

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

DIVISION OF WATER RIGHTS

**ORDER APPROVING IN PART AND DENYING IN PART A PETITION FOR
TEMPORARY CHANGE IN THE PLACE OF USE AND POINT OF REDIVERSION OF
PERMIT 16597 (APPLICATION 14858A) OF THE UNITED STATES BUREAU OF
RECLAMATION**

SOURCE: Upper Stanislaus River

COUNTIES: Stanislaus, Calaveras, Tuolumne, and San Joaquin

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 INTRODUCTION

On August 25, 2021, the United States Bureau of Reclamation (Reclamation) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), a Petition for Temporary Change under Water Code section 1725, et seq. (Petition) to temporarily change the authorized place of use of New Melones Reservoir (also referred to as New Melones) to include the Central Valley Project (CVP) authorized place of use downstream of Jones Pumping Plant (Jones), and add San Luis Reservoir as a point of rediversion. The Petition proposes to transfer up to 30,000 acre-feet (af) (minus 10 percent conveyance loss) of stored water consisting of: (1) up to 16,000 af to be transferred from Reclamation to Westlands Water District (Westlands) from New Melones Reservoir to allow 20,000 af of water from a previous transfer from Placer County Water Agency (PCWA) to Westlands to remain in Folsom Reservoir, and (2) up to 14,000 af from New Melones to south-of-Delta (SoD) municipal CVP contractors. Approval of the requested change would give Reclamation additional operational flexibility to maintain Folsom Reservoir levels longer and support public health and safety needs south of the Delta.

California is experiencing a second consecutive year of dry conditions, which has resulted in drought or near-drought conditions throughout the state. The combination of unusually low precipitation, warm temperatures, and dry soils have resulted in unprecedented low runoff from the Sierra-Cascade snowpack, resulting in significant reductions in water supplies and extreme low reservoir storage levels. Currently north-of-Delta reservoirs have considerably less storage than New Melones Reservoir. This Order approves the portion of the petition to effectuate the PCWA to Westlands

exchange while maximizing CVP storage, and denies the portion of the petition to execute a new transfer from New Melones stored water in light of extreme drought conditions and uncertainties associated with the water quality conditions in 2022.

2.0 SUBSTANCE OF TEMPORARY CHANGE PETITION

2.1 Summary of New Melones Water Right Permits

In 1973, the Board adopted Water Right Decision 1422, authorizing the issuance of four water right permits to Reclamation for appropriation of water from the Stanislaus River at New Melones Dam for various uses totaling 2,400,000 af per annum by storage, and for power purposes. The quantity of water which could be stored was limited to the amount needed for fish and wildlife enhancement, maintenance of water quality, satisfaction of prior rights and flood control until such time as a specific need for water for consumptive use was demonstrated. Order No. WR 83-3 allowed the Bureau to fill the reservoir, for consumptive use purposes within Tuolumne, Calaveras, Stanislaus, and San Joaquin Counties. Rediversion of stored water at Goodwin Dam, Knights Ferry Diversion Dam and various other locations between New Melones Dam and the mouth of the Stanislaus River was authorized on August 9, 1985. D-1616, adopted in 1988, authorized direct diversion of water from the Stanislaus River. Water Rights Decision WR-95-6 resolved some minor inconsistencies between existing permits and the requirements of the Bay-Delta Plan. Permit 16597 authorizes diversion to storage of up to 980,000 af per annum in New Melones Reservoir to be collected from November 1 of each year to June 30 of the succeeding year.

Summary of Reclamation's Permit 16597

Point of Diversion:

New Melones Dam: North 29 34' East, 1,075 feet from the SW corner of Section 11, T1N, R13E, MDB&M, being within SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Section 11.

Points of Rediversion:

- 1) Goodwin Dam: North 10° West, 2,825 feet from SE corner of Section 10, T1S, R12E, MDB&M, being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said Section 10.
- 2) Knights Ferry Diversion Dam: North 24° 20' West, 3,000 feet from SE corner of Section 21, T1S, R12E, MDB&M, being within SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of said Section 21.
- 3) Jones (formerly Tracy) Pumping Plant: North 481,000 and East 1,694,500, California Coordinate System, Zone 3, being within E $\frac{1}{2}$ of projected Section 29, T1S, R4E, MDB&M.

- 4) Points of redirection on the Stanislaus River between:
 - a. New Melones Dam: North 29° 34' East, 1,075 feet from SW corner of Section 11, T1N, R13E, MDB&M, and
 - b. San Joaquin River: within the NE¼ of Section 19, T3S, R7E, MDB&M.

Places of Use:

- 1) Within the counties of Stanislaus, Calaveras, Tuolumne, and San Joaquin.
- 2) New Melones Reservoir and downstream reaches of the Stanislaus and San Joaquin Rivers.

Purposes of Use:

Irrigation, domestic, municipal, industrial, recreational, water quality, and preservation and enhancement of fish and wildlife.

2.2 Place of Use and Point of Rediversion under the Proposed Temporary Change Petition

Reclamation has requested the following:

- 1) the temporary addition of the CVP service area downstream of Jones, located within San Joaquin, Stanislaus, Merced, Fresno, Kings, Kern, Tulare, Santa Clara, and San Benito counties, to the place of use under Reclamation's Permit 16597; and
- 2) the temporary addition of San Luis Reservoir as a point of rediversion.

The areas requested to be added to the CVP place of use are shown on the map titled *Reclamation Temporary Petition to Add CVP South of Delta Place of Use and San Luis Dam Point of Rediversion to Permit 16597*, dated August 17, 2021, submitted with the Petition.

2.3 Proposed Transfer

The total volume proposed for this transfer is 30,000 af. This transfer will provide 16,000 af of water to Westlands in lieu of 20,000 af of water purchased by Westlands from PCWA,¹ thereby allowing the water purchased from PCWA to remain in Folsom Reservoir. This portion of the transfer is referred to as the PCWA/Westlands Exchange. Allowing this water to remain in Folsom Reservoir will support reservoir levels needed by Folsom Reservoir municipal diverters and contractors while Folsom Reservoir

¹ Approved pursuant to State Water Board Order issued July 28, 2021.

releases continue to support environmental and water quality needs in the Delta. As stated in supplemental information provided by Reclamation on October 5, 2021, 17,800 af would be released from New Melones Reservoir to allow for rediversion of 16,000 af at Jones.

This transfer also proposes to provide up to 14,000 af of water (minus conveyance loss) to meet existing public health and safety needs of SoD municipal CVP contractors. This portion of the transfer is referred to as the New SoD Transfer. Since this Order denies the proposed New SoD Transfer, this Order does not address Reclamation's supplemental information regarding conveyance losses. Rediversion of 14,000 af at Jones in addition to rediversion for the PCWA/Westlands Exchange could require a release from New Melones Reservoir greater than 30,000 af.

The temporary changes were requested to be effective September 15, 2021. Since that date has passed, the temporary changes will be effective on the date of approval and remain in effect for up to one year from the date of approval.

Storage in New Melones Reservoir was 837,093 af as of October 11, 2021.

The Petition indicates that the water proposed to be transferred would be consumptively used or stored in the absence of the transfer. The water for this transfer is previously stored water; Reclamation stated that the portion of this stored water that is not released to support terms and conditions of Water Rights Decision 1641 (D-1641) will remain in storage. The Petition also states there will be no change in operating agreements or a change in delivery to CVP contractors with or without the approval of the Petition. A portion of the water stored in New Melones Reservoir will continue to meet Delta water quality conditions, and other New Melones water right terms and conditions without any additional benefits to other CVP reservoirs or support of critical CVP contractor needs. Reclamation also subsequently stated by letter dated September 23, 2021, that the purpose of the proposed transfer is to support critical fishery needs in the American River, with additional benefits of 1) supporting fisheries in the Stanislaus River through timing transfer releases with the October pulse period and 2) delaying the installation of low-level pumps in Folsom Reservoir to support deliveries to municipal and industrial contractors.

3.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

Pursuant to Water Code section 1725, Reclamation has applied for temporary changes involving a transfer of water. The State Water Board shall approve temporary changes involving the transfer of water under Water Code section 1725 et seq. if it determines that a preponderance of the evidence shows both of the following:

- a. The proposed changes would not injure any legal user of the water, during any potential hydrologic condition that the State Water Board determines is likely to

occur during the proposed changes, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of water or return flows.

- b. The proposed changes would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b).)

In addition, the proposed changes must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary changes. (*Id.*, § 1726, subd.(e).)

Temporary changes pursuant to Water Code section 1725 may be effective for a period of up to one year from the date of approval. (Wat. Code, § 1728.) “The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out.” (*Ibid.*)

The State Water Board considers the evaluation of public trust resources as part of its evaluation of impacts to fish, wildlife, or other instream beneficial uses under Water Code § 1727, subdivision (b)(2). The State Water Board also 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.)

4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Petitioners filed the Petition for a temporary change under Water Code section 1725 et seq. Water Code Section 1729 exempts temporary changes involving a transfer or exchange of water from the requirements of CEQA (Pub. Resources Code, § 21000 et seq.). The State Water Board will file a Notice of Exemption.

5.0 PUBLIC NOTICE AND COMMENTS

The 30-day comment period per Water Code section 1726, subdivision (f) was reduced to 15 days per the Governor’s Proclamation of a State of Emergency in the Klamath River, Sacramento–San Joaquin Delta, and Tulare Lake Watershed Counties due to drought (Drought Proclamation) dated May 10, 2021. This Drought Proclamation sought to expedite processing of water transfers.

On August 26, 2021, a 15-day public notice of the Petition for temporary change was provided as follows: 1) by posting on the Division’s website; and 2) via the State Water Board’s electronic subscription mailing list. Comments were due by September 10, 2021. Timely comments were received from Stockton East Water

District (SEWD), Richard Morat, South Delta Water Agency and Central Delta Water Agency (SDWA and CDWA), jointly, South San Joaquin Irrigation District (SSJID), and Ronda Lucas of Lucas Law Firm (Lucas Law). The State Water Board's consideration of the comments received is reflected in Sections 6.2 and 6.3 of this Order.

5.1 Comments of SEWD

SEWD states that allowing Reclamation to transfer 30,000 af of water from New Melones Reservoir would adversely impact future water allocations to SEWD from the reservoir under its contract with Reclamation. SEWD also stated that adding places of use not authorized for use from New Melones Reservoir could cause a future shortage in the reservoir.

SEWD provided data from 1998 to 2005 that showed lower contract allocations than south of Delta agricultural contractors due to New Melones historically low storage levels. SEWD indicated these reduced allocations must also be considered in light of the fact that Eastside contractors, including SEWD, are not eligible for Municipal and Industrial (M&I) Priority. SEWD points out that in 2021, all other CVP M&I contractors are entitled to and receiving minimum health and safety allocations, which the New SoD Transfer would supplement.

SEWD also indicated that over 105,000 af has already been released from New Melones for Delta Outflow in 2021, which could impact future allocations to Eastside contractors. SEWD alleges that Reclamation cannot consistently meet the in-basin demands of the Stanislaus River and should not have volunteered to make releases from New Melones Reservoir for Delta Outflow when these flows could have been met from other CVP reservoirs. SEWD also stated that New Melones is unique in the CVP due to its Congressional Authorization and that, per the County of Origin Law, the water from New Melones should only be used in the counties of Stanislaus, Calaveras, Tuolumne, and San Joaquin.

SEWD provided additional comments regarding Reclamation's response by letter dated October 6, 2021. The additional comments reiterate that Reclamation has not described how allocations from New Melones Reservoir to CVP contractors are determined and point out this information was not provided despite being requested by State Water Board staff.

Reclamation's Response:

The Central Valley Improvement Act, in 1992, indicated that fish and wildlife was a co-equal purpose of the CVP, including the New Melones Project. The operation of the CVP balances fishery needs and water delivery without injuring other legal users of water. In this contract year, which runs from January 1 through December 31, 2021, SEWD received 100 percent allocation. The water for this proposed transfer is not water to which SEWD has any contract rights and all of Reclamation's contractual

obligations to SEWD will be satisfied for 2021. SEWD's contract entitles them to an annual allocation and does not earmark any water specifically for their contract from year to year.

Reclamation disputes that the water cannot be served outside the four counties. California Water Code allows for petitioned changes to water rights, including a temporary change to place of use. In addition, "area of origin" laws do not apply to water stored in CVP facilities or delivery of CVP water to CVP contractors.

5.2 Comments of Richard Morat

Mr. Morat expressed concern for diverting water to out-of-stream users, especially municipal water users. He sought clarification on whether the New Melones releases will be completed by December 31, 2021 or October 15, 2021, noting inconsistencies in the Petition. He stated there is no scientific basis to the claim that reductions in releases from Folsom Reservoir are not anticipated to negatively impact streamflow or water quality. He indicated that moving water out of stream could adversely impact aquatic resources in the Sacramento-San Joaquin ecosystem and that a refill agreement should be developed to protect beneficial uses, including aquatic resources. He also stated that temporary transfers should address cumulative impacts.

Reclamation's Response:

Reclamation acknowledged that the Supplement in the Petition lists the date that withdrawals from New Melones will be complete as October 15, 2021, while the Environmental Information document lists this date as December 31, 2021. While Reclamation anticipates that withdrawal from New Melones will be complete during October, it recognizes that circumstances may require that the water may be released at a later time at the request of the fishery agencies. Therefore, the date in the Supplement for completion of releases should be December 31, 2021.

Refill agreements are required for transfers of stored water as a condition of approval of the transfer through facilities of the CVP and State Water Project (SWP) where the water was not originally stored by the CVP or SWP (collectively, the Projects). This is to ensure that there is no impact to the Projects so that they can continue to meet flow and water quality requirements for downstream beneficial uses.

Reclamation agrees that multiple transfers from one system can produce cumulative impacts greater than that seen for one individual project. However, this transfer involves Reclamation's operation of New Melones Reservoir to deliver CVP water to an expanded authorize place of use in order to hold the original transfer volume in Folsom Reservoir to meet Project needs and objectives.

Reclamation states that the CVP and SWP will continue to operate to meet all water quality requirements and minimum instream flow requirements. Folsom Reservoir is at a critically low storage level (222,100 af as of October 11, 2021). According to Reclamation, allowing 20,000 af of water to remain in Folsom Reservoir would protect the cold-water pool at Folsom Reservoir and improve water supply conditions for M&I users.

5.3 Comments of SDWA and CDWA

SDWA and CDWA, submitted a joint comment to the transfer on the basis that release of up to 30,000 af of water from storage in New Melones Reservoir will adversely affect Reclamation's ability to meet the following:

- Reclamation's contractual obligation to South San Joaquin Irrigation District, Oakdale Irrigation District, Central San Joaquin Water Conservation District, and Stockton East Water District by decreasing an already insufficient amount of water available for those contractors,
- Reclamation's fishery obligations both on the Stanislaus and San Joaquin Rivers by decreasing the already insufficient amount of water available to meet those needs,
- Reclamation's water quality objectives on the San Joaquin River and in the southern Delta by decreasing an already insufficient amount of water for those needs,
- Reclamation's drought planning goals of maximizing reservoir storage to increase its ability to meet future water quality obligations, and
- Various public trust uses on the Stanislaus River, the San Joaquin River, and in the southern Delta, which include recreation and environmental needs.

SDWA and CDWA are also are concerned that the export pumping associated with the transfer water could result in increased adverse effects to southern Delta water levels and quality. In addition, they requested Reclamation explain how the approved 20,000 af transfer of water from PCWA to Westlands from Folsom Reservoir storage can proceed in the absence of the Petition. They also asked for further explanation of Westlands' minimum health and safety obligation as it pertains to the transfer amount.

Reclamation's Response:

The claim that the proposed action will result in failure to meet future water right terms and conditions is highly speculative. This claim would also apply to any release or bypass of inflow to New Melones Reservoir in any year and for any purpose. The water

for this transfer was previously stored and is available for CVP purposes in 2021. Reclamation will continue to bypass inflow to New Melones Reservoir under the current curtailment order; absent the curtailment order, Reclamation could store inflows under its Permit in order to meet senior water right holders, water right terms and conditions, and biological opinions.

The 16,000 af transfer to Westlands is in exchange for 20,000 af of PCWA-origin water remaining in storage in Folsom Reservoir.

Westlands' health and safety needs are approximately 4,400 af.

5.4 Comments of SSJID

SSJID submitted comments objecting to the transfer citing:

- Reclamation failed to demonstrate the transfer will not injure SSJID by impacting SSJID's Access to its Joint Conservation Account Water in New Melones Reservoir.
- Reclamation has not demonstrated the transfer will only involve water that would have been consumptively used or stored in the absence of the transfer.
- Reducing New Melones Reservoir storage will further limit Reclamation's ability to meet its obligations under D-1641.
- The proposed transfer would improperly remove water from the Stanislaus River basin.
- Reclamation failed to coordinate with Senior Water Rights Holders and CVP Contractors on the Stanislaus River.

Reclamation's Response:

Reclamation attributes up to 200,000 af of the annual initial storage in New Melones to OID and SSJID, up to a collective 200,000 af of cumulative storage in New Melones and Tulloch Reservoirs. According to this accounting of water rights, OID and SSJID have since used this 2021 storage volume. Further, due to the August curtailment of their pre-1914 water rights as well as the limited volume of instream flow, OID and SSJID are diverting water previously stored under Reclamation's water rights to meet their current demands. Reclamation has delivered its previously stored water, up to 200,000 af in 2021, in accordance with the 1988 operational agreement.

The water for this proposed transfer is currently stored in New Melones Reservoir and would remain in storage in the absence of the transfer.

This water is available for CVP purposes and is unencumbered by any contract, agreement, or water right. However, Reclamation looks forward to having discussions with Stanislaus River parties and all CVP contract holders, as well as other stakeholders, over this winter for input into CVP operations should this drought continue throughout 2022.

5.5 Comments of Lucas Law

Lucas Law submitted a comment letter summarized below.

- The Petition fails to provide the necessary information to determine if there would be any injury to other legal users of water or unreasonable effects on fish and wildlife caused by the proposed temporary change.
- The Petition fails to provide data needed to determine impacts to groundwater dependent ecosystems.
- Refill criteria should be required to ensure that the transfer does not injure other legal users of water.
- The proposed action would transfer water out of the geographic area from which the water originated which violates Area of Origin Laws in the California Water Code.
- The Petition should be denied because of the dire drought conditions and the State Water Board's existing curtailment orders. The curtailment orders require water right holders served by Placer, Folsom Reservoir and New Melones Reservoir to cease their water diversions.

Reclamation's Response:

- Reclamation prepared a Biological Assessment to consider the effects of the action on fisheries and concluded that there would be no adverse effect on fish or habitat.²
- A refill agreement is entered into to ensure that a "hole" in a reservoir due to a storage transfer is filled and does not occur at a time when the Projects are releasing stored water to meet Delta conditions. The Department of Water Resources (DWR) and Reclamation will manage any impacts to the Projects through their Coordinated Operations Agreement.

² NMFS concurred with this determination in its September 14, 2021 letter to Reclamation.

- The Area of Origin Laws do not apply to water lawfully stored in CVP facilities or to delivery of CVP water to CVP contractors.
- The water for transfer was lawfully stored in New Melones Reservoir under Permit 16597 prior to issuance of the curtailment orders.

6.0 REQUIRED FINDINGS OF FACT

6.1 Transfer Only Involves Water That Would Have Been Consumptively Used or Stored

Before approving a temporary change due to an 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 Water Code 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.”

According to the Petition, and as conditioned, the water for this transfer is previously stored water in New Melones Reservoir. There will not be a change in New Melones operating agreements and allocations for CVP contractors in 2021 have already occurred, with no changes to those allocations resulting from the proposed change. Permit 16597 authorizes diversion to storage of 980,000 af to be collected from November 1 of each year to June 30 of the succeeding year. Storage in New Melones Reservoir was 837,093 af as of October 11, 2021, indicating that end of year storage will be significantly more than the amount proposed for transfer prior to commencement of the diversion season authorized by Permit 16597.

In light of the above, the State Water Board finds in accordance with Water Code section 1726, subdivision (e), that the water proposed for transfer under Reclamation’s Permit 16597 pursuant to this Order would be consumptively used or stored in the absence of the proposed temporary change.

6.2 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 Water Code, the State Water Board must find that the temporary change would not injure any legal user of the water during any potential hydrologic condition that the State Water 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).)

Reclamation states “the CVP is integrated financially and operationally, including the New Melones Project,” and that New Melones Reservoir is operated in coordination with or in lieu of releases from Folsom Reservoir. Thus, according to Reclamation, authorizing an exchange of water between the reservoirs increases operational flexibility without reducing the total supply available to Reclamation for use to meet its obligations. The financial and operational integration of New Melones Reservoir results in no decrease to CVP storage as a result of the PCWA/Westlands Exchange component of the transfer. Reclamation states that the CVP contracts provide no contract rights to excess stored water or to any carryover from year to year and these supplies are available for CVP purposes.

As of August 1, 2021, CVP allocations to South-of-Delta irrigation contractors are zero, South-of-Delta municipal and industrial contractors are 25 percent of their historic use, and Eastside Division contractors are 100 percent. Reclamation indicated since CVP Eastside contractors have a 100 percent allocation for 2021, they will not be affected by approval of the Petition. Shasta Reservoir is at 23 percent capacity which is 38 percent of historical average and Folsom Reservoir is at 23 percent capacity which is 42 percent of historical average, whereas New Melones Reservoir is currently at 35 percent capacity which is 62 percent of historical average. As stated in its response, Reclamation’s releases from New Melones Reservoir are under the lawful control of Reclamation pursuant to its Permit and, therefore, not available to any downstream users, except upon agreement with Reclamation.

It is well established that area of origin statutes do not apply to stored CVP water. (Tehama-Colusa Canal Authority vs. U.S. Department of the Interior, et al. (9th Cir. 2013) 721 F.3d 1086, 1090 [“while the area of origin statutes help to determine the total quantity of water available to the Bureau for allocation, those statutes in no way control how the water is allocated by the Bureau once acquired”].) Similarly, the State Water Board does not find anything in the Congressional authorization cited by SEWD that prevents approval of Reclamation’s proposal, although Reclamation does acknowledge that this transfer is “unusual.” (Reclamation Response to Comments, p. 4 [“Reclamation is attempting to address the temperature issues at Folsom”].) Condition 4 of Decision 1422 restricts the ultimate place of consumptive use under Permit 16597 to Tuolumne, Calaveras, Stanislaus, and San Joaquin Counties, unless another place of use is authorized by the Board. Pursuant to Water Code section 1725 et seq., a permittee can petition to add a place of use to a permit to accomplish a proposed temporary change. In this case, Reclamation proposes that the service area of Westlands and other SoD contractors be added as an additional place of use. If approved by the Board, this change is consistent with condition 4.

The State Water Board understands that options for effective management of water supplies in the Delta watershed have dwindled as hydrological conditions have deteriorated. Reclamation has discretion and flexibility in how to manage its contracts for CVP stored water in this drought. Nothing in the comments and responses indicates

any obligation for Reclamation to manage the reservoir for next year's allocations with particular specificity. Disputes over Reclamation's management of next year's allocation is between Reclamation and its contractors, and such disputes do not raise an issue of injury for the Board to decide.

The appropriative water rights for New Melones water are subject to all downstream prior water rights. Reclamation stated it will ensure that OID and SSJID will not be injured as a result of the proposed transfer because Reclamation has satisfied their rights under the 1988 Agreement with these parties. SSJID and OID will continue to be credited the first 200,000 acre-feet of actual initial storage in New Melones and Tulloch reservoirs, and any deficiency would be due to the inflow into New Melones in the 2022 water year (October 1 through September 30), not carryover. SSJID and OID's other water rights will be limited similarly by hydrology. The State Water Board is satisfied with Reclamation's assurances that this transfer will not impact Reclamation's ability to meet the conditions and obligations to prior right holders under the 1988 Agreement.

As described below in Section 6.3, the State Water Board is approving the PCWA/Westlands Exchange and not approving the New SoD Transfer. As conditioned, there will be no increase in CVP diversions or allocations as a result of the proposed transfer. The transfer is conditioned to require that Reclamation notify the Deputy Director for Water Rights (Deputy Director) when refill of the storage space vacated by the transfer occurs and authorizes the Deputy Director to require release of the water should the refill occur at a time that could injure downstream senior water rights.

In light of the above, the State Water Board finds in accordance with Water Code section 1727, subdivision (b)(1), that the proposed temporary change will not injure any legal user of the water.

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

Before approving a temporary change in order to facilitate a transfer or exchange 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, title 23, section 794 (c), Petitioners provided California Department of Fish and Wildlife (CDFW) and the Central Valley Water Quality Control Board with a copy of the Petition. CDFW and the Central Valley Water Quality Control Board did not respond with any information regarding potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses.

Reclamation consulted with both the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). Reclamation prepared a Biological Assessment (BA) to consider the effects of the proposed New Melones Reservoir release on fisheries and concluded that it would not affect listed species or critical habitat for species administered by USFWS. Reclamation provided the BA to NMFS

and requested concurrence that the action is not likely to adversely affect (NLAA) species listed as threatened or endangered or critical habitats designated under the Endangered Species Act. NMFS concurred with Reclamation's BA in a letter dated September 14, 2021.

PCWA/Westlands Exchange

Reclamation's rediversion at Jones of 16,000 af of water released from New Melones Reservoir is an exchange for the 20,000 af PCWA transfer water already in Folsom Reservoir. The proposed transfer is conditioned on Reclamation's compliance with D-1641. In the absence of approval of the PCWA/Westlands Exchange, the water currently stored in Folsom Reservoir would be released instead of the water being released from New Melones. The PCWA water currently stored in Folsom Reservoir would not be preserved for meeting Reclamation's water quality or fishery obligations, thereby increasing the likelihood that those obligations would be met through releases from New Melones Reservoir in the future. As stated by Reclamation and described in Section 6.2, "the CVP is integrated financially and operationally, including the New Melones Project." As a result of this integration, the addition of water to Folsom Reservoir in exchange for water released from New Melones Reservoir will not negatively impact Reclamation's abilities to meet its obligations under D-1641 or other environmental obligations.

Reclamation does not anticipate that reductions in releases from Folsom Reservoir and corresponding increases in releases from New Melones Reservoir associated with the PCWA/Westlands Exchange will negatively impact streamflow or water quality, since the operations will be done in coordination with DWR, state and national fishery agencies, and the State Water Board. The PCWA/Westlands Exchange and associated increase in New Melones releases may also assist Reclamation in satisfying its obligation to meet the October San Joaquin River flow requirements included in D-1641. The PCWA/Westlands Exchange will be completed prior to December 31. As conditioned, the PCWA/Westlands Exchange component of the transfer will not increase the amount of water diverted at Jones. All water exported at Jones is required to be pumped consistent with the applicable regulatory restrictions and court orders governing CVP operations.

Regarding comments on the effects of the PCWA transfer to Westlands, those were evaluated in the July 28, 2021 order. The basis of the PCWA transfer was that water would remain in storage in the absence of the transfer and there would be no use of groundwater in lieu of surface water.

In light of the above, the State Water Board finds in accordance with Water Code section 1727, subdivision (b)(2) that the PCWA/Westlands Exchange component of the proposed temporary change of Reclamation's Permit 16597 will not unreasonably affect fish, wildlife, or other instream beneficial uses.

New SoD Transfer

Reclamation's proposed transfer also includes up to 14,000 af of water (minus conveyance loss) to meet existing public health and safety needs of SoD municipal CVP contractors. Unlike the PCWA/Westlands Exchange which results in no net reduction in CVP storage, this transfer could reduce CVP storage available to meet environmental requirements next year.

During the recent water year, drought conditions severely tested the Projects' ability to meet both water supply and regulatory objectives. Responding to deteriorating conditions, Reclamation implemented shortage provisions in its contracts, reducing water deliveries to both its Settlement and Exchange Contractors. CVP allocation to south-of-Delta agricultural service contractors were reduced to zero percent. Having reduced SoD agricultural service contract deliveries, the Projects' reduced their combined exports at Jones and at the SWP's Banks Pumping Plant to below a daily average of 1,500 cfs (considered the minimum to meet human health and safety needs) for most of the summer. To preserve the Projects' limited north-of-Delta storage, Reclamation took the unprecedented step of providing Supplemental Project Water to meet Delta outflow requirements from New Melones Reservoir throughout most of the summer. Notwithstanding such drastic reductions in late season deliveries and these extraordinary management actions, the Projects needed to submit a TUCP; the State Water Board granted the requested regulatory relief from D-1641 Delta outflow requirements from June 1 through August 15.

The continuing drought and water operations throughout the Delta watershed have left the Projects' reservoirs upstream of Jones severely depleted. Combined storage in Shasta, Oroville, Folsom and New Melones Reservoirs was less than three million af on September 30, 2021, far below historic averages for end-of-year storage levels. Moreover, prolonged dry conditions in the watersheds above all Project reservoirs have caused reduced runoff efficiency as precipitation is absorbed by dry soils or evaporated into the atmosphere. Hotter than normal temperatures also increased evaporation from Project reservoirs.

The claim by CDWA and SDWA that transferring incremental stored water from CVP storage will increase the risk that Reclamation could be unable to meet its water quality and fishery obligations is not "highly speculative" as described by Reclamation in its response to comments. On the contrary, during Reclamation's drought condition presentation to the State Water Board on September 21, 2021, it was clear that in light of severely depleted storage in the Project's north-of-Delta reservoirs and the risk of continued dry conditions, the Projects are collaboratively planning for a "worst case scenario" for the water year that began on October 1. Embracing a planning assumption of low precipitation during the first quarter of the water year, the Projects anticipate being physically challenged to meet water quality objectives. As a result, the Projects projected the likelihood of their filing a Temporary Urgency Change Petition (TUCP) for relaxation of those objectives.

As outlined by Reclamation and DWR, the planning assumptions include (i) minimal precipitation through the end of December; (ii) enriched early communication and enhanced collaboration among Reclamation and DWR, the fish agencies, the State Water Board, and water managers; (iii) the need to prepare another TUCP to be filed in December, evaluated during a 60-day public input process and implemented by February 1, 2022. Reclamation and DWR also proposed a planning target of end-of-year storage (September 2022) in Shasta, Oroville and Folsom of a combined two million af, equating to no net accumulation in these three reservoirs during the year. Reclamation and DWR also made clear the following order of planning priorities for Project operations during water year 2022: 1) meeting human health and safety needs; 2) maintaining salinity control in the Delta; 3) complying with environmental obligations; 4) conserving water in storage; and 5) making water deliveries in priority.

The New SoD Transfer was originally described as being for the purpose of meeting public health and safety needs of contractors south of the Delta; however, Reclamation's October 5, 2021, letter in response to questions from the State Water Board states the water is not currently needed and was intended as a back-up supply to water previously borrowed from the SWP. The borrowing of water from SWP was approved through an Order dated August 25, 2021 authorizing transfer of 200,000 af from SWP to CVP. Reclamation's October 5, 2021 letter identifies a total of 69,696 af of public health and safety allocations to south of Delta contractors approved by Reclamation. It is unclear to what purpose the additional 14,000 af would be put given 1) the planning priorities stated by Reclamation, and 2) that Reclamation has not complied with the reporting requirements of the August 25, 2021 Order to identify where and to what purposes the borrowed 200,000 af has been delivered.

As noted by SEWD, Reclamation did not provide its methodology for making allocations of New Melones water to its contractors as requested by the State Water Board. Given the uncertainty around two of the planning priorities identified by Reclamation in relation to the New SoD Transfer, i.e., whether the New SoD Transfer is necessary to support public health and safety and how water deliveries in priority are made, State Water Board has insufficient information to conclude that an additional decrease in total CVP storage won't impact Reclamation's planning priorities of ensuring environmental and salinity control obligations are satisfied.

Based on the totality of current conditions, the Division is unable to find, based on the preponderance of the evidence presented by Reclamation, that the incremental releases of water from New Melones Reservoir for the New SoD Transfer will not unreasonably affect fish, wildlife or other instream beneficial uses under reasonably foreseeable hydrologic conditions. Rather, the preponderance of the evidence supports the finding that the New SoD Transfer's incremental release of water from CVP storage presents a risk to fish, wildlife or instream beneficial uses in direct proportion to the 14,000 af that would be transferred from storage in New Melones Reservoir. For the foregoing reasons, the New SoD Transfer is denied.

7.0 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 and the Deputy Director for Water Rights redelegation of authority dated November 18, 2020.

8.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1727, and therefore finds as follows regarding Reclamation's Permit 16597 for the transfer proposed in the Petition of up to 30,000 af of water (minus 10 percent conveyance loss) from New Melones Reservoir, which includes up to 16,000 af to Westlands (PCWA/Westlands Exchange) and up to 14,000 af to SoD municipal CVP contractors (New SoD Transfer).

The State Water Board concludes that, based on the available information:

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 PCWA/Westlands Exchange component of the Petition will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses. There is insufficient information to find that the New SoD Transfer component will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

ORDER

NOW, THEREFORE, IT IS ORDERED that the PCWA/Westlands Exchange component of the Petition filed for temporary change in the place of use and point of rediversion, under Reclamation's Permit 16597 for transfer of up to 17,800 af of water, is approved and the remaining proposed changes are denied.

All existing terms and conditions of Reclamation's subject permit remain in effect, except as temporarily amended by the following provisions:

1. The transfer of water is limited to the period beginning on the date of this Order and continuing for up to one year.
2. The place of use under Reclamation's Permit 16597, is temporarily expanded to include the service area of Westlands.
3. San Luis Reservoir located at CCS83, Zone 3, North 1,845,103 feet and East 6,393,569 feet, being within SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 15, T10S, R8E, MDB&M is temporarily added as a point of rediversion and place of storage for purposes of the transfer.
4. The 20,000 af of water released by PCWA to Folsom reservoir shall be used to support reservoir levels needed by Folsom Reservoir municipal diverters and contractors while Folsom Reservoir releases continue to support environmental and water quality needs in the Delta.
5. Releases from New Melones pursuant to this Order shall be scheduled in coordination with the Stanislaus Watershed Team to maximize fishery benefits and minimize negative impacts and consistent with the concurrence from NMFS that the action is not likely to adversely affect species listed as threatened or endangered or critical habitats designated under the Endangered Species Act.
6. Rediversion of water at the Jones Pumping Plant (Jones) is conditioned upon compliance by the operators with the objectives currently required of Petitioner set forth in Tables 1, 2, and 3 on pages 181-187 of D-1641 or as modified through approval of temporary change petitions applicable to the water rights involved in this petition. Diversion of water is also conditioned upon compliance by Reclamation with all applicable water right permit requirements, federal and California Endangered Species Act requirements (ESA), including applicable Biological Opinions (BOs), Incidental Take Permits (ITPs), court orders, and any other conditions imposed by other regulatory agencies applicable to these operations.
7. Rediversion of water at Jones is also conditioned upon compliance with applicable State Water Board Orders establishing temporary or interim operating conditions during the transfer period, unless the State Water Board has specifically exempted conveyance of transfer water from the order.
8. The transfer period authorized in Condition 1 of this Order is further limited to the period allowed pursuant to any applicable BO, ITP, or federal or State ESA requirements related to transfers at Jones. Reclamation shall provide documentation of the diversion period allowed pursuant to the BO, ITP, or federal or State ESA requirements prior to transfer of water. Such documentation may include an electronic link to any transfer BOs, ITPs, or other federal or State ESA consultations, informal consultations, opinions, or other documents issued by the

California Department of Fish and Wildlife, National Marine Fisheries Service, or U.S. Fish and Wildlife Service.

9. Notification shall be given to the Deputy Director for Water Rights (Deputy Director) within 15 days of the refill of storage vacated in New Melones Reservoir due to this Order. The notification shall include the amount and timing of the refill, as well as a description of downstream hydrologic conditions. Should information available to the Deputy Director indicate the refill occurred during a period when injury to senior water rights could have occurred, Reclamation shall release the volume of refill water if directed to do so by the Deputy Director. Recognizing that refill may not occur within the year of the transfer, Reclamation shall include the total remaining volume of refill subject to this Order in its annual Reports of Permittee until the storage vacated due to this transfer has been refilled.
10. Pursuant to Water Code Sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this temporary change order, including method of use and quantity of water diverted, are subject to the continuing authority of the State Water Board 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.

11. 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 ESA (Fish & G. Code, §§ 2050-2097) or the federal ESA (16 U.S.C.A. §§ 1531-1544). If a "take" will result from any action authorized under this Order, the Petitioners shall first obtain authorization for an incidental take permit prior to undertaking that action. Petitioners shall be responsible for meeting all applicable California ESA and federal ESA requirements for the temporary change authorized under this Order.
12. The State Water Board reserves authority to supervise the 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:

*Erik Ekdahl, Deputy Director
Division of Water Rights*

Dated: OCT 14 2021