



# FRIENDS OF THE RIVER

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Mr. Tom Howard  
Executive Director  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

September 9, 2015

EMAIL (tom.howard at waterboards.ca.gov)

RE: Premature and Defective Petition for Change Application for Water Fix submitted by DWR and Bureau of Reclamation:

Dear Mr. Howard:

The California Department of Water Resources (DWR) and federal Bureau of Reclamation (Reclamation) have submitted a joint Petition for Change of Point of Diversion and Rediversion. The project is Alternative 4 A of the California Water Fix. The diversion would be near Clarksburg for the Delta Water Tunnels taking enormous quantities of freshwater away from the Sacramento River, sloughs, and Delta for transport through the Tunnels about 35 miles to the pumping plants near Tracy for the Central Valley Project (CVP) and State Water Project (SWP).

Friends of the River is devoted to the protection and restoration of California rivers including the lower Sacramento River and the Delta. Friends of the River objects to acceptance of the Petition on the ground that the Petition is premature, misleading and defective.

### ***The Petition is Premature***

The Petition admits that Reclamation will have to prepare a Biological Assessment under the Endangered Species Act (ESA). (Petition, Supplemental Information, p. 17-18). Reclamation expects that the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) “will ultimately prepare a biological opinion analyzing the effects of the California Water Fix, including the modification and addition sought in this Petition, on listed species and designated critical habitats . . .” (*Id.*). In fact, “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. Locke*, 776 F.3d 971, 987 (9<sup>th</sup> Cir. 2015).<sup>1</sup>

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<sup>1</sup> DWR admits that it must seek a permit from the Department of Fish and Wildlife under the California Endangered Species Act. (Petition, Supplemental Information, p. 18). DWR faces a similar prohibition under Fish & Game Code §§ 2080 and 2081(c) of the California ESA to the prohibitions faced by Reclamation under the federal ESA.

Consequently, the Petition should not be considered at this time. Consideration of the Petition should await completion of the ESA process to determine whether the new points of diversion would even be lawful under the ESA.

In addition, the Petition admits that no final environmental document has been prepared under the California Environmental Quality Act (CEQA) or the National Environmental Policy Act (NEPA). (Petition, Supplemental Information, pp. 21-23). In fact, the comment period for the Draft EIR/EIS does not end until October 30, 2015. (*Id.* p. 23). No lawful, final decision can be made for the Water Tunnels until after final selection of an alternative and approval and certification of a Final EIR/EIS by Reclamation and DWR.

The Board, the public, and all affected water users are entitled to the critical information that will be supplied by Biological Opinions prepared under the ESA and by a Final EIR/EIS before, not after, they are required to determine whether to file protests in this matter and before they are required to submit evidence in this matter.

Specifically, the *Fact Sheet* issued by the Board with respect to processing the Petition states that: “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.” (Board Fact Sheet, first paragraph after heading “Processing Changes in Points of Diversion”). The only way to demonstrate that the proposed change will comply with the ESA is to review Biological Opinions to be issued by USFWS and NMFS as ESA compliance is by law determined by those agencies’ Biological Opinions. Similarly, the only way to demonstrate compliance with CEQA is to have in hand the Final EIR/EIS after it has been prepared and approved.

### ***The Petition is False and Misleading***

The Petition’s Supplemental Information includes a citation to California Water Code § 1701.2 including subsection (c) which requires that a Petition “Include all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and [Wildlife], concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.” (Petition, Supplemental Information p 10).

The Petition then goes on to falsely represent that “The California Water Fix would result in substantially improved conditions in the Delta for endangered and threatened species and afford greater water supply reliability for the State.” (*Id.*, p. 2). The Petition also falsely represents that “The requested additional points of diversion/rediversion are expected to provide several important environmental benefits without creating new, or exacerbating existing, environmental stressors.” (*Id.*, p. 7).

It is absurd to claim that taking away enormous quantities of freshwater that presently flow through the lower Sacramento River, sloughs, and the Delta would not only not be bad for the fish-- taking their water away would actually be good for them.

Reflecting reality, on August 26, 2014, the U.S. Environmental Protection Agency (EPA) in its review of the Draft BDCP (Water Tunnels) EIR/EIS 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.” (EPA letter, p. 2).

For more than three years now, the NMFS has issued “Red Flag” comments that the Water Tunnels project threatens the “potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit . . .” (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013).

The BDCP/Water Fix documents admit adverse effects of diversions for the Water Tunnels on fish. The Effects Analysis chapter of the BDCP plan (November 2013) admits, for example, adverse effects on the endangered winter-run Chinook salmon including far-field (reduced downstream flows (ch. 5, 5.3-23), reduced Sacramento River attraction flows for migrating adult winter-run Chinook salmon (5.3-29), possible reduction of survival of juvenile winter-run Chinook salmon during downstream migration and possible negative effect on upstream migration of adult winter-run Chinook salmon by changing attraction flows/olfactory cues. (5.3-32). The BDCP also admits that “A potential adverse effect of the BDCP on adult winter-run Chinook salmon will be the reduction in flow downstream of the north Delta diversions on the Sacramento River, reducing river flow below the north Delta intakes.” (5.3-45). The reduced outflow along with the possible change in olfactory signals due to change in the flow mixture “could affect upstream migration.” (Id.). Now, the new RDEIRS admits that “when compared to the CEQA baseline, [the Water Tunnels], including climate change, would substantially reduce the quantity and quality of spawning and egg incubation habitat for winter-run Chinook salmon relative to existing conditions.” (RDEIRS 4.3.7-58). The BDCP/Water Fix documents likewise identify similar threats and stressors to the threatened spring-run Chinook Salmon, Steelhead, Green Sturgeon, and Delta Smelt that would result from the diversions.

Petitioners have made false representations about the impacts of the proposed new points of diversion on Delta water quality and quantity and the fish. Petitioners are public agencies that should be required by the Board to include honest admissions of the undeniable adverse effects of the new points of diversion on the lower Sacramento River, sloughs, and Delta water quantity, quality, temperature, and thus on the fish. Again, as we said above, in the absence of the ESA-required Biological Opinions, the Petition is premature, and thus conducive to making false representations about effects on fish.

***The Petition Fails to Show that Permits will be Required from DFW and the U.S. Army Corps of Engineers***

In the Environmental Information for Petitions form (page 3 of 4) petitioners failed to check the box that would show that a permit will be required for the project from the Department of Fish and Game (now, the Department of Fish and Wildlife, CDFW). However, in their Supplemental Information for Petition for Change in Point of Diversion (page 18 of 24), petitioners recite that DWR will make a permit request to CDFW for authorization of incidental take of species. The Department of Fish and Game (now Wildlife) box needs to be checked.

Petitioners also failed to check the box that would show that permits will be required for the project from the U.S. Army Corps of Engineers. (Env. Inf. Form page 3 of 4). Petitioners refer to the Partially Recirculated Draft EIR/Supplemental Draft EIS (RDEIRS) for the water fix as information for the Petition. (*Id.* at p. 1). Petitioners' RDEIRS (RDEIRS Introduction, pp. 1-16, 1-17) however, recites that the Army Corps "has regulatory authority over activities within certain waters within the project area" and that Army Corps permits may be required for the project under Section 404 of the Clean Water Act (discharge of dredged or fill material into waters of the United States), Section 10 of the Rivers and Harbors Act (activities in, under, or over navigable waters of the United States), and under Section 14 of the Rivers and Harbors Act (activities that have the potential to affect Army Corps civil works projects, including project levees). The Army Corps of Engineers box needs to be checked on the form.

***Conclusion***

Again, the Petition is premature. The Petition is also filled with misrepresentations. Reclamation and DWR are public agencies with access to abundant information about the adverse effects of diversion of enormous quantities of water for the Water Tunnels on Delta water quality, water quantity, and the fish. Unlike private parties, Reclamation and DWR are public agencies with stewardship and trustee responsibilities toward Delta water quality and quantity, the fish, and the public. Truthful information "concerning the extent, if any, to which fish and wildlife would be affected by the change . . ." is required. Is it too much for the public to expect and obtain truthful representations from public agencies?

The Petition should not be accepted for consideration until after the Biological Opinions have been prepared in the required ESA process and made available to the Board and the public. Likewise, consideration of the Petition should await the completion of the NEPA and CEQA process and issuance of a final Record of Decision in that process. Please call the undersigned at (916) 442-3155x 207 or email to [bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org) if you have any questions about this matter.

Sincerely,

/s/ E. Robert Wright  
Senior Counsel  
Friends of the River

cc: VIA EMAIL

Felicia Marcus, Chair, State Water Resources Control Board (SWRCB)  
Frances Spivey-Weber, Vice-Chair  
Doreen D' Adamo, SWRCB  
Tam M. Doduc, SWRCB  
Stephen Moore, SWRCB  
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