February 13, 2018

State Water Resources Control Board Hearing Officers
WaterFix Hearing Team

Re: **MOTION TO TERMINATE WATERFIX HEARING BASED UPON THE TOTALITY OF CIRCUMSTANCES AND RESPONSES TO DWR's CONSOLIDATED OPPOSITION TO NRDC et al.'s MOTION TO STAY WATERFIX PART II HEARING AND TO STATE WATER BOARD QUESTIONS**

Dear WaterFix Hearing Officers and Hearing Team:

INTRODUCTION

Protestants Friends of the River (Friends) and Sierra Club California (Sierra Club) Move for termination of the Hearing based upon the totality of circumstances showing pre-decisional bias, collusion, and violations of due process. Friends and Sierra Club are also movants on the County of Sacramento et al.'s Petition for Reconsideration and Request for Stay or Continuance filed February 9, 2018, based on unlawful ex parte communications.

Friends and Sierra Club also submit this response to the Department of Water Resources' (DWR) Consolidated Opposition DWR filed on February 9, 2018, to the Natural Resources Defense Council's (NRDC) renewed Motion to Stay Part II of the Hearing. Friends and Sierra Club orally joined in the renewed Motion at the Hearing on February 8, 2018.

It is time for the State Water Board to halt the Hearing. The Board needs to update the Bay-Delta Plan. The Board needs to prepare or require DWR to prepare, a *subsequent* EIR that finally develops and considers a reduced diversion alternative to inform the Board, the parties,

and the public of the trade-offs between exporting water for consumptive uses, and protection of the Bay-Delta. Only then would it be possible to have a fair Hearing complying with due process, CEQA, and State policy established in the Delta Reform Act.

In the event that the Hearing is not terminated, the Hearing must, at minimum, be stayed until DWR issues its final supplemental Environmental Impact Report (EIR), and until the full extent and import of the unlawful ex parte communications have been determined.

Demonstration of actual bias can be based "on the totality of circumstances." *See Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 739-740, discussing *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817. The totality of circumstances showing actual bias here is overwhelming. The circumstances showing actual bias range from unlawful ex parte communications between petitioner DWR and the State Water Board Hearing Team to the continued ignoring of CEQA's requirements for transparency in environmental decision making and that a project description be accurate, stable, and finite.

FACTS

The Ex Parte Communications

The following facts are either admitted, have not been denied, and/or are undeniable:

First, the State Water Board Ruling of February 6, 2018, admits that there were ex parte communications between Hearing Team Members and petitioner DWR advocates. (Ruling, p. 4.) According to State Water Board declarant attorney Dana Heinrich, there were at least seven of these meetings between January 4 and October 4, 2016. Also, some of the meetings included DWR witness Jennifer Pierre. "The purpose of those meetings was to discuss the modeling and CEQA impact analysis of the SWRCB staff scenario to ensure that the EIR was adequate for the State Water Board's use as a CEQA document, not to assist DWR with its participation in the hearing on the petition." (Heinrich Decl. p. 9, ¶ 18) (Attachment A to Ruling.)

State Water Board declarant supervising engineer Kyle Ochenduszko explained (p. 4, ¶ 8) (Attachment C to Ruling):

> At these meetings, I and other State Water Board staff in attendance stated that DWR's CEQA document may not be adequate for the State Water Board's consideration as part of its responsibilities as a CEQA responsible agency because it did not appear to analyze a sufficient range of alternatives. Specifically, I and other State Water Board staff opined that the range of project alternatives did not include project alternatives with operating conditions that would maximize water quality protection in the Bay-Delta without adversely affecting water quality upstream. To address potential impacts to fish and flow,

> State Water Board staff requested that DWR's CEQA document analyze a modeling scenario that included higher Bay-Delta outflow with no impacts to water stored in upstream reservoirs needed for River temperature management. State Water Board staff in attendance also indicated that if this type of analysis was not included, the State Water Board may need to prepare a supplemental CEQA document that analyzed this type of alternative as part of its CEQA review process.

The statements in the Ruling that "several" (Ruling p. 4, fn. 6) or "a few" (Ruling p. 11 section 5) of the communications "were related to non-controversial procedural matters" in effect admits that the rest of the ex parte communications were *not* related to non-controversial procedural matters.

Second, the State Water Board at all times throughout the hearing beginning in its October 30, 2015 Notice of Petition (p. 36) ordered that "there shall be no ex parte communications with State Water Board members or State Water Board hearing team staff and supervisors, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11439.89.)" After many of the ex parte meetings had already taken place and with others yet to take place, the Board in its July 13, 2016, Ruling (at p. 2) repeated: "Please remember that ex-parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited." Virtually every Board Ruling including its Ruling of January 4, 2018 includes language at the end specifying that: "If you have any *non-controversial*, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960." (Emphasis added.)

Third, the Hearing Officers as well as the Hearing Team knew that the ex parte communications and meetings were taking place. We know that because even though the Board filed three Declarations in support of its February 6, 2018 Ruling, nowhere is there any *denial* that the Hearing Officers knew that the communications were taking place.

Fourth, the issue of whether DWR's CEQA document, the BDCP/WaterFix EIR/S including its alternatives analysis was adequate, was and is a critically important substantive and controversial issue within the scope of the proceeding. As shown by State Water Board Exhibit 1, the Board's May 30, 2008 letter (at p. 2), attached to the declaration (Attachment B to Ruling) of State Water Board Assistant Deputy Director Diane Riddle, stated:

> In addition, to achieve BDCP's project objectives to assure protection and restoration of fish and wildlife resources, the EIR/EIS should analyze a broad range of alternate water

> quality objectives and operational strategies, including reductions in exports, that may be more protective of fish and wildlife beneficial uses.

The State Water Board in the Board's May 15, 2009, letter (Exh. 2 to Riddle Declaration) followed up on the May 30, 2008, letter, stating (at p. 2):

> One issue in particular that will require coordination is environmental review of the SWP's and CVP's interim and long-term exports from the Delta. As noted in the State Water Board's May 30, 2008 letter, a reduced diversion alternative should be analyzed to inform the State Water Board and others of the potential trade-offs between delivering water for consumptive uses and protection of fish and wildlife beneficial uses. While SWP and CVP exports are not the only factor contributing to the current degraded state of the Bay-Delta ecosystem, exports remain an important factor requiring analysis. Uncertainty remains concerning the amount of water that can be diverted from the estuary without significantly impacting fish and wildlife beneficial uses. These impacts must be analyzed under CEQA before significant changes are made to the plumbing and hydrology of the Delta.

Friends and the Sierra Club (joined by the Planning and Conservation League) emphasized the requirements under CEQA and the Delta Reform Act (Water Code § 85021 "policy. . . to reduce reliance on the Delta. . .") to develop and consider a range of reasonable alternatives that would increase flows by reducing exports, in their Pre—Hearing Conference letter of January 21, 2016. (Especially at pp. 8-14.)

As we have pointed out on numerous occasions, including our letter of November 24, 2015, the U.S. Environmental Protection Agency (EPA) gave the BDCP SDEIS a rating of "' 3' (*Inadequate*)". (EPA Letter, October 30, 2015, p. 4).[1] That is EPA's failing grade. EPA's *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (10/3/84) explains what that means in section 4(b) of that document entitled "Adequacy of the Impact statement":

> (3) '3' (Inadequate). The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA [National Environmental Policy Act] and/or the Section 309 review, and thus

[1] A copy of the October 30, 2015 EPA letter was attached to our November 24, 2015 letter, submitted on behalf of Friends, Restore the Delta, California Sportfishing Protection Alliance, and the Environmental Water Caucus.

> should be formally revised and made available for public comment in a supplemental or revised draft EIS. (p. 4-6).

The EPA said they expected the missing information will be "supplied as later regulatory processes proceed." (EPA Letter, p. 4). "[P]ending actions by the State Water Resources Control Board" was one of the future processes that the EPA expected "will supply the missing pieces necessary to determine the environmental impacts of the entire project." (*Id.*). The inadequacies of the EIR/S have at all times been a substantive, controversial red flag.

Fifth, the State Water Board has consistently misrepresented to the parties in public that (January 15, 2016 Instructions, p. 5):

> As a general rule, a responsible agency must assume that the CEQA document prepared by the lead agency is adequate for use by the responsible agency. (Cal. Code of Regs., tit. 14, § 15096, subd. (e).) *Accordingly, the adequacy of DWR's EIR for the WaterFix Project for purposes of CEQA compliance is not a key hearing issue, and the parties should not submit evidence or argument on this issue*." (Emphasis added.)

The State Water Board has called its directive to not submit evidence or argument on the adequacy of the EIR-- an "admonition." (February 11, 2016 Ruling, p. 8.)

The Project Changes

On February 7, 2018, DWR announced a change in the project in its letter to the water agencies participating in the WaterFix. Because only some agencies continue to support the project, DWR proposes now to proceed with a one tunnel instead of two tunnel project, having a total capacity of 6000 cfs. DWR announced in its letter (at p. 2):

> In addition, DWR will fully evaluate the potential environmental impacts of the staged implementation option and expects to issue a draft supplemental Environmental Impact Report in June 2018, with a final in October 2018. The additional information developed for CEQA will also be used to supplement the Endangered Species Act, Section 7 and California Endangered Species Act, Section 2081 record.

ARGUMENT

Again, demonstration of actual bias can be based "on the totality of circumstances." *See Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 739-740, discussing *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817. The totality of circumstances showing actual bias here is overwhelming.

THE EX-PARTE COMMUNICATIONS DEMONSTRATE ACTUAL PRE-DECISIONAL BIAS AND COLLUSION

The Subject of the Ex Parte Communications has been CEQA Compliance Violating the CEQA Requirement that there be Full Environmental Disclosure

A definition of "fraud" includes "deceit, trickery, intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right."[2] The Board in its Rulings was telling the parties in public that as a general rule as a responsible agency it must assume that the BDCP/WaterFix EIR/EIS was adequate for its use and that "the adequacy of DWR's EIR for the Water Fix Project for purposes of CEQA compliance is not a key hearing issue, and the parties should not submit evidence or argument on this issue." At the same time, in secret ex parte meetings with DWR, State Water Board Hearing Team members were telling DWR that "DWR's CEQA document may not be adequate for the State Water Board's consideration as part of its responsibilities as a CEQA responsible agency because it did not appear to analyze a sufficient range of alternatives. . . State Water Board staff in attendance also indicated that if this type of analysis was not included, the State Water Board may need to prepare a supplemental CEQA document that analyzed this type of alternative as part of its CEQA review process." Telling the protestants that "CEQA compliance is not a key hearing issue" was deceit to induce protestants to surrender their rights to point out the inadequacies of DWR's EIR. In fact, CEQA compliance was so important that the Hearing Team members were telling DWR that unless the State Water Board-desired alternative was included, the Board itself might prepare a supplemental EIR.

There was deceit here in yet another way. In addition to being an order to all parties, the State Water Board repeated prohibitions of ex parte communications to Board members or Hearing Team staff was also a false *representation* that no such communications had taken place, were taking place or would take place. The ex parte prohibitions applied to all parties including petitioner DWR. Protestants were deceived into believing that, of course, persons issuing such repeated prohibitions against ex parte communications would not themselves violate their own prohibitions. The Board even continued to issue prohibition of ex parte communications after a number of the ex parte meetings had already taken place.

[2] Webster's Ninth New Collegiate Dictionary (1985.)

If the Hearing Officers and Hearing Team had concluded that there was nothing wrong with having the ex parte meetings with DWR, they would have issued notice to all parties that such meetings were taking place together with an explanation of any claim of why the meetings were lawful and permissible. Instead, the violations of the ex parte meeting prohibitions were discovered recently by way of a Public Records Act request. The secrecy demonstrates consciousness of guilt. There is no reason to keep meetings secret or private during an administrative Hearing if one believes the meetings to be lawful and proper.

The subject of the ex parte meetings was the single most critical environmental Hearing issue and the one that posed the greatest danger to petitioner DWR's quest for a diversion change for the Water Tunnel(s) project. The State Water Board itself, back in 2008 and 2009, had called for the BDCP EIR/EIS to analyze a broad range of alternatives including reductions in exports to "inform the State Water Board and others of the potential trade-offs between delivering water for consumptive uses and protection of fish and wildlife beneficial uses." Yet when Friends, Sierra Club, and other protestants attempted to argue that the CEQA document was inadequate and that such alternatives including reductions in exports had to be included, they were told that the adequacy of the EIR is "not a key hearing issue, and the parties should not submit evidence or argument on this issue." And, the Board actually admonished those protestants who persisted in attempting to obtain compliance with CEQA and the Delta Reform Act.

Instead, the Hearing Team worked in secret, in ex parte meetings with DWR, in an attempt to get DWR to include in the EIR an alternative the Hearing Team felt necessary for CEQA compliance. Protestants needed to know the truth that the State Water Board had concluded that DWR's CEQA document did not appear adequate for the Board's consideration as a responsible agency, "because it did not appear to analyze a sufficient range of alternatives." Protestants needed to be afforded the opportunity to weigh in, that beyond the alternatives the Hearing Team members were secretly discussing with DWR, the alternatives reducing exports as had been called for by the Board itself in 2008 and 2009, and by Friends, Sierra Club, and other protestants, had to *also* be included.

It is not possible to overstate the importance of inclusion of alternatives reducing exports, and reducing reliance on the Delta as required by CEQA and by State policy established by the Delta Reform Act. The Hearing Officers have intentionally prejudiced protestants by artificially narrowing the issues to preclude alternatives that would increase freshwater flows through the

Delta by reducing exports and thus making the Tunnel(s) project not even arguably in the public interest.

There has been ongoing collusion between the State Water Board and DWR to communicate ex parte in violation of Government Code § 11430.10(a) and in violation of CEQA's "full environmental disclosure" requirements. *See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 88. . A primary goal of CEQA is "transparency in environmental decision-making." *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 136.CEQA requires that "an agency must use its best efforts to find out and disclose all that it reasonably can" about the project being considered and its environmental impacts. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* 40 Cal.4th 412, 428 (2007); 14 Cal. Code Regs 15144. In addition to the APA and the State Water Board's own prohibitions of ex parte communications, CEQA requires full environmental disclosure and that an agency such as the Board use its best efforts to find out and disclose all that it reasonably can about the Tunnel(s) project, its environmental impacts, and alternatives to the project. The purpose of the collusion was to instead limit additional alternatives analyses in an attempt to foreclose consideration of alternatives that would endanger approval of the diversion change.

It was Unlawful to Allow One Side to Bend the Ear of the Hearing Team about CEQA Compliance while Attempting to Silence the Other Side from Even Talking about CEQA Compliance on the Public Record

The California Supreme Court explained in *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737, that "Violation of this due process guarantee [that the adjudicator must be impartial] can 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 decision-maker is too high to be constitutionally tolerable.'" Only when "rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, . ." is there a presumption of impartiality that can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. *Morongo Band of Mission Indians,* 45 Cal.4th 731, 741. Here, the rules prohibiting ex parte communications were not observed by the State Water Board.

Extensive guidance has been provided by the California Supreme Court in terms of what is necessary in order to provide a fair administrative hearing in its decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Quintanar)* (2006) 40 Cal.4th 1. According to the Court:

> While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in private. (40 Cal.4th at 5.)

The Court explained that the background of the administrative adjudication bill of rights included the declaration by the California Law Revision Commission that: "'Fundamental fairness in decisionmaking demands both that factual inputs and arguments to the decisionmaker on law and policy be made openly and be subject to argument by all parties.'" (40 Cal.4th at 9.) Further, "The Court of Appeal drew no distinction between communications between a prosecutor and a final agency decision maker on the one hand, and those between a prosecutor and the decision maker's advisor, on the other. Nor do we." (40 Cal.4th at 10, fn. 8.) The Court cited one of its earlier decisions for the proposition that: "'[T]he right of the hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties.'" (40 Cal.4th at 11.) Moreover, "Principles of fairness dictated [during adoption of the rules prohibiting ex parte contacts] that these final decisions [of agencies] should flow exclusively from the record, not from off-the-record submissions by either side." (40 Cal.4th at 13.) And, "The party faced with such a [ex parte] communication need not prove that it was considered; conversely, the agency engaging in ex parte discussions cannot raise as a shield that the advice was *not* considered." (40 Cal.4th at 16)(Emphasis by Court.) The Court concluded:

> Second, although both sides no doubt would have liked to submit a secret unrebutted review of the hearing to the ultimate decision maker or decision maker's advisors, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences. We will not countenance them here. Thus, reversal of the Department's orders is required. (40 Cal.4th at 17.)

Here, petitioner DWR was unlawfully allowed by the State Water Board to bend the ear of the Hearing Team in private. But there was more and it was worse. The Board was falsely representing by its prohibitions of ex parte communications that no such communications were

occurring. The precise subject of the ex parte communications, CEQA compliance, is the object of CEQA requirements that agencies make full environmental disclosure and find out and disclose all that they reasonably can about the project being considered and its environmental impacts. And to top it off, the Board was falsely representing to the protestants that CEQA compliance was not a key hearing issue and that they were not to submit evidence or argument on the issue of CEQA compliance. And when some protestants persisted, they were admonished. This has been an extreme case of actual bias.

THE RECENTLY ANNOUNCED PROJECT CHANGE ADDS TO THE TOTALITY OF CIRCUMSTANCES SHOWING ACTUAL BIAS IF A STAY OF THE HEARING IS NOT GRANTED

On February 7, 2018, DWR announced a downsizing of the project from two Tunnels to one Tunnel. The DWR Director claimed at the hearing of February 8, 2018, that this change is not really a change. DWR asserts in its Consolidated Opposition to NRDC's Motion to Stay Part II of the Hearing, "To repeat, California WaterFix has not changed." (DWR Opposition, p. 3:23.) DWR has, however, announced in its February 7, 2018 letter that it is preparing a supplemental EIR. DWR expects to issue the draft in June 2018 and after public review and comment, issue the Final supplemental EIR in October 2018.

CEQA in Public Resources Code § 21166 provides that no subsequent or supplemental EIR shall be required by the lead or any responsible agency "unless one or more of the following events occurs:"

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

People can say or write anything. The law, however, is the law. DWR is going to prepare a supplemental EIR. Pursuant to CEQA that means that one or more of the three major events set forth in section 21166 has occurred.

Also, pursuant to CEQA,

> [a]n accurate, stable and finite project description is the *sine qua non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. Only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 bracket internal citations omitted]."

The Hearing at minimum needs to be stayed until that accurate, stable and finite project description has been provided in the Final supplemental EIR that DWR will eventually issue.

Protestants have already been prejudiced throughout the Hearing by the failures of the State Water Board to: update the Bay Delta Plan before starting the Hearing; prepare or require DWR to prepare an adequate EIR including alternatives that would increase freshwater flows through the Delta by reducing exports before starting the Hearing; secret ex parte meetings with DWR about the adequacy of the CEQA document while falsely representing that all ex parte communications were prohibited and by falsely telling protestants that CEQA compliance was not a key hearing issue; and by not requiring petitioners to submit a complete project description. Now, if the State Water Board fails to stay the Hearing until DWR has issued the Final supplemental EIR, that will be additional circumstances the totality of which demonstrate actual bias requiring termination of the Hearing.

The questions set forth by the Board in the email of February 8, 2018, also evidence bias and predetermination. The four questions directed to all parties would best be responded to after the Final supplemental EIR has been issued. For example, question 4 asks "If the Water Fix Project is constructed and operated in stages, are there potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing issues? Which issues?" Protestants are not prophets and are not the preparers of the EIR. Presumably, it would be the Final supplemental EIR that would provide DWR's answers to those questions. And protestants answers would be formulated during the public review and comment on the Draft supplemental EIR and then during protestants review and scrutiny of the Final supplemental EIR. At least one thing, however, is already crystal-clear. Reducing the size of the project, or as DWR calls it, implementation in stages, changes any public interest benefits drastically. The very reason some

supposed beneficiaries of the project do not support the project with financial commitment is that they are not convinced that the project benefits exceed the costs.

All that is reasonably possible with this short notice is to say in response to question 3, that an amendment to the change petition and additional supporting information under the cited water code sections will be necessary. The question of "why" will be answered based on information included in the future supplemental EIR and obtained through Public Records Act requests. Question 4 has already been dealt with. Question 5 asks if a supplement to the EIR is entered into the administrative record, "what is the most efficient way to address any new information included in the supplement?" The answer to that question is that the Hearing should be stayed until the Final supplemental EIR's issued and it would then be possible to address new information during the Hearing.

Stay of the Hearing until the Final supplemental EIR is issued would also afford ample opportunity to obtain responses to Public Records Act requests and conduct discovery to learn the full extent and import of the unlawful ex parte communications.

There is more. It is finally time for the State Water Board to become independent again and stop taking the side of DWR. It is time for the Board to require a *subsequent*, not just a supplemental, EIR that would develop and consider alternatives that would increase instead of reduce freshwater flows through the Delta by reducing exports. That is what the Board itself called for in 2008 and 2009. It is time to do that in order to comply with CEQA and the Delta Reform Act and to also update the Bay-Delta Plan before allowing the diversion change Hearing to resume.

CONCLUSION

The State Water Board evidences its bias and predetermination by dealing with each deficiency in its Hearing process in a vacuum. The Board, knowing that DWR was going to formally announce the change to a one Tunnel project the next day, issued its Ruling on February 6, 2018, denying the motions to stay or continue the Hearing pending production of public records and discovery directed to the ex parte communications. Now, the Board proposes to in a vacuum, deal with, meaning deny, the motion to stay the Hearing based on the changes in the Project. The Hearing needs to be terminated because the Hearing Officers and Hearing Team have chosen to permit one adversary, petitioner DWR, to bend their ear in private about CEQA compliance while doing their best to muzzle protestants from even talking in public on the

Record about CEQA compliance. That is not due process. If the Board denies the request to stay the Hearing until the Final supplemental EIR has been issued that will constitute additional circumstances among the overwhelming totality of circumstances showing actual bias here.

At minimum, if the Board does not terminate the Hearing, the Board must stay the Hearing until DWR issues its Final supplemental EIR, and until the full extent and import of the unlawful ex parte communications have been determined. Beyond that, it is time to require the preparation of a *subsequent* EIR including alternatives that would increase freshwater flows through the Delta by reducing exports. That, and updating the Bay-Delta Plan, need to be done before the Hearing resumes.

Respectfully submitted,

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