

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF PERMITS¹
OF THE U.S. BUREAU OF RECLAMATION**

**PETITIONS FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF UP TO 5,000 ACRE-FEET OF WATER
FROM THE U. S. BUREAU OF RECLAMATION
TO ALAMEDA COUNTY WATER DISTRICT AND ALAMEDA COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT (ZONE 7)**

SOURCES: Sacramento River, San Joaquin River Delta, and Trinity River

COUNTIES: Alameda and Contra Costa

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On August 28, 2015, the U.S. Bureau of Reclamation (Reclamation) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) thirteen petitions for temporary change under California Water Code Section 1725, et seq. Reclamation requested to transfer up to 5,000 acre-feet (af) of water to Alameda County Water District (ACWD) and Alameda County Flood Control and Water Conservation District (Zone 7). The transfer period begins on the date of State Water Board approval and continues for up to one year.

1.1 Description of the Transfer

The proposed transfer will be a one-for-one exchange of State Water Project (SWP) water for Central Valley Project (CVP) water. The requested change will allow the exchange of up to 5,000 af of surface water that would otherwise be diverted by Contra Costa Water District (CCWD) at its Rock Slough, Old River, and/or Middle River intakes under Reclamation's CVP water rights, as part of CCWD's available CVP contract allocation. The water will instead be diverted at the SWP Clifton Court Forebay for pumping at Banks Pumping Plant and delivery via the South Bay Aqueduct to ACWD and Zone 7 in 2016. An equivalent amount of SWP water will be diverted to CCWD in 2015 to initiate the one-for-one exchange; this SWP water is return water from ACWD and Zone 7's Semitropic Water Storage District and Cawelo Water District groundwater banking programs. The transfer of SWP water to CCWD under Department of Water Resources Permits 16478 and 16479 was approved by a State Water Board Order dated January 20, 2015.

In order to recover water previously stored in the Semitropic and Cawelo groundwater banking facilities for use during the peak summer demand period in 2016, CCWD, ACWD, and Zone 7 are proposing the exchange of SWP and CVP supplies described above.

The transfer will be subject to provisions of Reclamation's Permits 12721, 11967, 12722, 12723, 12725, 12726, 11315, 11316, 11968, 11969, 11971, 11973, and 12364 (Permits 12721 et al.) and Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) under the federal Endangered Species Act (ESA).

¹ Reclamation's petitions were filed under Permits 12721, 11967, 12722, 12723, 12725, 12726, 11315, 11316, 11968, 11969, 11971, 11973, and 12364 (Applications 5626, 5628, 9363, 9364, 9366, 9367, 13370, 13371, 15374, 15375, 16767, 17374, and 17376, respectively).

2.0 BACKGROUND

Information on Reclamation's water rights involved in this transfer is available online through the Division's eWRIMS electronic database. The transfer has been reviewed by Division staff to ensure that the transfer quantities and season are within the scope of the existing rights and that the source of transfer water is an authorized source under the water rights.

Reclamation's water rights involved in the transfer are extensive. Reclamation's CVP facilities (Shasta Project, Trinity Project and Folsom Project) divert from multiple sources. The sources located upstream of the transfer location are not listed herein, but are available in the Division's eWRIMS records. Under Reclamation's rights, water may be used for irrigation, domestic, municipal, industrial, salinity control, water quality control, fish and wildlife enhancement, stockwatering, recreation, and incidental power.

2.1 Place of Use and Point of Diversion under the Proposed Transfer

The present place of use of water diverted under Reclamation's permits is the entire consolidated CVP place of use shown on maps on file with the State Water Board. The petitions request the temporary addition of the service area for Zone 7 as a place of use. The ACWD service area is within the CVP service area, except for a small area in the southeastern part of ACWD that is outside the distribution pipelines of ACWD and cannot receive water. Therefore, only the Zone 7 service area needs to be added as a temporary place of use for this transfer. The State Water Project (SWP) Clifton Court Forebay will be temporarily added as a point of diversion/rediversion to Reclamation's permits so that CVP water can be diverted to ACWD and Zone 7.

2.2 Governor's Proclamations of a Drought State of Emergency

On January 17, 2014, Governor Edmund G. Brown Jr. issued a Proclamation of a Drought State of Emergency (Proclamation). The Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmers' long-term investments at risk. The conditions also threaten the survival of animals and plants that rely on California's rivers, including many species in danger of extinction.

The Proclamation refers to the Governor's Executive Order B-21-13 (Executive Order) issued on May 20, 2013 for the purpose of streamlining approval for water transfers to address the dry conditions and water delivery limitations to protect California's agriculture. The Executive Order directs the State Water Board and DWR to expedite processing of water transfers (in accordance with the California Water Code) and to assist water transfer proponents and suppliers, as necessary, provided that the transfers will not harm other legal users of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. The State Water Board and DWR were also directed to make all efforts to coordinate with relevant federal agencies, water districts, and water agencies to expedite the review and approval of water transfers in California.

On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency (April Proclamation). The Governor reiterates direction to DWR and the State Water Board to immediately and expeditiously process requests to move water to areas of need, including requests involving voluntary water transfers. If necessary, DWR will request that the State Water Board consider changes to water right permits to enable such voluntary movements of water. The April Proclamation also states that for actions taken pursuant to Directive 2 (water transfers), Section 13247 of the California Water Code is suspended. California Water Code Section 13247 requires that state offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the State Water Board, unless otherwise directed or authorized by statute in which case they shall indicate to the regional boards in writing their authority for not complying with such plans.

On December 22, 2014, Governor Brown issued Executive Order B-28-14 which extended the waiver of Water Code Section 13247 in paragraph 9 of the January 2014 Proclamation, and paragraph 19 of the April 2014 Proclamation, through May 31, 2016.

On April 1, 2015, the Governor issued Executive Order B-29-15 to save water, increase enforcement of water laws, streamline government response to the drought, and invest in new water. It references that the orders and provisions of the January and April 2014 Proclamations are still in effect, unless otherwise modified. The provisions of the January and April 2014 Proclamations relating to streamlining approval of water transfers are still in effect.

2.3 State Water Board Water Unavailability Actions

In April and early May 2015, the Executive Director for the State Water Board issued Water Unavailability Notices (Notices) for all post-1914 water rights in the Sacramento and San Joaquin River watersheds and the Delta. The direct diversion and collection of water to storage under Reclamation's Permits 12721, 12722, 12723, 12725, 12726, 11315, 11316, and 12364 were subject to the Notices. However, releases of water collected to storage prior to issuance of the Notices, such as in the case of this transfer, are not subject to curtailment.

3.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On September 8, 2015, public notice of the petitions for temporary change was provided by posting on the Division's website and via the State Water Board's LYRIS e-mail notification system. In addition, on September 8, 2015, Reclamation noticed the project via publication in the Sacramento Bee newspaper and mailed the notice via first class mail to interested parties. No comments were received.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Reclamation filed petitions for temporary transfer of water pursuant to California Water Code Section 1725, et seq. California 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.

In addition to any obligation the State Water Board may have under CEQA, the Board 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 may approve a temporary change due to a transfer of water only if it determines that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) The independent evaluation of impacts to public trust resources was conducted concurrent with the California Water Code Section 1727 evaluation.

5.0 REQUIRED FINDINGS OF FACT

5.1 Transfer Only Involves 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 California 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 Section 1011. (Wat. Code, §§ 1725, 1726.) California 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."

In the absence of the transfer, CCWD would have diverted its CVP contract water for use in its service area. The transfer results in no net increase in diversions from the Delta and no increase in allocations of SWP or CVP water to ACWD, Zone 7, or CCWD, respectively.

In light of the above, I find, in accordance with California Water Code Section 1726, subdivision (e) that the amount of water proposed for transfer pursuant to this Order would be consumptively used or stored in the absence of the proposed temporary change.

5.2 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 California 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).)

In general, the transfer of water that would otherwise be consumptively used will not result in injury to other legal users of the water. In the absence of the proposed transfer, CCWD would have diverted its CVP contract water at Rock Slough, and/or Old River and/or Middle River intakes for use in its service area. Net pumping from the Delta would not increase as a result of this transfer. There will be no significant change in streamflow, water quality or timing of diversions or return flows. Also, there will be no increase in net diversions under DWR's or Reclamation's water rights or allocations of SWP or CVP water to ACWD, Zone 7, or CCWD, respectively.

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

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

Before approving a temporary change due to 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).) In accordance with California Code of Regulations Section 794 (c), Petitioners provided California Department of Fish and Wildlife (CDFW) and the applicable Regional Water Quality Control Board (Regional Board) with a copy of the petition. CDFW and the Regional Board did not provide any information regarding potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses.

The surface water under CVP contract that is foregone will be diverted from Clifton Court Forebay at the Banks Pumping Plant. All water diverted from Clifton Court Forebay at the Banks Pumping Plant is done in accordance with the criteria contained in State Water Board Revised Water Right Decision 1641 (D-1641) and the BOs. DWR and Reclamation will continue to meet the objectives specified in D-1641 or any subsequent Orders in effect at the time of the export, as well as the requirements contained in the BOs. The quantity of transfer water to be conveyed through the Delta, including other currently planned transfers, is well within the quantities analyzed in the environmental documents issued for the BOs. The transfer will not result in a measurable change in quantity or quality of return flows. There will be no net increase in pumping from the Delta.

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

6.0 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.

7.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by California 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 petitions filed for temporary change for the transfer of up to 5,000 af of water under Permits 12721 et al. are approved.

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

1. The transfer is limited to the period commencing on the date of Order issuance and continuing for up to one year.
2. The points of diversion/rediversion under Reclamation's Permits 12721 et al. are temporarily amended to add:

Clifton Court Forebay – North 2,126,440 feet and East 6,256,425 feet, Zone 3, NAD 83 shown on Figure 2 submitted with the petition for this transfer.
4. Rediversion of water from Clifton Court Forebay at the Banks Pumping Plant is subject to compliance by the operators with the objectives currently required of DWR and Reclamation set forth in Tables 1, 2, and 3 on pages 181-187 of D-1641, or any future State Water Board order or decision implementing Bay-Delta water quality objectives at those points of diversion/rediversion, including compliance with the various plans required under D-1641 as prerequisites for the use of the Joint Points of Diversion by DWR and Reclamation. Rediversion of water is also subject to compliance by DWR and Reclamation with all applicable BOs and court orders and any other conditions imposed by other regulatory agencies applicable to these operations.
5. The State Water Board has issued Water Unavailability Notices to Reclamation under Permits 12721, 12722, 12723, 12725, 12726, 11315, 11316, and 12364. Accordingly, only water collected in storage prior to issuance of the Notices may be transferred.
6. Reclamation is responsible for providing the Deputy Director for Water Rights a monthly report describing the transfer of water pursuant to this Order until such time as the transfer has been completed. The report shall include the daily average rate of water diverted and daily volume of water diverted from Clifton Court Forebay at the Banks Pumping Plant pursuant to this Order.

If the above required information is in the possession of DWR and Reclamation and has not been provided to ACWD and Zone 7 in time for inclusion in a monthly or annual report, ACWD and Zone 7 shall provide the information to the Deputy Director for Water Rights within 30 days of receipt.

7. Pursuant to California Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and 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.

8. 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 & G. Code, §§ 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531 to 1544). If a “take” will result from any act authorized under this temporary transfer, the permittees shall obtain authorization for an incidental “take” permit prior to construction or operation. Permittees shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this Order.
9. 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:
JOHN O'HAGAN, FOR

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: SEP 28 2015