



March 29, 2016

Via Email and U.S. Mail

The Honorable Felicia Marcus, Chair
Co-Hearing Officer
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

The Honorable Tam Doduc
Co-Hearing Officer
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Hearing Team
CalWaterFix
CWFhearing@waterboards.ca.gov

RE: Application for Recusal of Hearing Officers Marcus and Doduc

Dear Hearing Officers Marcus and Doduc:

The San Joaquin Tributaries Authority (SJTA) supports the motion of the San Luis & Delta-Mendota Water Authority (SLDMWA) seeking disqualification of Hearing Officers Felicia Marcus and Tam Doduc. In addition, the SJTA has been contemplating, for some time, the possibility of filing its own motion seeking the recusal of Chair Marcus on grounds other than those identified by the SLDMWA in its motion for disqualification.

The primary basis for such a motion by the SJTA would be that Chair Marcus' prior tenure as Western Director of the National Resources Defense Council (NRDC), from November of 2008 through May of 2012, could create an appearance of bias and impartiality in the proceedings related to the California WaterFix change petitions. During the time that Chair Marcus served as Western Director of the NRDC, the organization regularly advocated for higher flows in the Sacramento-San Joaquin River/San Francisco Bay Delta Estuary, and explicitly registered support with the legislature for such a

Honorable Felicia Marcus
Honorable Tam Doduc
State Water Resources Control Board
March 29, 2016
Page 2

position with respect to the 2009 Delta Reform Act, the very law requiring the inclusion of “appropriate Delta flow criteria” in an approval of the WaterFix change petitions. (Water Code, § 85086.) The SJTA believes that the pronouncements by the Co-hearing Officers on the issue of appropriate Delta flow criteria in the recent pre-hearing ruling of February 11, 2016 might lend significant support to such a motion.¹

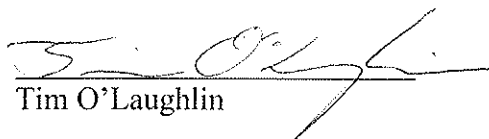
In addition, the SJTA requests a stay of the WaterFix proceedings until the State Water Resources Control Board resolves this important issue. The SJTA believes that proper resolution of this issue prior to commencement of the proceedings will conserve the time and resources of the Board, the petitioners and all parties involved. If a court ultimately determines that the Co-Hearing Officers should have recused themselves, and did not, the Board’s decision could be set aside by the Superior Court. (*Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174-1175.)

This issue then raises several concerns. If the two hearing officers recuse themselves, then the three remaining members of the Board will need to vote unanimously in order to approve the change petition. (Water Code, § 183 [“any final action of the board shall be taken by a majority of all the members of the board, at a meeting duly called and held.”])

The SJTA previously requested in its opening brief that the entire Board hear the petition, as the WaterFix project is the most important water right proceeding in the State in last thirty years. This may not occur. The Board should explore alternatives that will preserve the petitioners’ and participants’ rights to a fair hearing, eliminate any hint of tainted proceedings, and ensure expeditious resolution of this matter. The SJTA suggests that it may be prudent and sensible, at this point, to refer this matter to an administrative law judge.

Whether or not the Co-Hearing Officers recuse themselves, the Board should, at a minimum, stay the proceedings so that this important issue can be resolved by recusal, denial of recusal, or by Writ of Mandate to the Superior Court.

Very truly yours,


Tim O’Laughlin

TO/llw

cc: *San Joaquin Tributaries Authority*

¹ California WaterFix Project Pre-Hearing Conference Ruling, dated February 11, 2016, available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/021116phc_ruling.pdf.