



# Fact Sheet

## **California WaterFix – Water Right Change Petition And Water Quality Certification Process (Updated May 2018)**

The Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) have filed with the State Water Resources Control Board (State Water Board) a petition to change their water rights (WaterFix change petition) for the California WaterFix Project (WaterFix Project), formerly part of the Bay Delta Conservation Plan (BDCP). The WaterFix Project involves the construction and operation of new water diversion facilities near Courtland to convey water from the Sacramento River through two tunnels to the existing State and federal pumping facilities near Tracy. In addition to other federal, State, and local approvals, the WaterFix Project requires changes to the water right permits for the State Water Project and Federal Central Valley Project (collectively Projects) to authorize the proposed new points of water diversion and rediversion. Because construction will involve discharge of material into water bodies, DWR has also submitted an application for a water quality certification under section 401 of the Clean Water Act (water quality certification) from the State Water Board. WaterFix change petition hearing materials may be obtained at the program webpage:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/).

### **Notice of Change Petition, Associated Public Hearing and Notice of Application for Water Quality Certification**

On October 30, 2015, the State Water Board issued two public notices regarding the WaterFix Project: 1) a [combined notice](#) of DWR's and Reclamation's WaterFix change petition and public hearing on that petition; and 2) a [notice of DWR's application for water quality certification](#). The purpose of the hearing is for the State Water Board to receive information on whether it should approve the WaterFix change petition, subject to terms and conditions, or whether the petition should be disapproved. The hearing will also inform the water quality certification decision. Revised hearing notices and rulings have been issued following the original hearing notice updating the hearing schedule and responding to various issues.

The State Water Board decided to conduct the hearing in two parts so that the hearing could proceed while DWR and Reclamation completed necessary State and federal environmental documents required by the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), and obtained approvals required by the Federal Endangered Species Act (ESA), and the California Endangered Species Act (CESA) for the WaterFix Project. Part 1 of the hearing addressed the effects of the project on agricultural and municipal uses and associated legal users of water and was further subdivided into Parts 1A and 1B. Petitioners presented their case-in-chief in Part 1A and other parties presented their cases-in-chief in Part 1B. The key issues in Part 2 include the effects of the project on fish and wildlife, what appropriate Delta flow criteria should be included in any approval of the WaterFix change petition, and whether the project is in the public interest.



Parts 1A and 1B consisted of 53 hearing days held from July 26, 2016 through July 11, 2017. The [Notice for Part 2](#) was issued on August 31, 2017. Part 2 of the hearing resumed on February 8, 2018, and is currently underway.

State Water Board staff are planning to process the application for water quality certification separately from the change petition. The Executive Director has delegated authority to consider whether to issue the certification and, if so, under what conditions based on the information included in the hearing record that is applicable to the certification decision, as well as other relevant information. Given the different review requirements, the Executive Director may make a decision on the application for certification prior to the decision on the water right change petition. Any decision by the Executive Director will be subject to reconsideration by the State Water Board.

## **Background on the California WaterFix Project**

The planning process related to the WaterFix Project began in 2006. The initial proposed project, or BDCP, was envisioned as a water conveyance and habitat conservation project. The project's goals were to obtain long-term ESA and CESA permits by improving conditions for various species beyond the mitigation measures required for the water conveyance facility. In December 2013, DWR, Reclamation, the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS) released a Draft Environmental Impact Report/Draft Environmental Impact Statement for the BDCP pursuant to CEQA and NEPA.

In April 2015, DWR and Reclamation announced plans to split the project into two separate efforts; one for water conveyance facilities and the other for habitat restoration. The water conveyance effort is now called the California WaterFix Project, which consists of the new water conveyance facilities, operational elements, and habitat restoration and other environmental commitments to mitigate the construction and operation-related impacts of the new conveyance. DWR continues to be the CEQA lead agency and Reclamation is now the sole NEPA lead agency for the WaterFix Project. The habitat restoration effort that goes beyond the mitigation measures identified for the WaterFix Project is called California EcoRestore. California EcoRestore is a separate effort and is not part of the WaterFix change petition or water quality certification decisions currently before the State Water Board. In December 2016, DWR and Reclamation released a Final Environmental Impact Report/ Environmental Impact Statement (FEIR/FEIS) for the WaterFix Project. NMFS and the USFWS then released Biological Opinions (BO) for the WaterFix Project in June of 2017, and the California Department of Fish and Wildlife issued an Incidental take Permit for the project in July of 2017. A detailed description of the WaterFix Project can be found in the REIR/FEIS at: <http://baydeltaconservationplan.com/FinalEIREIS.aspx>.

## **Processing of the WaterFix Change Petition**

In order for the State Water Board to approve a water right change petition, the petitioner must: 1) demonstrate that the change will not initiate a new water right or injure any legal users of water; and 2) provide information on how fish and wildlife would be affected by the change and identify proposed measures to protect them from any unreasonable impacts of the change. The petitioner must also comply with any applicable requirements of the Fish and Game Code, CESA, CEQA, and ESA.

In addition, the Delta Reform Act of 2009 imposes unique requirements on the processing of the WaterFix water right change petition. The Delta Reform Act prohibits any construction of the project to begin until the State Water Board makes a decision on the WaterFix change petition. Any decision by the State Water Board to approve the WaterFix change petition must include “appropriate Delta flow criteria” and be informed by flow criteria to protect the Delta ecosystem, which the State Water Board was required to develop in 2010. Delta flow criteria included in any decision approving the WaterFix change petition would not apply until the new diversion facilities are constructed and used. The Delta flow criteria are discussed in more detail below.

In light of the size and complexity of the WaterFix Project and the likelihood of disputed facts on which the State Water Board’s decision will be based, the State Water Board decided to conduct an evidentiary hearing on the WaterFix change petition. Interested parties were provided the opportunity to participate in the State Water Board’s decision-making process by following the hearing procedures. Notices of intent to appear in the evidentiary portion of the hearing were solicited on October 30, 2015, and were received from over 80 parties. Over a hundred policy statements have also been made during the hearing so far. During the evidentiary hearing, parties who submitted timely notices of intent to appear in the evidentiary portion of the hearing have the opportunity to present evidence and argument about whether the petition should be approved and, if so, under what conditions, as well as opportunities for cross examination of witnesses and rebuttal. The hearing is public and certain procedural requirements must be met to participate in the hearing as either an interested person or a party. The public record for the hearing will serve as the basis for the State Water Board’s decision regarding the WaterFix change petition.

### **Processing of the Application for Water Quality Certification**

Construction of the WaterFix Project will involve discharges to waters of the United States which requires a permit from the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act (CWA). The CWA requires any applicant seeking a federal license or permit to conduct an activity that may result in any discharge into navigable waters to obtain a certification from the State in which the discharge originates. The State Water Board and Regional Water Quality Control Boards are designated as the State’s water pollution control agencies responsible for issuing such certifications. Since the WaterFix Project certification is associated with a water right project, the application for certification is processed by the State Water Board’s Division of Water Rights. The USACE cannot issue its permit without certification from the State Water Board, and the conditions of the State Water Board’s certification become conditions of the section 404 permit.

### **Relationship of the WaterFix Change Petition and Water Quality Certification to Other State Water Board Processes**

#### *Bay-Delta Water Quality Control Plan (Bay-Delta Plan)*

The State Water Board is currently engaged in a phased process to update the Bay-Delta Plan. The Bay-Delta Plan designates beneficial uses of waters within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and establishes water quality objectives that must be met to protect these uses; a program of implementation for achieving the objectives and protecting beneficial uses, including measures by other entities; and monitoring, evaluation and special studies measures. The Bay-Delta

Plan's beneficial uses fall into three broad categories: fish and wildlife; agricultural; and municipal and industrial uses. The current water quality objectives include: inflows from the Sacramento and San Joaquin Rivers; Delta outflows; limitations on State and federal water project exports and related operations; dissolved oxygen; salmon protection; and various salinity objectives to protect fish and wildlife, agriculture, and municipal and industrial uses. The current program of implementation includes flow and non-flow actions that the State Water Board is taking or that should be implemented by others to meet the objectives and protect beneficial uses.

Water quality control plans must be reviewed periodically and updated as necessary to reasonably protect beneficial uses of water. The State Water Board is currently updating the Bay-Delta Plan through two separate processes. Those processes began several years ago and are largely focused on addressing the significant fishery and ecological declines that have occurred in the Bay-Delta watershed, including changes to the plan's flow and non-flow measures. [Phase I](#) addresses flows from the San Joaquin River and its tributaries for the protection of fish and wildlife and salinity conditions in the southern Delta for the protection of agriculture, as well as companion non-flow measures, monitoring, reporting, and evaluation provisions. [Phase II](#) addresses flows on the Sacramento River and its tributaries and tributaries to the Delta (the Calaveras, Cosumnes and Mokelumne Rivers), Delta outflows, and interior Delta flows for the protection of fish and wildlife, as well as companion non-flow measures, monitoring, reporting and evaluation provisions.

In determining how to update the Bay-Delta Plan, the State Water Board must consider a comprehensive list of environmental, economic, and societal factors, including all beneficial uses of water, the effects of water diversions on water quality needed for other beneficial uses, and other factors that affect water quality. Each phase of the update to the Bay-Delta Plan involved developing a Scientific Basis Report identifying the best available science supporting potential changes to the Bay-Delta Plan. Based on that science, proposed changes to the Bay-Delta Plan and alternatives are developed and included in a Staff Report or Substitute Environmental Document (SED) that analyzes the potential environmental, economic, and other effects of potential changes. A draft of Staff Report/SED is released for public review and comment. Following the comment period, the State Water Board reviews and considers the public comments and prepares responses and any needed changes to the proposed Bay-Delta Plan revisions and analyses. In support of the Phase I effort, a [draft revised SED](#) was released for public review in September 2016, and staff are currently responding to the comments received. The [final Scientific Basis Report](#) for Phase II was completed in October 2017. Staff is currently preparing a draft Staff Report/SED and draft proposed Phase II changes to the Bay-Delta Plan for public review and comment. More information about the Bay-Delta Plan update processes, including the current status of each phase can be found on the [Bay-Delta Plan updates program webpage](#).

#### *Relationship Between the Bay-Delta Plan Update, the WaterFix Change Petition, and Certification*

In light of the multi-year schedules for completion of the updates to the Bay-Delta Plan, the State Water Board elected to review the WaterFix change petition and application for water quality certification for the WaterFix Project concurrently with the Bay-Delta Plan update processes, rather than delay consideration of the petition and application for several years while those processes are being completed. The Executive Director may issue a decision on the water quality certification before the State Water Board issues its decision on the WaterFix change petition.

The decision on the application for water quality certification will not be based on future changes to water quality requirements that may result from the update to the Bay-Delta Plan, but rather it must ensure that existing water quality requirements will be met. Similarly, the State Water Board is not required to know exactly what changes to flow and water quality objectives will result from the updates of the Bay-Delta Plan in order to process the WaterFix change petition. However, to inform the proceeding on the WaterFix change petition, preliminary Phase II recommendations along with the science supporting the recommendations, may be entered into the hearing record.

The flow criteria included in any WaterFix change petition approval could be adjusted consistent with the requirements that come out of the Bay-Delta Plan update and implementation processes. Currently, State Water Board Decision 1641 requires the Projects to meet certain water quality objectives contained in the Bay-Delta Plan. However, both the objectives themselves and the responsibility of the Projects for meeting the objectives may be revised as a result of the Bay-Delta Plan update. Any new flow or water quality objectives established in the Bay-Delta Plan update may lead to future changes in conditions of the Projects' water rights, regardless of whether the change petition for the WaterFix Project is approved. Likewise, whether any other water right holders should be required to make additional contributions to inflows and outflows will occur as part of the update and implementation of the Bay-Delta Plan. The State Water Board's decision in the WaterFix change petition proceeding will not address the responsibilities of third parties.

For further information on the State Water Board's Bay-Delta planning efforts and the State Water Board's consideration of the California WaterFix Project, please go to:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/).