



October 2, 2015

Thomas Howard  
Executive Director  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

EMAIL ([tom.howard@waterboards.ca.gov](mailto:tom.howard@waterboards.ca.gov))

**Subject: Premature and Defective Petition for Change Application for Water Fix submitted by DWR and Bureau of Reclamation<sup>1</sup>**

Dear Mr. Howard:

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<sup>1</sup> The submitted change petition for these water rights permits covers DWR permits 16478, 16479, 16481, and 16482 for the State Water Project (SWP) and Reclamation permits 11315, 11316, 12721, 12722, 12723, 11967, 11968, 11969, 11971, 11973, and 12364 for the Central Valley Project.

## *Introduction*

We, the undersigned environmental water organizations, have reviewed the Change Petition proposing to add north Delta intakes along the lower Sacramento River as part of the California Water Fix Water Tunnels project (Water Tunnels project). The project is in the Change Petition is also known as Alternative 4A in the Bay Delta Conservation Plan/California Water Fix Recirculated Draft EIR/Supplemental Draft EIS [RDEIR/SDEIS]). We follow up and expand upon defects in the Petition previously identified in letters submitted by Local Agencies of the North Delta and Central Delta Water Agency, the City of Antioch, Friends of the River (individually), and Natural Resources Defense Council et al. If and when the Board gives notice of the Petition, many of our organizations expect to file protests based on allegations including that the proposed change would: have an adverse environmental impact; would not best serve the public interest or public trust; and would be contrary to law.

This Petition is the most damaging and controversial diversion and rediversion proposal in California history. It is the most expensive water project proposal in California history. It is also the most controversial. The 1970s' version of the Water Tunnels project, then known as the peripheral canal, was voted down in a statewide referendum in June 1982 by a 2 to 1 margin.

We appreciate that the Board recognizes “the complexity and magnitude of the California Water Fix project and likely disputed facts” and that the Board “anticipates that it will notice an evidentiary hearing on the petition.”<sup>2</sup> An evidentiary Hearing is indeed required.

We also appreciate that in response to letters previously submitted, the Board has already stated that:

The State Water Board has received several comments on the adequacy of the petition as well as concerns about whether the petition can be processed prior to completion of the California Environmental Quality Act (CEQA)/National Environmental Policy Act (NEPA) process and the Endangered Species Act (ESA) consultation process. Under the California Water Code the petitioners must provide information demonstrating that the project will comply with the Fish and Game Code and the ESA. *While this information and a final CEQA document are required before the State Water Board can take final action, this information does not necessarily need to be available before the State Water Board can begin processing the petition.*<sup>3</sup>

We highlight the last sentence. We do appreciate recognition by the Board that the referenced items are required before the Board could consider taking final action to approve the Petition. Our concern is with the language stating that “*this information does not necessarily need to be available before the State Water Board can begin processing the petition.*” Our response to that is that the referenced items including Biological Opinions prepared by the

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<sup>2</sup> State Water Board Fact Sheet, Bay Delta Conservation Plan/California Water Fix-Water Right Petition Process under heading “Processing Changes in Points of Diversion.”

<sup>3</sup> Board September 18, 2015 Update) (emphasis added).

National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) and Final EIR/EIS must be incorporated into the change petition's evidentiary record far enough in advance of the evidentiary Hearing so that project opponents can determine if they need to attempt to raise the funds to retain their own experts or will rely solely on the Biological Opinions. The Board's Division of Water Rights Protest's Submittal Information advises that:

A protest must be accompanied by a statement of facts supporting the allegation. For example: public interest protests should clearly indicate how the appropriation will affect the public; environmental protests should identify specific impacts and provide supporting recitals on the effect of the proposed project on plants, animals, fish, erosion, pollution, aesthetics, etc.; public trust protests must identify the navigable waters and public trust values that would be affected by the proposed project and how the project will impact public trust values.

If sufficient information is not submitted, the State Water Board may reject the protest or request that the protestants submit additional information.

The best source of information on these issues including the effect of the proposed project on fish would be the Biological Opinions and the Final EIR/EIS, neither of which have been yet prepared. The public, and project opponents are prejudiced if they must prepare protests before they have the benefit of the Biological Opinions and the Final EIR/EIS.

### ***Conflict of Interest Objection***

We are concerned that there is a conflict of interest that will preclude the Board from exercising its independence on the Change Petition and Phase 2 of the Bay-Delta Plan Update (Update). ICF International, the Board's environmental consultant for the Update, is also the lead environmental consultant for the Water Tunnels project in the Change Petition. This is similar to going to court and finding out that the assigned judge's research attorney also happens to be the attorney for the opposing party in the case. We object to this conflict of interest and request that the ICF be completely screened from any contact whatsoever with Board members and staff on or about the pending Water Fix water rights petition and the Bay-Delta Plan Update.

The conflict with relying on ICF for the Phase 2 of the Bay-Delta Plan Update given ICF's role with the Water Fix has been a longstanding concern; some of the signatories to this letter objected to the extension of the contract with ICF for their continued work on the Update in February 2014. At that time, we were assured that the Update would occur separately from consideration of the Change Petition. The assumption at that time was that the Update would occur first. But now, the Board has stated its intention to consider the Change Petition first, and then complete the Update afterwards. As described below, we also object to this ordering of the Board's decisions.

In addition to the other concerns described in this letter, we also continue to object to the Board's reliance on ICF for the Update given ICF's role as the lead Water Fix consultant. For the Board to rely on a consultant that has a major financial interest in the advancement of the Water Fix for the Update calls into serious question the ability of the Board to carry out its mission: "To preserve, enhance, and restore the quality of California's water resources and drinking water for

the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations.” Even if there is no direct conflict, we believe that the Board needs to distance itself from ICF at this critical time in order to provide the public with certainty that the Board is acting independently and in the public interest with respect to both the Change Petition and the Bay-Delta Plan Update.

***Any Evidentiary Hearing would be Premature until the Biological Opinions have been Obtained pursuant to the ESA***

The Bureau of Reclamation has already stated that it expects the NMFS and USFWS “will ultimately prepare a biological opinion analyzing the effects of the California Water Fix, including the modification and addition sought in this Petition, unlisted species and designated critical habitats . . .”<sup>4</sup> The Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA. The Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt are listed as threatened species under the ESA. Each of these fish species are also listed under the California ESA, as is longfin smelt. The reaches of the lower Sacramento River, the sloughs, and the Delta are critical habitat for each of these listed fish species, and would lose large quantities of freshwater flows from operation of the proposed Water Tunnels. It is not just that the Biological Opinions to be prepared by the expert fishery agencies will be the best evidence on the subject of whether one or more of these species would be jeopardized or whether their designated critical habitat would be adversely modified by the new diversion. The Biological Opinions find jeopardy or adverse habitat modification will be dispositive on these issues, unless the Opinions are successfully challenged and overturned in court.

Presumably, if the Biological Opinions conclude that one or more of the species would be jeopardized or its critical habitat adversely modified by the new diversion, the project would at that point be dropped with no need to ever have an evidentiary hearing. An evidentiary hearing prior to preparation and issuance of the required and governing Biological Opinions would be an idle, hypothetical exercise. Moreover, individuals and non-profit organizations protesting the application would be forced to attempt to undergo the extremely expensive retention of expert witnesses to develop evidence on these issues which would be completely unnecessary after completion of the Biological Opinions. The Petition itself recites that “The proposed project reflects the culmination of a multiyear planning process that began in 2006 . . .”<sup>5</sup> Petitioners have had nine years to initiate ESA consultation and obtain the necessary Biological Opinions. Reclamation was supposed to “review its actions at the earliest possible time” to initiate the

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<sup>4</sup> Petition, Supplemental Information, pp. 17-18). “ESA section 7 [16 U.S.C. § 1536(a)(2) prohibits a federal agency from taking any action that is ‘likely to jeopardize the continued existence’ of any listed or threatened species or ‘result in the destruction or adverse modification’ of those species’ critical habitat.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9<sup>th</sup> Cir. 2015). The Department of Water Resources (DWR) faces a similar prohibition under Fish and Game Code §§ 2080 and 2081(c) of the California ESA to the prohibition faced by Reclamation under the federal ESA.

<sup>5</sup> Petition cover letter, p. 1.

ESA consultation requirement.<sup>6</sup> Yet Reclamation has not even taken the first step in the ESA consultation process, preparation of the required Biological Assessment to identify endangered species and critical habitats that could be affected by the project.<sup>7</sup>

The Board has issued a “Fact Sheet” with respect to the “Bay Delta Conservation Plan/ California Water Fix-Water Right Petition Process.” Under the heading “Processing Changes in Points of Diversion” the board explains that:

Second, the petitioner must provide information concerning the extent to which fish and wildlife would be affected by the change, and identify proposed measures to protect fish and wildlife from any unreasonable impacts of the change. The petitioner also must demonstrate that the proposed change will comply with any applicable requirements of the Fish and Game Code and the federal Endangered Species Act, and demonstrate compliance with CEQA.

The petitioner does not, will not, and cannot have the necessary information concerning the extent to which fish and wildlife would be affected by the change unless and until such time as petitioner finally carries out its duties under the ESA by initiating consultation and obtaining for the Board and all interested parties the required Biological Opinions.

Again, the indisputably relevant and controlling evidence on these ESA issues would not be evidence developed by experts retained by petitioners, protestants, or even the Board itself. The dispositive evidence on these ESA issues will be the Biological Opinions prepared by NMFS and USFWS. In explaining the Hearing Process in the Water Rights Hearings Program, the Board has explained that: “For a large project, the project advocate will commonly assemble his/her own team of experts to offer testimony that addressed the defined issues. The primary responsibility for making an evidentiary record rests with the project advocate. . .The project opponent has the responsibility of providing evidence in support of any allegations made against the project. The project opponent must present his/her own supportive evidence.”<sup>8</sup> Fairness, the public interest, the public trust, the environment, the fish, the truth and project opponents would be gravely and unfairly prejudiced by being forced to attempt to prepare for, let alone participate

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<sup>6</sup> 50 C.F.R. § 402.14(a); *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9<sup>th</sup> Cir. 2012) (en banc), *cert. denied*, 133 S.Ct. 1579 (2013).

<sup>7</sup> Petition, Supplemental Information, pp 17-18. “Reclamation, with DWR as an applicant, will initiate Section 7 consultation with USFWS and NMFS. In cooperation with DWR, Reclamation will prepare a biological assessment for submission to USFWS and NMFS requesting formal consultation under ESA Section 7.” (Petition, Supplemental Information, p. 18).

<sup>8</sup> Updated by Board, September 11, 2013.

in, an evidentiary Hearing without the best evidence addressing these issues— that being the Biological Opinions.<sup>9</sup>

***Any Evidentiary Hearing would be Premature in the Absence of the Final EIR/EIS***

Similar, related issues of unfairness and prejudice to the public interest and project opponents would be raised by proceeding to the evidentiary hearing prior to *completion* of the CEQA and NEPA processes. The Petition recites that: “A final decision on this Petition is not requested until Petitioners provide final environmental documents.”<sup>10</sup> On that we can all agree. What is both unacceptable and wrong is the next statement by Petitioners claiming that: “The Draft EIR/EIS provides information well beyond that which is sufficient to initiate consideration by the State Water Board and fully inform both the State Water Board and the public for the purposes of the limited scope of any public hearing associated with this Petition.”<sup>11</sup>

In fact, nothing could be farther from the truth. The Draft EIR/EIS documents consist of about 48,000 pages of project advocacy and speculation prepared by the aforementioned self-interested consultants for the project proponents. The other side of the story is contained in the voluminous, critical comments prepared by public agencies including the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers, and your Board, as well as by public interest organizations ranging from the Environmental Water Caucus, Restore the Delta, and Friends of the River to the Natural Resources Defense Council, et al. As just one example, the EPA found that:

operating any of the proposed conveyance facilities . . . would contribute to increased and persistent violations of water quality standards in the Delta, set under the Clean Water Act, measured by electrical conductivity (EC) and chloride concentrations. We recommend that the Supplemental Draft EIS include one or more alternatives that would, instead, facilitate attainment of all water quality standards in the Delta. Specifically, we recommend that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedances of water quality objectives, and that would address the need for water availability and greater freshwater flow through the Delta. Such an alternative should result in a decrease in the state and federal water projects’ contributions to the exceedance of any water quality objectives in the Delta.<sup>12</sup>

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<sup>9</sup> Until the Biological Opinions are obtained, the Board, the public, and the parties will also be deprived of having the “reasonable and prudent alternatives” (RPA) which must be developed by the federal fishery agencies when the Biological Opinion concludes that the action is likely to jeopardize a species or adversely modify its habitat. E.g., *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 596 (9<sup>th</sup> Cir. 2014), *cert. denied*, 135 S.Ct. 948 and 950 (2015). The consulting agency “in the course of proposing an RPA, must insure that the RPA does not jeopardize the species or its habitat.” *Jewell*, 747 F.3d 581, 636.

<sup>10</sup> Petition, Supplemental Information, p. 2.

<sup>11</sup> *Id.*

<sup>12</sup> August 26, 2014, EPA letter, p.2.

EPA further stated that “Data and other information provided in the Draft EIS indicate that all CM1 [Tunnels project] alternatives may contribute to declining populations of Delta smelt, longfin smelt, green sturgeon, and winter-run, spring-run, fall-run and late-fall run Chinook salmon.”<sup>13</sup> “We recommend that the Supplemental Draft EIS consider measures to insure freshwater flow that can meet the needs of those [declining fish] populations and ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance.”<sup>14</sup> “Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta.”<sup>15</sup> In addition, EPA concluded that “The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated. We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts.”<sup>16</sup>

It is the Final EIR/EIS that will include the other side of the story—the comments by public agencies, organizations, and individuals—along with the required responses to the comments required by both CEQA and NEPA. Moreover, it should be presumed at this time that Reclamation and DWR may choose not to go ahead with the Water Tunnels and change of diversion point if that appears to be the reasonable decision called for following their review of the comments, and completion of the Final EIR/EIS. It would save everyone a lot of trouble.

The public interest, public trust, the fish, fairness, truth, and project opponents will all be unfairly prejudiced if forced into a premature Hearing without having the benefit of a Final EIR/EIS and project decision.

### ***Any Evidentiary Hearing would be Premature for additional Reasons***

The Board’s Fact Sheet on the Water Fix Petition Process includes the heading “Relationship to the Board’s Comprehensive Bay-Delta Effort.” The Board explains that Phase 2 of the Bay-Delta Plan Update “involves other changes to the Bay-Delta Plan to protect beneficial uses not addressed in Phase 1, including Delta outflow objectives, Sacramento River inflow objectives, exports/inflow objectives, and potential new reverse flow objectives for Old and Middle Rivers, as well as their program of implementation.” The Board goes on to state that it “will concurrently review the change petition for the California Water Fix projects separate from, and *likely before completion of the Phase 2 update of Delta outflow and other flow objectives* of the Board’s Bay-Delta planning efforts. While Delta and Sacramento flow issues are raised in both proceedings, the Bay-Delta Plan update provides the opportunity for a more comprehensive assessment of Delta and Sacramento River flow issues.” (Emphasis added).

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<sup>13</sup> EPA letter, p. 10.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* p. 3.

<sup>16</sup> *Id.*

At the same time, the Board indicates it will not be governed by the report on development of flow criteria it developed in 2010 as required by the Delta Reform Act. The Board is already distancing itself from its own report, calling it “narrowly focused on the suggested flows needed in the Delta ecosystem if fishery protection was the sole purpose for which its waters were put to beneficial use.”<sup>17</sup> We are gravely concerned about this misapprehension of the law and reality in this area at the very outset of the Petition proceeding. Reclamation and DWR are not private individual or organization applicants. Reclamation is a federal agency subject to the ESA § 7 absolute prohibitions against endangered species jeopardy and adverse modification of their critical habitat. DWR is a state agency subject to the similar prohibitions in the California ESA. Consequently, there is no need or place for the Board to develop some new, Water Tunnels-friendly flow criteria, instead of using the criteria developed in 2010 or awaiting development of comprehensive flow criteria during the ongoing Bay-Delta update. The “balancing” of factors the Board talks about in the Fact Sheet may be fine in some settings. Here, however, we have the presence of listed fish species and designated critical habitat for them. Consequently, in contrast to “balancing,” both Reclamation and DWR are simply prohibited from jeopardizing the fish species and from adversely modifying their critical habitat. Both Reclamation and the Board are bound by the federal ESA.

There are also governing prohibitions under the federal Clean Water Act. As just one example, “Granting a CWA Section 404 permit is prohibited for projects that violate State Water Quality Standards . . .”<sup>18</sup> As another example, “The Draft EIS indicates that CM1 [the project] would not protect beneficial uses for aquatic life, thereby violating the Clean Water Act.”<sup>19</sup> We are aware that petitioners have filed their application for a Section 401 certification. 404 permit issuance depends on whether the SWRCB can issue a 401 certification to the Tunnels Project. Through a separate letter, a number of our organizations argue from evidence that it cannot because the project’s own modeling results continue to show it will violate beneficial uses and flow and other water quality criteria.

The petitioners continue to avoid putting forth an alternative that would comply with water quality objectives and the Clean Water Act.

***The change petition fails to acknowledge the full scope of California water policy applicable in the evidentiary proceeding.***

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<sup>17</sup> Board Fact Sheet.

<sup>18</sup> EPA’s Comments on BDCP ADEIS, p. 18, July 3, 2013.

<sup>19</sup> EPA Letter, August 26, 2014, p. 2.

Petitioners point to the Delta Vision Blue Ribbon Task Force recommendations and recent Public Policy Institute of California reports as evidence of consistency with state water policy. Neither are evidence of state water policy.<sup>20</sup>

Petitioners look to the 2009 Delta Reform Act as justification for “improved conveyance.” While the Tunnels project would alter how water is diverted, the Delta Reform Act nests the objective of “improved conveyance” among interlinked goals and objectives that must move forward together through state actions, rather than privileging one goal or objective over another.

California nonetheless has a rich framework of water policy goals. This policy framework includes, but is not limited to:

- Achieving the coequal goals of Water Code Section 85054 of enhanced ecosystem health and water supply reliability.
- Water Code Section 85023, stating: “The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.”
- Water Code Section 85021 requiring reduced reliance on the Delta in meeting California’s future water supply needs (and whose strategy specifies “investing in improved regional supplies, conservation, and water use efficiency”).
- Water Code Section 12200 *et seq.*, (the Delta Protection Act of 1959) requiring that neither state nor federal water projects should divert water from the Delta to which Delta users are entitled.
- Achieving the fish and specifically salmonid abundance goals of California Fish and Game Code Sections 5937, 5946, and 6902(a); and the Central Valley Project Improvement Act of 1992, Section 3406(b)(1).)
- The federal Clean Water Act requiring protection of the chemical, physical and biological integrity of the nation’s waters (including those of the Bay-Delta Estuary), that the navigable waters of the United States (including those of the Estuary) not be degraded, and that the regulation of water quality standards for the Estuary be based on the “most sensitive” beneficial use among those occurring in a particular water body.

These policies form the foundation and framework of California water policy.

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<sup>20</sup> Petitioners look as well to the State Water Resources Control Board’s 2006 Bay-Delta Water Quality Control Plan update for support for “new conveyance.” We note that Petitioners’ quote from the Plan does not specify “new conveyance” but that “the DWR and USBR should continue their efforts to develop alternative water conveyance and storage facilities in the Delta and should evaluate these alternatives and their feasibility and take action as necessary to minimize impacts to fish.” (2006 Bay Delta Water Quality Control Plan, p. 38.)

Finally, we are concerned about the statement in the Board’s Fact Sheet (under the heading Processing Changes in Points of Diversion) that: “The change petition, associated hearing, and State Water Board decision are solely about the California Water Fix proposal to add additional diversion points on the Sacramento River.” We respectfully disagree. In fact, the decision to be made will be one of the most important about water in the history of the State of California. The merits of the change petition have undeniable statewide importance and necessarily involve broad questions of statewide water policy. Failure by the State Water Resources Control Board to address these broader issues will impair the public interest, public health, the Delta’s regional economy, San Francisco Bay-Delta estuary water quality, public trust values, the environment, endangered and threatened fish species and their critical habitat.

**Conclusion**

In this setting, proceeding to the evidentiary hearing in the absence of the Biological Opinions, in the absence of the Final EIR/EIS, and in the absence of comprehensive updated flow requirements would severely prejudice the public, the public interest, the public trust, the fish, water quality, the truth, and project opponents. And the Board would likewise be prejudiced presuming that the Board’s intent is to proceed fairly, based on governing evidence, and in the manner required by law.

Sincerely,



Barbara Barrigan-Parrilla  
Executive Director  
Restore the Delta



Tim Stroshane  
Policy Analyst  
Restore the Delta



E. Robert Wright  
Senior Counsel  
Friends of the River



Kyle Jones  
Policy Advocate  
Sierra Club California



Jonas Minton  
Senior Water Policy Analyst  
Planning and Conservation  
League



Barbara Vlamis  
Executive Director  
AquAlliance



Linda Sheehan  
Executive Director  
Earth Law Center



Tim Sloane  
Executive Director  
Pacific Coast Federation of  
Fishermen’s Associations /  
Institute for Fisheries  
Resources



Conner Everts  
Facilitator  
Environmental Water Caucus /  
Southern California Watershed  
Alliance /  
Desal Response Group

/s/John C. Hooper  
Co-Founder  
Protect Our Water

cc: (via email)  
Felicia Marcus, Chair, SWRCB  
Frances Spivy-Weber, Vice-Chair, SWRCB  
Tam Doduc, member, SWRCB  
Dorene D'Adamo, member, SWRCB  
Steven Moore, member, SWRCB  
Mark W. Cowin, Director, DWR  
David Murrillo, Regional Director, US Bureau of Reclamation  
Barbara Evoy, Division of Water Rights, SWRCB  
Diane Riddle, SWRCB  
Maria Rea, NMFS  
Michael Tucker, NMFS  
Larry Rabin, USFWS  
Lori Rinek, USFWS  
Deanna Harwood, NOAA  
Kaylee Allen, Dept. of Interior  
Jared Blumenfeld, U.S. EPA, Region IX  
Tom Hagler, U.S. EPA  
Tim Vendlinski, U.S. EPA, Region IX  
Stephanie Skophammer, U.S. EPA, Region IX  
Erin Foresman, U.S. EPA  
Lisa Clay, U.S. Army Corps of Engineers  
Michael Nepstad, U.S. Army Corps of Engineers  
Zachary M. Simmons, U.S. Army Corps of Engineers