

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING TO DETERMINE REQUESTED CHANGES IN WATER RIGHTS OF THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE CALIFORNIA WATERFIX PROJECT) THE SAN JOAQUIN TRIBUTARIES AUTHORITY'S PROTEST TO PHASE 2 OF THE PETITION REQUESTING CHANGES IN WATER RIGHTS OF THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE CALIFORNIA WATERFIX PROJECT

MERCED IRRIGATION DISTRICT, MODESTO IRRIGATION DISTRICT, OAKDALE IRRIGATION DISTRICT, SOUTH SAN JOAQUIN IRRIGATION DISTRICT, TURLOCK IRRIGATION DISTRICT, CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation, each individually, and collectively the SAN JOAQUIN TRIBUTARIES AUTHORITY, Interested Parties.

PLEASE TAKE NOTICE that the MERCED IRRIGATION DISTRICT, MODESTO IRRIGATION DISTRICT, OAKDALE IRRIGATION DISTRICT, SOUTH SAN JOAQUIN IRRIGATION DISTRICT, TURLOCK IRRIGATION DISTRICT, all of which are California irrigation districts, the CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation acting by and through its PUBLIC UTILITIES COMMISSION, and the SAN JOAQUIN TRIBUTARIES AUTHORITY (all parties collectively referred to as SJTA), submit their Protest to Phase 2 of the above-referenced Petition as follows:

INTRODUCTION

The San Joaquin Tributaries Authority (SJTA) protests the California Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation) (collectively Petitioners) joint petition to change the water rights necessary to enable the California WaterFix Project

1 (Petition). If approved, the Petition would have adverse environmental impacts, would not conserve
2 the public interest, and is contrary to law. (Water Code, § 1700 et. seq.) The Petition cannot be
3 approved by the State Water Resources Control Board (State Water Board) because the Petitioners
4 have failed to properly identify, disclose and/or mitigate for adverse environmental impacts of the
5 proposed California WaterFix Project (WaterFix Project). In addition, the Petition cannot be
6 approved because it will not best serve the public interest. The Petition does not analyze how the
7 benefits of the WaterFix Project will outweigh the adverse impacts to fish and aquatic species.

8 Finally, the Petition is contrary to law. The Petition was submitted prior to the completion of
9 environmental analysis under the California Environmental Quality Act (CEQA) and National
10 Environmental Policy Act (NEPA), before consultation under the Endangered Species Act (ESA),
11 and prior to obtaining Clean Water Act (CWA) section 401 and 404 permits. All of these processes
12 are intended to be iterative and the WaterFix Project is likely to undergo significant changes as a
13 result of Petitioners' compliance with these regulatory processes. For these reasons, the Petition is
14 premature and cannot be approved by the State Water Board at this time.

15 ADVERSE ENVIRONMENTAL IMPACTS

16 **(1) Burden of Providing All Information on Fish and Wildlife Impacts**

17 Petitioners have the burden of providing all information reasonably available concerning the
18 extent to which fish and wildlife would be affected by the change and any measures proposed to be
19 taken for the protection of fish and wildlife. (Water Code, § 1701.2(c).) Petitioners have not
20 provided all reasonably available information concerning affects to fish and wildlife. In fact,
21 Petitioners have provided only information on impacts related to the construction of the intakes.
22 (Petition, at 14-16.) This limited approach does not comply with the law. The Petitioners attempt to
23 frame the Petition as a minor proposal making small changes to the point of diversion and building
24 new intakes. However, the Petition is much broader than a small relocation of diversion. Instead,
25 the WaterFix Project would divert water into underground pipes and fundamentally change the
26 existing conveyance of water through natural surface water systems. Taking 5,000,000 acre feet of
27 water out of the Delta system is the most fundamental part of the WaterFix Project. However, the
28 Petition fails to disclose any details regarding the operation of how this portion of the proposed

1 project would operate. Removing 5,000,000 acre feet of fresh water from the Delta and concluding
2 no impacts will result is disingenuous. Simply because the Petition refuses to disclose or address
3 these impacts does make them any less real; the Petition must be revised to identify and analyze the
4 impacts of the WaterFix Project.

5 **(2) Reliance on the Draft Environmental Impact Statement/Report**

6 The Petition relies on information from the Draft Environmental Impact Statement/Report
7 (DEIS/R) to conclude the WaterFix Project will not have an adverse environment. Reliance on the
8 DEIS/R is not appropriate for at least four reasons. First, the DEIS/R has not been finalized or
9 adopted, but rather, has faced harsh criticism during the comment period. Second, it suffers from the
10 same failure as the Petition – it fails to disclose and analyze the operational details of the WaterFix
11 Project. Third, the modeling that serves as the basis for the DEIS/R analysis was based on the Bay
12 Delta Conservation Plan alternatives. These alternatives included significant habitat conservation
13 measures and other conservation efforts that are not included in the revised WaterFix Project.
14 Finally, several organizations, including the EPA and the California Department of Fish and Wildlife
15 have determined that the DEIS/R is inadequate. For example, CDFW commented that the DEIS/R
16 failed to analyze impacts and the proposed mitigation measures failed to sufficiently explain how
17 and to what extent these measures would reduce impacts and could be feasibly implemented.
18 (CDFW Staff Comments, Oct 29, 2015 at 2) (stating, “the mitigation measures and CEQA
19 conclusions need additional clarification to demonstrate that they will be effective in reducing or
20 eliminating impacts and can be feasibly implemented”).) CDFW further explained that the
21 conclusions from the CEQA analyses “do not clearly demonstrate how each species’ habitat
22 requirements will be met.” (*Id.*)

23 **(3) Adverse Impacts to Central Valley Spring-Run Chinook Salmon**

24 The Petition fails to include the available information and analysis regarding the impacts to
25 Spring Run Chinook. The Petition summarily concludes that there will be no impact to fisheries and
26 aquatic resources due to fish screens. (Petition, at 15.) However, the Petition fails to address the
27 impacts of reduced Sacramento River attraction flows. The DEIR/S identified lower flows
28 downstream of the north Delta diversions as a potential cause of reduced survival of juvenile spring

1 run and could also negatively affect upstream migration of adult spring run by changing flows and
2 migratory cues. (DEIS/R, at 5.4-20.) The Petition does not disclose or analyze this potential impact.

3 The Petition also fails to identify potential temperature increases due to reduced Sacramento
4 River flows near the north Delta intakes. The DEIS/R suggests such increased temperatures could
5 “lead to biologically meaningful increases in egg mortality rates and overall reduced habitat
6 conditions for spawning spring-run and egg incubation.” (DEIR/S, at 4.3.7-98.) The Petition fails to
7 consider increased temperature on fish and wildlife. The failure of the Petition to identify, analyze,
8 and/or provide mitigation for impacts to fish species and aquatic habitat preclude the State Water
9 Board from approving the Petition as it is currently drafted. (Water Code, § 1701.2.)

10 **(4) Adverse Impacts to Steelhead**

11 The Petition fails to include the available information and analysis regarding the impacts to
12 steelhead. The Petition fails to consider impacts to steelhead, despite the previous identification of
13 such potential impacts in the DEIR/S. For example, the DEIR/S concludes that the preferred
14 alternative 4A would “degrade the quantity and quality of rearing habitat for steelhead” compared to
15 existing conditions. (DEIR/S, at 4.3.7-22.) The DEIR/S also considered the reduction in
16 Sacramento River flows near the north Delta intakes, expressing concern that such reduced flows
17 could fail to attract migrating adult steelhead in the region. (DEIR/S, at 5.6-13.) In addition, the
18 DEIR/S concluded that the WaterFix Project may reduce flows in the high flow channels in the
19 Feather River, which could exacerbate conditions in an already unsuitable habitat. (DEIR/S, at 5.6-
20 16.) The failure of the Petition to identify, analyze, and/or provide mitigation for impacts to fish
21 species and aquatic habitat preclude the State Water Board from approving the Petition as it is
22 currently drafted. (Water Code, § 1701.2.)

23 **(5) Adverse Impacts to Green Sturgeon**

24 The Petition fails to include the available information and analysis regarding the impacts to
25 green sturgeon. However, the DEIR/S notes that the preferred alternative 4A “would reduce the
26 quantity and quality of rearing habitat for larval and juvenile green sturgeon.” (DEIR/S, at 4.3.7-
27 294.) In addition, the flow changes from north Delta intake could change flows enough to reduce
28 transport and migration flows for green sturgeon in the Feather River and Plan area.” (DEIR/S, at

1 5.8-17.) The failure of the Petition to identify, analyze, and/or provide mitigation for impacts to fish
2 species and aquatic habitat preclude the State Water Board from approving the Petition as it is
3 currently drafted. (Water Code, § 1701.2.)

4 **(6) Adverse Impacts to Delta Smelt**

5 The Petition fails to include the available information and analysis regarding the impacts to
6 Delta smelt. The Petition states that smelt will benefit from the WaterFix Project due to reduced
7 entrainment. (Petition, at 14-15.) However, the Petition does not disclose that there are potentially
8 adverse impacts from the WaterFix Project as well, such as reducing the quantity of sediment, which
9 can adversely impact smelt habitat. (DEIR/S, at 5.1-30.) In addition, the WaterFix Project may
10 increase toxic blue algae, which has both direct and indirect adverse impacts on smelt. (DEIR/S, at
11 5.4-14.) The failure of the Petition to identify, analyze, and/or provide mitigation for impacts to fish
12 species and aquatic habitat preclude the State Water Board from approving the Petition as it is
13 currently drafted. (Water Code, § 1701.2.)

14 **CONSERVE THE PUBLIC INTEREST**

15 The State Water Board is required to evaluate whether the Petition will conserve the public
16 interest. (Water Code, § 1701.) This evaluation requires the State Water Board to weigh and
17 balance competing beneficial uses of water. (State Water Board Decision 1651 [“State Water Board
18 must consider the potential impacts to fish, wildlife, or other instream beneficial uses.”]; WR Order
19 2009-0033, at 6 [review of a proposed change to a permit or license requires the Board to “consider
20 the same factors that were considered when reviewing the underlying water right application, and
21 therefore the Board should consider the public interest and effects on fish and wildlife.”].) In order
22 to conclude the Petition would best serve the public interest, the Petition would need to demonstrate
23 the benefit from the WaterFix Project – *i.e.*, disclose the estimated increased water supply reliability,
24 economic benefit, and improved safety of statewide water systems. These benefits would then need
25 to be compared to the adverse impacts of the WaterFix Project – *i.e.*, adverse impact to fish and
26 wildlife, impact to legal water users, etc.

27 The Petition fails to include this information or analyses. Specifically, the Petition does not
28 estimate or describe how Petitioners will benefit if the Petition were approved. Petitioners do not

1 disclose how much more water will be pumped over any specific time period. The Petition does not
2 analyze the economic impact of the assumed benefit. Nor does the Petition estimate how the public
3 safety of water systems will be improved. Without this information it is not possible to properly
4 analyze whether the Petition would best serve the public interest. The State Water Board should
5 withhold any approval of the Petition until this information is disclosed, reviewed for accuracy, and
6 weighed against adverse project impacts.

7 8 **THE PETITION IS CONTRARY TO LAW**

9 **(1) Petition Violates Water Code Section 85086**

10 Water Code section 85086 states that any approval of the Petition “shall include appropriate
11 Delta flow criteria.” This requirement further specifies that the flow criterion is different and
12 distinct from existing water quality control flow objectives. (Water Code, § 85086(c)(1) [stating the
13 flow criteria is “new,” focused on the “Delta ecosystem” and pursuant to “public trust” protections].)
14 The Water Code clearly requires that the flow criteria will be developed in a new process specific to
15 the Delta and requires the Petitioners fund the analysis for developing such criteria. (Water Code, §
16 85086(d).)

17 The Petition does not include proposed flow criteria. Instead of developing and including
18 flow criteria in its Petition, the Petitioners state that Water Code section 85086 requirements will be
19 satisfied by the “existing regulatory framework for the Delta provided by the WQCP and D-1641.”
20 (Petition, at 11.) The reference to the ongoing Bay Delta Plan review is not sufficient to satisfy the
21 requirements of section 85086. First, section 85086 requires the flow criteria to be developed before
22 approval of the Petition and be included in any approval. Second, the requirement that the flow
23 criteria be included in the approval of the Petition indicates that Petitioners must be the parties
24 responsible for meeting or complying with the flow criteria. The ongoing Bay Delta Plan review
25 currently proposes to make SJTA Members responsible for meeting a portion of the water quality
26 objectives. Third, section 85086 states that the Petitioners must fund a new process that develops
27 flow criteria; reliance on an existing process, not funded by Petitioners, is not contemplated. Fourth,
28 the delegation of developing flow criteria through the Bay Delta Plan presupposes or predetermines

1 that the objectives developed in the Bay Delta Plan review will satisfy the requirement for flow
2 criteria. The Petition provides no support for such assumption.

3 In support of the Petition's reliance on the Bay Delta Plan review for the development of
4 flow criteria, the Petition alleges Petitioners currently comply with the existing water quality
5 requirements. This statement is not accurate or supported by historical data. Rather, since 1995,
6 Petitioners have fully complied with Bay Delta Plan objectives in only 8 of the 21 years. Assuming
7 arguendo that this statement is accurate, the SJTA protest regarding this issue could be resolved by
8 an agreement in which the Petitioners are responsible for meeting existing water quality objectives
9 and are also responsible for complying with any amendments to the water quality objectives in the
10 future.

11
12 **(2) Petition is Deficient and Fails to Properly Describe Proposed Project**

13 Water Code section 1701.2 requires that a petition to change the terms of a permit or license
14 shall "include all information reasonably available to the petitioner," and "include sufficient
15 information to demonstrate a reasonable likelihood that the proposed change will not injure any
16 other legal user of water." (Water Code, § 1701.2.) At the most basic level, these requirements
17 require Petitioners disclose the changes to how, when, where, and at what time the diversion of
18 water pursuant to the right will change. The Petition does not provide this information or otherwise
19 disclose how the WaterFix Project will be operated. For example, the Petition describes the altered
20 operations as follows:

21 "Construction of the north Delta intakes will allow greater flexibility in
22 operation of both south and north Delta diversions, and better balancing of the
23 associated water quality and hydrodynamic benefits for fish, drinking water,
24 agriculture, and other beneficial uses. Diversions at the north Delta intake
25 would be greatest in wetter years and lowest in drier years, when south Delta
diversions would provide the majority of CVP and SWP south of Delta
exports."

26 (Petition, at 9.) This description of operations only provides general conclusions that are not
27 supported. Certainly this description does not satisfy Water Code section 1701's requirement to
28 "include all information reasonably available to the petitioner." For these reasons, the Petition

1 violates the requirements of Water Code section 1701.

2 In addition, CEQA requires a project proponent provide a “description of the project’s
3 technical, economic, and environmental characteristics.” (Cal. Code Regs., tit. 14, § 15124.) The
4 purpose of these requirements is to ensure that the impacts of a project are understood and able to be
5 analyzed. The Petitioners fail to provide a description of the Project’s technical characteristics by
6 failing to disclose how the dual conveyance system will be operated – basic disclosure regarding the
7 quantity and season of water diverted at the newly proposed point of diversion are not included in
8 either the Draft Environmental Impact Report/Statement (DEIS/R) or the Petition. This lack of
9 detail precludes stakeholders or regulatory agencies from fully understanding the timing or quantity
10 of water that will move through pipes as opposed to through natural conveyance. This information
11 is fundamental; the WaterFix Project cannot be analyzed without better understanding the basic
12 operational facts of how and where water will be taken out of the system.

13
14 **(3) The Petition is Premature**

15 Water Code section 1701.2 requires all information reasonably available to Petitioners be
16 included in the Petition. This provision requires the Petitioners withdraw their Petition and re-file
17 after the numerous iterative regulatory processes have been completed. Only after environmental
18 review has been completed, including satisfaction of all CEQA and NEPA requirements, should the
19 State Water Board consider the Petition for approval. Similarly, Petitioners must complete
20 consultation under the Endangered Species Act and receive a 401 certification before a final project
21 can be determined. It is highly likely Petitioners compliance with these regulatory processes will
22 result in significant modifications to the WaterFix Project. Accordingly, it would be a waste of the
23 State Water Board’s limited resources to review the existing preliminary proposal for the WaterFix
24 Project, given the Project is likely to significantly change.

25 ///

26 ///

27 ///

28 ///

1 **(4) The State Water Board Cannot Rely on the Existing Environmental Documents**

2 The Petitioners released the DEIR/S for the Bay Delta Conservation Plan project on
3 December 9, 2013. Since that time, Petitioners revised and renamed the project “WaterFix.”
4 Petitioners recirculated the existing Draft Environmental Impact Statement/Report (DEIS/R) for the
5 WaterFix project on July 9, 2015. Currently, the Petitioners are reviewing comments on the DEIS/R
6 and have yet to adopt a final environmental document identifying a preferred alternative project.

7 Petitioners have received numerous comments on the DEIS/R. Several comments are critical
8 and demand Petitioners make significant changes to the project. For example, the United States
9 Environmental Protection Agency (USEPA) stated the DEIS/R is inadequate because the “impacts of
10 the WaterFix project on the Delta ecosystem cannot be fully evaluated at this time, and any attempt
11 to describe the environmental impacts of the project is necessarily incomplete.” (USEPA Letter to
12 USBR, at 2). In fact, the “proposed project and alternatives evaluated in the DEIS . . . defer actions
13 necessary to protect water quality and aquatic life to the future.” (*Id.*) Although the “project has been
14 significantly revised since the initial DEIS . . . [it still] relies on modeling results that are based on
15 the [original] BDCP alternatives . . . [which] is not necessarily representative of the environmental
16 effects resulting from the WaterFix alternatives.” (*Id.*, at 3). Other comments are similarly critical of
17 the DEIR/S document. Given the comment and responses to the DEIS/R, it is likely that the
18 WaterFix Project may undergo significant revision and further environmental analysis. (Cal. Code
19 Regs., tit. 14, § 15088.5(a)(4) (“A lead agency is required to recirculate an EIR when . . . the draft
20 EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public
21 review and comment were precluded.”).)

22 The State Water Board cannot rely on preliminary environmental documentation. It is likely
23 the preferred project alternative described in the DEIS/R may undergo further changes or the
24 environmental analysis may significantly change. For these reasons, the State Water Board cannot
25 approve the Petition until it is able to rely on valid environmental analysis via a final environmental
26 impact report/statement.

27 ///

28 ///

1 DATED: January 5, 2016


O'LAUGHLIN & PARIS LLP

2
3 By 
4 TIM O'LAUGHLIN
5 VALERIE KINCAID, Attorneys for
6 SAN JOAQUIN TRIBUTARIES AUTHORITY
7

8 DATED: January 5, 2016


9
10 By: 
11 Phillip McMurray
12 MERCED IRRIGATION DISTRICT

13 DATED: January 5, 2016

14
15
16 By: 
17
18 Anna Brathwaite
19 MODESTO IRRIGATION DISTRICT
20

21 DATED: January 5, 2016

O'LAUGHLIN & PARIS LLP

22
23
24 By: 
25 TIM O'LAUGHLIN
26 VALERIE KINCAID, Attorneys for
27 OAKDALE IRRIGATION DISTRICT
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: January 5, 2016



By: _____
Ken Robbins
SOUTH SAN JOAQUIN
IRRIGATION DISTRICT

DATED: January 5, 2016



By: _____
TURLOCK IRRIGATION DISTRICT

DATED: January 5, 2016



By: _____
CITY AND COUNTY OF SAN FRANCISCO

1 Re: *Before the California State Water Resources Control Board*
2 *Public Hearing to Determine Requested Changes in Water Rights of the*
3 *Department of Water Resources and U.S. Bureau of Reclamation for the*
4 *California WaterFix Project*
5 *San Joaquin Tributaries Authority's Protest to Phase 2 of the Petition*

6
7
8
9
10 **PROOF OF SERVICE BY EMAIL/MAIL**

11 (Government Code §11440.20)

12
13 I, Linda L. Wood, declare that:

14 I am employed in the County of Sacramento, State of California. I am over the age of eighteen years
15 and not a party to the within cause. My business address is 2617 K Street, Suite 100, Sacramento, CA 95814.
16 On this date, in the following manner, I served the foregoing document(s) identified as:

17 **THE SAN JOAQUIN TRIBUTARIES AUTHORITY'S PROTEST TO PHASE 2 OF THE**
18 **PETITION REQUESTING CHANGES IN WATER RIGHTS OF THE DEPARTMENT**
19 **OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE**
20 **CALIFORNIA WATERFIX PROJECT**

21 **▶▶▶ UNITED STATES MAIL** [CCP §1013]: I enclosed the documents in a sealed envelope addressed to
22 the following persons and placed the envelope for collection and mailing, following our ordinary
23 business practices. I am readily familiar with our practice for collection and processing
24 correspondence for mailing. On the same day that the correspondence is placed for collection and
25 mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a
26 sealed envelope with postage thereon fully prepaid at Chico, California addressed as below:

27 **FACSIMILE**: Based on prior consent, I caused the documents to be sent to the following persons
28 via telecopier/facsimile machine a true copy thereof to the parties indicated below:

OVERNIGHT DELIVERY [CCP §1013(c)]: I enclosed the documents in a sealed envelope
provided by an overnight delivery carrier and addressed it to the persons identified below. I placed
said envelope for collection at a regularly utilized drop box of the overnight carrier.

▶▶▶ E-MAIL [CCP §1010.6]: Based on pending consent of the parties, and/or court order or an
agreement of the parties to accept service by e-mail, I caused the documents to be sent to the
following persons at the following e-mail address, and did not receive, within a reasonable time
after the transmission, any electronic message or other indication that the transmission was
unsuccessful:

PERSONAL DELIVERY [CCP §415.10] I arranged to have the documents personally delivered to
the office of the persons identified below on _____:

26
27 **SEE ATTACHED SERVICE LIST**

SERVICE LIST

1
2 California Department of Water Resources
3 c/o James Mizell
4 1416 Ninth Street, Room 1104
5 Sacramento, CA 95818
6 Email: James.Mizell@water.ca.gov

7 U.S. Bureau of Reclamation
8 c/o Amy Aufdemberge
9 U.S. Department of Interior
10 Office of Regional Solicitor, Pacific
11 Southwest Region
12 2800 Cottage Way
13 Sacramento, CA 95825-1898
14 Email: Amy.Aufdemberge@sol.doi.gov

15 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
16 and correct, and that this declaration was executed on January 5, 2016, at Sacramento, California.

17
18
19
20
21
22
23
24
25
26
27
28


Linda L. Wood, Legal Assistant