

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

APPLICATION _____¹ **PERMIT** _____¹ **LICENSE** _____¹

OF California Department of Water Resources and U.S. Bureau of Reclamation

California Department of Water Resources
c/o James Mizell
1416 Ninth Street, Room 1104
Sacramento, CA 95818
James.Mizell@water.ca.gov

U.S. Bureau of Reclamation
c/o Amy Aufdemberge
U.S. Department of Interior
Office of Regional Solicitor, Pacific Southwest Region
2800 Cottage Way
Sacramento, CA 95825-1898
Amy.Aufdemberge@sol.doi.gov

I (We) have carefully read 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 (state name):

Stephan C. Volker and M. Benjamin Eichenberg, on behalf of the Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

Address, email address and phone number of protestant or authorized agent:

Law Offices of Stephan C. Volker
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Oakland, CA 94612
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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.

¹ 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.

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

1. The ecological health of the Bay-Delta has been collapsing for over two decades, and the Twin-Tunnel "WaterFix" will undoubtedly exacerbate this decline.
2. The SWRCB has the legal responsibility to maintain and restore the fish and wildlife and other public trust resources of the Bay-Delta.
3. Accordingly, the SWRCB cannot lawfully approve the WaterFix as proposed.
4. Instead, the SWRCB must, consistent with federal and state law, promptly amend the Bay-Delta Water Quality Control Plan to strengthen its water quality objectives and thereafter, adopt implementation measures through a water rights proceeding that will assure restoration of the Bay-Delta's water quality and fish and wildlife and other public trust beneficial uses.

These points are elucidated in Attachment 1 hereto.

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.)

1. Rejection of the subject WaterFix petition for change in point of diversion of the California Department of Water Resources and the United States Bureau of Reclamation.
2. Amendment of the Bay-Delta Water Quality Control Plan to adopt more stringent water quality objectives which will assure protection and restoration of the Bay-Delta's water quality and dependent fish and wildlife and other public trust uses.
3. Completion of a water rights proceeding pursuant to which the existing water rights to appropriate water from the Delta are modified to assure attainment of the water quality objectives set forth in the amended Bay-Delta Water Quality Control Plan.

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

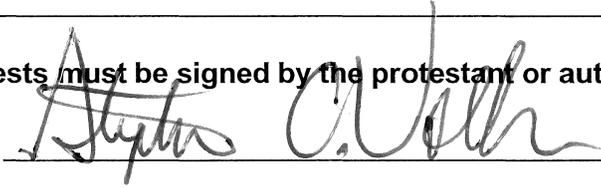
If new point of diversion is being requested, is your point of diversion downstream from petitioner's proposed point of diversion? _____

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

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

All Electronic Service via Email as of January 5, 2016

State Water Resources Control Board
Division of Water Rights
Attn: California WaterFix Hearing Staff
P.O. Box 2000, Sacramento, CA 95812-2000
CWFhearing@waterboards.ca.gov

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ATTACHMENT 1

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I. INTRODUCTION

The State Water Resources Control Board (“SWRCB”) has duties under the California Constitution, Water Code, Public Resources Code and Government Code, and implementing regulations to protect and restore the Bay-Delta’s fish and wildlife and other beneficial public trust uses. The SWRCB also has duties under the federal Clean Water Act to designate beneficial uses of the Bay-Delta and to establish water quality criteria sufficient to protect those uses. The SWRCB must submit its water quality criteria to the United States Environmental Protection Agency (“EPA”) for review to confirm their adequacy for protection of designated uses, and to conduct triennial reviews of its water quality objectives (in federal parlance, “standards”) to assure that all designated uses are protected.

The SWRCB has failed to maintain compliance with the foregoing state and federal laws. As a consequence, the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan (“Bay-Delta Plan”) does not protect the fish and wildlife resources, and other public trust uses, of the Bay-Delta. The primary reason why the Bay-Delta’s ecological system is collapsing is that the SWRCB has allowed far too much of the Delta’s fresh water flows to be diverted elsewhere.

Approval of the proposed WaterFix would remove even more water from the Delta by diverting its fresh water inflows before they reach the Delta, exacerbating the ongoing decline in the Bay-Delta’s water quality and vanishing fish and wildlife populations. Accordingly, the SWRCB must *disapprove* the pending proposal to change the point of diversion of the state and federal water projects on which the misguided “WaterFix” project is predicated. These points are elucidated below.

II. GOVERNING STATE AND FEDERAL WATER QUALITY LAW.

The federal Clean Water Act establishes the overarching water quality standards for the nation, including California. The Clean Water Act’s purposes are to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters, and to attain, *inter alia*, “water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. § 1251(a), (a)(2). The Clean Water Act charges the states with primary responsibility to adopt adequate water quality standards, subject to EPA review and approval. States must designate the beneficial uses of their water bodies (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(a)), adopt water quality criteria adequate to protect these designated uses (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(c)), and establish an anti-degradation policy sufficient to identify and prevent degradation of the water quality mandated for a particular water body (40 C.F.R. §§ 131.6(d), 131.12(a)). EPA then periodically reviews those state water quality standards to confirm their adequacy to protect designated uses including fish and wildlife, as discussed below.

To assure that states comply with these water quality mandates, Congress charged EPA with the overarching responsibility to review state water quality standards to confirm they protect designated uses. “Whenever [a] State revises or adopts a new [water quality] standard, such revised or new standard shall be submitted to the Administrator” of the EPA for review. 33 U.S.C. § 1313(c)(2)(A). The Clean Water Act also requires states to conduct public reviews of their water quality standards at least every three years. 33 U.S.C. § 1313(1). It directs that states “shall from time to time (but at least once every three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.” *Id.*; 40 C.F.R. § 131.20. Even if there has been no revision to the state’s water quality standards, the state must submit the results of its triennial review to EPA for examination. 40 C.F.R. § 131.20. The state’s report to EPA must include “the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards.” *Id.* EPA then evaluates the state’s standards to assure they protect the designated beneficial uses.

Contrary to the foregoing statutory scheme, neither the SWRCB nor EPA has conducted the required triennial reviews of the Bay-Delta Plan for over 20 years.

California law imposes additional water quality duties on the SWRCB that have been largely ignored. Article 10, section 2 of the California Constitution directs that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented” Water Code sections 1243 and 1243.5 require that “[i]n determining the amount of water available for appropriation, [the SWRCB] shall take into account, whenever it is in the public interest, the *amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.*” *Id.*, emphasis added. These provisions require further that the SWRCB consider “the amounts of water needed to remain in the source for protection of beneficial uses, *including any uses specified to be protected in any relevant water quality control plan.*” Water Code § 1243.5, emphasis added. The 2006 Bay-Delta Plan, like the 1995 Bay-Delta Plan, recognizes that the beneficial uses to be protected including fish and wildlife. Its water quality objectives include criteria for salinity, flows, exports, and dissolved oxygen, among other requirements. However, none of these criteria are currently sufficient to restore the Bay-Delta’s fish and wildlife and other public trust uses.

Water Code section 1257 likewise directs the SWRCB, when acting upon applications to appropriate water, to consider the relative benefit to be derived from “any uses specified to be protected in any relevant water quality control plan.” Water Code section 1258 similarly provides that in acting upon applications to appropriate water, the SWRCB shall consider water quality control plans which have been established pursuant to [Water Code section 13000 et seq.] and may subject such appropriations to such terms and conditions as it finds are necessary to carry out such plans.”

III. A SHORT HISTORY OF THE SWRCB'S FAILED ATTEMPTS TO ADOPT AN ADEQUATE BAY-DELTA PLAN.

The SWRCB has repeatedly failed to adopt water quality standards sufficient to protect the Bay-Delta's designated beneficial uses. In June 1984 the EPA Regional Administrator advised the SWRCB that "existing water quality standards [in the SWRCB's 1978 Bay-Delta Plan] do not fully protect the designated beneficial uses." Three years later, in June 1987, the EPA Regional Administrator again notified the SWRCB that its water quality standards were inadequate because they "do not adequately protect the fishery resource." In October 1988 the SWRCB issued a draft revised Bay-Delta Plan which recommended a significant decrease in spring exports in order to meet habitat requirements for chinook salmon, striped bass, and other species in jeopardy. However, the SWRCB withdrew that plan in January 1989. Although water quality and fishery populations continued to decline, in May 1991 the SWRCB adopted a Bay-Delta Plan which omitted any new minimum flow standards to protect the estuary's fish and wildlife resources. Instead, it deferred consideration of adoption of adequate flow standards until a future water rights allocation phase. As a consequence, water quality objectives for flow were subordinated to continued, even expanded, water exports.

In response, a coalition of environmental and fishing organizations asked EPA to promulgate adequate water quality standards for the Bay-Delta as required under 33 U.S.C. § 1313(c)(3). When EPA failed to take action, these organizations served EPA with a 60-Day Notice of intent to sue which demanded prompt promulgation of water quality standards sufficient to protect the Bay-Delta. In response, on September 3, 1991, EPA disapproved the SWRCB's 1991 Bay-Delta Plan, noting in particular its failure to protect estuarine habitat and to provide scientifically defensible salinity and temperature objectives for fish and wildlife.

On February 10, 1992 the SWRCB advised in EPA in writing that EPA had no authority to disapprove the SWRCB's Bay-Delta Plan, and declined to revise that plan. The coalition of environmental and fishing organizations then warned EPA that unless it promptly adopted adequate water quality standards as required under section 303 of the Clean Water Act, they would file suit pursuant to their 1990 60-Day Notice letter. In response to EPA's failure to promptly promulgate adequate water quality standards, on July 30, 1992, the coalition of environmental and fishing organizations served EPA with a second 60-Day Notice of intent to sue. Because EPA failed to take prompt action to remedy its omission, on April 16, 1993 the environmental coalition filed suit against EPA to compel its promulgation of adequate water quality standards for the Bay-Delta estuary. *Golden Gate Audubon Society, et al., v. Browner*, Civ. No. S-93-646 LKK PAN (E.D. Cal. 1993). The suit alleged that EPA had an affirmative duty under section 303(c) of the Clean Water Act to disapprove deficient state water quality standards, and promptly thereafter, to promulgate adequate federal water quality standards. This suit resulted in the parties' negotiation of a Consent Decree which required EPA's completion of its proposed water quality standards by December 15, 1993. Those proposed standards were published on January 6, 1994 (59 Fed.Reg. 809).

Following EPA's release of its proposed water quality standards, on May 3, 1994 Judge Karlton approved a second Consent Decree on May 3, 1994, requiring EPA's promulgation of final water quality standards by December 15, 1994. In accordance with this Court Order, on December 14, 1994, EPA promulgated its final water quality standards. On January 24, 1995, those standards were published in the Federal Register (60 Fed.Reg. 4663-4779) preparatory to their formal promulgation as regulations set forth in 40 C.F.R. section 131.37.

However, EPA has never enforced these water quality standards. Instead, under pressure from the SWRCB to allow it to continue to kick the can down the road, EPA took no action to disapprove the SWRCB's adoption of a new Bay-Delta Plan in 1995 despite the fact that its water quality objectives did not meet EPA's adopted standards and represented insufficient improvement over previous plans. The 1995 Bay-Delta Plan's deficient standards were largely readopted by the SWRCB in its 2006 Bay-Delta Plan. Despite its duty to review the 2006 Plan at least every three years to assure that it adequately protects designated uses, the SWRCB has failed to conduct the required triennial review in 2009, 2012 and 2015. EPA likewise abdicated its responsibility to affirmatively review the 2006 Bay-Delta Plan. Consequently, *both the SWRCB and EPA are currently in violation of section 303 of the Clean Water Act.*

Thus, the 2006 Bay-Delta Plan occupies a critical position within the federal and state water quality regulatory regime. Yet, contrary to the foregoing statutory and regulatory direction, the 2006 Plan does not adequately protect fish and wildlife and other public trust uses of the Bay-Delta. Nor does it implement EPA's Bay-Delta water quality standards. Without an adequate Bay-Delta Plan, the SWRCB cannot lawfully approve the WaterFix's proposed diversion of up to 9,000 cubic feet per second of high quality Sacramento River water upstream of the Delta, depriving both the Delta and the Bay of fresh water flows critical to their protection and restoration.

IV. THE SWRCB'S 2006 BAY-DELTA PLAN AND WATER RIGHT DECISION 1641 FAIL TO PROTECT THE BAY-DELTA'S FISH AND WILDLIFE AND OTHER PUBLIC TRUST USES.

It is undisputed that the Bay-Delta ecosystem is in free fall. According to every state and federal agency with management responsibility for its fish and wildlife, this ecosystem is collapsing. The National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") concluded in 2008 and 2009, respectively, that continued operation of the Central Valley Project and State Water Project would jeopardize the existence of Delta smelt, winter-run Chinook salmon, green sturgeon, and several other fish species. As EPA stated in its comments on the Supplemental Draft Environmental Impact Statement ("SDEIS") for the WaterFix dated October 30, 2015, "[t]hese species have experienced sharp population declines in the last decade and showed record low abundance over the last five years." *Id.* at 3. Moreover, as EPA noted further, "[i]nformation presented in the SDEIS shows that the WaterFix project could reduce habitat conditions for Delta smelt, winter-run Chinook salmon, green and white sturgeon, striped bass, and American shad, and result in a decline of longfin smelt abundance." *Id.* The WaterFix

would cause “selenium concentrations in sturgeon [to] increase by 12-19% . . . , . . . exceed[ing] the FWS and NMFS benchmark for adverse impacts to sensitive species.” *Id.*

EPA acknowledges further that the WaterFix will cause a wholesale increase in salinity throughout the Bay-Delta, posing potentially catastrophic impacts on both fish and wildlife and municipal uses. As EPA explains, “[t]he modeling results presented in the SDEIS show predicted exceedances of a salinity standard at both Prisoner’s Point and Emmaton. The water quality modeling predicts that the Western Delta and Suisun Marsh will become saltier over time, which is likely to cause increased exceedances of chloride criteria near municipal water supply intakes.” *Id.*

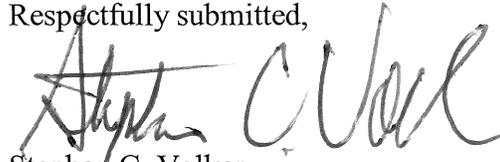
EPA has given the SDEIS a failing grade of “‘3’ (inadequate).” *Id.* at 4. Although EPA speculates that the glaring deficiencies in the SDEIS that it has repeatedly documented might eventually be addressed, the fact of the matter is that at present, *there is no adequate environmental review of the impacts of the WaterFix*. Nor, as noted above, is there an adequate Bay-Delta Plan. Absent the sufficient review required under both the National Environmental Policy Act and the California Environmental Quality Act, and in the further absence of an adequate Bay-Delta Plan which sets forth sufficient water quality protections for designated fish and wildlife and other public trust uses, *the SWRCB may not proceed with this water right allocation proceeding* to evaluate the requested change in the point of diversion for the Central Valley Project and the State Water Project.

V. CONCLUSION

For the foregoing reasons, the SWRCB must withhold any action on the proposed application to change the point of diversion of the Central Valley Project and the State Water Project as needed to implement the WaterFix. Applicable state and federal law require the Board to promptly adopt an adequate Bay-Delta Plan and submit it to EPA for review and approval before any decisions are made regarding allocation of the Delta’s fresh water flows allowing further diversions from the Bay-Delta system.

Dated: January 5, 2016

Respectfully submitted,



Stephan C. Volker

Attorney for Protestants Pacific Coast Federation of
Fishermen’s Associations and Institute for Fisheries
Resources