



State Water Resources Control Board

JUN 27 2013

In Reply Refer to:
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Dear Sir or Madam:

COMMENTS ON TEMPORARY TRANSFERS REQUESTED BY DEPARTMENT OF WATER RESOURCES, U.S. BUREAU OF RECLAMATION, CONAWAY PRESERVATION GROUP, ETC. (SEE LIST BELOW)

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division), has received the June 3, 2013 joint comments filed by California Water Impact Network, California Sportfishing Protection Alliance and AquAlliance (commenters) on the transfers listed below:

1. Transfer of 20,000 acre-feet (af) to Westlands Water District under Placer County Water Agency's (PCWA) Permits 13856 and 13858 (Applications 18085 and 18087);
2. Transfer/Exchange of up to 196,000 af under Department of Water Resources Permit 16479 (Application 14443) and the Specified License and Permits of the US Bureau of Reclamation (Reclamation);
3. Transfer of 1,730 af from Pelger Mutual Water Company to San Luis and Delta-Mendota Water Authority (SLDMWA) under License 8547B (Application 12470B);
4. Transfer of 3,520 af from Tule Basin Farms to State Water Contractor Agencies under License 2840 (Application 10030);

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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5. Transfer of 5,000 af from Garden Highway Mutual Water Company to State Water Contractor Agencies under License 2033 (Application 1699);
6. Transfer of 1,100 af from Eastside Mutual Water Company to SLDMWA under License 3527 (Application 11274);
7. Transfer of 7,175 af from Reclamation District No. 1004 to the SLDMWA under License 3165 (Application 27);
8. Transfer of 8,100 af from Pleasant Grove-Verona Mutual Water Company to SLDMWA under Licenses 6389A (Application A07641A), 6389C (Application A07641C), 11001 (A015606), 7064A (A015856A), 7064B (A015856B), 7064C (A015856C), and 6399 (A015858);
9. Transfer of 8,000 af from Conaway Preservation Group to SLDMWA under License 5487B (Application 12073B);
10. Transfer of 3,658 af from City of Sacramento and Sacramento Suburban Water District to State Water Contractor Agencies under Permit 11360 (Application 12622)

The commenters request that all of the transfer requests be denied on the basis that the temporary water transfers are injurious to existing water right holders throughout the Sacramento Valley region, detrimental to the ecosystems of the Bay-Delta Estuary since they involve Delta export pumping, and groundwater substitution pumping threatens to result in loss of surface flow to groundwater recharge from surface streams.

The standard for review of temporary changes due to transfer of water is set forth in Water Code section 1727, and requires the following findings:

- (a) The proposed temporary change would not injure any legal user of 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;
- (b) The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

Water Code section 1732 requires any temporary change petition substituting groundwater for surface water foregone to comply with sections 1745.10 and 1745.11 of the Water Code. Section 1745.10 states that groundwater substitution transfers may not occur unless the groundwater use is either:

- (a) Consistent with a groundwater management plan adopted pursuant to state law for the affected area, or

- (b) In the absence of an adopted groundwater management plan, self-certified by a water supplier that the transfer will not create, or contribute to, conditions of long-term overdraft in the affected groundwater basin.

Water Code section 1745.11 allows transfer of previously recharged groundwater from an overdrafted groundwater basin or replacement of transferred surface water with groundwater previously recharged into an overdrafted groundwater basin, if the recharge was part of a groundwater banking operation carried out by direct recharge, delivery of surface water in lieu of groundwater pumping, or by other means, for storage and extraction.

Following are the main issues raised by the commenters and the State Water Board Responses.

1. The petitions fail to demonstrate no injury to other water right holders.

Injury to Prior Right Holders

The commenters assert potential injury to prior water rights. The commenters, however, did not identify any water rights which they hold, nor did they identify injury to specific, named water rights of others. Consequently, this response does not include any evaluation of injury to specific water rights.

To support the claim of injury, the commenters assert that it is inappropriate to approve the transfers when other water right holders with Term 91 in their water rights must discontinue water diversion. The transferors maintain water rights that: (a) either have sufficient priority that direct diversion and/or storage is not curtailed by Term 91, (b) plan to transfer water stored during a time when Term 91 was not in effect, or (c) are part of the State Water Project (SWP) or Central Valley Project (CVP) and such rights do not include Term 91. Under routine operating conditions, the transferors are not required to make water available to other right holders to alleviate the burden of such right holders to comply with Term 91. This situation is unchanged when considering the transfers. The Term 91 water right holders lack the ability to divert water when the term is in effect, irrespective of whether the transfers are approved. This should not be construed as an impact of the transfers on other legal users of water.

This issue is evaluated further by the petitioners in the June 14, 2013 joint response letter of petitioners (1) through (8). The petitioners concluded that any additional flow supplied by transferors under senior water rights actually benefits junior right holders whose water rights are subject to Term 91 because the additional non-project surface water foregone by transferors no longer would be consumed in the customary place of use, but instead remains in the Sacramento River system and increases the flow through the Delta. As a result of such increases in flow, the transferors assert that the CVP and SWP may be able to decrease required storage releases necessary to meet Delta water quality requirements, and may therefore increase the chance that the Delta will return to balanced conditions and eliminate the necessity for curtailment under Term 91. Thus, there is a potential benefit to junior water right holders subject to Term 91.

The commenters reference a July 2012 DWR memorandum entitled, "Water Transfer Approval: Assuring Responsible Transfers". The commenters interpret the DWR memorandum as finding that the transferred water portion of a water right is subordinate to existing uses – even existing uses of junior right holders. This information was used to support the Term 91 priority argument. The water right priority issue was addressed above. Although DWR and the State Water Board coordinate regarding water transfers, the two processes are separate. Therefore, we will not respond to the June 3 comments on the DWR process.

Water Available for Transfer

The commenters assert that there is a lack of available water in the Delta and provide information related to Delta water supply and water supplied by return flows. The commenters note that a water availability analysis (WAA) supporting the transfer petitions was not prepared. A WAA is only required for issuance of new appropriative water rights. The present matter does not involve issuance of new water rights.

The commenters indicate a concern regarding the quantities of return flow available for use in the Delta. For transfer purposes, it is sufficient to evaluate whether there is a change in return flow associated solely with the transfer. Such evaluations will be included in the transfer orders.

Although the commenters indicated concern regarding Delta flows, the appropriate evaluation for temporary transfers is whether 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. 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 otherwise been removed from use in the downstream water supply as a result of direct diversion." An evaluation and determination of whether the transfer provision has been met will be made separately for each of the ten transfer requests.

2. The petitions fail to demonstrate they would not have unreasonable effects on fish, wildlife, and other instream beneficial uses.

Delta Pumps

The commenters assert that the transfer petitions include the service areas of either the State Water Project or the Central Valley Project or, in some cases, both. These additions to the place of use result in a water transfer that requires pumped export from either the State Water Project's Banks Pumping Plant or the Central Valley Project's Jones Pumping Plant, or both. The commenters assert that diversions by Reclamation and DWR routinely violate interior South Delta salinity objectives. These violations are said to injure in-Delta water rights, in-Delta fish, wildlife and other instream beneficial uses. This assertion is related to ongoing diversion practices of Reclamation and/or DWR, not the proposed transfers.

The comment letter also states that the Delta pumps entrain fish, phytoplankton and other food sources, kill fish and enhance predation by predatory fish species. Thus, the June 3

letter indicates that use of the Delta pumps should be limited to existing exports, not transfer water.

As noted in previous water transfer orders (see Order WR 2010-0022-DWR, for example), redirection 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 to 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/redirection, 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.

Redirection 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.

The commenters indicate that the analysis provided by the various petitioners that provision of additional Delta flows in the stream reaches between the current authorized points of diversion under the transferor's water rights and the Delta pumps "may" provide benefits for fisheries and wildlife is insufficient. The commenters assert that the State Water Board lacks a preponderance of evidence for finding that the proposed temporary changes would not unreasonably affect fish, wildlife, or other instream beneficial uses. The State Water Board has evaluated the information provided in the individual petitions and has also reviewed the responses to the commenters' letter from the following: 1) a joint response from petitioners (3) through (10) above, including David & Alice Te Velde Revocable Family Trust (Te Velde)¹; 2) individual responses from PCWA and Reclamation; and 3) individual responses regarding groundwater substitution information specific to each water right(s) from petitioners (3) through (10) above as well as Te Velde.

The June 14, 2013 joint response letter provides a list of the evidence before the State Water Board establishing that the proposed temporary changes will not unreasonably affect fish, wildlife or other instream beneficial uses, as follows:

- 1) Temporary changes will comply with the Biological Opinions issued by the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for the long-term operations of the CVP and SWP (OCAP BOs);
- 2) Specifically, operation of the Banks and Jones Pumping Plants are governed by the OCAP BOs. The BOs were issued in 2008 (USFWS) and 2008 (NMFS), and are based on CALSIM modeling of SWP and CVP operations;

¹ The commenters identified transfers 1 through 10 above as the subject of their letter. The list of transfers did not include the proposed transfer of up to 4,000 af of water from Te Velde to SLDMWA under Licenses 9994, 9995, 9996, and 9997 (Applications 3423, 4901, 4902, and 5359, respectively). Te Velde joined in joint response letter and also provided an individual response.

- 3) The OCAP BOs are based on CALSIM modeling of SWP and CVP operations, which includes up to 600,000 af of water transfers from July 1 through September 30 of each year;
- 4) The Reasonable and Prudent Alternatives (RPAs) contained in the OCAP BOs do not include export restrictions during the July 1 through September 30 period;
- 5) Although the transfers are being approved for one year periods, movement of water through the Delta pumps is constrained by the OCAP BOs which will effectively limit the transfer period to July 1 through September 30;
- 6) California Department of Fish and Wildlife (CDFW) did not file any comments on the transfers. Therefore, the transferors concluded that CDFW did not identify any harm to the public trust resources for which it is the trustee agency;
- 7) Similarly, the USFWS and NMFS did not file any comments on the transfers or identify any concerns regarding potential impacts to public trust resources and instream beneficial uses;
- 8) Diversion of water at the Banks and Jones Pumping plants is subject to compliance with the objectives set forth in Decision 1641, or any future State Water Board order or Decision implementing Bay-Delta water quality objectives;
- 9) Petitioners proposed groundwater substitution or other transfers, which results in additional surface water flows instream to the point of transfer diversion at the Delta Pumps; and
- 10) Historical data as set forth in reporting filed by these and other Petitioners that have participated in previous groundwater transfers demonstrates that groundwater levels have recovered promptly after past groundwater substitution transfers and that no injury has occurred to any surface water diverter or groundwater pumper during or after the completion of such transfers;

The June 3 letter cites the State Water Board's 2010 determination that additional Delta flows are necessary to recover Delta fisheries as showing the need for additional Delta flows. The June 14, 2013 joint response provides a detailed analysis of this issue. After evaluating all available information, the Division concludes that the transfers will result in greater inflow and will not result in less outflow.

The commenters indicated that the incremental transfer flows will occur in the June through September period, with some transfers commencing July 1. These flows are said to be at cross-purposes to the objective of shifting the Delta watershed hydrograph to mimic more natural unimpaired flow patterns. Modification of flow patterns would require State Water Board action to modify existing water rights, which is outside the scope of the current process. However, the State Water Board is currently engaged in a process to review potential changes to San Joaquin River flow and southern Delta water quality objectives and a program of implementation included in the Water Quality Control Plan for the Bay-Delta. Thus, while only the changes requested under the petitioned transfers are subject to review at this time there is another ongoing process to address this concern. The transfers are

consistent with existing diversion seasons under the various water rights and our review indicates that there will be no shift in timing of diversion and use of water. Therefore, this comment does not appear to raise a valid basis for objection.

For the environmental aspect of the objection, the appropriate evaluation is whether the transfers will result in an unreasonable effect on fish, wildlife or other instream beneficial uses. The transferors have met the burden of demonstrating that the temporary changes would not unreasonably affect fish, wildlife, or other instream beneficial uses.

3. The petitions fail to demonstrate consistency with approved groundwater management plans, or that they will not contribute to long-term overdraft of groundwater.

Groundwater substitution transfers

The commenters indicate that the groundwater substitution transfers fail to demonstrate that they are consistency with approved groundwater management plans, or that they will not contribute to long-term overdraft of groundwater. Division staff has reviewed the groundwater substitution transfers and notes that the information required by Water Code section 1745.10 was submitted by the petitioners. The Division notes that some of the transfers do not involve groundwater substitution.

The commenters indicate that the transferors have not made a prima facie showing of non-injury associated with the groundwater transfers. The transferors submittals include: (a) supporting documentation submitted with the petitions; and (b) the joint and separate response to comment letters listed under item (2) above. In addition to evaluating any potential impacts of the current transfers, the transferors evaluated the monitoring data associated with similar, past groundwater transfers to determine whether previous transfers had any impact on groundwater or surface water supplies. The transferors concluded: (a) both present and past transfers are consistent with approved groundwater management plans; (b) neither present nor past transfers contribute to long-term overdraft of groundwater; and (c) neither present nor past transfers impact surface water users.

For those entities seeking groundwater substitution transfers, the petitioners have submitted detailed information relative to potential impacts of the temporary transfers on surface water, historical groundwater pumping, groundwater well characteristics, groundwater monitoring and reporting elements, and associated maps to DWR and Reclamation. DWR and Reclamation are reviewing the proposals.

The June 3 comment letter indicates that the State Water Board needs to obtain the supporting data and analysis regarding groundwater substitution provided by the petitioners to DWR and Reclamation and make an independent appraisal. As part of the inter-agency coordination of the transfers program and to increase efficiency by eliminating redundant reviews, the State Water Board will consider the technical analysis performed by DWR and Reclamation. Only groundwater wells which have been approved by DWR and Reclamation will be used for the temporary transfers. The transfers will be conditioned to require the following:

- Only wells approved by Reclamation and DWR for suitability and acceptability may be used for groundwater substitution.

- The amount of transferable water credited to Petitioner's groundwater substitution water transfer operation is subject to the determination of Reclamation and DWR.
- Before commencing the groundwater substitution operation, Petitioner shall submit a Monitoring Program Plan and Mitigation Program Plan to DWR and Reclamation for evaluation and prior approval.
- Transferable water may be credited only during balanced conditions in the Sacramento-San Joaquin River Delta.

This condition will ensure that the transfers do not injure any legal user of 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. This condition resolves the objection to the groundwater substitution element of the transfers.

4. A programmatic environmental review of regional scope for water transfers must be conducted to prevent continuing serial transfers and illegal piece-mealing under both California Environmental Quality Act (CEQA) and the National Environmental Policy Act.

The commenters request that the State Water Board act on all transfers concurrently and consider the cumulative impacts of the ten transfer requests, rather than act on the individual transfers separately. Water Code section 1725, et seq., does not prohibit approval of a series of similar temporary changes in successive years. Accordingly, the proposed temporary change is not in violation of Water Code sections 1725 et seq. The Water Code does not require such action and doing so may unduly delay action on individual transfers.

The commenters ask that programmatic environmental review of regional scope for water transfers be conducted pursuant to CEQA. Pursuant to Water Code section 1729, transfers are exempt from CEQA. Accordingly, there is no CEQA requirement for cumulative review.

The commenters also request that the State Water Board lead evaluation of water transfers broadly as a program affecting the Delta watershed region. This request appears to exceed the required evaluation under the Water Code of whether the transfers would unreasonably affect fish, wildlife, or other instream beneficial uses. The State Water Board will include an evaluation of whether individual transfers would unreasonably affect instream resources in any orders issued, but will not broaden the review.

The issues described in this section do not appear to set forth any valid basis for objection.

In accordance with the draft Delta Plan regulations, the State Water Board and DWR are initiating a process to work with stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers and protect water rights and environmental resources. As an initial step, the agencies have been coordinating with CDFW regarding the transfer program. We anticipate having an ongoing dialogue with environmental stakeholders as this process moves forward.

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Barbara Williams
Bill Jennings

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If you require further assistance, please contact Katherine Mrowka at (916) 341-5363 or by email at kmrowka@waterboards.ca.gov. Written correspondence or inquiries should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Katherine Mrowka, P.O. Box 2000, Sacramento, CA, 95812-2000.

Sincerely,

ORIGINAL SIGNED BY:

James W. Kassel, Assistant Deputy Director
Division of Water Rights

cc: City of Sacramento and Sacramento
Suburban Water District
c/o Joshua M. Horowitz
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David and Alice Te Velde Revocable Family Trust
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