



California WaterFix – Water Right Change Petition and Water Quality Certification Process (updated July 21, 2016)

The Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) have filed with the State Water Resources Control Board (State Water Board) a petition to change their water rights (change petition) for the California WaterFix Project (WaterFix Project), formerly part of the Bay Delta Conservation Plan or BDCP. The WaterFix Project involves the construction and operation of new water diversion facilities near Courtland to convey water from the Sacramento River through two tunnels to the existing State and federal pumping facilities near Tracy. In addition to other federal, State and local approvals, the WaterFix Project requires changes to the water right permits for the State Water Project and federal Central Valley Project (collectively Projects) to authorize the proposed new points of water diversion and redirection. Because construction will involve discharge of material into water bodies, DWR has also submitted an application for a water quality certification (certification) under section 401 of the Clean Water Act from the State Water Board.

Notice of Change Petition, Associated Public Hearing and Notice of Application for Water Quality Certification

On October 30, 2015, the State Water Board issued two public notices regarding the WaterFix Project: 1) a [combined notice](#) of DWR's and Reclamation's water right change petition and public hearing on that petition; and 2) a [notice of DWR's application for certification](#). The purpose of the hearing is for the State Water Board to receive information on whether it should approve the change petition, subject to terms and conditions, or whether the petition should be disapproved. Two revised hearings notices and various rulings have been issued following the original hearing notice revising the hearing schedule and responding to various issues. The [latest May 11, 2016 revised hearing](#) notice rescheduled the hearing to begin on July 26, 2016.

The hearing is being conducted in two parts so that the hearing can proceed while DWR and Reclamation complete necessary State and federal environmental documents required by the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), and obtain approvals required by the federal Endangered Species Act (ESA), and the California Endangered Species Act (CESA) for the WaterFix Project. Part 1 will address the effects of the project on agricultural and municipal uses and associated legal users of water and is further subdivided into Parts 1A and 1B. Part 1A addresses the petitioners' case-in-chief and Part 1B addresses other parties' cases-in-chief and rebuttal for Part 1 of the hearing. Part 2 will address the effects of the project on fish and wildlife, including what appropriate Delta flow criteria should be included in any approval of the change petition. Part 2 will also address inclusion of the final CEQA document in the hearing record.

Part 1A will begin with brief non-evidentiary policy statements on July 26, 27, and 28, 2016, by the public and interested parties. After the presentation of policy statements the evidentiary portion of the hearing will begin with DWR and Reclamation's case-in-chief and associated cross-examination by other hearing parties starting on July 29 through September 30, 2016, as necessary. Part 1B of the hearing will commence on October 20, 2016, and continue through January 2017, as necessary, with other

parties' cases-in-chief and associated cross examination as well as rebuttal for all of Part 1 of the hearing. Parts 1A and 1B hearing dates and hearing room schedules are listed on Enclosure A of the May 11, 2016, [Second Revised Notice of Public Hearing](#). The hearing will be webcast live at: <https://video.calepa.ca.gov>. Part 2 of the hearing will not commence before the final CEQA/NEPA and ESA/CESA documents are complete so that those documents can become part of the hearing record. Part 2 is unlikely to begin before February 2017.

State Water Board staff are planning to process the application for certification separate from the hearing and processing of the change petition. The Executive Director has delegated authority to consider whether to issue the certification and, if so, under what conditions based on the information included in the hearing record that is applicable to the certification decision, as well as other relevant information. Given the different review requirements, the Executive Director may make a decision on the application for certification prior to the decision on the water right change petition. Any decision by the Executive Director will be subject to reconsideration by the State Water Board.

Background on the California WaterFix Project

The planning process related to the WaterFix Project began in 2006. The initial proposed project, or BDCP, was envisioned as a water conveyance and habitat conservation project. The project's goals were to obtain long-term federal ESA and CESA permits by improving conditions for various species beyond the mitigation measures required for the water conveyance facility. In December 2013, DWR, Reclamation, the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS) released a Draft Environmental Impact Report/Draft Environmental Impact Statement for the BDCP pursuant to CEQA and NEPA.

In April of 2015, DWR and Reclamation announced plans to split the project into two separate efforts; one for water conveyance facilities and the other for habitat restoration. The water conveyance effort is now called the California WaterFix Project, which consists of the new water conveyance facilities, operational elements, and habitat restoration and other environmental commitments to mitigate the construction and operation-related impacts of the new conveyance. DWR continues to be the CEQA lead agency and Reclamation is now the sole NEPA lead agency for the WaterFix Project. The habitat restoration effort that goes beyond the mitigation measures identified for the WaterFix Project is referred to as California EcoRestore. California EcoRestore is a separate effort and is not part of the current change petition or application for certification. In July 2015, DWR and Reclamation released a Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) that analyzes the WaterFix Project. A more detailed description of the WaterFix Project can be found in the Environmental Document as Alternative 4A (http://baydeltaconservationplan.com/RDEIRS/4_New_Alternatives.pdf).

Processing of the Change Petition

In order for the State Water Board to approve a change petition, the petitioner must: 1) demonstrate that the change will not initiate a new water right or injure any legal users of water; and 2) provide information on how fish and wildlife would be affected by the change and identify proposed measures to protect them from any unreasonable impacts of the change. The petitioner must also comply with any applicable requirements of the Fish and Game Code (including CESA), ESA, and CEQA.

In addition, the Delta Reform Act of 2009 imposes unique requirements on processing the change petition. The Delta Reform Act prohibits any construction of the project to begin until the State Water Board makes a decision on the change petition. Any decision by the State Water Board to approve the change petition must include “appropriate Delta flow criteria,” and be informed by flow criteria to protect the Delta ecosystem, which the State Water Board was required to develop in 2010. Delta flow criteria included in any decision approving the change petition would not apply until the new diversion facilities are constructed and used. The Delta flow criteria are discussed in more detail, below.

In light of the size and complexity of the WaterFix Project and the likelihood of disputed facts on which the Board’s decision will be based, the State Water Board has decided to conduct an evidentiary hearing on the change petition. Interested parties have been provided the opportunity to participate in the State Water Board’s decision-making process by following the hearing procedures as outlined in the notices and rulings regarding this matter. Notices of intent to participate in the evidentiary portion of the hearing were due earlier this year and were received from over 70 parties. Notices of intent to participate in the non-evidentiary portion of the hearing through making policy statements during Part 1 of the hearing were also received from hundreds of parties, though parties need not notify the State Water Board of their intent to make a policy statement. Opportunities for policy statements will also be provided during Part 2 of the hearing at a later date. During the evidentiary hearing, parties who submitted timely notices of intent to appear in the evidentiary portion of the hearing will be given the opportunity to present evidence and argument about whether the petition should be approved and, if so, under what conditions, as well as opportunities for cross examination and rebuttal of witnesses. The hearing will be public and certain procedural requirements must be met to participate in the hearing as either an interested person or a party. The public record for the hearing will serve as the basis for the Board’s decisions regarding the change petition for the project.

Processing of Application for Water Quality Certification

Construction of the WaterFix Project will involve discharges to waters of the United States, which requires a permit from the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act (CWA). The CWA requires any applicant for a federal license or permit to conduct an activity that may result in any discharge into navigable waters to obtain a certification from the State in which the discharge originates. The State Water Board and Regional Water Quality Control Boards are designated as the State’s water pollution control agencies responsible to issue such certifications. Since the WaterFix Project certification is associated with a water right project, the application for certification is processed by the State Water Board’s Division of Water Rights. A final CEQA document is not required to submit an application for certification. However, a final CEQA document must be submitted by DWR and considered before a certification can be issued. The USACE cannot issue its permit without certification from the Board, and the conditions of the Board’s certification become conditions of the permit.

Relationship of the Change Petition and Certification to Other Board Processes

2010 Delta Flow Criteria

In 2010, the State Water Board approved a report on the development of flow criteria for the Delta Ecosystem, as required by the Delta Reform Act. The report is not a regulatory document but was instead prepared to inform various decisions, including the change petition and the Board’s update to the Bay-Delta Water Quality Control Plan (Bay-Delta Plan) discussed below. However, the report is

only one document that will inform those processes along with other information. The report was narrowly focused on the suggested flows needed in the Delta ecosystem to protect public trust resources if fishery protection were the sole purpose for which water in the Delta was put to use, without consideration of cold water storage needs for salmon species. As the report recognized, there are many other important beneficial uses that these waters support such as municipal and agricultural water supply and recreational uses.

Bay-Delta Plan

The State Water Board is currently engaged in a phased process to update the Bay-Delta Plan. The Bay-Delta Plan designates beneficial uses of waters within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and establishes water quality objectives that must be met to protect these uses and a program of implementation for achieving the objectives. The Bay-Delta Plan's beneficial uses fall into three broad categories: fish and wildlife, agricultural, and municipal and industrial uses. The current water quality objectives include: inflows from the Sacramento and San Joaquin Rivers; Delta outflows; water project operations; dissolved oxygen; salmon protection; and various salinity objectives to protect fish and wildlife, agriculture, and municipal and industrial uses. The current program of implementation includes flow and non-flow actions that should be implemented by the State Water Board and others to meet the objectives.

Water quality control plans must be reviewed periodically. The current update started in 2009 to respond to fishery and ecological declines occurring in the Delta watershed. As a part of the update, the Board is evaluating changes to address these concerns, including changes to the plan's flow and non-flow measures that should be implemented. In so doing, the Board must consider a comprehensive list of environmental, economic, and societal factors, including all beneficial uses of water, the effects of water diversions on water quality needed for other beneficial uses, and other factors that affect water quality.

Phases of Bay-Delta Plan Update

- Phase 1 of the State Water Board's Bay-Delta planning efforts involves updating San Joaquin River flow and southern Delta salinity objectives and their associated program of implementation included in the Bay-Delta Plan.
- Phase 2 involves other changes to the Bay-Delta Plan not addressed in Phase 1, including Delta outflow objectives, Sacramento River inflow objectives, export/inflow objectives, and potential new reverse flow objectives for Old and Middle Rivers, as well as their program of implementation.
- Phase 3 involves changes to water rights and other measures to implement changes to the Bay-Delta Plan from Phases 1 and 2.
- Phase 4 involves developing and implementing flow requirements for priority Delta tributaries outside of the Bay-Delta Plan updates.

Relationship between the Bay-Delta Plan Update, the Change Petition, and Certification

In light of the current schedule for completion of Phase 2, State Water Board staff is proposing to review the change petition and application for certification for the WaterFix Project concurrent with the Bay-Delta Plan update, rather than delay consideration of the petition and application for several years while Phase 2 is being completed. The Executive Director may also issue a decision on the water quality certification before the State Water Board issues its decision on the change petition.

The decision on the application for certification will not be based on future changes to water quality requirements that may result from the update to the Bay-Delta plan, but rather it must ensure that existing water quality requirements will be met. Similarly, the State Water Board is not required to know exactly what changes to flow and water quality objectives will result from the update of the Bay-Delta Plan in order to process the change petition. To inform the proceeding on the change petition, however, preliminary Phase 2 recommendations, along with the science supporting the recommendations, may be entered into the hearing record for Part 2 of the hearing.

The State Water Board anticipates that the flow criteria included in any WaterFix change petition approval may be adjusted consistent with the requirements that come out of the Bay-Delta Plan update and implementation process. Currently, State Water Board Decision 1641 requires the Projects to meet certain water quality objectives contained in the Bay-Delta Plan. However, both the objectives themselves and the responsibility of the SWP and CVP for meeting the objectives may be revised as a result of Phases 1 through 3 of the ongoing Bay-Delta planning efforts. Any new flow or water quality objectives established in the Bay-Delta Plan update may lead to future changes in conditions of the CVP and SWP's water rights, regardless of whether a change petition for the WaterFix Project is approved. Likewise, whether any other water right holders should be required to make additional outflow contributions will occur as part of the update and implementation of the Bay-Delta Plan. The State Water Board's decision in the change petition proceeding will not address the responsibilities of third parties.

For further information on the State Water Board's comprehensive Bay-Delta planning efforts and the State Water Board's consideration of the California WaterFix Project, please go to:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/.