

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterboards.ca.gov/waterrights>

PROTEST– PETITION

This form may also be used for objections
PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT CHANGE
OR TRANSFER ON

Water Right Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512, respectively) of the California Department of Water Resources for the State Water Project; and Water Right Permits 11315, 11316, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722, and 12723 (Applications 13370, 13371, 5628, 15374, 15375, 16767, 17374, 17376, 5626, 9363, and 9364, respectively) of the U.S. Bureau of Reclamation for the Central Valley Project.

I (We) have carefully read the notice (state name): Brian J. Johnson, Trout Unlimited

Address, email address and phone number of protestant or authorized agent: Trout Unlimited / 4221 Hollis Street, Emeryville, CA 94608 / bjohnson@tu.org / 510-528-4772

Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS (Prior right protests should be completed in the section below):

- the proposed action will not be within the State Water Resources Control Board's jurisdiction
- not best serve the public interest
- be contrary to law
- have an adverse environmental impact



State facts which support the foregoing allegations: See attached

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.): None at this time because CEQA and Public Trust Resources Assessment are not complete; also see attached.

Protest based on INJURY TO PRIOR RIGHTS:

To the best of my (our) information and belief the proposed change or transfer will result in injury as follows: _____

Protestant claims a right to the use of water from the source from which petitioner is diverting, or proposes to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative or riparian right): _____

List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree).

Where is your diversion point located? _ ¼ of ____ ¼ of Section , T ____, R____, ____ B&M

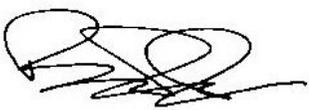
If new point of diversion is being requested, is your point of diversion downstream from petitioner's proposed point of diversion? _____

The extent of present and past use of water by protestant or his predecessors in interest is as follows:

- a. Source _____
- b. Approximate date first use made _____
- c. Amount used (list units) _____
- d. Diversion season _____
- e. Purpose(s) of use _____

Under what conditions may this protest be disregarded and dismissed? _____

All protests must be signed by the protestant or authorized representative:



Signed: _____ Date: January 5, 2016

Signed: _____ Date: January 5, 2016

Signed: _____ Date: January 5, 2016

All protests must be served on the petitioner. Provide the date served and method of service used:

Service via email to James.Mizell@water.ca.gov and Amy.Aufdemberge@sol.doi.gov on 1/5/2016

**Information and Statement of Facts
in Support of Protest of WaterFix Petition
Submitted by Trout Unlimited**

Executive Summary

Our organization protests the August 25, 2015 Petition by the Department of Water Resources and U.S. Bureau of Reclamation to change the point of diversion for the federal Central Valley Project (CVP) and State Water Project (SWP) as part of the California WaterFix Project (“Petition”), because the best available scientific data and information demonstrates that granting the Petition would cause unreasonable impacts on fish and wildlife, would be contrary to various state policies and laws, and is not in the public interest.

This document provides initial information in support of our protest. However, our testimony and subsequent submissions in this proceeding may raise additional issues that are not addressed in this statement of facts because the State Water Resources Control Board (“Board”) has explicitly stated in the Notice of Petition Requesting Changes in Water Rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project (“Notice”) that, “Persons wishing to participate in the hearing do not need to submit a protest against the Petition.” See Notice at 3.

The Board must deny the Petition because it would cause unreasonable impacts on fish and wildlife, is contrary to law, and is not in the public interest.

**The Scope of the Board’s Review of the Petition is Legally Inadequate
to Protect Public Trust Resources**

The Board must consider the full range of impacts of the proposed operations of the CVP and SWP with the change in point of diversion, in light of the Board’s obligations under the Public Trust doctrine, section 85086(c)(2) of the Water Code, and other requirements of law. The scope of the Board’s review lawfully cannot be limited to the incremental, additional harm caused by the additional point of diversion or incremental changes to project operations. Instead, the Board must consider the full range of impacts on fish and wildlife and other beneficial uses from the operations of the State Water Project and Central Valley Project as proposed in the Petition and environmental documents, in order to determine if the proposed operations would result in unreasonable impacts on fish and wildlife. This includes both impacts from upstream operations as well as impacts in and downstream of the Delta from the new point of diversion. In order to grant the Petition, the Board must include conditions that are sufficient to ensure that: (a) existing water quality standards are achieved (including the narrative objective for salmon protection); and, (b) cumulative effects of the operations of the CVP and SWP will not cause unreasonable impacts to fish, wildlife, and water quality or jeopardize the continued existence or recovery of species, including upstream impacts from reservoir operations and/or impacts that are not limited to the incremental effect of the change in point of diversion. When processing water right

changes, the State Water Board must prepare a Public Trust Resources Assessment. That assessment has not been done, or if it has been done it has not been disclosed.

The Board's Review Cannot be Limited to Consistency with Existing Water Quality Standards

The Board's review of impacts cannot be limited to compliance with existing water quality standards. As the Board has indicated, the existing standards in the Bay-Delta Water Quality Control Plan fail to protect public trust resources including fish and wildlife. For instance, the Board has previously determined that "[t]he best available science suggests that current flows are insufficient to protect public trust resources." SWRCB, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (August 3, 2010) at 2; *id.* at 5 (acknowledging that "[r]ecent Delta flows are insufficient to support native Delta fishes for today's habitats"); see SWRCB Resolution 2010-0039 ("In accordance with the Delta Reform Act, the State Water Board approves the report determining new flow criteria for the Delta ecosystem that are necessary to protect public trust resources."). In addition, by adopting Resolution 2009-0065, the Board approved the staff report on periodic review of the Bay-Delta Water Quality Control Plan, which recommends numerous changes to existing flow and water quality standards, recognizing that existing standards fail to adequately protect fish and wildlife. See Staff Report, Periodic Review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary at 19 ("The available information indicates that further review and change of Delta outflow objectives may be required.").

Other agencies have also concluded that existing water quality standards are inadequate to protect native fish species and other Public Trust resources, including preventing the extinction of native fish species. See, e.g., CDFW 2010 flow objectives report; CDFW May 2, 2012 comment letter to SWRCB regarding Phase II; Environmental Protection Agency 2012 Bay Delta Action Plan at 7 (stating that "Despite much ongoing activity, CWA programs are not adequately protecting Bay Delta Estuary aquatic resources, as evidenced by the pelagic organism decline."); *id.* at 9-11 (stating that many designated uses are currently impaired, and directing the Board to expeditiously modify estuarine habitat protection standards in the Bay Delta Water Quality Control Plan to more fully protect aquatic species); FWS 2008 biological opinion;¹ NOAA 2009 biological opinion; NOAA April 25, 2012 comments to the SWRCB regarding Phase II; Delta Stewardship Council 2013 Delta Plan at 133, 148.

The Delta Reform Act of 2009 requires that the Board impose "appropriate" flow criteria, which are to be informed by the Board's 2010 Public Trust Flow report, before approving any petition seeking a change in point of diversion for the CVP and SWP. Water Code § 85086(c)(2). Such review cannot be limited to existing water quality standards. It is unclear from the Notice whether the Board's adoption of

¹ The biological opinions from the U.S. Fish and Wildlife Service and National Marine Fisheries Service concluded that implementation of existing water quality standards under D-1641, without implementation of the Reasonable and Prudent Alternative in each biological opinion, would jeopardize the continued existence and recovery of species listed under the federal Endangered Species Act. This demonstrates that the water quality standards are insufficient even to avoid jeopardy of endangered species, much less to meet the Board's obligations under the Public Trust doctrine.

appropriate flow criteria pursuant to section 85086(c)(2), including Sacramento River bypass flows and Delta outflows, will include only those flows that are the responsibility of the CVP and SWP to contribute, or whether it will include flows from other sources. DWR and Reclamation currently bear responsibility for meeting all of the flow objectives in the water quality control plan. The Board must specify whether flow criteria under section 85086(c)(2) includes only flows that are the future responsibility of the CVP and SWP (such that additional outflows and bypass flows may be required from other water rights holders), or whether it includes flows that may be the responsibility of other water rights holders.

The Board Must Ensure that the Narrative Objective for Salmon Protection will be met in Order to Avoid Unreasonable Impacts on Fish and Wildlife

The Board must ensure that the Petition is consistent with, and will achieve, the narrative salmon protection objective in the existing Bay-Delta Water Quality Control Plan (“to achieve a doubling of natural production of Chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law”). The failure to achieve this objective would constitute an unreasonable injury to fish and wildlife, as the narrative salmon protection objective constitutes a legislative and policy determination of California’s obligations under the Public Trust doctrine.

The Board Must Ensure Compliance with the California Endangered Species Act and the Prevention of Extinction of Endangered Species in Order to Avoid Unreasonable Impacts on Fish and Wildlife

The Board must ensure that the Petition is consistent with the California Endangered Species Act (“CESA”), including CESA’s requirement to avoid driving native fish and wildlife species to extinction, and with other provisions of the Fish and Game Code including section 5937. The failure to comply with CESA would constitute an unreasonable injury to fish and wildlife, which is not subject to balancing.

The Board Must Assess the Availability of Alternative Water Supplies in this Proceeding

In order to determine the reasonableness of protections for fish and wildlife and other beneficial uses, and other water users, as well as the public interest in the Petition, the Board must consider the availability of alternative water supplies including water recycling, water conservation and efficiency, stormwater capture, and reservoir re-operation. *See* Decision 1485 at 16-19; Decision 1631 at 165-168, 176-177; Water Rights Order 2009-0034EXEC; *see also* Water Code § 13241(f). The Board’s decision on the Petition also must comply with section 85021 of the Water Code, which requires that agencies reduce reliance on water supplies from the Bay-Delta and invest in regional self-sufficiency.

**The Supplemental Draft Environmental Impact Report Fails to Comply with CEQA
and Must be Revised and Recirculated**

As a responsible agency, the Board must independently review the adequacy of the Revised Draft Environmental Impact Report (RDEIR) under the California Environmental Quality Act. As noted in many of the comments on the CEQA documents, the DEIR and RDEIR fail to comply with CEQA, particularly with respect to the effects of climate change, the range of alternatives that are analyzed, and the analysis of environmental impacts.

Prior to initiating Part II of this water rights proceeding, the Board must ensure that the RDEIR is revised and recirculated, including but not limited to analysis of the potential environmental impacts of the operational provisions included in Appendix B to the CEQA document. In prior proceedings, the Board has concluded that, "The State Water Resources Control Board cannot conduct a hearing on the petitions until the EIR is completed." Water Rights Order 79-20, July 19, 1979, 1979 WL 24780.

**The Best Available Science Demonstrates that Granting the Petition
will Cause Unreasonable Impacts to Fish and Wildlife**

The best available scientific data and information demonstrates that granting the Petition will cause unreasonable impacts on fish and wildlife, including but not limited to continued declines and potential extinction of fish species listed as endangered or threatened under the ESA and CESA and severe degradation and potential loss of environmental water quality, estuarine habitat and fish migration for a broad range of Bay-Delta fish and wildlife species. We hereby incorporate by reference the statement of facts submitted by NRDC, The Bay Institute, and Defenders of Wildlife as support for this statement.

Granting the Petition is Not in the Public Interest

Granting the petition will cause unreasonable impacts to fish and wildlife for the reasons stated above. Furthermore, declines in the fish and wildlife species mentioned above (and others) are expected to have a negative impact on wildlife including diving ducks, pelagic piscivorous birds of the San Francisco Estuary, and local marine mammal populations. Moreover, construction of the proposed project may reduce available habitat for birds and other wildlife that utilize Delta islands (e.g., Sandhill Cranes), and project operations may reduce the amount of water available for state, federal, and private wildlife refuges in the Central Valley that support several threatened and endangered species and millions of migratory birds. Finally, the proposed project's impact on sediment supplies to the Delta and estuary is likely to have negative effects on the ability to restore shallow intertidal habitats and the plant and wildlife species that rely on these habitats. As a result of these impacts, including impacts to species listed under CESA and the ESA, granting the Petition is not in the public interest. We hereby incorporate by reference the statement of facts submitted by NRDC, The Bay Institute, and Defenders of Wildlife as support for this statement.

I. Potential Conditions to Resolve Protest

Until legally adequate CEQA and PTRAs documents have been prepared and until the scope of the petition's review is legally sufficient, it is impossible to identify specific protest resolution terms.

Conclusion

The Board should deny the Petition because: (1) the best available science demonstrates that granting the Petition will cause unreasonable impacts to fish and wildlife and worsen water quality in the Delta for multiple beneficial uses; (2) the social and economic benefits of restoring the Delta ecosystem outweigh the social and economic benefits of granting the Petition; (3) alternative water supplies are available and economically feasible, and the law requires project proponents to reduce reliance on water from the Delta and invest in regional water supplies including conservation and efficiency, stormwater capture, wastewater recycling, and improved groundwater management; and (4) existing documentation is incomplete and inadequate to completely evaluate the Petition.