

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

WR ORDER 2005-0021-DWR

**IN THE MATTER OF PERMIT 16482 (APPLICATION 17512)
PETITION FOR TEMPORARY CHANGE
INVOLVING THE TRANSFER OF 20,000 ACRE-FEET OF WATER
TO SEVERAL CENTRAL VALLEY WILDLIFE REFUGES
UNDER CALIFORNIA DEPARTMENT OF WATER RESOURCES
PERMIT 16482 (APPLICATION 17512)**

ORDER AUTHORIZING TEMPORARY CHANGE IN PLACE OF USE
BY THE CHIEF OF THE DIVISION OF WATER RIGHTS:

1.0 SUBSTANCE OF PETITION

On April 21, 2005,

Department of Water Resources
c/o Nancy Quan, Chief
Bay Delta Program Development
P.O. Box 942836
Sacramento, CA 94236-0001

filed with the State Water Resources Control Board (State Water Board), a Petition for Temporary Change under Water Code section 1725, et seq. If approved, several Central Valley wildlife refuges would be temporarily added to the authorized place of use under the Department of Water Resources' (DWR) Permit 16482 (Application 17512). This temporary change would facilitate the sale of up to 20,000 acre-feet (af) of water from Kern Tulare Water District (Kern) to these wildlife refuges. Temporary changes under Water Code section 1725 may be effective for a period up to one year.

1.1 Description of the Transfer Kern has agreed to sell 20,000 af of its Friant-Kern Class I and II Central Valley Project (CVP) water to the United States Bureau of Reclamation (USBR) for use within several Central Valley wildlife refuges. The wildlife refuges involved in this sale are the Grasslands Water District, the West Bear National Wildlife Refuge, the Los Banos Wildlife Area, North Grasslands Wildlife Area (including the Salt Slough and China Island Units), the West Bear Creek Unit of the San Luis National Wildlife Refuge, the Mendota Wildlife Area and the Volta Wildlife Area. Maps showing the locations of the wildlife refuges are on file with the State Water Board and available for viewing on the Division of Water Rights' website at www.waterrights.ca.gov, Water Transfers Program.

Since these wildlife areas may be served from the California Aqueduct and the Delta Mendota Canal, Kern County Water Agency (KCWA), a State Water Project (SWP) contractor, has agreed to act as an intermediary to facilitate this transfer. KCWA would make 20,000 af of its SWP water available for use within the wildlife refuges. In exchange for this water, KCWA would receive 20,000 af of Kern's CVP water (plus 3% for losses). State Water Board approval is not required for this portion of the exchange since portions of KCWA are located within the CVP place of use. Additionally, this sale would not result in a reduction in total deliveries of water to KCWA.

In the absence of the proposed temporary change, the water would be delivered to KCWA for use within its

service area or delivery to underground storage.

2.0 BACKGROUND

2.1 Substance of DWR's Permit Permit 16482 was issued to DWR on September 26, 1972. It authorizes DWR to collect up to 1,100,000 acre feet per annum by storage, to be diverted from the Sacramento and San Joaquin watersheds and San Luis Creek between January 1 and December 31. The Clifton Court Forebay and the Tracy Pumping Plant, located within the San Francisco Bay/Sacramento-San Joaquin Delta (Delta), are authorized points of diversion/rediversion under Permit 16482. Water diverted under Permit 16482 may be used for irrigation, domestic, municipal, industrial, salinity control, recreation, fish and wildlife enhancement, and to generate incidental power within the SWP service area. The subject 20,000 af of SWP water is either currently stored or will be stored in San Luis Reservoir. In addition to the water right permits, Biological Opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service under the Endangered Species Act constrain diversions of water to storage in San Luis Reservoir. The SWP would divert the 20,000 af of water from the southern Delta and store it in San Luis Reservoir regardless of whether its ultimate destination is KCWA or the aforementioned wildlife refuges. The proposed transfer may result in temporary increases in the instantaneous release rate from San Luis Reservoir.

2.2 Place of Use under the Proposed Transfer DWR's petition requests the temporary addition of the aforementioned wildlife refuges to the place of use of Permit 16482. Maps showing the locations of the wildlife refuges are available for viewing on the Division of Water Rights' website at www.waterrights.ca.gov, Water Transfers Program.

3.0 PUBLIC NOTICE AND COMMENT TO THE PROPOSED TEMPORARY CHANGE

Public notice of the petition for temporary change was provided via regular mail to interested parties and by publication in the Fresno Bee on April 27, 2005. Timely comments regarding the proposed temporary change were received from South Delta Water Agency (SDWA) and Stockton East Water District (SEWD). Additionally, DWR submitted two letters in response to these comments. The timely comments, DWR's responses and the State Water Board's conclusions are summarized below.

SDWA Comments

SDWA asserts that the proposed temporary change would violate the federal Central Valley Project Improvement Act (CVPIA) because the transfer does not result from a decrease in consumptive use by the seller. SDWA also asserts that the proposed temporary change violates Water Code section 1725 because USBR would not consumptively use or store the Friant-Kern Class I and II water in the absence of the transfer.

SDWA notes that USBR and DWR had previously indicated that certain Delta salinity objectives would be violated during this summer. SDWA asserts the proposed temporary change should not be approved under these circumstances. Finally, SDWA also noted that the wildlife refuges intended to receive water under the proposed temporary change drain to the San Joaquin River and will exacerbate the anticipated violations of in-Delta salinity objectives. Thus, SDWA concludes that the proposed temporary change should not be approved unless the transfer would result in a decrease in consumptive use of water and unless DWR and USBR show how they will meet the aforementioned in-Delta salinity objectives.

Department of Water Resources Response

DWR comments that the proposed transfer will allow USBR to take advantage of surplus flows available south of the Delta due to the wet hydrology in 2005 to provide supplemental water to meet a portion of the unmet Level 4 demand in the federal, State and private refuges of the northern San Joaquin Valley, pursuant to Section 3406(d)(2) of the CVPIA. DWR notes that USBR prepared an environmental document pursuant to the National Environmental Policy Act (NEPA) for this acquisition of supplemental water. DWR

also comments that the portion of this transfer under review by the State Water Board involves only the delivery of 20,000 af of SWP water to the wildlife refuges instead of delivering a like amount of water to KCWA. DWR notes that absent the proposed temporary change, the 20,000 af of water would be used by KCWA or delivered to underground storage, and thus meets the requirements of Water Code section 1725.

DWR also indicated that it had provided information to the State Water Board on March 25, 2005 and June 20, 2005, copies of which were sent to SDWA, showing that due to the wet hydrology this year on the San Joaquin River, the salinity objectives in the southern Delta would be met. DWR notes that current hydrologic conditions make it unlikely that water quality in the San Joaquin River will be impaired or that additional releases from New Melones will be required to meet the Vernalis Salinity Objective through the period of the proposed transfer. The current water year type for the San Joaquin River Basin is classified as wet. The Delta is in excess conditions (as defined in the Coordinated Operations Agreement between DWR and USBR) and current projections indicate excess conditions will continue until October. The 30-day running average for salinity concentration at Vernalis is currently well below the objective.

State Water Board Conclusion

As stated in Section 1.1, above, the portion of this sale involving the delivery of Kern's CVP water to KCWA does not require State Water Board approval. The portion of the sale subject to State Water Board approval is the transfer of water from DWR to the wildlife refuges. USBR approved the delivery of water from Kern to KCWA. SDWA's concerns regarding the sale of water from Kern to KCWA therefore should be addressed to USBR.

SDWA also argues there is a potential for this temporary change to injure other legal users of water through changes in water quality due to discharges from the refuges to the San Joaquin River. The current wet hydrology, including significant late-season rainfall, has resulted in changes in the forecasts for the water-year type and has alleviated previous concerns that DWR and USBR would not meet in-Delta salinity objectives. DWR states that excess conditions are anticipated to continue through October. Most major reservoirs are at or near capacity. Water quality conditions within the Delta are currently much better than is typical for this time of year.

DWR states that the wildlife refuges intend to take delivery of the transfer water this fall (likely starting in September). Discharges resulting from this fall delivery would occur through late fall and into the winter. Since most major project reservoirs are at or near capacity, DWR and USBR should be able to meet the required salinity objectives through the time period when this transfer may result in increased discharges to the San Joaquin River. Additionally, the wildlife refuges have secured a conditional waiver of their agricultural discharge requirements from the Central Valley Regional Water Quality Control Board (RB5). Accordingly, discharges from these refuges will be monitored, and, if warranted, discharge operations may be altered in coordination with other discharges within the area under the direction of RB5.

SEWD Comments

SEWD notes that the wildlife refuges intended to receive water under the proposed temporary change drain to the San Joaquin River and that increased deliveries to these refuges is likely to result in increased drainage of poor quality water (high in salinity concentration) to the San Joaquin River between January and April. SEWD notes that the Central Valley Regional Water Quality Control Board (RB5) has recently adopted a Total Maximum Daily Load (TMDL) for salinity in the San Joaquin River. SEWD asserts that the refuge drainage may require USBR to release more water from New Melones Reservoir to meet Delta water quality objectives, resulting in a reduction in the amount of New Melones water SEWD would receive under its contract with USBR. SEWD asserts that this would be an injury to other legal users of water. SEWD also notes that elevated salinity within the San Joaquin River would adversely affect agricultural diverters on the Lower San Joaquin River and within the Delta (an additional injury to other legal users of water).

SEWD asserts that the drainage from these wildlife refuges (which may have electrical conductivities between 2,000 and 3,500 mmhos/cm) may also adversely impact fish within the San Joaquin River.

Finally, SEWD asserts that additional releases of water from New Melones Reservoir to meet Delta water quality objectives resulting from this transfer would violate Public Law 108-361 which requires the Secretary of the Interior, with assistance from the State of California, to reduce the use of New Melones Reservoir to meet existing Delta water quality objectives. Finally, SEWD's comments included tables showing the monthly water quality releases from New Melones Reservoir for the years 1991 through 2003.

Department of Water Resources Response

DWR notes that current hydrologic conditions make it unlikely that water quality in the San Joaquin River will be impaired or that additional releases from New Melones will be required to meet the Vernalis Salinity Objective through the period of the proposed transfer. The current water year type for the San Joaquin River Basin is classified as wet. The Delta is in excess conditions (as defined in the Coordinated Operations Agreement between DWR and USBR) and this is anticipated to continue at least through July (current projections indicate excess conditions will continue through October). The 30-day running average at Vernalis is well below the current requirement.

DWR also notes that USBR operates the CVP to balance the available supplies and competing demands for water to provide deliveries to all its contractors. DWR asserts that the operational decisions made by USBR to meet existing regulatory requirements (including Delta salinity objectives) are the responsibility of USBR and not its individual contractors. Thus, DWR concludes that SEWD does not have vested rights that would be injured by this proposed temporary change and may not (as an individual contractor of USBR) obligate USBR to make operational decisions regarding New Melones Reservoir releases.

DWR states that the potential for releases from the wildlife refuges intended to receive water under the proposed temporary change to have unreasonable impacts on fish and wildlife is based on numerous factors specific to the operation of each wildlife refuge. Dischargers of waste from irrigated lands, such as the refuges, are required to secure a conditional waiver as authorized under the California Water Code (Division 7). DWR states that a Coalition Group that includes participation by the refuges has secured a conditional waiver of waste discharge requirements from RB5. Under the conditional waivers, the Coalition Groups must prepare and implement technical reports to monitor surface water; evaluate, monitor and implement management practices that result in attainment of receiving water limitations based on water quality objectives; and, if directed by RB5, implement additional measures to protect the quality of waters of the state within the Central Valley Region.

Finally, DWR states that Public Law 108-361 requires the Secretary of the Interior, in consultation with the Governor, to develop and initiate implementation of a program to meet all existing water quality standards and objectives for which the CVP has responsibility. DWR indicated that pursuant to Public Law 108-361, the refuges and Reclamation are actively participating in development of a plan for refuge water quality Best Management Practices to reduce the water quality impacts of the discharges from wildlife refuges that receive water from the federal government and discharge salt or other constituents into the San Joaquin River.

State Water Board Conclusion

SEWD's concerns regarding the potential for the proposed temporary change to injure other legal users of water or unreasonably affect fish and wildlife due to increased discharges to the San Joaquin River are similar to those described by SDWA. The State Water Board's conclusion regarding the potential to have adverse effect to fish and wildlife or to deprive water users of water is set forth above.

Further, since it is a CVP contractor, SEWD is not the holder of the water rights under which it receives water (the water rights serving SEWD are held by USBR). Accordingly, SEWD cannot assert injury to itself as a legal user of water. USBR, which is the water right holder, is a participant in the transfer and is not objecting to the change petition. Consequently there is no basis for finding that there is injury to another legal user of water.

Finally, as noted by DWR in its response, pursuant to Public Law 108-361, the refuges and Reclamation

are developing a plan for refuge water quality Best Management Practices to reduce the water quality impacts of the discharges from wildlife refuges into the San Joaquin River. Any concerns SEWD has regarding this plan should be taken up with USBR or DWR.

4.0 REQUIRED FINDINGS OF FACT

A Water Supply is Available

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. (Wat. Code, § 1725.) The water proposed for transfer consists of a portion of KCWA's SWP entitlement under Permit 16482. In the absence of the proposed transfer, KCWA would take delivery of the water proposed for transfer for use within its service area or for delivery to underground storage. Current wet hydrologic conditions should eliminate the potential for water quality impacts from delivery of the transfer water to the wildlife refuges due to discharges to the San Joaquin River. Additionally, these discharges will be monitored under a conditional waiver of agricultural discharge requirements issued by RB5. Accordingly, the requirement of an available water supply under section 1725 is satisfied.

No Injury to Other Legal Users of the Water

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 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 light of the above, I find in accordance with Water Code section 1727(b)(1) that the proposed transfer would not injure any legal user of the water.

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

Water Code section 1729 exempts temporary changes involving the transfer of water from the requirements of the California Environmental Quality Act (CEQA). (Public Resources Code section 21000, et seq.) However, 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 diversion from the Delta and conveyance of the water for the transfer will have no such unreasonable effects. The water available for the transfer is either currently stored or will be stored in San Luis Reservoir.

It will be diverted from the southern Delta at Banks Pumping Plant and impounded in San Luis Reservoir whether or not the change due to the proposed transfer is approved. Because the effect on fish, wildlife, and other instream uses in the Delta would be the same in the absence of the transfer as with the transfer, I conclude that this temporary change will have no unreasonable effect on fish, wildlife, or other instream beneficial uses of water.

Further, the application and use of the water under the proposed temporary change will have no such unreasonable effects. Current wet hydrologic conditions should eliminate the potential for water quality impacts from delivery of the transfer water to the wildlife refuges due to discharges to the San Joaquin River. Additionally, these discharges will be monitored under a conditional waiver of agricultural discharge requirements issued by RB5.

In light of the above, I find that in accordance with Water Code section 1727, subdivision (b)(2), the proposed transfer will have no unreasonable effects on fish, wildlife or other instream beneficial uses.

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ORDER

NOW, THEREFORE, IT IS ORDERED that the petition filed for temporary change in the place of use under the Department of Water Resources' (DWR) Permit 16482 (Application 17512) for the transfer of up to 20,000 acre-feet of water is approved.

All existing terms and conditions of Permit 16482 remain in effect, except as temporarily amended by the following provisions:

1. The transfer/exchange is limited to the period commencing on the date of this Order and continuing through December 31, 2005.
2. The place of use under Permit 16482 is temporarily expanded to include the Grasslands Water District, the West Bear National Wildlife Refuge, the Los Banos Wildlife Area, North Grasslands Wildlife Area (including the Salt Slough and China Island Units), the West Bear Creek Unit of the San Luis National Wildlife Refuge, the Mendota Wildlife Area and the Volta Wildlife Area. Maps showing the locations of the wildlife refuges are on file with the State Water Board.
3. Water made available pursuant to this order shall be used in a method consistent with good water management practices and in accordance with the conditional waiver of agricultural discharge requirements issued by the Central Valley Regional Water Quality Control Board for these wildlife refuges.
4. Within 120 days of the completion of the transfer, but no later than July 1, 2006, the permittee shall provide the Chief of the Division of Water Rights a report describing the use of the water transferred pursuant to this Order. The report shall include a summary showing the monthly amounts of water actually transferred under this Order.

The report shall also include the following information:

- a. Specific wildlife refuges where the transferred water was used;
 - b. The monthly amounts of water each refuge received; and
 - c. A summary of the water quality data maintained in accordance with the conditional waiver of agricultural discharge requirements for each wildlife refuge.
5. 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 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.

6. 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 permittee shall obtain authorization for an incidental

take permit prior to construction or operation. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary transfer authorized under this order.

7. 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

*Victoria A. Whitney, Chief
Division of Water Rights*

Dated: August 11, 2005