

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**IN THE MATTER OF PERMIT 13856 (APPLICATION 18085)
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 20,000 ACRE-FEET OF WATER
FROM PLACER COUNTY WATER AGENCY
TO WESTLANDS WATER DISTRICT**

SOURCES: Duncan Canyon, North Fork American River, Middle Fork American River, Rubicon River
COUNTIES: Placer and Sacramento

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On May 22, 2020, Placer County Water Agency (PCWA or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a petition for temporary change under Water Code section 1725, et seq. PCWA has requested to transfer up to 20,000 acre-feet (af) of water under water right Permit 13856 (Application 18085) from July through September 2020 to Westlands Water District (Westlands). Temporary changes approved pursuant to Water Code section 1725 may be effective for up to one year from the date of approval.

1.1 Description of the Transfer

PCWA proposes to transfer up to 20,000 af of water ("transfer water") currently stored in the Middle Fork American River Project (MFP), which includes Hell Hole Reservoir on the Rubicon River and French Meadows Reservoir on the Middle Fork American River, to Westlands. The transfer water would be released from Hell Hole Reservoir, through Middle Fork Powerhouse, and rediverted to Ralston Afterbay and released to the Middle Fork American River via the Oxbow Powerhouse. Water from Oxbow Powerhouse flows down the Middle Fork American River to the North Fork American River and into Folsom Reservoir. Water from French Meadows Reservoir would be conveyed to Hell Hole Reservoir via the French Meadows – Hell Hole Tunnel for release from Hell Hole Reservoir.

Subsequent release of the transfer water at Folsom Reservoir would be scheduled by the United States Bureau of Reclamation (Reclamation) in cooperation with Westlands so that the proposed transfer would not disrupt normal Central Valley Project (CVP) or State Water Project (SWP) operations and would adhere to all required flow standards for the lower American River.

After release from Folsom Reservoir, the transfer water would flow down the lower American and Sacramento Rivers and be rediverted at either the SWP's Harvey O. Banks pumping plant (Banks Pumping Plant) or the CVP's Bill Jones pumping plant. Water diverted at either facility will be temporarily stored in San Luis Reservoir and then delivered via the San Luis Canal to the Westlands' service area.

For the purposes of the proposed transfer, PCWA will be solely exercising Permit 13856, which is described in Section 2.1. In the absence of this transfer, the total 20,000 af of water would remain in storage in PCWA's MFP reservoirs.

1.2 Reservoir Reoperation

The transfer involves water currently stored in Hell Hole and French Meadows Reservoirs. Refill criteria developed in conjunction with the California Department of Water Resources (DWR) and Reclamation are required to ensure that the future refill of the reservoir space made available in Hell Hole and French Meadows Reservoirs from this transfer does not adversely impact the SWP or the CVP. The refill criteria provide for an accounting of refill of the reservoirs resulting from the proposed transfer. Pursuant to the criteria, any refill occurring during balanced conditions in the Delta¹ is subject to repayment to DWR and Reclamation, according to a schedule agreed to by PCWA, DWR, and Reclamation.

2.0 BACKGROUND

2.1 Substance of PCWA's Permit 13856

Permit 13856 (Application 18085) authorizes direct diversion and combined storage/consumptive use of MFP water as follows: (a) direct diversion of 1,225 cubic feet per second (cfs) from about November 1 through about July 1 of the succeeding year from North Fork American River; (b) 25,000 af by offstream storage, at a maximum rate of diversion of 400 cfs, from about November 1 of each year to about July 1 of the succeeding year from Duncan Creek to French Meadows Reservoir;

¹ The Delta is referred to as in Balanced Condition when the CVP and the SWP are being operated to meet water quality and flow requirements in the Delta.

(c) 95,000 af by storage from about November 1 of each year to about July 1 of the succeeding year from the Middle Fork American River at French Meadows Reservoir; and (d) 129,000 af by storage from about November 1 of each year to about July 1 of the succeeding year from the Rubicon River at Hell Hole Reservoir. The authorized purposes of use include irrigation, municipal, industrial, recreational, and incidental domestic use. The authorized place of use is shown on PCWA's map set dated July 31, 1996 and as amended by an order dated May 24, 2000. Permit 13856 expired on December 1, 2007 and on January 7, 2008, PCWA filed a petition for extension of time. The petition for extension of time is currently pending before the State Water Board.

2.2 The Middle Fork American River Project (MFP)

PCWA owns and operates the MFP and holds appropriative water rights for the MFP pursuant to Permits 13856 and 13858 (Applications 18085 and 18087). The permits allow for a total direct diversion amount of 2,025 cfs from about November 1 of each year to about July 1 of the succeeding year from North Fork American River and for a combined diversion to storage of 315,000 af per annum of MFP water held in two storage reservoirs (French Meadows Reservoir and Hell Hole Reservoir). The MFP is a multi-purpose project designed to conserve waters of the Middle Fork American River, the Rubicon River, and tributaries for domestic, municipal, industrial, recreational, and irrigation uses as well as for hydroelectric power generation. The MFP's principal project features include French Meadows Reservoir and Hell Hole Reservoir (French Meadows Reservoir is located on the Middle Fork American River and Hell Hole Reservoir is located on the Rubicon River), five associated diversion dams (Duncan, North Fork Long Canyon, South Fork Long Canyon, Middle Fork Interbay, and Ralston Afterbay), and five power plants (French Meadows, Hell Hole, Middle Fork, Ralston, and Oxbow).

PCWA has determined that it has at least 20,000 af of surplus water stored in the MFP. The determination was reached by reviewing current MFP reservoir storage levels, projected inflow, and modeled project operations data for 2020. As of May 20, 2020, PCWA had approximately 265,000 af of water (95 percent of average year-to-date) held in storage in its MFP reservoirs.

2.3 Westlands Water District

Westlands was formed in 1952 and encompasses more than 600,000 acres of farmland in western Fresno and Kings Counties. According to information provided in the petition, Westlands is interested in augmenting its water supply with PCWA's transfer water because CVP south of Delta contracted water allocations are only 20 percent in 2020. The additional water would provide Westlands' agricultural customers with a water supply for irrigation of crops.

2.4 Proposed Temporary Changes

To facilitate this transfer, PCWA is requesting the following changes to its Permit 13856: (1) the temporary addition of the CVP's Bill Jones Pumping Plant and the SWP's Banks Pumping Plant as points of diversion; (2) add San Luis Reservoir as a point of rediversion, and (3) add the Westlands Water District service area as additional place of use.

3.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On June 1, 2020, public notice of the petition for temporary change was provided by posting on the Division's website and via the State Water Board's electronic notification system. In addition, on June 1, 2020, the Petitioner noticed the project via publication in the Sacramento Bee newspaper and mailed the notice via first class mail to interested parties. Comments were received from Mr. Richard Morat, Ms. Laurette J. Laurent, the California Department of Water Resources (DWR), the California Department of Fish and Wildlife (CDFW), Reclamation, Outdoor California, and the Central Delta Water Agency (CDWA).

3.1 Comments of Mr. Richard Morat

By letter dated June 1, 2020, Richard Morat commented on the proposed transfer. Mr. Morat requested terms and conditions that better protect public trust resources and that the transfer will not result in an unreasonable effect on fish and wildlife or other instream beneficial uses. Mr. Morat also commented that the transfer should be conditioned for only essential uses in 2020, and that transfer of water that otherwise would have remained in storage be conditioned such that conservation storage replenishment of the transferred amount be timed and amounts allowed to be conserved scoped to the affected river's and the estuary's capacity to reasonably forego those flows.

State Water Board Response:

The State Water Board is responsible for considering public trust resources, and while it does not anticipate any adverse public trust impacts to result from this transfer, the State Water Board is aware of long-standing challenges with regard to management of flows and maintaining habitat conditions that are suitable for protection of fish and wildlife in the Delta and its tributaries. Current outflow and water quality requirements are established by State Water Board Revised Water Right Decision 1641 (D-1641) and applicable Biological Opinions, which are the responsibility of DWR and Reclamation to fulfill during the entirety of this transfer.

The State Water Board is supportive of transfers to provide water where it is needed. It is anticipated that Westlands Water District will only receive 20 percent of their CVP allocation this year.

The proposed temporary transfer by PCWA is for water that would have otherwise been diverted pursuant to their license. By approving the transfer, additional water will flow down the American River to the Sacramento River and the Delta. Furthermore, Reclamation is responsible for fulfilling its in-delta and export commitments, consistent with D-1641, related to any storage releases from Folsom Lake. In light of the above explanation, it is not anticipated that this transfer will result in unreasonable effects on fish and wildlife, other instream beneficial uses, or other public trust resources.

3.2 Comments of Ms. Laurette J. Laurent

By letter dated June 1, 2020, Ms. Laurette J. Laurent commented on the proposed transfer. Ms. Laurent feels it is unlikely the water transfer could occur without adverse impacts to the environment and other users of water, that the water transfer lacks certification by a licensed California engineer, that California Environmental Quality Act (CEQA) requirements have not been met, and that the transfer should not be allowed due to Westland's recent permanent federal water service contract.

State Water Board Response:

California Water Code Section 1729 states a proposed temporary change shall be statutorily exempt from the requirements of Division 13 of the Public Resources Code, known as CEQA. However, the transfer will be subject to current outflow and water quality requirements established by D-1641 and applicable Biological Opinions, which are the responsibility of DWR and Reclamation to fulfill during the duration of this transfer.

California Water Code section 109(a) declares it to be the "the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare and the place of import." Subsection (b) of Section 109 directs the State Water Board and other state agencies to encourage water transfers. Water transfers are intended to aid California in meeting present and future water demands.

Transfers are approved when willing buyers and sellers are present, all provisions of the water code are met and the State Water Board can make the finding that the transfer will result in no significant impacts to the environment or other legal users of water. This water transfer will supply an amount of water not included in the CVP water allocations for 2020.

3.3 Comments of DWR

By letter dated June 25, 2020, DWR commented on the proposed transfer. DWR requested that the petitioner provide baseline operations plans for French Meadows Reservoir and Hell Hole Reservoir so any potential impacts of the water transfer can be evaluated. DWR also stated the need for a refill agreement including conditions, criteria, and procedures to account and mitigate for injuries to SWP operations from the release of transfer water. DWR further requested that refill not occur if the Sacramento-San Joaquin Delta is in balanced conditions, and that monthly refill accounting reports be made available to DWR.

PCWA Response:

PCWA stated that as part of the transfer approval process, PCWA will execute a Refill Agreement that accounts for the delivery of Transfer water from MFP reservoirs to Folsom Reservoir and the subsequent refill of MFP reservoirs following the transfer.

PCWA also stated the proposed transfer will not significantly alter flows or water quality in the Middle Fork and/or North Fork American rivers when compared to baseline operational conditions of PCWA's MFP, including power generation activities. The release of stored transfer water would occur during 'shoulder hours', or off-peak times when generation is not scheduled as part of the baseline operations from PCWA's Middle Fork/Ralston Powerhouse complex into Ralston Afterbay. Transfer releases are then re-regulated from Ralston Afterbay and released into the Middle Fork American River (MFAR) at a controlled rate above the baseline.

PCWA directed DWR to the transfer operations plan provided in Attachment E of the Petition package, and said it provides the amount of transfer water that would be released from July through September above baseline MFP power generation operations through the Middle Fork Powerhouse. The daily accounting of transfer releases is based upon the difference between the daily average throughput with and without the transfer for each respective month. PCWA also stated the MFP combined carryover storage target will maintain the 20,000 af of transfer deficit through the next refill cycle until conditions in the Refill Agreement are met.

Finally, PCWA described how releases from Oxbow Powerhouse will maintain the range of flows that occur normally in the Middle Fork American River in the summer months (150 cfs – 1,050 cfs) while maintaining the ramping rates (Appendix A; Condition No. 24) and conditions contained within PCWA's Federal Energy Regulatory Commission (FERC) license (Project No. 2079-069) throughout the transfer period.

State Water Board Response:

This Order includes a condition requiring PCWA to obtain a reservoir refill agreement with Reclamation and DWR before the transfer may commence.

3.4 Comments of CDFW

By letter dated June 25, 2020, CDFW commented on the proposed transfer. CDFW stated concerns over the potential cumulative adverse impacts from changes in the quantity, timing, and duration of seasonal water transfers on the sensitive anadromous and/or resident fisheries within the Lower American River (LAR). CDFW indicated a water transfer into Folsom Reservoir that is completed in early spring may help to build cold-water pool volume, whereas a transfer into Folsom Reservoir completed in late summer may not have this same beneficial effect for temperature management. Similarly, CDFW stated increasing reservoir releases in spring may encourage emigration of juvenile salmonids and improve survival whereas a transfer completed in summer or fall may cause rearing steelhead to redistribute to less desirable habitat.

CDFW recommended working closely with Reclamation and regulatory agencies on optimizing releases to provide stable flows across summer and fall months at a targeted release rate that minimizes warming in Lake Natoma.

CDFW indicated the alteration of volume, timing, and temperature of stream flow associated with the marginal increase of water released into the MFAR and ultimately the North Fork American River under this transfer could impact Foothill Yellow Legged Frog (FYLF) during vulnerable life stages. CDFW stated tadpole rearing sites require protection from unpredictable scouring flows and appropriate ramp down rates to prevent stranding and desiccation, and that lower water velocity and shallower water depth habitats are more suitable for tadpole rearing sites. CDFW recommended PCWA provide a detailed water transfer release schedule that identifies both regular hydropower operation releases as well as marginal additional water transfer releases, and that PCWA demonstrate the overall schedule of releases and ramping rates align with new MFAR FERC Project # 2079-069 license conditions.

PCWA Response:

In response, PCWA stated the transfer releases will adhere to all applicable instream flow requirements, biological opinions, and temperature requirements in the Delta and the LAR, and that Reclamation and DWR will be responsible for coordination and scheduling of the volume and timing of releases from the Point of Delivery (Folsom Reservoir) to the Point of Rediversion. PCWA pointed to modeling shown in Appendix G of the Petition that indicates a proposed transfer beginning in mid-July still offers slight benefits to temperature in both Folsom Reservoir and the LAR.

PCWA also pointed to the description of the environmental effects of water transfers through Folsom Reservoir in Attachment G and summarized that PCWA water transfers place additional cold water in the South, Middle, and North Forks of the American River, and subsequently into Folsom Reservoir. PCWA stated the additional transfer releases provide for a greater volume of cool water in the metalimnion to blend with the cold water in the hypolimnion, preserving more cold water in the reservoir (when compared to the non-transfer baseline) as storage levels recede and natural warming of the upper reservoir layers occur during the summer. Additionally, the resulting increased flows in the LAR due to the addition of transfer water also decreases the rate of warming of the LAR, providing additional benefits to habitat for anadromous salmonids (e.g., cooler water temperature in the river).

PCWA also stated it is working in close coordination with Reclamation and DWR to accomplish the transfer and will execute a Refill Agreement with these agencies that accounts for the delivery of transfer water from MFP reservoirs to Folsom Reservoir and the subsequent refill of MFP reservoirs following the transfer. PCWA intends to increase the average daily release above the baseline throughout the entire transfer period and does not intend to make a block release to deliver transfer water.

PCWA stated a transfer operations plan is provided in Attachment E of the Petition package, which shows the amount of transfer water that would be released from July through September above baseline MFP power generation operations through the Middle Fork Powerhouse. The daily accounting of transfer releases is based upon the difference between the daily average throughput with and without the transfer for each respective month. In addition, the MFP combined carryover storage target will maintain the 20,000 af of transfer deficit through the next refill cycle until conditions in the Refill Agreement are met.

PCWA's release of Transfer Water from Oxbow Powerhouse will maintain the range of flows that occur normally in the MFAR in the summer months (150 cfs – 1,050 cfs) while maintaining the ramping rates (Appendix A; Condition No. 24) and conditions contained within PCWA's FERC license (Project No. 2079-069) throughout the transfer period. The schedule of flow releases and associated ramping rates contained in PCWA's FERC license were developed in close consultation with CDFW (among other state and federal stakeholders) and are fully protective of all aquatic resources within the peaking reach of the MFAR, downstream of Oxbow Powerhouse.

State Water Board Response:

The Order is conditioned to require ongoing concurrence from Reclamation that the transfer will not impact the cold water pool in Folsom Reservoir to ensure the transfer actions are coordinated with Reclamation and CVP operations. As summarized in the FERC Order Issuing New License for Project 2079-069 dated June 8, 2020 (FERC

Order), PCWA prepared the *Supplemental Biological Assessment on the Potential Effects of the Placer County Water Agency's Middle Fork American River Project on Sierra Nevada Yellow-legged Frog* (Supplemental BA). The Supplemental BA was filed June 9, 2016 and found that the nearest designated critical habitat unit of FYLF is located about one mile upstream of Hell Hole reservoir. Any change in flows resulting from the transfer will occur downstream of Hell Hole reservoir and therefore, no impacts to FYLF are anticipated. The transfer is conditioned to require compliance with all existing regulatory requirements, which includes conditions in PCWA's FERC license for Project 2079-069.

3.5 Comments of Reclamation

By letter received July 10, 2020, Reclamation commented on the proposed transfer. Reclamation requested that any Order approving the transfer require a refill agreement between Reclamation and PCWA. Reclamation also requests a term be added to prohibit PCWA or Westlands from holding any water in Folsom Reservoir for more than 30 days absent the written consent of Reclamation. Reclamation also requested that PCWA coordinate with Reclamation on the Folsom operations schedule and that all applicable regulatory constraints in the Delta be met so as to not cause any adverse impacts to water quality or other users of water.

State Water Board Response:

The Order is conditioned to require that transfer releases adhere to all applicable instream flow requirements, biological opinions and temperature requirements. To avoid injury to the water rights and operations of the CVP, this Order includes a requirement for PCWA to obtain a reservoir refill agreement with Reclamation and DWR prior to initiating the transfer. Additionally, the Order includes a condition requiring PCWA to obtain regular confirmation from Reclamation during the transfer period that the cold water pool in Folsom Reservoir is not being negatively impacted by PCWA's transfer.

3.6 Comments of Outdoor California

On June 25, 2020, Nathan Rangel, president of Outdoor California, submitted a letter in support of PCWA's proposed transfer to Westlands. Mr. Rangel indicated PCWA has been a reliable and responsible stakeholder and partner with both environmental and recreational interests in the management of their district and the water rights that they hold.

3.7 Comments of CDWA

By email dated July 1, 2020, CDWA commented on the proposed transfer as described below.

Comment 1 – Notice of Petition and Posting of Pertinent Documents

CDWA commented on the State Water Board's public notice procedures for petitions for temporary transfer as follows: 1) CDWA stated that the State Water Board should post temporary transfer petitions and supporting documentation along with the public notice on the State Water Board's website to better facilitate public review of proposed transfers; 2) CDWA indicated that Water Code section 1726 requires that water right holders who may be affected by the proposed transfer be notified in writing of the proposed transfer, however none of the members within CDWA were notified; and 3) CDWA believes that the State Water Board should re-notice the proposed transfer to additional parties, including CDWA member agencies, and allow additional time for processing the transfer.

State Water Board Response:

The State Water Board posted the public notice on its website and provided an email notice to its electronic email list for transfers, which includes over two thousand recipients who have requested to be notified of all proposed water right transfers. The State Water Board is limited to what documents can be posted on its website based on the requirements for all State agencies to satisfy Priority 1, 2, and 3 guidelines for "AA" compliance of the World Wide Web Consortium, Web Content Accessibility Guidelines 1.0. The State Water Board's website is also required to comply with Section 508, Subpart B, Subsection 1194.22, Guidelines A-P of the Rehabilitation Act of 1973 as revised in 1998. Therefore, in order to comply with web accessibility requirements, the State Water Board was not able to post the petition on its website. However, the State Water Board provided a copy of the petition and supplemental information to all parties who requested the documents.

Further, the notice was published in the Sacramento Bee newspaper and mailed to applicable counties, interested parties, and downstream diverters who Division staff believed could be harmed by the transfer. The Division and PCWA have complied with the public notice requirements in Water Code section 1726 subdivision (d); therefore, the State Water Board declines to adjust the timeline of the proposed transfer and the timeline for processing the petition will not be extended.

Comment 2 – Demonstration that the Transferred Water is Surplus to the Delta and Areas of Origin

CDWA stated that Water Code section 11460 (the Watershed Protection Act) and section 12204 (the Delta Protection Act of 1959) "expressly prohibit the export of water that is not surplus to the needs of the Delta or areas where the water originates." CDWA further commented that PCWA's petition did not demonstrate that the water

proposed to be transferred was truly surplus and would not be needed to meet requirements in the Delta such as D-1641. CDWA also stated that Petitioner should demonstrate that the proposed transfer would not injure water right holders subject to Term 91².

State Water Board Response:

The State Water Board disagrees with CDWA's assertions that the Watershed Protection Act applies to the water that is the subject of the proposed transfer and that the proposed transfer would result in the export of non-surplus water from the Delta. Water Code section 11460 applies to DWR and Reclamation. (State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 754.) Further, CDWA fails to explain how the proposed transfer would "deprive" the Delta of flows it would receive absent the transfer (Wat. Code, § 11460) or otherwise result in diminished flows to the Delta or to CVP or SWP operations compared to the without-transfer scenario. As discussed above, the proposed transfer would increase the flow of water to the Delta. In addition, the Delta Protection Act provides the State Water Board with discretion to "balance in-Delta needs and export needs." (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at pp. 770-771, quotation marks and citation omitted.)

PCWA's points of diversion and rediversion are at French Meadows Reservoir on the Middle Fork American River and Hell Hole Reservoir on the Rubicon River, tributary the Middle Fork American River. These rivers lead to the American and Sacramento Rivers. The waterways from PCWA's diversion area to the Project pumps are currently controlled by Term 91, which restricts diversions from streams tributary to the Sacramento-San Joaquin Delta and the Delta. Absent the transfer, this water would not be released by PCWA and would not be available instream to meet temperature or other requirements such as those established by D-1641. Reclamation and DWR cannot require release of water previously diverted to storage by another right holder to assist in establishing compliance with water quality and flow standards in the Delta.

With the proposed temporary transfer, PCWA would transfer water that has already been diverted to storage under their permit. The amount of water available for transfer by PCWA is determined by their water rights and established diversion and beneficial use histories. Normal river operation and the protection of Term 91 will ensure that the water entering the project facilities will be similar to that absent the proposed transfer.

² The State Water Board has included Term 91 in permits and licenses issued after August 16, 1978 that authorize the diversion of water within the Sacramento-San Joaquin River Delta watershed at a rate greater than one cubic foot per second or authorize the collection to storage within the Delta of more than 100 acre-feet of water per year. There are 115 active water right permits and licenses that include Term 91.

Comment 3 – Absence of Refill Agreement and Coordination Details with Reclamation and/or DWR and Comment 4 – Reservoir Storage Release Information

CDWA indicated that it is unclear of the timing and amount of water that will be released from storage to effectuate the proposed transfer. Specifically, CDWA stated that reservoir refill agreement and coordination details with DWR and USBR were not provided with the petition in order to disclose how the reservoir refill agreement will avoid injury to downstream water right holders.

CDWA indicated that PCWA should have provided the same reservoir storage release information to the State Water Board that is required by DWR's and USBR's *Draft Technical Information for Preparing Water Transfer Proposals* (Draft Technical Information).

State Water Board Response:

DWR and Reclamation require parties proposing stored water transfers to provide historical reservoir operation information in order to develop a reservoir refill agreement with the transferor. DWR and Reclamation require a refill agreement to ensure that the stored water that is transferred will not be replaced at a time when operations of the SWP and CVP could be injured. In order to protect SWP and CVP water rights, this Order requires PCWA to obtain and comply with a reservoir refill agreement referenced above with DWR and Reclamation.

Comment 5 – Analysis of Potential Effects to Fish, Wildlife, or Instream Beneficial Uses in the Delta

CDWA indicated that PCWA's Petition lacks analysis of potential effects to fish, wildlife, or instream beneficial uses in the Delta. CDWA indicated that PCWA should have analyzed the proposed transfer's potential impacts to aquatic or terrestrial species that inhabit the Delta since movement of water through the Delta (including increased deliveries and exports by the SWP and CVP, resulting in increased reverse flows and decreased Delta outflows) has a potential to impact these species.

State Water Board Response:

Water released from Hell Hole and French Meadows Reservoirs through Folsom Reservoir pursuant to the transfer is water that would not have been available in downstream systems if not for the transfer. Additionally, the Order is conditioned to require that the releases from the MFP for the transfer are subject to all existing regulatory requirements, including the conditions of the FERC license for Project 2079-069. The increase in flows tied to the release of water for the transfer has a potential negative impact the cold water pool in Folsom Reservoir, and this Order is conditioned to mitigate those potential negative impacts.

State Water Board staffs' comment letter on the Draft Environmental Impact Report for the Long Term Operation of the SWP discusses the proposed increased transfer period tied to changes in long term operations of the SWP. However, the referenced State Water Board comment letter does not discuss impacts from SWP operations related to the current transfer window. This transfer is being operated under SWP's current transfer window.

Comment 6 – Quantification of Losses from Transferred Water Source to Export Pumps and Transferee's Place of Use

CDWA commented that an accurate analysis and quantification of losses that occur is required to prevent injury to legal users of water. CDWA requested that this analysis include losses from the source of the transferred water to the export pumps, carriage losses, and losses from the export pumps to the ultimate places of use.

State Water Board Response:

The Draft Technical Information requires a conveyance agreement between PCWA, Reclamation, and DWR as the transferred water is non-project water being conveyed through CVP and SWP facilities. According to the Draft Technical Information, only that portion of the proposed transfer that is determined to represent new water to the system is transferable using CVP or SWP facilities. This water, frequently referred to as "new water or real water," is the net addition of water to the downstream system that would not be available absent the transfer.

Reclamation and DWR have a shared responsibility for meeting Delta water quality and environmental requirements. Appendix A of the Draft Technical Information addresses potential adverse effects of transfers on the CVP and SWP. If water transferred is not new water to the system, it will instead come out of the supply for CVP and SWP contractors. The Draft Carriage Water Overview for Non-Project Water Transfers (Carriage Water Overview) dated October 2019 describes how Reclamation and DWR account for the losses of water as it is transferred from the seller to the buyer. The document provides a methodology for determining carriage losses through the Delta. The transfer proposed by PCWA will be subject to this accounting as part of the conveyance agreement between PCWA and DWR or Reclamation. Once the water has been conveyed through the Delta, the SWP or CVP is responsible for delivering the transferred quantities and making up any potential conveyance losses to the final place of use for the transfer.

Comment 7 – Potential Effects of Return Flows

CDWA indicated that PCWA did not include analysis of potential impacts caused by changes in timing, quality, and volume of return flows as a result of the proposed transfer. CDWA also mentioned the potential for increased selenium runoff in the San Joaquin River as a result of the transfer.

State Water Board Response:

Senior water right diverters downstream of Hell Hole and French Meadows Reservoirs will not be affected by the transfer. The water under Permit 13856 is diverted to storage in accordance with water right priority on the stream system. Senior rights cannot be injured by the release of water previously stored under a junior water right.

The article referenced by CDWA indicated that historic irrigation practices have contributed to high selenium concentrations in the San Joaquin River but did not specifically mention that water transfers exacerbated the problem. As mentioned above, Westlands will only receive 20 percent of their contracted CVP allocation; consequently, even with the proposed transfer, Westlands will likely have a net reduction in agricultural runoff to the San Joaquin River this year.

Comment 8 – Compliance with Federal Law

CDWA indicated that PCWA's proposed transfer appears to be inconsistent with the Central Valley Project Improvement Act (CVPIA) as they contend that the CVPIA considers any water delivered by the CVP to be considered CVP water. CDWA indicates that CVPIA limits the transfer of CVP water to only water that would have been consumptively used and does not allow the transfer of previously stored water as is allowed under Water Code section 1725. Therefore, CDWA indicates that in order for PCWA to transfer water via the CVP, PCWA must have an equivalent decrease in the amount of water beneficially used under Permit 13856.

State Water Board Response:

The proposed transfer water is available under PCWA's water right Permit 13856 and is not CVP Project Water. The CVPIA does not preclude the use of non-CVP facilities to facilitate a transfer of non-CVP water supplies, which is what the Petition proposes.

4.0 POTENTIAL CURTAILMENT

During any Notice of Water Unavailability (curtailment) period in 2020 that includes PCWA's Permit, PCWA will be required to cease all diversions under the Permit. A condition is therefore included in this Order that if at any time prior to, or during the period of transfer, the State Water Board issues notification that water is unavailable for collection to storage pursuant to Permit 13856, only water collected to storage prior to issuance of the notification may be transferred.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of CEQA. (Pub. Resources Code, § 21000, et seq.) The State Water Board will issue a Notice of Exemption for this project.

6.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

Pursuant to Water Code section 1725, "a permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses." (Wat. Code, § 1725.)

The State Water Board shall approve a temporary change involving the transfer of water under Water Code section 1725 et seq., if it determines that a preponderance of the evidence shows both of the following:

- a. The proposed change would not injure any legal user of water, during any potential hydrologic condition that the State Water Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of water or return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1727, subd. (b).)

In addition, the proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change. (*Id.*, § 1726, subd.(e).)

Temporary changes pursuant to Water Code section 1725 may be effective for a period of up to one year from the date of approval. (Wat. Code, § 1728.) The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out.” (*Ibid.*)

The State Water Board also has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The State Water Board considers the evaluation of public trust resources as part of its evaluation of impacts to fish, wildlife, or other instream beneficial uses under Water Code section 1727, subdivision (b)(2).

7.0 REQUIRED FINDINGS OF FACT

7.1 Transfers Only Involve Water That Would Have Been Consumptively Used or Stored

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Water Code section 1011. (Wat. Code, §§ 1725, 1726.) Water Code section 1725 defines “consumptively used” to mean “the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.” PCWA’s petition shows that the 20,000 af of proposed transfer water is currently held in storage in MFP reservoirs and would remain in storage absent the transfer.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the water proposed for transfer pursuant to this Order would be stored in MFP reservoirs in the absence of the proposed temporary change.

7.2 No Injury to Other Legal Users of the Water

Before approving a temporary change due to a transfer or exchange of water pursuant to Article 1 of Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would not injure any legal user of the water during any potential hydrologic condition that the Board determines is likely to occur during the

proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (Wat Code, § 1727, subd. (b)(1).) The water proposed for transfer pursuant to this temporary change consists of water previously stored in French Meadows Reservoir and Hell Hole Reservoir pursuant to Permit 13856. In the absence of the proposed transfer, the water would remain in storage for future use by PCWA and would not be available to other water users. Since the water would otherwise have remained in storage, there will be no changes in return flows as a result of the transfer. PCWA will enter into a reservoir refill agreement with Reclamation and DWR, ensuring that future refill of any storage space in MFP reservoirs and/or Folsom Reservoir created by the transfer will not reduce the amount of water that Reclamation, DWR, or other water users could otherwise divert under their water rights. Therefore, no injury to other legal users of water would occur due to the transfer.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(1) that the proposed temporary change will not injure any legal user of water.

7.3 No Unreasonable Effect on Fish, Wildlife, or Other Instream Beneficial Uses

Before approving a temporary change in order to facilitate a transfer of water, the State Water Board must find that the proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) The Petitioner provided CDFW and the Central Valley Regional Water Quality Control Board (Regional Board) with a copy of the petition in accordance with California Code of Regulations, title 23, section 794, subdivision (c). The Regional Board did not provide any comments to the State Water Board regarding potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses. CDFW provided comments requesting confirmation that the reservoir releases will be in conformance with existing regulatory requirements and recommending close coordination with CVP operations to avoid potential effects on the cold water pool of Folsom Reservoir. These comments and related conditions are addressed in Section 3.4 of the Order.

In general, North of Delta transfers result in an incremental increase in instream flows between the Petitioner's point of diversion and the location where the water is removed from the stream system. The increase in flows is not anticipated to be harmful to instream resources, provided that the transfer water does not cause instream temperatures to increase to harmful levels and also does not result in false fish attraction flows to streams not suited for fish rearing. No information is available that suggests the transfer flows will contribute to false fish attraction flows. PCWA submitted an analysis showing the proposed water transfer may cause a slight beneficial decrease in stream temperatures in the affected waterways.

The transfer will be subject to all applicable federal and State Endangered Species Act requirements, including applicable Biological Opinions, Incidental Take Permits, court orders, and any other conditions imposed by other regulatory agencies applicable to diversions and exports of water at the SWP and CVP Delta pumps. The transfer will also be subject to the conditions of the FERC license for Project 2079-069, which includes the PCWA facilities relied upon for the transfer.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(2) that the proposed transfer would not unreasonably affect fish, wildlife, or other instream beneficial uses.

8.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2012-0029.

9.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1727, and therefore I find as follows:

I conclude that, based on the available evidence:

1. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.
2. The proposed temporary change will not injure any legal user of the water.
3. The proposed temporary change will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change for the transfer of up to 20,000 af of water under Permit 13856 is approved.

All existing terms and conditions of Permit 13856 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on the date of this Order and continuing through September 30, 2020.
2. The place of use under Permit 13856 is temporarily expanded to include the service area of Westlands as shown in Attachment C submitted with the petition.
3. The Harvey O. Banks Pumping Plant (located within the SW1/4 of Section 35, T1S, R3E, MDB&M) and Bill Jones Pumping Plant (located within the SW1/4 of Section 35, T1S, R3E, MDB&M) (collectively as "Delta Pumps") are temporarily added as authorized PORDs.
4. San Luis Reservoir (located within the SE1/4 of Section 7, T10S, R9E, MDB&M) is temporarily added as a PORD and place of storage for purposes of the transfer.
5. Diversion of water at Banks Pumping Plant is subject to compliance by the operators with the objectives currently required of DWR set forth in Tables 1, 2, and 3 on pages 181-187 of Revised Water Right Decision 1641 (D-1641), or any future State Water Board Order or decision implementing Bay-Delta water quality objectives at that point of diversion, including compliance with the various plans required under D-1641. Diversion of water is also subject to compliance by DWR with all applicable Biological Opinions and court orders and any other conditions imposed by other regulatory agencies applicable to these operations.

Diversion of water at Banks Pumping Plant is also subject to compliance with any State Water Board Orders establishing temporary or interim operating conditions during the transfer period, except if the State Water Board has specifically exempted conveyance of transfer water from the Order.

6. During the period of transfer, Petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies, including applicable conditions in the Federal Energy Regulatory Commission license issued for Project 2079-069. This Order shall not be construed as authorizing the violation of any agreement entered into by the Petitioner.

7. Petitioner shall ensure that Westlands has executed a Warren Act contract with Reclamation prior to transferring water into Folsom Reservoir under this Order, unless Reclamation states a Warren Act contract is not required. Petitioner shall provide confirmation from Reclamation and Westlands to the Deputy Director for Water Rights (email confirmation is acceptable) that this condition has been complied with, within 30 days of issuance of this Order.
8. Water may not be transferred through Banks Pumping Plant, Jones Pumping Plant, and San Luis Reservoir until PCWA has executed a refill criteria agreement for the 2020 water transfer between DWR, Reclamation, and PCWA. Documentation that acceptable refill criteria have been agreed to by DWR, Reclamation, and PCWA shall be submitted to the Deputy Director for Water Rights within 15 days of the date of execution of the agreement. The refill criteria shall govern the conditions under which refill of the water released pursuant to this Order occurs, including the conditions under which refill impacts may accrue and how PCWA shall rectify any impacts. At the conclusion of refilling water in French Meadows Reservoir and Hell Hole Reservoir for the water released pursuant to this Order, if a refill impact has occurred, PCWA shall release the amount of water identified in the refill criteria to DWR and Reclamation in a manner and on a schedule agreed to between PCWA, DWR, and Reclamation. Any release required pursuant to this paragraph shall be conducted in a manner that does not injure any legal user of water and does not unreasonably affect fish, wildlife, or other instream beneficial uses.
9. No water can be transferred under this Order unless Reclamation concurs that the transfer will not result in increased risks of negative impacts to the cold water pool at Folsom Reservoir resulting from incoming transfer water. Such approval may be given on a weekly basis or other time-step acceptable to Reclamation. PCWA shall provide documentation to the Deputy Director for Water Rights by email of any Reclamation approvals issued after the date of issuance of this Order. PCWA shall coordinate with Reclamation on the Folsom operations schedule as part of on-going real-time operations for the CVP.
10. If at any time prior to, or during the period of the transfer, the State Water Board issues notification that water is unavailable for collection to storage pursuant to Permit 13856, only water collected to storage prior to issuance of the notification may be transferred.
11. Within 90 days of the completion of the transfer, PCWA shall provide to the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information:

- a. The duration and magnitude of the increased releases of water and corresponding volume of water released from MFP reservoirs as a result of this transfer (reported on a daily basis);
 - b. The average daily release rates and corresponding volume of water released from Folsom Reservoir as a result of the transfer (reported on a daily basis);
 - c. The amount of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis); and
 - d. Recognizing that reservoir refill will occur after the transfer ends, monthly reporting of reservoir refill is not required during the transfer period. However, PCWA shall provide reservoir refill reporting in its Report of Permittee by April 1 of each year on monthly reservoir refill until the reservoir Refill Agreement has been satisfied. This occurs when the value of the Refill Reservation, as defined in the Refill Agreement, equals zero. These reports shall include the daily values of the Refill Reservation.
12. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this temporary change Order, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in this Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.

13. This Order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this temporary transfer, the Petitioner shall obtain authorization for an incidental take permit prior to construction or operation. The Petitioner shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.

14. The State Water Board reserves jurisdiction to supervise the transfer, exchange and use of water under this Order, and to coordinate or modify terms and conditions, for the protection of vested rights, fish, wildlife, instream beneficial uses and the public interest as future conditions may warrant.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: JUL 27 2020