

## PROTEST- PETITION

This form may also be used for objections

### PETITION FOR CHANGE ON

APPLICATION \_\_\_\_\_<sup>1</sup> PERMIT \_\_\_\_\_<sup>1</sup> LICENSE \_\_\_\_\_<sup>1</sup>  
OF \_\_\_\_\_<sup>1</sup>

*We, Tim Stroshane (Policy Analyst, Restore the Delta, 639 San Carlos Avenue, Albany, CA 94706; [tim@restorethedelta.org](mailto:tim@restorethedelta.org)) and Barbara Barrigan-Parrilla (Executive Director, Restore the Delta, 42 N. Sutter Street, Suite 506, Stockton, CA 95202; [barbara@restorethedelta.org](mailto:barbara@restorethedelta.org)), have carefully read the petition for change to the water rights of the State Water Project (SWP) and the Central Valley Project (CVP) for the California WaterFix, submitted to the State Water Resources Control Board on August 25, 2015, by the California Department of Water Resources and the US Bureau of Reclamation; and the addendum and errata to the aforesaid petition submitted September 11, 2015, to the State Water Board by the same petitioners.*

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:

- 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 adverse environmental impacts.

State facts which support the foregoing allegations:

*See attached allegations of protest from Restore the Delta. RTD expects to participate in both Parts 1 and 2 of the hearings scheduled by the State Water Board concerning this change petition.*

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.) *See attachment.*

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

*See signatures of protestants and listing of parties receiving service of Restore the Delta's protest at the end of our protest petition attachment.*

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<sup>1</sup> Petition for diversion and rediversion submitted by DWR and the Bureau applies to Permits 16478, 16479, 16481, and 16482 and 16483 (Applications 5630, 14443, 14445A, and 17512, respectively) of the Department of Water Resources for the State Water Project; and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722, 12723, respectively) of the United States Bureau of Reclamation for the Central Valley Project.



January 4, 2016

Submitted via email to: [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov)

**Subject: Protest of petition for change to the water rights of the State Water Project (SWP) and the Central Valley Project (CVP) for the California WaterFix, submitted to the State Water Board on August 25, 2015, by the California Department of Water Resources and the US Bureau of Reclamation; and addendum and errata to aforesaid petition submitted September 11, 2015, to the State Water Board by petitioners**

To whom it concerns:

Restore the Delta's mission is to save the San Francisco Bay-Delta Estuary for our children and future generations, a grassroots campaign of residents and organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries and farming can thrive there together again. We fight for a Delta with waters that are fishable, swimmable, drinkable, and farmable, able to support the health of the estuary, San Francisco Bay, and the ocean beyond.

Restore the Delta (RTD) petitions the State Water Board to participate in Parts 1 and 2 of the evidentiary hearing on the Petition. We herein protest the subject petition and also enclose our Notice of Intent to Appear as required by the Notice of Petition and Public Hearings released to the public by the State Water Board on October 30, 2015.

Restore the Delta protests the above-mentioned petition and addendum and errata (collectively, "Petition") on grounds that:

- **The Petition best serves neither the public interest nor conserves public trust uses.**
- **The Petition is contrary to law.**
- **The Petition has adverse environmental impacts.**

Our specific allegations, with supporting facts, are as follows:

- **The Petition best serves neither the public interest nor conserves public trust uses.**

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Interests proposed to be served by the project described in the Petition are not broadly public. They are instead representative of entrenched political interests in the western and southern San Joaquin Valley, and metropolitan southern Bay Area and Southern California. These specific regions, which are coterminous with service areas of the SWP and CVP, receive SWP and CVP water as a recurring fraction of their portfolio of other water supply sources on which they rely. Agricultural interests in particular account for a large majority of water use in the CVP, while comprising less than 2 percent of California's gross domestic product.

The State Legislature has directed by passing statewide policies in the Delta Reform Act of 2009 that what best serves the public interest in and for the Delta Estuary is to achieve the Act's coequal goals; to reduce reliance on the Delta for California's future water supply needs; and that the foundational policy framework in California water law are the public trust and reasonable use doctrines. These doctrines are, according to the Act, particularly important and applicable to the Delta. (Water Code Section 85023.) The Act's policies are the legal and policy framework, in addition to state water rights law, through which the State Water Board is obligated to protect the public interest in the Delta as it evaluates the evidence it receives, the policy statements it hears, and the insights it obtains from testimony concerning the Petition.

Meanwhile, interests that would be *harm*ed by the Petition are numerous, centered in the Delta region but exist also in the Sacramento River basin, the Trinity River basin, the San Joaquin River basin, and in the service areas of the SWP and CVP. In the latter region, water ratepayers would be harmed by increased water rates because the Tunnels Project of "California WaterFix" would be so expensive to construct and operate.

Those interests in the Delta include as many as four million residents in Delta counties who would be harmed by the project, including water right holders, some of whom operate marinas and other outdoor, recreational water contact businesses which foster recreational beneficial uses in the Delta, and individuals and families from all walks of local Delta region life and communities who live, work, farm and play in and near Delta waters, and individuals and families that engage in subsistence fishing in and near Delta waters. Water supply depletions and water quality impairments from approval and completion of the Petition's proposed project would reduce output from the Delta's current \$5.2 billion annual agricultural economy, its \$750 million recreational economy, and the \$1.5 billion salmon coastal economy.

In addition, the harms from the project's 14-year construction period and ongoing operation activities that would ensue from the Petition, if approved, would harm future generations of Californians and all other Americans for being deprived of access to and enjoyment of the rich cultural, ecological, agricultural, and economic heritage of the Delta region, should the Petition be approved.

The Petition also does not best serve the public interest because current water quality control plan objectives are deficient for protecting beneficial uses in the Delta. Application of the 1995 Water Quality Control Plan for the Bay Delta Estuary and Water Rights Decision 1641 (D-1641) to the permits contained in the Petition as conditions would fail to protect beneficial uses in the Delta. Their continued protection is in the public interest. Degradation of water quality that impairs these beneficial uses, as would occur if the proposed project in the Petition is approved, would not best serve the public interest. It would better serve the public interest to protect

beneficial uses in the Delta by updating the Water Quality Control Plan immediately, because of the demonstrable failure under existing conditions of the current water quality objectives and framework of the Bay-Delta Estuary Water Quality Control Plan originated in May 1995, and implemented by D-1641 in early 2000. Implementing this new plan with a new water rights decision governing the Bay-Delta Estuary would better serve the public interest than approving this Petition in reliance upon the existing water quality policy framework. Proceeding with the Petition before revising the Water Quality Control Plan would prejudice future Board action on water quality regulation in the Delta. This is because permitting a \$17 billion tunnel construction project with permit conditions favorable to the project (that is, conditions that would justify additional water export supplies from the Delta to offset construction expenses for water contractors) would make it extremely difficult for future Board members to adopt more restrictive and protective water quality objectives in a new Water Quality Control Plan.

Other reasonable alternatives were not considered by the petitioners as part of the proposed project's environmental review. For example, alternatives that significantly reduce reliance on Delta exports as called for in state law were not considered, nor was an alternative considered that significantly reduces exports by placing fish and other public trust resource beneficial uses first in priority for river flows and Delta water quality over export uses. The lack of disclosure of non-diversion alternatives that improve Delta water quality and public trust resource conditions, and which reduce reliance on the Delta Estuary, as occurs under this Petition, does not best serve the public interest because it fails to properly inform decision-makers, including in this instance the State Water Resources Control Board.

The cost to ratepayers and the public of the proposed project in the Petition far exceeds the cost of reasonable alternatives that could achieve sustainable outcomes that are comparable and superior. The expected economic impact to rate payers in the projects' service areas from approval of the Petition does not best serve the public interest, when other alternatives to the Petition's proposed project are available and feasible for reducing reliance on the Delta for California's future water supplies, and are well-known to be cost-competitive.

Delta water exports provided by the Tunnels would continue irrigating agriculture in the western San Joaquin Valley, a mode of farm production that is not sustainable due to toxic runoff and drainage back to the San Joaquin River and the Delta. It does not best serve the public interest to expand this vicious cycle of export to irrigated agriculture, followed by polluted return flow drainage to the Delta Estuary, which contributes to the Estuary's impaired status for water quality.

The proposed petition would not conserve public trust uses of the water ways of the legal Delta. These water ways include the Sacramento, San Joaquin River, Mokelumne River, Cosumnes, and Calaveras rivers, and the other major sloughs and tributary creeks and streams that comprise flowing waters of the legal Delta. We allege as well that the proposed petition would not best conserve public trust uses in Suisun Marsh because it would dramatically increase salinity and residence time of water in the Marsh's major water ways.

Public trust uses in the legal Delta and Suisun Marsh that would be harmed by the Petition include but are not limited to: navigation; water contact recreation; non-contact water recreation; groundwater recharge; commercial and sport fishing; warm freshwater habitat; cold freshwater

habitat; migration of aquatic organisms; shellfish harvesting; spawning, reproduction, and/or early development of fish; subsistence fishing; drinking water supplies; estuarine habitat; wildlife habitat; and rare, threatened, or endangered species' uses of water.

- **The Petition is contrary to law.**

RTD protests that this Petition is actually a new water right aiming to divert water in the north Delta along the lower Sacramento River between Courtland and Clarksburg for conveyance to SWP and CVP export pumps. Approval of the change petition is improperly sought as an amendment to existing SWP and CVP water rights, when the proposed project is a new conveyance facility within the SWP with new sources, a new purpose (that is, increased water transfer capacity across the Delta) and new service areas. On the basis of this allegation contained herein, Restore the Delta intends to participate in Part 1 and submit written testimony to accompany this protest.

RTD protests further that this Petition is actually a new water right because under the doctrine of prior appropriation, the current completion dates for use of water under the permits of both the SWP (12/31/2009) and CVP (12/1/1990) have both expired. At this time, the State Water Resources Control Board should act to license the existing permits at their maximum usage rates, and if the Board allows the project to go forward, its change petition should be withdrawn and replaced by the applicant with a new application to appropriate water.

Tunnels construction would take 14 years to complete, according to the latest RDEIR/SDEIS. This duration closely approximates a permanent condition of construction impacts in the Delta which would harm the Delta as a unique place, in violation of the Delta Reform Act of 2009. This would be contrary to Water Code Section 85022.

The duration of this construction period, if the project is to be treated as changes to existing water right permits rather than as a new application, would require the State Water Board to approve the time extensions requested by the Department and the Bureau, while placing water rights to be reserved for the existing permits into "cold storage," which is contrary to the principle of due diligence in the doctrine of prior appropriation.

Instead, the State Water Resources Control Board should treat the Petition as a new application to appropriate water, and use it as an opportunity to determine water availability prior to issuance of a new water right permit to the proposed project. Water rights in the Sacramento River basin are over-appropriated. For every acre-foot of average annual unimpaired river flow to the Delta, there are over 5 acre-feet of water right claims on those flows. In drier years, this ratio increases dramatically. Restore the Delta intends to present evidence during Part 1 documenting the lack of available water to supply conveyance capacity that would be created by construction and operation of the Petition facilities.

Tunnels operation would privilege water supply reliability over Delta ecosystem protection and enhancement, in violation of the coequal goals of the Delta Reform Act of 2009. This is contrary to Water Code Section 85054.

Tunnels construction and operation would violate beneficial uses and water quality objectives contrary to the federal Clean Water Act, which requires protection of the most sensitive beneficial uses as the standard by which all beneficial uses are protected. This is contrary to USEPA regulations, 40 CFR §131.10 and 40 CFR §131.11.

Tunnels operation would violate statewide policy mandating reduced reliance on the Delta for California's future water needs. This is contrary to Water Code Section 85021.

Tunnels operation would violate the Endangered Species Act by reducing through-Delta survival rates of listed winter-run and spring-run Chinook salmon, creating jeopardy conditions while failing to contribute to the species recovery, and reducing and harming designated critical habitat for these listed fish species. This is contrary to ESA, Section 9.

The recirculated draft environmental impact report and supplemental environmental impact statement, as well as the change petition's previously released Bay Delta Conservation Plan draft environmental impact report/statement are inadequate. Their inadequacy violates the California Environmental Quality Act and the National Environmental Policy Act.

The three new diversions along the lower Sacramento River in the north Delta would reduce Delta inflow to an extent that is contrary to the Delta Protection Act of 1959 (Water Code Section 12200-12205). The three new diversions along the lower Sacramento River in the north Delta would increase export of surplus water from the Delta beyond the availability of water and area of origin rights buttressed in the Delta Reform Act and the Delta Protection Act of 1959. (Water Code Sections 12200-12205, and 85031.)

- **The Petition has adverse environmental impacts.**

Tunnels construction would create in-channel impacts on critical habitat of listed fish species like Delta smelt, longfin smelt, winter-run Chinook salmon, spring-run Chinook salmon, and green sturgeon through de-watering, installation of coffer dams, disturbance of channel sediments that contain toxics, and other actions and impacts identified in the Draft EIR/EIS in 2013 and the RDEIR/SDEIS in 2015.

Tunnels construction would have significant and unavoidable adverse impacts on air quality and greenhouse gas emissions from the Delta during lasting at least 14 years, harming adjacent communities and public health, including respiratory problems of children.

Tunnels construction and operation would have significant and unavoidable adverse impacts on environmental justice communities in and adjacent to the Delta due to the unacceptable impacts of the project on opportunities for safe and healthful subsistence fishing, contact recreation beneficial uses such as boating and swimming, residential drinking water quality (including cost of fresh water treatment), and loss of agricultural productivity and job opportunities resulting from poorer irrigation water quality and crop yields.

Tunnels operation would decrease flows year-round into and through the lower Sacramento River and contribute to higher residence times of water remaining in the Delta and greater presence of more polluted San Joaquin River water in the Delta. This radical transformation in Delta

hydrodynamics would have adverse water quality impacts on the Delta, including increased salinity concentrations in agricultural and residential drinking water supplies, greater concentrations of pesticides, increased boron, nitrate, mercury, and selenium concentrations, as well as dissolved organic carbon and increased occurrence of harmful and toxic algal blooms, like *Microcystis*.

The same water quality impacts in the Delta would occur in designated critical habitat of Delta smelt, longfin smelt, winter-run and spring-run Chinook salmon, and green sturgeon, all of which are listed under the federal Endangered Species Act, and/or the California Endangered Species Act.

Moreover, potential adverse impacts are not completely known because at this time Section 7 consultation has not been completed on the proposed project in the Petition. Neither the National Marine Fisheries Service nor the US Fish and Wildlife Service have completed and released biological opinions concerning the proposed project in the Petition. As a consequence, the Petition should not proceed further until both parts of the evidentiary hearing process have benefit in the record of a full and complete environmental review record.

- **Under what conditions may this protest be disregarded and dismissed?**

This protest may be disregarded and dismissed only upon the withdrawal of the Petition from further consideration by the State Water Resources Control Board.

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



Date: 4 January 2016

Signed: \_\_\_\_\_  
Executive Director, Restore the Delta



Date: 4 January 2016

Signed: \_\_\_\_\_  
Policy Analyst, Restore the Delta

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

Served Party	Address	Email Address (service method employed)	Date Served
State Water Resources Control Board, Division of Water Rights, % California WaterFix Hearing Staff	P.O. Box 2000 Sacramento, CA 95812	<a href="mailto:CWFhearing@waterboards.ca.gov">CWFhearing@waterboards.ca.gov</a>	<a href="#">4 January 2016</a>
California Department of Water Resources, % James Mizell Department of Water Resources	1416 Ninth Street, Room 1104, Sacramento, CA 95818	<a href="mailto:James.Mizell@water.ca.gov">James.Mizell@water.ca.gov</a>	<a href="#">4 January 2016</a>
U.S. Bureau of Reclamation, % Amy Aufdemberge U.S. Department of Interior, Office of Regional Solicitor, Pacific Southwest Region	2800 Cottage Way Sacramento, CA 95825-1898	<a href="mailto:Amy.Aufdemberge@sol.doi.gov">Amy.Aufdemberge@sol.doi.gov</a>	<a href="#">4 January 2016</a>