

1 DANIEL J. O'HANLON, State Bar No. 122380  
REBECCA R. AKROYD, State Bar No. 267305  
2 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation  
3 400 Capitol Mall, 27<sup>th</sup> Floor  
Sacramento, California 95814  
4 Telephone: (916) 321-4500  
Facsimile: (916) 321-4555

5  
6 Attorneys for San Luis & Delta-Mendota Water  
Authority

7 JON D. RUBIN, State Bar No. 196944  
General Counsel  
8 SAN LUIS & DELTA-MENDOTA WATER AUTHORITY  
400 Capitol Mall, 27th Floor  
9 Sacramento, CA 95814  
Telephone: (916) 321-4519  
10 Facsimile: (209) 826-9698

11 Attorney for San Luis & Delta-Mendota Water  
Authority

12

13

BEFORE THE

14

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

15

16 In re State Water Resources Control Board  
Petition Requesting Changes in Water Rights  
17 of the Department of Water Resources and  
U.S. Bureau of Reclamation for the California  
18 WaterFix Project.

MOTION FOR DISQUALIFICATION OF  
HEARING OFFICERS FELICIA MARCUS  
AND TAM DODUC

19

20

21

22

23

24

25

26

27

28

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  
12 channels, increased tidal habitat, improved water quality, reduced competition from  
13 invasive species, changes in the point of diversion of the SWP and CVP, and  
14 climate change.

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

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

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

The periodic review resulted in State Water Board staff recommending:

[T]he State Water Board consider changes to the Delta outflow objective, or  
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

14  
15 By: 

16 Daniel J. O'Hanlon  
17 Attorneys for San Luis & Delta-Mendota Water  
18 Authority and Westlands Water District  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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):

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

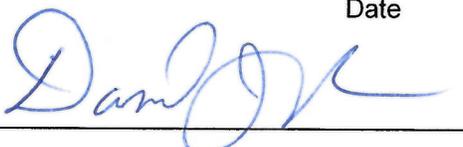
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml):

*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:**

	I caused a true and correct <b>hard copy</b> 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:  <b>Method of Service:</b> _____
--	--

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  
Sacramento, CA 95814