



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

Chris Shutes

FERC Projects Director

Water Rights Advocate

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June 14, 2010

Ms. Victoria Whitney, Deputy Director
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
(via e-mail and surface mail)

Re: Protest/Comments on Petition for Temporary Change under License 11360
(Application 12622) of the City of Sacramento and the Sacramento Suburban Water
District

Dear Ms. Whitney:

The California Sportfishing Protection Alliance (CSPA) has reviewed the petition for a proposed Temporary Change under License 11360, Application 12622 of the City of Sacramento and the Sacramento Suburban Water District, to transfer 4,377 acre-feet of water to eight State Water Contractor Agencies between July 1, 2010 and September 30, 2010. The petition was noticed on May 13, 2010. We offer the following comments.

The proposed temporary change is not temporary.

Water Code Section 1728 defines a temporary change: "For the purposes of this article, a temporary change means any change of point of diversion, place of use, or purpose of use involving a transfer or exchange of water or water rights for a period of one year or less." Water Code Section 1735 says: "A long-term transfer shall be for any period in excess of one year."

Petitioner states on page 2 of its petition: "The proposed transfer would substantially repeat the 2009 water transfer SSWD made through DWR's Drought Water Bank, which was approved by the SWRCB in Order WR 2009-0054-DWR."

This is thus the second consecutive year that Sacramento Suburban has petitioned for water transfer to many if not most of the same recipients. By the plain meaning of Water Code Section 1728, this petition should not be considered as a temporary transfer because it contemplates a second year of the same action. It should be considered a long-term transfer under Section 1735 of the Water Code.

Unlike changes, including transfers, under Water Code Section 1728, transfers under Water Code Section 1735 are not exempt from CEQA analysis under the Water Code Section 1729 exemption. The proposed change should therefore be analyzed under CEQA.

Falling under the requirement for CEQA analysis, the rules governing analysis of cumulative effects of the proposed long-term transfer should also apply. This is in notable distinction from Water Code Section 1727(e), which limits consideration of effects to the incremental effect of a temporary transfer alone, as opposed to the more comprehensive burden of the cumulative effects analysis under CEQA, which requires analysis of a proposed project in combination with other known or reasonably foreseeable actions that affect the environment.

The statutory limitation under Water Code Section 1727(d), which does not allow consideration of the ongoing effects to the public trust under the water right for which a temporary change is sought, also does not apply to long-term transfers. In addition to a CEQA analysis, a public trust analysis of License 12622, Application 11360 should therefore be conducted by the State Board.

Non-response by the Department of Fish and Game does not necessarily denote absence of fisheries impacts.

In response to several comment letters regarding water transfers that CSPA filed in 2009, the State Board included a default response that read: “DFG was provided a copy of the subject petition and did not submit comments or concerns regarding the temporary change” (see, e.g., Order WR 2009-0040-DWR, page 6). The decision by DFG not to comment on transfers in 2009 reflected a policy decision and perhaps a workload decision made by DFG management, and likely its superiors in Resources and the Governor’s office. The State Board should not draw conclusions of substance based on failure by DFG to engage procedurally, either in 2009 or, should it come to pass, in 2010. The CEQA and public trust analyses that are required for the City of Sacramento and Sacramento Suburban’s proposed transfer due to its long-term character will adequately disclose and analyze impacts to fisheries, including cumulative impacts in the Bay-Delta. CSPA reminds the Board that DFG submitted substantial written and oral testimony in the Delta Flow Proceeding conducted by the Board in January through March, 2010 regarding the dire condition of Bay-Delta fisheries, and also submitted extensive recommendations for greatly increased Delta outflow based on an equitable allocation of responsibility. The CEQA and public trust analyses for the proposed transfer should consider cumulative effects of the proposed project in light of the recommendations of DFG and other resource agencies and non-governmental organizations, including CSPA, in the Delta Flow Proceeding.

Conclusion

The requested transfer should be denied as a temporary transfer under Section 1725 of the Water Code. As a long-term transfer under Section 1735 of the Water Code, the proposed transfer should be analyzed under CEQA. The CEQA analysis should evaluate cumulative effects, not merely incremental effects.

As part of consideration of the long-term transfer, the Board should also conduct a public trust analysis of the petitioner's license.

Thank you for the opportunity to comment on the Petition for Temporary Change under License 11360 (Application 12622) of the City of Sacramento and the Sacramento Suburban Water District.

Respectfully submitted,



Chris Shutes
Water Rights Advocate
California Sportfishing Protection Alliance

Certificate of Service

I hereby certify that on this day, June 14, 2010, I, Chris Shutes, have placed in first class mail at Berkeley, California, a true copy of this protest mailed to:

City of Sacramento
c/o Joe Robinson, Senior Deputy City Attorney
City Attorney's Office
915 I Street, 4th Floor
Sacramento, CA 95814

and

Sacramento Suburban Water District
c/o Joshua Horowitz
Bartkiewicz, Kronick & Shananan
1011 22nd St.
Sacramento, CA 95816-4907


Chris Shutes

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. BOX 2000, Sacramento, Ca. 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterrihts.ca.gov>

PROTEST – (Petitions)

BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS
Protests based on Injury to Vested Rights should be completed on other side of this form

APPLICATION: 12622 LICENSE: 11360

We, the California Sportfishing Protection Alliance; Chris Shutes, 1608 Francisco St., Berkeley, CA 94703; Bill Jennings, 3536 Rainier Ave., Stockton, CA 95204; and Michael Jackson, P.O. Box 207, 429 West Main St., Quincy, CA 95971. (Name and address of Protestant)

have read carefully a petition for temporary transfer of water under Section 1725 of the Water Code, of the City of Sacramento and the Sacramento Suburban Water District, under application 12622 for license 11360, noticed on May 13, 2010, to transfer 4,377 acre-feet of water, by reducing the City's diversion from the American River at Fairbairn Water Treatment Plant in that amount, to eight State Water Contractor agencies (the Dudley Ridge Water District, Kern County Water Agency, Napa County Flood Control and Water Conservation District, the Metropolitan Water District of Southern California, Antelope Valley-East Kern Water Agency, Oak Flat Water District, Palmdale Water District, and the San Bernardino Valley Municipal Water District). Petitioner proposes to substitute groundwater for surface water whose licensed diversion is foregone.

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

- (1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
- (2) not best serve the public interest** x
- (3) be contrary to law** x
- (4) have an adverse environmental impact** x

State Facts, which support the foregoing allegations:

Please see attached comment letter for supporting facts and discussion.

Under what conditions may this protest be disregarded and dismissed? The requested transfer should be denied as a temporary transfer under Section 1725 of the Water Code. As a long-term transfer under Section 1735 of the Water Code, the proposed transfer should be analyzed under CEQA. The SWRCB should also conduct a public trust analysis of license 11360. CSPA reserves the right to state additional dismissal terms based on review of the CEQA document and the public trust analysis.

A true copy of this protest has been served upon the petitioner by mail.

(Personally or by mail)

Date: June 14, 2010.

Chris Shutes, Water Rights Advocate,

Bill Jennings, Executive Director

Michael Jackson

California Sportfishing Protection Alliance



Protestant(s) Authorized Representative sign here

Certificate of Service

I hereby certify that on this day, June 14, 2010, I, Chris Shutes, have placed in first class mail at Berkeley, California, a true copy of this protest mailed to:

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