

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812

PROTEST – PETITION

CA Water Fix Change Petition related to 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.

We, North San Joaquin Water Conservation District (“NSJWCD”), have carefully read DWR and Reclamation’s August 26, 2015 Notice of Petition for Change related to the California WaterFix program.

NSJWCD’s authorized agent for purposes of this protest is as follows:

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**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

Protest also based on INJURY TO PRIOR RIGHTS:

State facts which support the foregoing allegations

See Attachment.

Under what conditions may this protest be disregarded and dismissed?

NSJWCD will need assurances that the proposed changes will not adversely impact NSJWCD’s water rights or the fisheries of the Mokelumne River.

Signed: Jennifer Spaletta Date: 1/4/16
Date and method of service on DWR and Reclamation: Emailed on January 4, 2016.

PROTEST OF NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT

North San Joaquin Water Conservation District (“NSJWCD”) has significant concerns with DWR and Reclamation’s change petition.

I. Introduction and overview of NSJWCD’s interest in the petitions

NSJWCD is a California water conservation district and holder of water right Permit 10477. Its jurisdictional area includes approximately 150,000 acres straddling the Mokelumne River in San Joaquin County. NSJWCD’s primary mission is to manage and protect the surface and groundwater resources available to the District for the benefit of its jurisdictional area.

NSJWCD overlies a portion of the Eastern San Joaquin and Cosumnes Subbasins. The basin was declared critically overdrafted in 1981. Overdraft conditions persist, especially in the portion of the basin underlying NSJWCD. Maximizing the use of available surface water supplies is critical in NSJWCD and will be even more important as the district works to achieve sustainability under the Sustainable Groundwater Management Act.

NSJWCD’s Permit 10477, which has a 1948 priority date, is junior to the rights of East Bay Municipal Utility District (EBMUD) and Woodbridge Irrigation District (WID) on the Mokelumne River. The water available under EBMUD, WID and NSJWCD’s water rights is impacted by the amount of water required under a 1998 Joint Settlement Agreement for fishery purposes on the Mokelumne River. To the extent DWR and Reclamation’s operations, as proposed in the change petition, adversely impact Mokelumne River fisheries, this could put more pressure on EBMUD, WID, and NSJWCD’s Mokelumne River water rights in the future. NSJWCD, as the junior water right on the river, would be the most severely impacted by this result.

In addition, the Mokelumne River is an eastside tributary to the Delta. To the extent that operations proposed by the change petition further degrade the Delta, impact flows or water quality, this would also put additional regulatory pressure on eastside tributaries and further threaten the reliability of water under NSJWCD’s Permit 10477.

II. DWR and Reclamation’s proposed changes would not serve the public interest and are contrary to law

A. The proposed changes threaten the health of the Mokelumne River fisheries

The Delta Cross Channel (DCC) is located on the Sacramento River near Walnut Grove, California. The primary purpose of the DCC is to reroute large quantities of Sacramento River water out of its natural channel and into the Central and Eastern Delta for conveyance southward to the Projects’ Delta export facilities. The DCC does this by connecting to Snodgrass Slough, which, along with Dead Horse Cut, connects to the North and South Forks of the Mokelumne River; the rerouted Sacramento River water flows through the DCC to these natural channels toward the state and federal export facilities in the South Delta.

The North and South Forks of the Mokelumne River are also the key migratory pathways for adult and juvenile fall-run Chinook salmon and steelhead migrating to and from the lower Mokelumne River. DCC operations generally result in the Cross Channel gates being open during anadromous fish migration periods. This leads to two types of impacts to the lower Mokelumne River anadromous fishery: (a) increased straying of returning adult Mokelumne River fall-run Chinook salmon and steelhead because, in the fall, high volumes of Sacramento River water funneled through the DCC attract migrating adult Chinook salmon into the Sacramento River instead of the Mokelumne River;¹ and (b) rerouting of out-migrating naturally produced juvenile anadromous fish from the Mokelumne River toward the South Delta and the Projects’ export facilities, leading to increased mortality caused by migration delays which increase the exposure of the juvenile anadromous fish to predation and other diversions. Studies have demonstrated that juvenile salmonids entrained into the interior Delta via the DCC or Georgiana Slough have lower survival than along other migratory routes (Perry et al 2010, Newman and Brandes 2010).

The operation of the DCC has long been identified as having a potential adverse impact on salmonid migration. For example, in 1989 the Mokelumne River Technical Advisory Committee identified the DCC as a significant factor contributing to straying of Mokelumne

¹ Bureau et al. (2007) estimated that when the DCC gates are open, approximately 45% of the Sacramento River flow at Freeport is redirected into the Central Delta through the DCC and Georgiana Slough. With the gates open, there is a clear pathway for salmon attempting to migrate upstream into the Lower Mokelumne River to instead “stray” into the Sacramento River system. Excess straying rates impact the anadromous fishery population structure as it relates to river specific stocks and sustaining natural production.

River salmonids. In addition, the Lower Mokelumne River Partnership, which includes representatives from CDFW, USFWS, and National Marine Fisheries Service (NMFS), worked with United States Bureau of Reclamation (USBR) to develop a low-risk study plan looking at the effects of DCC closures on migrating salmon. USBR issued a Finding of No Significant Impacts (FONSI) on the study plan in 2012. Under the plan, USBR proposed closing the DCC for up to 10 days during the first half of October over a five year study period to evaluate the effects of the closures on reducing Mokelumne River fall-run Chinook salmon straying. The proposal was “anticipated to have a beneficial effect on LMR adult fall-run Chinook salmon by reducing straying...” (USBR FONSI Number 12-10-MP (2012), p. 3.) This proposal was not a comprehensive solution to the fishery impacts caused by DCC operations, but it was a reasonable first step. Due to limitations related to Delta water quality standards, however, the planned study closures did not occur.

However, preliminary data indicates that when the DCC has periodically been closed in the fall, the stray rates for Mokelumne River salmonids are significantly reduced. In addition, as part of the SWRCB Bay Delta Plan update Notice of Preparation in 2012, USFWS, USBR, and CDFW submitted comments supporting continued evaluation of DCC closures to improve salmon returns to both the Sacramento and Mokelumne river systems.

While it is well settled that DCC operations adversely impact Mokelumne River fisheries, it is difficult to ascertain the additional impacts from DCC operations resulting from the Change Petition because no operations plan has been prepared by Petitioners. It is clear that with new points of diversion in the North Delta, Delta operations will fundamentally and significantly change. These changed operations could result in the DCC being open more than it has been historically, leading to increased impacts on the lower Mokelumne River anadromous fishery. These impacts have not been evaluated by the Petitioners.

For example, the RDEIR/SDEIS lumps the Mokelumne River together with the San Joaquin River, and contains no analysis addressing the project’s impacts specifically on the Mokelumne River fishery. The RDEIR/SDEIS must assess impacts specifically on the Mokelumne fishery, as the Mokelumne River contributes a very high percentage of non-Sacramento-origin salmonid return in the Central Valley and to the commercial and recreational ocean fishery. While the RDEIR/SDEIS recognizes the hazards and low survival of migratory

fish passing through the central Delta, the document makes no attempt to assess the potentially significant environmental impacts of the revised DCC operations likely as a result of Alternative 4A.

There must be a full consideration by the State Water Board of (a) how the SWP and CVP will operate if the requested Change Petition is approved; at this time that critical information is missing, as Petitioners have not provided an operations plan describing how the requested new North Delta points of diversion will be operated in conjunction with the existing South Delta points of diversions; (b) how Alternative 4A will change the operations of the Delta Cross Channel; and (c) how those changed operations will cause potentially significant environmental effects to the Mokelumne fisheries resources. This must be done in an adequate RDEIR/SDEIS to meet legal requirements under CEQA, and it must be conducted by the State Water Board in carrying out its public trust obligations in this proceeding. Finally, conditions must be included in any approval of the Change Petition to ensure full mitigation of impacts resulting from the proposed change, such as requiring DCC gate closures during critical anadromous fishery migration periods related to Mokelumne River populations.

B. The proposed changes are inconsistent with the Delta Protection Act and Delta Reform Act's requirements

The Delta Protection Act (Water Code § 12200 et seq.), enacted in the same legislative session that created the SWP, recognizes the unique “salinity intrusion” problems of the Delta and provides “for the protection, conservation, development, control and use of the waters in the Delta for the public good.”² To achieve this purpose, “[t]he act prohibits project exports from the Delta of water necessary to provide water to which the Delta users are ‘entitled’ and water which is needed for salinity control and an adequate supply for Delta users. [Footnote omitted] (§§ 12202, 12203, 12204.)”³ The 2009 Delta Reform Act affirmed these principles and established that the state’s policy “is to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.”⁴

² Wat. Code § 12200.

³ United States v. State Water Resources Control Bd. (1986) 182 Cal.App.3d 82, 107, 139.

⁴ See, e.g., Water Code 85021, 85054.

DWR and Reclamation's proposed changes are inconsistent with the Delta Protection Act's mandate that the projects cannot export from the Delta water that is necessary for salinity control and in-Delta water users. And they are further inconsistent with the state's established policy under the Delta Reform Act to reduce reliance on the Delta in meeting California's future water supply needs.

C. The proposed changes are inconsistent with the Watershed Protection Act

In the Watershed Protection Act, enacted at the same time of the 1933 act that created the CVP, the Legislature recognized that residents must have first access to water originating in their area. To this end, the Legislature provided in Water Code Section 11460 that "[i]n the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." This limitation applies to the operation of the SWP by the DWR and the operation of the CVP by the USBR.⁵

DWR and Reclamation's proposed changes are in conflict with the Watershed Protection Act's requirements. And they are, as a result, contrary to public interests. As the Water Board has found, the public interest supports extending to areas in which water originates the assurance that they will not be deprived of water required for their reasonable needs by export of their water to areas of deficient supply. (See D-869 at p. 18; see also D-884, D-886.)

III. The proposed changes would result in significant adverse environmental impacts

Granting the change petition would result in reduced Delta flow, increased saltwater intrusion, increased violations of water quality standards, and severe harm to fish species. NSJWCD does not believe that these potential impacts have been adequately analyzed in the still draft environmental review documents in support of the change petition or that any identified impacts can be adequately mitigated.

⁵ United States v. State Water Resources Control Bd., supra, at pp. 138-139.

IV. CONCLUSION

For the foregoing reasons, NSJWCD submits this protest to DWR and Reclamation's California WaterFix program petitions. NSJWCD is prepared to work with the Water Board and other parties in this proceeding to ensure that any changes are supported by the public interest, are consistent with the law, and are not unnecessarily harmful to the environment. NSJWCD will also be looking for assurances that any adverse impacts to Mokelumne River fisheries or flow and water quality in the Delta will be mitigated or avoided by DWR and Reclamation and that none of the responsibility for these impacts will be shifted to other water right holders on tributaries, such as NSJWCD.