

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF PERMITS 13856 AND 13858 (APPLICATIONS 18085 AND 18087)
PETITIONS 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,
South Fork Long Canyon, North Fork Long Canyon

COUNTY: Placer and Sacramento

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITIONS

On April 23, 2013, Placer County Water Agency (PCWA or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), two petitions for Temporary Change under Water Code Section 1725, et seq. Pursuant to the petitions, PCWA seeks to transfer up to a combined total of 20,000 acre-feet (af) of water to Westlands Water District (WWD). 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

The water to be transferred is currently stored in French Meadows Reservoir and Hell Hole Reservoir (the major storage facilities of PCWA's Middle Fork Project) under Permits 13856 and 13858 (Applications 18085 and 18087). The Petitioner proposes to transfer up to 10,000 af of water under water right Permit 13856 and up to 10,000 af of water under Permit 13858 to WWD. The transfer water would be released from PCWA's Ralston Afterbay Reservoir on the Middle Fork American River and would be routed through Folsom Reservoir, thence the lower American River for eventual rediversion at the Harvey O. Banks Pumping Plant and/or Bill Jones Pumping Plant (Delta Pumps) for conveyance to WWD. Transfer releases would be scheduled in cooperation with the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation).

On April 26, 2013, PCWA submitted a request to amend the petitions for change based on a requirement by Reclamation to execute a Warren Act Agreement with WWD authorizing the storage of transfer water in Folsom Reservoir, which is a Reclamation facility. Reclamation requested PCWA to modify its operational plan for release of the 20,000 af of transfer water to Folsom Reservoir. The modified operation plan would require PCWA to release not less than 10,000 af in May and the balance of the 20,000 af in June, rather than scheduling the releases over July, August, and September, as originally proposed in the petitions, in order to provide enhanced environmental benefits and flexibility in Reclamation operations. PCWA plans to provide the early release of water into Folsom Reservoir once Reclamation has authorized the Warren Act Agreement.

In the absence of this transfer, the 20,000 af of water would remain in storage in French Meadows Reservoir and Hell Hole Reservoir.

2.0 BACKGROUND

2.1 Substance of PCWA's Permits

Permits 13856 and 13858 authorize PCWA to divert to storage up to a maximum of 133,700 af per annum (afa) in French Meadows Reservoir and up to 208,400 afa in Hell Hole Reservoir. These permits also authorize direct diversion of 2,025 cubic feet per second (cfs) between November 1 and July 1 of each year. The authorized purposes of use under Permits 13856 and 13858 are irrigation, municipal, industrial, recreation, and incidental domestic use. The authorized place of use is shown on PCWA's map set dated July 31, 1996.

2.2 The Middle Fork Project

PCWA owns and operates the Middle Fork Project (MFP), on the Middle Fork American River, Rubicon River, and tributaries for domestic, municipal, industrial, recreational, irrigation uses, as well as for the generation of electrical energy. The MFP consists of the French Meadows and Hell Hole Reservoirs, with a combined storage capacity of approximately 342,000 af, and associated canals, pipelines, powerhouses, and regulating reservoirs. French Meadows Reservoir is located on the Middle Fork American River and Hell Hole Reservoir is located on the Rubicon River (which is tributary to the Middle Fork American River).

Water stored in French Meadows Reservoir may be pumped via underground pipeline to Hell Hole Reservoir and PCWA uses Hell Hole reservoir as the release point for most of the water it uses for power generation.

2.3 Proposed Temporary Changes

The proposed temporary change would: 1) allow rediversion of transfer water¹ at the State Water Project (SWP) and/or federal Central Valley Project (CVP) Delta pumps; and, 2) add the service area of WWD to the authorized place of use under Permits 13856 and 13858 for irrigation.

2.4 Governor's 2013 Executive Order to Streamline Approvals for Water Transfers

On May 20, 2013, Governor Edmund G. Brown Jr. issued Executive Order B-21-13 to streamline approvals for water transfers to address the dry conditions and water delivery limitations in 2013 to protect California's agriculture. The Governor's Order directs the State Water Board and DWR to expedite the review and processing of temporary transfers for 2013 (in accordance with the 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.

3.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On May 3, 2013, public notice of the petition for temporary change was provided as follows:

1) via first class mail to interested parties; 2) by posting on the Division's website; and 3) via the State Water Board's LYRIS email notification program. In addition, on April 30, 2013, the Petitioner noticed the project via publication in the Sacramento Bee newspaper.

¹ Less Delta carriage and conveyance losses.

3.1 Joint Comments by California Water Impact Network, California Sportfishing Protection Alliance and AquAlliance (Environmental Commenters)

On June 3, 2013, the environmental commenters indicated their concerns regarding the transfer proposal. The concerns extend beyond the scope of the current transfer, and encompass all pending 2013 water transfers being processed by the State Water Board. To expedite transfer processing, the concerns are not repeated herein; however, the State Water Board response letter, dated the same date as this order, is incorporated by reference. The response letter details the issues raised by the environmental commenters.

State Water Board Response:

The State Water Board response letter identifies a need to evaluate the following issues in the present order: (a) whether there is a change in return flow associated solely with the transfer, and (b) whether the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee in the absence of the proposed temporary change or conserved pursuant to Water Code section 1011.

In addition, the response letter indicates that use of the Delta Pumps for transfer purposes should be conditioned on compliance by DWR and Reclamation with Decision 1641, all applicable biological opinions and court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.

The objection is addressed upon a finding that: (a) no change in return flows is occurring, and (b) the transfer only involves water that would have been consumptively used or stored. Approval of the petition is also contingent on inclusion of the Delta pumping condition. The required evaluations are found in Section 5 of this order.

3.2 Comments of Richard Morat

On May 4, 2013, Richard Morat commented on the proposed transfer. The Morat comments were similar to, but not as extensive as, the environmental commenters concerns.

State Water Board Response:

The State Water Board response letter, dated the same date as this order, refers Mr. Morat to the more extensive responses provided to the environmental commenters. The information identified in item 3.1 also addresses the Morat objection.

3.3 Comments of DWR

On May 23, 2013, DWR objected to the proposed transfer based on potential injury to its water rights. DWR is concerned that the transfer has the potential to impact the SWP if the water released in 2013 and conveyed to WWD is refilled at times when it will diminish the flows otherwise available to the SWP under its permitted water rights. PCWA has agreed to execute a refill agreement with Reclamation to account for any potential refill impacts. DWR requested that any transfer order include a condition requiring the execution of a refill agreement acceptable to DWR.

State Water Board Response:

Refill criteria are needed to ensure that the refill of Folsom Reservoir (Middle Fork Project) resulting from the proposed temporary change does not adversely impact operations and/or water rights of the SWP or CVP or other downstream water rights. This Order includes a condition requiring the execution of a refill agreement acceptable to DWR.

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Petitioner filed the petitions for temporary transfer of water pursuant to Water Code section 1725, et seq. 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 Water Code section 1727 evaluation.

5.0 REQUIRED FINDINGS OF FACT

5.1 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 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 petitions state that the 20,000 af of proposed transfer water is currently in storage in the 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.

5.2 No Injury to Other Legal Users of 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 Permits 13856 and 13858. 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. Therefore, no injury to other legal users of water would occur since the water is to be transferred.

PCWA will enter into a reservoir refill agreement with Reclamation that is acceptable to DWR ensuring that future refill of any storage space in 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.

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 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).) The Department of Fish and Wildlife (DFW) was provided a copy of the subject petitions and did not submit comments or concerns regarding the temporary change. The Petitioner has stated that the early release of 20,000 af of MFP water over a 46-day period in May and June will provide enhanced environmental benefits to the coldwater pool in Folsom Reservoir, which would assist Reclamation in maintaining favorable temperature conditions for aquatic species in the lower American River as water is released to the transferee.

Rediversion of water at the Delta pumping plants pursuant to this Order is subject to compliance by the SWP and CVP project operators with the objectives currently required of DWR and Reclamation set forth in Tables 1,2, and 3 on pages 181-187 of Decision 1641 (D-1641), including compliance with the various plans required under D-1641. Rediversion at these facilities pursuant to this Order is also subject to compliance by the operators with all applicable biological opinions and any court orders applicable to these operations.

In light of the above, I find in accordance with 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 2010-0029.

7.0 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 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 10,000 af of water under each permit are approved.

All existing terms and conditions of Permits 13856 and 13858 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 for one year.
2. The place of use under Permits 13856 and 13858 is temporarily expanded to include the service area of WWD as shown on map submitted with the petition and on file with the State Water Board under Application 18085.
3. The Delta Pumps are temporarily added as authorized points of diversion under Permits 13856 and 13858.
4. Rediversion of water at the Delta pumps 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 State Water Board Revised Decision 1641 (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 biological opinions and court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.
5. Water may not be transferred through the Delta pumps until Petitioner has implemented a Refill Agreement between Reclamation and Petitioner to address potential refill concerns in Folsom Reservoir. The executed Refill Agreement must be acceptable to DWR. Documentation that an acceptable Refill Agreement has been agreed to by Reclamation, DWR and Petitioner shall be submitted to the Division within 15 days of the date of execution of the agreement.
6. During the period of transfer, petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies. This Order shall not be construed as authorizing the violation of any agreement entered into by the petitioner.
7. Within 90 days of the completion of the transfer, but no later than October 1, 2014, the petitioner shall provide 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 the corresponding volume of water released from Hell Hole Reservoir 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 this transfer (reported on a daily basis); and
 - c. The value of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis).

Should the value of the Refill Reservation exceed zero at the time of this report, PCWA shall submit subsequent reports by June 1 of each year until the Refill Reservation equals zero. These reports shall include the daily values of the Refill Reservation.

8. Pursuant to 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 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.

9. This order does not authorize any act that results in the taking of a threatened or endangered species or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code, §§ 2050-2097) or the federal Endangered Species Act (16 U.S.C.A. §§ 1531-1544). If a "take" will result from any act authorized under this transfer, the petitioners shall obtain authorization for an incidental take permit prior to construction or operation. Petitioners shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.
10. I reserve 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:
JAMES W. KASSEL FOR

Barbara Evoy, Deputy Director
Division of Water Rights

Dated: JUN 27 2013