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Secretary for  
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# State Water Resources Control Board



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April 23, 2010

Mr. John Herrick  
Attorney at Law  
4255 Pacific Avenue, Suite 2  
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Dear Mr. Herrick:

**WATER RIGHT HEARINGS REGARDING ADOPTION OF DRAFT CEASE AND DESIST ORDERS AGAINST MARK AND VALLA DUNKEL; MUSSI ET AL.; AND YONG PAK AND SUN YOUNG**

This letter responds to your letters dated March 26, 2010, and March 31, 2010. In your letters, you requested that new hearing officers be assigned to preside over the three hearings identified above. You also requested a delay in the hearings, which are currently scheduled for May 5, 2010. For the reasons set forth below, the hearing officers, State Water Resources Control Board (State Water Board) Chairman Charles R. Hoppin and Board Member Arthur G. Baggett, Jr., have declined to recuse themselves or to delay the hearings.

In your first letter dated March 26, 2010, you stated that you needed to know more details concerning meetings that have taken place between State Water Board Members and an attorney from Mr. Petruzzelli's office in order to address what you characterize as an issue of ex parte communications. Specifically, you asked the name of the person from Mr. Petruzzelli's office who met with the Board Members, the date, time, and duration of the meetings, and the specific topics covered, including whether the Wee Report was discussed.

As I stated in my March 16, 2010 letter to the hearing participants, the hearing officers have not had any communications with any parties concerning the alleged unauthorized diversions that are the subject of the hearings, either before or after the hearing notice was issued. Nonetheless, I discussed this issue again with Chairman Hoppin and Board Member Baggett. With the assistance of their executive assistant, I also reviewed their calendars for 2009 to present.

Chairman Hoppin does not recall ever having scheduled or conducted a meeting to discuss Delta enforcement issues with anyone other than Board advisory staff, including anyone from Mr. Petruzzelli's office. He does recall that Tim O'Laughlin once said in passing that he thought the Phelps case just touched the surface in terms of unauthorized diversions in the Delta, but Mr. O'Laughlin did not mention any particular diverters. Chairman Hoppin does not recall ever having talked to Mr. O'Laughlin on the phone. He also does not recall ever having discussed the Wee Report with anyone, and he is unfamiliar with that report.

Consistent with his recollection, Chairman Hoppin's calendar from 2009 to present does not include any meetings to discuss Delta enforcement issues. The only meetings to discuss other issues related to the Delta are a meeting on April 6, 2009, with Board Member Baggett, Dan Nelson, Cliff Schultz, Jon Rubin, Allen Short, Terry Erlewine, Roger Patterson, and Randel Nuedeck or Byron Buck to discuss Bay-Delta process and BDCP, and a meeting on October 19, 2009, with Tim O'Laughlin and Allen Short to discuss salinity and San Joaquin River flows.

The only meeting or discussion that Board Member Baggett recalls having had with anyone other than Board advisory staff, including anyone from Mr. Petruzzelli's office, regarding Delta enforcement issues is a May 19, 2009 business lunch with Mr. O'Laughlin. During that meeting, Board Member Baggett recalls that Mr. O'Laughlin said that he thought illegal diversions were taking place in the Delta, but he does not recall Mr. O'Laughlin identifying a particular Delta island or any particular diverters. Board Member Baggett recalls having told Mr. O'Laughlin that he could not discuss the matter, and having advised Mr. O'Laughlin to file complaints with the Deputy Director for Water Rights if Mr. O'Laughlin had evidence to support his claim. Like Chairman Hoppin, Board Member Baggett is unfamiliar with the Wee Report.

Other than the May 19, 2009 business lunch with Mr. O'Laughlin, Board Member Baggett's calendar from 2009 to present does not include any meetings to discuss Delta enforcement issues with persons other than Board advisory staff. The only meeting to discuss other issues related to the Delta is the October 19, 2009, meeting with Mr. O'Laughlin and Mr. Short to discuss salinity and San Joaquin River flows mentioned above.

As evidenced by the meetings and discussions described above, no ex parte communications have taken place between the hearing officers and any interested parties regarding any of the legal or factual issues presented in the hearings, either before or after the hearing notice was issued. Moreover, none of the meetings or discussions that have taken place provide any indication that the hearing officers have prejudged any of the hearing issues, or that they are biased against diverters in the Delta in general, or against your clients in particular.

In one of your letters, you also pointed to a speech that Chairman Hoppin made at the Almond Growers Convention last December as evidence that Chairman Hoppin is biased against your clients. According to your transcription of the speech, Chairman Hoppin stated that illegal diversions exist in the Delta. He also stated that there would be additional scrutiny in the Delta, not because violations there are more egregious than in the rest of the State, but because the Delta is the axis of water activity in the State. In your letter, you allow that Chairman Hoppin's statements may not lead anyone other than yourself to conclude that Chairman Hoppin is biased, but assert nonetheless that it is highly improper for him to have reached the conclusion that illegal diverters exist in the Delta. As you appear to concede, however, Chairman Hoppin's statements provide no support for your conclusion that Chairman Hoppin is biased against your clients. It does not follow from his statement that illegal diversions exist in the Delta that Chairman Hoppin has concluded that all diversions in the Delta are illegal, or that your clients' diversions are illegal. To the contrary, Chairman Hoppin's statements indicate that he does not believe that violations are any more egregious in the Delta than they are elsewhere in the State, and that he has an open mind as to whether any particular diversion is illegal.

In summary, the facts outlined above do not support your allegation that new hearing officers should be assigned because an unacceptable level of bias exists. Accordingly, the hearing officers have declined to recuse themselves.

In your letters, you also requested that the Board Members' calendars and phone records be produced pursuant to section 2031.510 of the California Code of Civil Procedure, and that the hearings be delayed to allow you to review the records. As I explained in my April 5, 2010 letter to you, section 2031.510 does not apply administrative adjudicative proceedings, but the State Water Board will treat your request as a request pursuant to the California Public Records Act.

The State Water Board has records that are responsive to your request, including electronic calendars and cell phone bills. (The Board does not maintain phone logs.) Many of the entries on the Board Members' calendars, however, are protected by the deliberative process privilege, and therefore are exempt from disclosure requirements pursuant to Government Code section 6255. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1339-1346.) Similarly, many of the numbers listed on the cell phone bills are protected by the deliberative process privilege, and therefore are exempt from disclosure requirements. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 477-481.) In addition, some of the numbers may be personal numbers, which are protected from disclosure under the Information Practices Act (Civ. Code, § 1798 et seq.), and are exempt from disclosure requirements under the California Public Records Act, unless the public interest in disclosure outweighs the privacy interests of the individuals involved. (Gov. Code, § 6254, subd. (c).) Any nonexempt numbers listed on the phone bills are not reasonably segregable from the exempt numbers, and therefore the Board proposes to redact all of the numbers before making the bills available for inspection or copying.

Because the Board Members' calendars are maintained on Groupwise, production of these records will entail printing out the calendar for each day, reviewing the record, and redacting any privileged information. For some of the Board Members, electronic calendars date back to 2004. Accordingly, production of these records will take a considerable amount of time. Based on your letters, it does not appear that many of these records would be of interest to you, and the records that may be of interest to you could be produced much more quickly if you would be willing narrow your request, either to a discrete subject or timeframe. Please contact me at your earliest convenience to discuss whether you would be willing to do so.

In light of the information provided by this letter concerning the hearing officers' meetings and discussions with other parties regarding Delta enforcement issues, it does not appear that your review of the Board Members' calendars will reveal any procedural irregularities concerning the three pending enforcement hearings. Therefore, your request to delay the hearings pending your review of the records is not justified, and the hearing officers have denied your request.

To discuss your Public Records Act request, and any questions you may have regarding this letter, please contact me at (916) 341-5188 or [dheinrich@waterboards.ca.gov](mailto:dheinrich@waterboards.ca.gov).

Sincerely,

*Dana Heinrich*

Dana Heinrich  
Staff Counsel IV

Enclosure

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