

1
2 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
3

4 PUBLIC HEARING TO DETERMINE) **THE SAN JOAQUIN TRIBUTARIES**
5 REQUESTED CHANGES IN WATER) **AUTHORITY'S PROTEST TO PHASE 1**
6 RIGHTS OF THE DEPARTMENT OF) **OF THE PETITION REQUESTING**
7 WATER RESOURCES AND U.S. BUREAU) **CHANGES IN WATER RIGHTS OF THE**
8 OF RECLAMATION FOR THE) **DEPARTMENT OF WATER**
9 CALIFORNIA WATERFIX PROJECT) **RESOURCES AND U.S. BUREAU OF**
) **RECLAMATION FOR THE**
) **CALIFORNIA WATERFIX PROJECT**

10 MERCED IRRIGATION DISTRICT,)
11 MODESTO IRRIGATION DISTRICT,)
12 OAKDALE IRRIGATION DISTRICT,)
13 SOUTH SAN JOAQUIN IRRIGATION)
14 DISTRICT, TURLOCK IRRIGATION)
15 DISTRICT, CITY AND COUNTY OF SAN)
16 FRANCISCO, a California municipal)
) corporation, each individually, and)
) collectively the SAN JOAQUIN)
) TRIBUTARIES AUTHORITY,)
)
) Interested Parties.)

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

26 **INTRODUCTION**

27 The San Joaquin Tributaries Authority (SJTA) protests the California Department of Water
28 Resources (DWR) and United States Bureau of Reclamation (Reclamation) (collectively Petitioners)

1 joint petition to change the water rights necessary to enable the California WaterFix Project
2 (Petition). The State Water Resources Control Board (State Water Board) cannot approve the
3 Petition because it is contrary to law and injures legal water users. (Water Code 1700 et. seq.) The
4 Petition requests the State Water Board approve changes to Petitioners' water rights that will enable
5 the construction and operation of largest statewide water facilities project in the last fifty years.
6 Despite the enormity of the underlying project and change, the Petition is very limited and takes the
7 position that the request is for a simple relocation of diversion. The Petition fails to disclose the
8 operational changes that will result from changing the point of diversion. This failure is significant.
9 It prevents the State Water Board and stakeholders from any meaningful understanding and
10 analyzing the impacts of the proposed project. Without such understanding and analysis the State
11 Water Board cannot approve the Petition.

12 Specifically, the State Water Board cannot approve the Petition because its deficiencies make
13 it contrary to law. The Petition is not supported by environmental analysis required by the
14 California Environmental Quality Act (CEQA) and National Environmental Pollutant Act (NEPA).
15 The Petition was filed with the State Water Board prior to consultation with National Marine
16 Fisheries Service (NMFS) and United States Fish and Wildlife Service (USFWS) as required by the
17 Endangered Species Act (ESA). In addition, the Petition was submitted to the State Water Board
18 prior to receiving either a 401 or 404 permit, which are each required prior to Project approval. Each
19 of the above processes is iterative; the proposed project is likely to undergo significant changes
20 through the processes and potential restrictions they are likely to impose. The State Water Board
21 cannot review the Petition prior to the above processes, to do so would either (a) pre-determine the
22 outcome of the other processes and require project changes not occur or be minimal; or (b) waste
23 time and resources because the Petition is based on a project that will be significantly altered.

24 The State Water Board cannot approve the Petition because the Petitioners have failed to
25 establish that the Petition will not result in injury to legal water users. To the contrary, the Petition
26 will injure legal water users. SJTA Members are injured by the Petition's reliance on regulations
27 that will restrict SJTA Members' full and beneficial use water. Further, legal water users are injured
28 by the prematurity of the Petition; legal water users throughout the state are spending time and

1 resources analyzing a Petition with insufficient information and analysis on a project that is not yet
2 final.

3 STANDING OF LEGAL WATER USERS

4 The SJTA includes the Merced, Turlock, Modesto, Oakdale, and South San Joaquin
5 Irrigation Districts, as well as the City and County of San Francisco (SJTA Members). Each of the
6 SJTA Members holds a portfolio of water rights on one of the Merced, Tuolumne, or Stanislaus
7 Rivers. The specific rights to diversion, points of diversion, places of use and other required
8 information are set forth in the permits and licenses attached hereto as Exhibit A. In addition, the
9 SJTA Members have previously provided the State Water Board with specific information requested
10 in the Notice regarding specific timing and reporting of water use. This information can be found in
11 the SJTA Members' submissions in response to the Information Order regulations beginning on
12 March 6, 2015 and periodically updated pursuant to requirements in the Information Order.

13 THE PETITION IS CONTRARY TO LAW

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

15 Water Code section 85086 states that any approval of the Petition "shall include appropriate
16 Delta flow criteria." This requirement further specifies that the flow criterion is different and
17 distinct from existing water quality control flow objectives. (Water Code, § 85086(c)(1) [stating the
18 flow criteria is "new," focused on the "Delta ecosystem" and pursuant to "public trust" protections].)
19 The Water Code clearly requires that the flow criteria will be developed in a new process specific to
20 the Delta and requires the Petitioners fund the analysis for developing such criteria. (Water Code, §
21 85086(d).)
22

23 The Petition does not include proposed flow criteria. Instead of developing and including
24 flow criteria in its Petition, the Petitioners state that Water Code section 85086 requirements will be
25 satisfied by the "existing regulatory framework for the Delta provided by the WQCP and D-1641."
26 (Petition, at 11.) The reference to the ongoing Bay Delta Plan review is not sufficient to satisfy the
27 requirements of section 85086. First, section 85086 requires the flow criteria to be developed before
28 approval of the Petition and be included in any approval. Second, the requirement that the flow

1 criteria be included in the approval of the Petition indicates that Petitioners must be the parties
2 responsible for meeting or complying with the flow criteria. The ongoing Bay Delta Plan review
3 currently proposes to make SJTA Members responsible for meeting a portion of the water quality
4 objectives. Third, section 85086 states that the Petitioners must fund a new process that develops
5 flow criteria; reliance on an existing process, not funded by Petitioners, is not contemplated. Fourth,
6 the delegation of developing flow criteria through the Bay Delta Plan presupposes or predetermines
7 that the objectives developed in the Bay Delta Plan review will satisfy the requirement for flow
8 criteria. The Petition provides no support for such assumption.

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

17
18 **(2) Petition is Deficient and Fails to Properly Describe Proposed Project**

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

27 "Construction of the north Delta intakes will allow greater flexibility in operation
28 of both south and north Delta diversions, and better balancing of the associated
water quality and hydrodynamic benefits for fish, drinking water, agriculture, and

1 other beneficial uses. Diversions at the north Delta intake would be greatest in
2 wetter years and lowest in drier years, when south Delta diversions would provide
the majority of CVP and SWP south of Delta exports.”

3 (Petition, at 9.) This description of operations only provides general conclusions that are not
4 supported. Certainly this description does not satisfy Water Code section 1701’s requirement to
5 “include all information reasonably available to the petitioner.” For these reasons, the Petition
6 violates the requirements of Water Code section 1701.

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

18
19 **(3) The Petition is Premature**

20 Water Code section 1701.2 requires all information reasonably available to Petitioners be
21 included in the Petition. This provision requires the Petitioners withdraw their Petition and re-file
22 after the numerous iterative regulatory processes have been completed. Only after environmental
23 review has been completed, including satisfaction of all CEQA and NEPA requirements, should the
24 State Water Board consider the Petition for approval. Similarly, Petitioners must complete
25 consultation under the Endangered Species Act and receive a 401 certification before a final project
26 can be determined. It is likely that Petitioners compliance with these regulatory processes will

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1 result in significant modifications to the WaterFix Project. Accordingly, it would be a waste of the
2 State Water Board's limited resources to review the existing preliminary proposal for the WaterFix
3 Project, given the Project is likely to significantly change.
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5 **(4) The State Water Board Cannot Rely on the Existing Environmental Documents**

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

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

26 The State Water Board cannot rely on preliminary environmental documentation. It is likely
27 the preferred project alternative described in the DEIS/R may undergo further changes or the
28 environmental analysis may significantly change. For these reasons, the State Water Board cannot

1 approve the Petition until it is able to rely on valid environmental analysis via a final environmental
2 impact report/statement.

3 4 INJURY TO LEGAL WATER RIGHTS

5 **(1) Burden of Proving the Petition Will Not Result in Injury**

6 The Petitioners have the burden of establishing that the Petition will not injure other legal
7 water users. (Water Code, § 1702; WR Order 79-22.) The Petition has not met this burden. The
8 Petition spends only a few paragraphs addressing the injury to legal water users. (Petition, at 19-21.)
9 This section is made up of general conclusions that are not supported. For example, the Petition
10 refers to the DEIS/R and states the DEIS/R “considered” the impacts of the north Delta intakes on
11 water right holders and “finds that there are no regulatory actions that would affect non-project water
12 rights holders.” (Petition, at 20.) The Petition fails to disclose which injuries were considered, which
13 “water right holders” were considered, whether there are any non-regulatory actions that would lead
14 to injury, whether there were potential injuries, and how these injuries would be mitigated.

15 The Petition fails to identify or discuss impacts to upstream water users. Upstream water
16 users have long-requested assurance from Petitioners that the proposed project will not have
17 redirected impacts. The Petition fails to provide such assurance. To the contrary, the Petition does
18 not include any discussion of potential redirected upstream impacts, how the project will address
19 such potential impacts, or mitigation for such impacts. The Petition fails to analyze legal injury at
20 any specific detail. General and unsupported conclusions are not sufficient to meet Petitioners’
21 burden. For this reason, the State Water Board cannot approve the Petition as it is currently drafted.

22 **(2) Injury to Water Use and Water Reliability of SJTA Members**

23 The Petition injures the water rights held by the STJA Members and restricts the full exercise
24 of these rights. Water Code section 85086 requires that any approval of the Petition include flow
25 criteria. The Water Code makes clear the flow criteria is the responsibility of the Petitioners. The
26 Petition does not include new flow criteria. Instead, the Petition states that the flow requirement to
27 support the WaterFix Project will be satisfied at a later time through the State Water Board’s review
28 of the Bay Delta Plan and revision of D-1641. The Bay Delta Plan review process is underway and

1 the State Water Board has proposed that SJTA Members be responsible for some portion of the Bay
2 Delta Plan water quality flows. Indeed, the draft substitute environmental document that analyzes
3 the proposed changes to the Bay Delta Plan concludes that SJTA Members will make several
4 hundred thousand acre feet of water available for outflow and Project use. Thus, the SJTA Members
5 will have their water supply reduced by regulation in order to satisfy the flow criteria that is required
6 for approval of the Petition. This is a significant and unlawful injury to the water rights held by the
7 SJTA Members. The SJTA Members are strongly opposed to the proposed revisions to the Bay
8 Delta Plan for several reasons, one of which is the regulatory taking of SJTA Members' water rights
9 to support the Water Fix Project. This significant injury to the water rights of the SJTA Members
10 precludes the State Water Board from approving the Petition.

11
12 **(3) Injury to Water Quality And Increased Regulatory Burden on Upstream**
13 **Water Users**

14 The Petition does not meet the burden of providing the proposed project will not injure legal
15 water users through adversely affecting water quality. The Petition states that the project will only
16 result in "minor impacts to Delta salinity, which can and will be avoided in real time operations that
17 will remain controlled by the Board's regulatory requirements . . ." (Petition, at 19-20.) This
18 statement is fraught with problems. First, the statement is unsupported; no data or information is
19 provided to support the conclusion. Second, it is difficult to believe that removing significant
20 quantities of fresh water from flowing into the Delta will not impact the water quality in the Delta.
21 Third, the "control" provided by the State Water Board includes regulation that limits the ability of
22 the SJTA Members to fully exercise their water rights.

23 The State Water Board cannot approve the Petition because Petitioners have not satisfied
24 their respective burdens to establish that the changes in water quality will not injure a legal user of
25 water. The Petition acknowledges the WaterFix Project will slightly degrade salinity in the Delta.
26 This degradation is in addition to the failure to satisfy existing salinity standards in the Delta.
27 Together, the compromised water quality injures Delta water users ability to access water suitable
28 for application to all beneficial uses. In addition, the degradation of water quality increases

1 regulation of upstream water users, including the SJTA Members, by directly reducing their ability
2 to put their full water rights to beneficial use.

3
4 **(4) Lack of Project Disclosure Leads to Injury**

5 The Petition is required to identify and analyze environmental impacts. (Water Code, §
6 1701.) These requirements are in place, in part, to enable legal users of water to understand and
7 evaluate injury to their water rights. Because the Petitioners have not fully disclosed the operations
8 of the proposed project, it is not possible to fully understand or analyze potential injury to water
9 users. For example, without knowing the timing and quantity of water diverted in the north Delta
10 intakes, it is difficult to understand if water will be available for diversions in the Delta or how much
11 water upstream water right holders will need to release to meet any in-Delta water quality
12 requirements.

13 The failure to disclose the specific proposed operation of the Project is not a trivial issue.
14 Legal water users have been requesting Petitioners provide protection from potential re-directed
15 impacts from the inception of the WaterFix Project. Petitioners have failed to provide this
16 assurance. Now that Petitioners are moving forward with obtaining permitting, it is time to provide
17 assurance that the WaterFix Project will not have redirected impacts to upstream water users. The
18 Petition does not provide assurance, nor does it provide sufficient information upon which
19 stakeholders can identify impacts for themselves. This failure to disclose sufficient information is,
20 in itself, an injury to legal water users. It causes legal water users to conduct hydrologic modeling of
21 their own, to attend hearings on a premature Petition, and oppose the regulatory taking of water
22 through the Bay Delta Plan review. Further, the uncertainty of the statewide water system also
23 impacts the reliability of water rights held by legal water users. Not understanding how the
24 WaterFix Project will affect the Delta system and upstream water users undermines the reliability of
25 water deliveries for future generations.

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DATED: January 5, 2016

O'LAUGHLIN & PARIS LLP


By 

TIM O'LAUGHLIN
VALERIE KINCAID, Attorneys for
SAN JOAQUIN TRIBUTARIES AUTHORITY

DATED: January 5, 2016


By: 
Phillip McMurray
MERCED IRRIGATION DISTRICT

DATED: January 5, 2016

By: 
Anna Brathwaite
MODESTO IRRIGATION DISTRICT

DATED: January 5, 2016

O'LAUGHLIN & PARIS LLP

By: 
TIM O'LAUGHLIN
VALERIE KINCAID, Attorneys for
OAKDALE IRRIGATION DISTRICT

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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 1 of the Petition*

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8 **PROOF OF SERVICE BY EMAIL/MAIL**
9 (Government Code §11440.20)

10 I, Linda L. Wood, declare that:

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

14 **THE SAN JOAQUIN TRIBUTARIES AUTHORITY'S PROTEST TO PHASE 1 OF THE**
15 **PETITION REQUESTING CHANGES IN WATER RIGHTS OF THE DEPARTMENT**
16 **OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE**
17 **CALIFORNIA WATERFIX PROJECT**

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

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

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

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

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

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37 **SEE ATTACHED SERVICE LIST**
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SERVICE LIST

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California Department of Water Resources
c/o James Mizell
1416 Ninth Street, Room 1104
Sacramento, CA 95818
Email: 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
Email: Amy.Aufdemberge@sol.doi.gov

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



Linda L. Wood, Legal Assistant