasing costs, and conflict between owner and builder.

This is analogous to the predicament in which the Board finds itself. The Board is asked by the Department of Water Resources (DWR) to approve a major water diversion project in the Tunnels Petition while having no adequate or revised Bay Delta Estuary Water Quality Control Plan to govern how and whether the Tunnels Petition could or

should be approved.¹ Moreover, if the tunnels are permitted without an adequate and protective Bay Delta Estuary Water Quality Control Plan, there will be enormous political pressure on this Board and future boards to set standards that make the Tunnels full export conveyance facilities regardless of water availability conditions. A \$17 billion water conveyance project would not be allowed to go unused and become a stranded asset. . .(January 22, 2016 Letter, p. 2).

The Delta is in crisis and the Water Tunnels represent a deathblow. What is needed here is a determination of how much water flow the Delta needs to survive and recover before spending months in an uninformed vacuum trying to determine whether to take enormous additional quantities of water away from the Delta upstream.

The EJCW in its separate pre-hearing conference letter of January 22, 2016 to the Hearing Officers pointed out that:

those representing traditionally underrepresented interests need support to ensure their full and adequate participation. Without these supports, full participation and adequate representation of the issues imposes a[n] undue hardship and/or presents an obstacle that amounts to defact[o] exclusion from the proceeding. (January 22, 2016 letter, unnumbered p. 5).

Essential support for underrepresented interests as well as other protestants would include completion of an updated Bay Delta Plan that all interests could point to in assessing and responding to the WaterFix Petition for change in the diversion. The prejudice here to protestants in this instance is compounded by their inability to point to binding determinations of water flow, quantity, and quality objectives and impacts, as well as meaningful, reasonable alternatives to the Water Tunnels. Such binding determinations can be directly provided by updating the Bay-Delta Plan.

There is no good reason to substitute planning chaos here for sound, rational planning. There is no good reason to not update the Bay-Delta Plan first. The Water Board in its February 11, 2016 Ruling recognized the weakness of Petitioners' case for expediting the Petition, including: "DWR. . . has not clearly explained why the hearing process should begin now" and "DWR's lack of clarity on the need to begin the hearing process. . ." (Ruling, pp. 1-2). And now, on March 28, 2016, Petitioners for the second time, have sought to delay the start of the hearing-- this time for 60 days. On March 29, 2016, the Water Board has suspended all upcoming

¹ We respectfully remind the Board that the Board's own 2010 Flow Criteria Report found that flows at that time were found inadequate to protect and recover public trust resources in the Delta, an implicit criticism of both the 1995 Bay-Delta Estuary Water Quality Control Plan and Water Rights Decision 1641.[footnote in original letter].

deadlines in response to Petitioners request for a 60-day continuance of all dates and deadlines associated with the hearing.

Moreover, the decision to accept the Petition as complete should be reconsidered. The Water Board cited the RDEIR/SDEIS as satisfying the requirements of the Water Code regarding petitions, but the Petitioners later withdrew the modeling supporting the RDEIR/SDEIS.² These deficiencies are explained in detail in the California Water Research letter of April 2, 2016.

Finally, the only conceivable reason for Petitioners objecting to updating the Bay-Delta Plan first, is to prejudice protestants, by protestants not having an updated Plan to rely on. The updated Bay-Delta Plan would be the strongest and best evidence pertinent to whether a Change Petition of this magnitude should even be considered, let alone approved. This prejudice is magnified by the unstable project description and modeling to predict project impacts.

THE STATEMENT THAT “THE APPROPRIATE DELTA FLOW CRITERIA WILL BE MORE STRINGENT THAN PETITIONERS’ CURRENT OBLIGATIONS” IS NOT ONLY NOT OBJECTIONABLE, IT IS UNDENIABLE

Instead of being able to point to binding determinations in an updated Bay-Delta Plan, protestants cannot do so at this time because the Plan has not been updated. And now, protestants are prejudiced by claims by Movants, Petitioners, State Water Contractors and SJTA that even recognition of the obvious, undeniable facts by Hearing Officers that “appropriate Delta flow criteria will be more stringent than petitioners’ current obligations” constitutes disqualifying predecisional bias.

² Table 1 on page 3 of the Petitioners’ March 11, 2016 letter says that only the WaterFix Biological Assessment models will be used for the Change Petition. Then the letter says on Page 7: However, it was decided among USBR, USFWS, NMFS and DWR to use the most recent version of CALSIM II (2015) and a longer patterning period for DSM2 (82-year record) for the Biological Assessment. As noted in Table 1 above, the *modeling conducted for the BA is the basis of the information that will be used in the case-in-chief* in the Hearing process. DWR and Reclamation thus announced they are not using the CEQA analysis in support of their Case in Chief. This leaves no supporting evidence from the RDEIR/SDEIS that was submitted to meet the informational requirements of the Change Petition. The February 11, 2016 Ruling stated: “California Code of Regulations, title 23, section 794 contains a detailed list of information that must be provided in a change petition, including effects on other known users of water, and any quantified changes in water quality, quantity, timing of diversion and use, reduction in return flows and other pertinent information. The *petitioners’ change petition specifies that this information is contained in the CEQA/NEPA documents.* (Emphasis added).

Science and common sense say that more flows are needed, not less. The estuary is crashing. Agencies may take official notice of any facts which can be judicially noticed by courts. Government Code § 11515. Courts take judicial notice of the obvious and the undeniable. Evidence Code § 452(c) authorizes judicial notice of an official act of the executive departments of the State of California and the United States. The 2010 Flow Criteria Report referenced by the Hearing Officers in their March 4, 2016 Ruling was the result of a mandatory duty that the Water Board was required to perform by the Delta Reform Act, Water Code § 85086(c)(1). The 2010 Flow Criteria Report is appropriately noticed by the Hearing Officers and/or the Water Board as an official act of a department of the State of California.

Of course it is necessary to have more stringent Delta flow criteria. The Delta Reform Act requires measures to “Restore Delta flows and channels to support a healthy estuary and other ecosystems.” Water Code § 85302(e)(4). The Act establishes State policy “to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” Water Code § 85021. State policy is to: “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” Water Code § 85020(c).

Judicial notice of these undeniable facts, conditions, and requirements is also appropriate pursuant to Evidence Code § 452(g), facts of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and § 452(h), facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Judicial and thus official notice of the decisional, constitutional, and public statutory law of this State and of the United States is *mandatory* under Evidence Code § 451(a). Consequently, the Hearing Officers *must* take official notice of the requirements of the Delta Reform Act, as opposed to ignoring Delta Reform Act requirements as desired by Movants and Petitioners. Likewise, the Hearing Officers *must* take official notice of the requirements of the Endangered Species Act (ESA) and the Clean Water Act (CWA).

Movants point out that the 2010 Flow Criteria Report was six years ago and the Water Tunnels “would not become operational for some 10-15 years from now.” (Motion, p. 5). That is true. It is also true that with climate change, reduced mountain runoff, and rising sea levels, Delta

water flows and water quality, and crashing fish populations will be in even worse condition by 2030 than they were in 2010.

We disagree with Movants that due process requires recusal of the Hearing Officers. We do request that the Hearing Officers take this opportunity to dismiss or cancel the Change Petition proceeding in order to move ahead with completing the revision to the Bay-Delta Plan. One essential purpose of an updated Bay-Delta Plan is to serve as the governing guideline for determining whether or not to approve, or even burden everyone with considering, a momentous change Petition such as this one.

By the motion to disqualify the Hearing Officers, Movants seek to advantage themselves and further prejudice protestants by claiming that any recognition of the undeniable facts of the dire straits the Delta is in, and any recognition of the requirements of governing laws to improve rather than worsen Delta water flows, water quantity, and water quality, is predecisional bias. Recognition of the undeniable is not predecisional bias.

The public interest cannot be protected and protestants cannot function effectively in a stacked deck game where the exporters claim the Hearing Officers are biased any time they recognize the law or undeniable facts. It is both undeniable fact and federal and state law that indeed, new Delta flow criteria must be more stringent. By their Motion to disqualify, Movants seek to tilt the process even more in favor of Petitioners and the exporters and against dealing with the reality of the Delta crisis, governing law, and the inadequacy of current Delta “protections.”

As the Hearing Officers said in the February 11, 2016 Ruling:

We acknowledge that the Water Fix, if approved, would be a significant component of Delta operations, and it would be preferable to have Phase 2 [of the Plan update] completed prior to acting on the change petition. (February 11, 2016 Ruling, pp. 4-5).

Instead of engaging in a lengthy, burdensome, and expensive Change Petition hearing process clouded by accusations of Hearing Officer bias, the Hearing Officers or Water Board should deny the disqualification Motion and dismiss or cancel the Petition process and instead first focus on revising the Bay-Delta Plan.

CONCLUSION

The Motion to disqualify the Hearing Officers should be denied. Moreover, it is prejudicial to the public interest and protestants to attempt to proceed with hearing the Petition prior to updating the Bay-Delta Plan. A “course correction” should be to cancel the Change Petition proceeding until after completion of the Bay-Delta Plan update. Complying with an updated Bay-Delta Plan would eliminate any claimed issues of bias and predecisional determinations should a Change Petition be taken up again. An updated Plan will be subject to official notice as an official act of the State Water Board. Government Code § 11515; Evidence Code § 452(c).

Respectfully submitted,

/s/ E. Robert Wright
Senior Counsel
Friends of the River

/s/ Kyle Jones
Policy Advocate
Sierra Club California

Attachment: Service Certificate

cc: All by electronic service
Tom Howard, Executive Director, State Water Resources Control Board (SWRCB)
Michael Lauffer, Chief Counsel, SWRCB
Dana Heinrich, Staff Attorney IV, SWRCB
Diane Riddle, Environmental Program Manager, SWRCB
Michael Patrick George, Delta Watermaster
All party representatives on March 22, 2016 SWRCB service list

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):

RESPONSE TO CALIFORNIA WATERFIX AMENDED MOTION FOR DISQUALIFICATION OF HEARING OFFICERS FELICI MARCUS AND TAM DOCUC

To be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated March 22, 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.

I certify that the foregoing is true and correct and that this document was executed on April 4, 2016.



Signature:

Name: E. Robert Wright

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