

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

**DIVISION OF WATER RIGHTS**

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**IN THE MATTER OF PERMIT 13856 (APPLICATION 18085)  
PETITION FOR TEMPORARY CHANGE  
INVOLVING THE TRANSFER OF UP TO 20,000 ACRE-FEET OF WATER  
FROM PLACER COUNTY WATER AGENCY TO EAST BAY MUNICIPAL UTILITY DISTRICT**

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SOURCES: Duncan Canyon, North Fork American River, Middle Fork American River, Rubicon River

COUNTIES: Placer and Sacramento

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BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

**1.0 SUBSTANCE OF PETITION**

On February 14, 2014, Placer County Water Agency (PCWA or Petitioner) 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. PCWA has requested to transfer up to 20,000 acre-feet (af) of water to East Bay Municipal Utility District (EBMUD). The transfer would begin on or about April 1, 2014 and would be complete within one year from approval. Temporary changes approved pursuant to Water Code section 1725 may be effective for up to one year from the date of approval.

**1.1 Description of the Transfer**

PCWA proposes to transfer a minimum of 5,000 af and up to a maximum of 20,000 af of Middle Fork Project (MFP) water ("transfer water") currently stored in Hell Hole Reservoir on the Rubicon River and French Meadows Reservoir on the Middle Fork American River to EBMUD. The transfer water would be released from Ralston Afterbay, PCWA's most downstream reservoir on the Middle Fork American River, through Oxbow Powerhouse to the Middle Fork and North Fork American Rivers, and then to Folsom Reservoir, which would be the point of delivery. The release of transfer water at Folsom Reservoir would be scheduled by the U.S. Bureau of Reclamation (Reclamation) in cooperation with EBMUD so that the proposed transfer would not disrupt normal Central Valley Project (CVP) or State Water Project (SWP) operations and would adhere to all required flow standards for the lower American River. After release from Folsom Reservoir, the transfer water would flow down the lower American and Sacramento Rivers and be rediverted (minus carriage and conveyance losses) at the Freeport Regional Water Project (FRWP) intake facility. The transfer would be used by EBMUD to perform fish screen testing in April 2014 at the intake facility as required in the 2004 Biological Opinions issued by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) for operation of the FRWP facility. During other months (May, June, etc.), transfer releases would be scheduled in cooperation with the Department of Water Resources (DWR) and Reclamation. After rediversion at FRWP, transfer water would be conveyed through underground pipeline to the Folsom South Canal which flows south to the Mokelumne Aqueducts, and then west to the EBMUD service area to provide supplemental water to meet customer demands during the drought.

In order to accomplish the transfer, PCWA proposes to release 20,000 af of water from its MFP reservoirs during the months of April, July, and August of 2014. In the absence of this transfer, the total 20,000 af of water would remain in storage in PCWA's MFP reservoirs.

## **2.0 BACKGROUND**

### **2.1 Substance of PCWA's Permit**

Permit 13856 (Application 18085) authorizes direct diversion and storage/consumptive use of 249,000 af of MFP water as described below: (a) direct diversion of 1,225 cubic feet per second (cfs) from about November 1 through about July 1 of the succeeding year from North Fork American River; (b) 25,000 af by offstream storage, at a maximum rate of diversion of 400 cfs, from about November 1 of each year to about July 1 of the succeeding year from Duncan Creek to French Meadows Reservoir; (c) 95,000 af by storage from about November 1 of each year to about July 1 of the succeeding year from the Middle Fork American River at French Meadows Reservoir; and (d) 129,000 af by storage from about November 1 of each year to about July 1 of the succeeding year from the Rubicon River at Hell Hole Reservoir. The authorized purposes of use include: irrigation, municipal, industrial, recreation, and incidental domestic use. The authorized place of use is shown on PCWA's map set dated July 31, 1996. Permit 13856 expired on December 1, 2007 and on January 7, 2008, PCWA filed a petition for extension of time. Since the petition for extension of time is currently pending before the State Water Board, the Division will consider the maximum amount of water put to beneficial use at the time of permit expiration for the purposes of the proposed temporary change.

### **2.2 The Middle Fork Project**

PCWA owns and operates the MFP and holds appropriative water rights for the MFP pursuant to Permits 13856 and 13858 (Applications 18085 and 18087). The permits allow for the combined diversion and storage of 315,000 af per annum of MFP water held in two storage reservoirs (French Meadows Reservoir and Hell Hole Reservoir). The MFP is a multi-purpose project designed to conserve waters of the Middle Fork American River, the Rubicon River, and tributaries for domestic, municipal, industrial, recreational, and irrigation uses as well as for hydroelectrical power generation. The MFP's principal project features include French Meadows Reservoir and Hell Hole Reservoir (French Meadows Reservoir is located on the Middle Fork American River and Hell Hole Reservoir is located on the Rubicon River), five associated diversion dams (Duncan, North Fork Long Canyon, South Fork Long Canyon, Middle Fork Interbay, and Ralston Afterbay), and five power plants (French Meadows, Hell Hole, Middle Fork, Ralston, and Oxbow).

PCWA has determined that it has at least 20,000 af of surplus water stored in the MFP. The determination was reached by reviewing current MFP storage levels, projected inflow, and modeled project operations data for 2014. As of February 11, 2014, PCWA had approximately 146,000 af of water held in storage in its MFP reservoirs.

PCWA would be solely exercising Permit 13856 for the proposed transfer of up to 20,000 af of water to EBMUD.

### **2.3 Lower American River Water Forum Agreement**

PCWA is a signatory stakeholder of the American River Water Forum Agreement (WFA) that was established in 2000 and adopted by 40 regional stakeholders (including environmental groups such as the Sierra Club, Save the American River, and Friends of the River). The goal of the WFA is to ensure conservation of resources in the American River watershed consistent with the following seven elements: 1) increased surface water diversions; 2) actions to meet customer needs while reducing diversion impacts in drier years; 3) support for improved pattern of fishery flow releases from Folsom Reservoir; 4) lower American River habitat management; 5) water conservation; 6) groundwater management; and 7) Water Forum successor effort. As such, the WFA is to ensure a balance in managing regional water supplies and fisheries resources in the American River watershed, with a focus on the lower American River from Folsom Reservoir/Lake Natoma downstream to the confluence with the Sacramento River, which is a critical reach for threatened Central Valley steelhead and fall-run Chinook salmon.

As a signatory to the WFA, PCWA is obligated in critically dry years to release stored MFP water at a 1:1 ratio for every acre-foot of water taken greater than the established baseline of 8,500 af at the American River Pump Station (ARPS) under water right Permits 13856 and 13858. Under PCWA's Purveyor Specific Agreement (PSA), which is included in the WFA, PCWA would make such "supplemental" releases contingent upon (a) its ability to sell the released water for use below the lower American River on terms acceptable to PCWA and (b) PCWA's determination that it has sufficient water in its reservoirs to make the additional releases to mitigate conditions in dry years without jeopardizing the supply for PCWA's customers. According to PCWA, the proposed transfer meets the above-listed conditions. PCWA indicates that its main water supply is not from the MFP but from PG&E's Drum-Spaulling Project, of which it is currently being allocated 58% of the contracted supply in 2014. Accordingly, PCWA indicates that it has a critical need to replace 46,200 af of PG&E Drum-Spaulling supplies this year and will consequently supply Placer County residents with the maximum permitted amount of water (35,500 af) that can be pumped for beneficial use at the ARPS in 2014.<sup>1</sup> PCWA believes that it is obligated under its PSA to convey the 20,000 af of previously stored MFP water (the transfer under the subject petition) downstream to benefit the lower American River reach at a time when instream habitat conditions are suboptimal. As a condition of its WFA commitment, PCWA has an agreement with EBMUD to purchase the transfer water for beneficial uses within the EBMUD service area as described in Section 2.4.

## **2.4 EBMUD**

EBMUD is a public utility district that supplies water to approximately 1.34 million people and water supply for industrial, commercial, institutional, and irrigation water users in the East Bay region of the San Francisco Bay Area. The water service area encompasses incorporated and unincorporated areas within Alameda and Contra Costa Counties. EBMUD's principal raw water supply is from the Mokelumne River in the Sierra Nevada, with a point of diversion at Pardee Reservoir in Calaveras and Amador Counties. EBMUD's existing water supplies are sufficient in non-drought years; however, in dry years, EBMUD's water supplies can be supplemented with water from the CVP or with purchased transfer water to meet customer demands.

The place of use under Permit 13856 would be temporarily changed and expanded to include the service area of EBMUD which includes the cities of Alameda, Albany, Berkeley, El Cerrito, Emeryville, Hercules, Oakland, Piedmont, Pinole, Richmond, San Leandro, San Pablo, Walnut Creek, and the City of Brentwood and unincorporated areas in Alameda and Contra Costa Counties as shown on EBMUD's December 6, 2010 Map 1932-R.

## **2.5 Proposed Temporary Changes**

PCWA proposes to transfer a minimum of 5,000 af and up to a maximum of 20,000 af of MFP water currently stored in Hell Hole Reservoir and French Meadows Reservoir to EBMUD. To accomplish the water transfer, the petitioner has requested the following changes in the place of use and points of rediversion under PCWA's water right Permit 13856: 1) allow for rediversion of transfer water by EBMUD at the FRWP intake facility; and 2) allow for the consumptive use of the transfer water within the revised place of use which includes the EBMUD service area.

## **2.6 Refill Agreement with Reclamation and Warren Act Agreement**

As a requirement of the proposed transfer in 2014, PCWA will enter into a Reservoir Refill Agreement with Reclamation. The Refill Agreement will ensure that other downstream legal users of water with vested rights in the American River watershed are not unreasonably affected or negatively impacted by the proposed transfer.

PCWA is currently under an executed Refill Agreement with Reclamation for a 2013 water transfer of 20,000 af to Westlands Water District (WWD). Since PCWA will not be allowed to refill the 20,000 af

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<sup>1</sup> From article published in the Auburn Journal on March 5, 2014.

deficit from the 2013 transfer, the carryover storage target for the purposes of the proposed transfer would be 110,000 af. PCWA's estimated total of MFP planned/baseline releases (e.g., water supply deliveries, recreational releases, minimum instream flow releases, evaporative losses, and hydropower generation) for the remainder of 2014 (accounting for accretion between reservoirs as well as tributary inflows) requires approximately 123,000 af of stored MFP water, resulting in an estimated peak MFP storage of 205,000 af at the end of May 2014, and a planned (without transfer) carryover storage target of 130,000 af pursuant to the Refill Agreement executed between Reclamation and PCWA for the 2013 transfer of 20,000 af of water to WWD. PCWA's petition indicates that the proposed with-transfer carryover levels remain well above the minimum carryover level required by the Federal Energy Regulatory Commission (between 50,000 to 100,000 af depending upon the amount of inflow).

EBMUD will need to execute a Warren Act contract with Reclamation in order to temporarily store (less than 30 days) the 2014 transfer water in Folsom Reservoir prior to its release. As part of the Warren Act contract, EBMUD would need to informally consult with NMFS and/or USFWS to obtain the proper concurrence under Section 7 of the Endangered Species Act for federally listed threatened and endangered species. In addition, DWR and Reclamation will coordinate SWP and CVP operations to ensure transfer water pursuant to Permit 13856 does not interfere with the Reclamation/DWR Coordinated Operation Agreement.

## **2.7 Governor's 2014 Proclamation of a Drought State of Emergency**

On January 17, 2014, Governor Edmund G. Brown Jr. issued a Proclamation of a Drought State of Emergency (Proclamation). The Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmers' long-term investments at risk. The conditions also threaten the survival of animals and plants that rely on California's rivers, including many species in danger of extinction.

The Proclamation refers to the Governor's Executive Order B-21-13 (Executive Order), issued on May 20, 2013 for the purpose of streamlining approval for water transfers to address the dry conditions and water delivery limitations to protect California's agriculture. The Executive Order directs the State Water Board and DWR to expedite processing of water transfers (in accordance with the Water Code) and to assist water transfer proponents and suppliers, as necessary, provided that the transfers will not harm other legal users of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. The State Water Board and DWR were also directed to make all efforts to coordinate with relevant federal agencies, water districts, and water agencies to expedite the review and approval of water transfers in California.

## **3.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE**

On February 20, 2014, public notice of the petition for temporary change was provided by posting on the Division's website and via the State Water Board's LYRIS email notification system. In addition, on February 24, 2014, the Petitioner noticed the project via publication in the Sacramento Bee newspaper and mailed the notice via first class mail to interested parties.

## **3.1 Comments of Richard Morat**

On March 4, 2014, Richard Morat commented that the direct impacts of the transfer are reasonably described in the petition and supporting document. However, the commenter was concerned about the secondary impacts of the proposed transfer on reservoir storage replenishment and how this could potentially impact the American River, Sacramento River, and the Sacramento-San Joaquin Bay Delta (Bay-Delta). The commenter states that replenishment delays and reduces recovery of the environmental/aquatic resources from the drought and should only be allowed when water is instantaneously surplus to the fishery needs of the American River and downstream. Mr. Morat stated that he would not object to the proposed transfer if the reservoir is not refilled until there is water surplus to downstream fishery needs.

### **3.2 Comments of Felix Smith**

On March 6, 2014, Felix Smith filed comments and objection to the proposed transfer. The commenter did not identify any negative impacts to public trust resources which could result from the transfer. Instead, the commenter urged the State Water Board to consider whether others, including both junior right holders and public trust resources, could benefit from the transfer water. The commenter requested an explanation of how the 20,000 af will have a positive effect on flows, fishery resources, and water quality.

The commenter indicates that a portion of PCWA's transfer water should be used to help protect water quality, fish, and wildlife resources of the Bay-Delta.

### **3.3 Comments of Steven Rutter**

On March 21, 2014, the Division received comments from Steven Rutter regarding the proposed transfer. Mr. Rutter commented that he believes PCWA is not conserving its water resources by designating any of its resources as surplus. He recommended that PCWA retain all water resources until the current drought is over and continuing through 2015.

### **3.4 Comments of Reclamation**

On March 24, 2014, Reclamation submitted comments to the Division regarding the proposed transfer. Reclamation was concerned about potential impacts to the cold water pool in Folsom Reservoir due to transfer of water after June 1, 2014. The petitioner has proposed to transfer the water under two periods (initial transfer involving 5,000 af of flow beginning on April 1, 2014 and the remaining 15,000 af to be released from July 1, 2014 through August 31, 2014). In order to protect its water rights and operations for the American River, Reclamation requested the following conditions for approving the proposed transfer:

- The transfer is contingent upon a refill agreement being signed and adopted between Reclamation and petitioner. Consequently, before commencing the proposed April transfer, petitioner shall submit an unimpaired flow forecast of the Middle Fork Project, reservoirs carryover storage, and reservoir operations information to Reclamation for evaluation and prior approval. Any order approving the transfer shall include a term requiring the transfer be conducted consistent with that refill agreement.
- Petitioner<sup>2</sup> will execute a Warren Act contract with Reclamation prior to introduction of water appropriated under Permit 15835 into Folsom Reservoir.
- Since Reclamation has determined that the flow release by Petitioner into the Folsom Reservoir needs to be before June 1, 2014 to avoid impact to the cold water pool operations, Reclamation requests that the transfer during the July 1, 2014 through August 30, 2014 period not be approved.
- The proposed transfer shall be carried out in compliance with all existing regulatory constraints in the Delta and shall cause no harm to other legal water users or impact on water quality.

### **3.5 PCWA Response to Comments**

PCWA stated that the transfer has real and definite benefits to beneficial uses in this extremely dry water year; nonetheless, Mr. Morat and Mr. Smith (environmental commenters) both indicate in various ways that they oppose the proposed transfer on the basis that it must benefit fisheries and aquatic resources in the Bay-Delta watershed or that some portion of transfer water is due to the estuary. PCWA noted that the proposed transfer supports Reclamation operations in meeting its

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<sup>2</sup> On March 25, 2014, Reclamation indicated that its March 24, 2014 letter contained an error and that "Petitioner" should be replaced with "EBMUD".

beneficial use requirements downstream of Folsom Reservoir. The release of the transfer water to the lower American River by Reclamation will occur pursuant to the current Biological Opinion and Flow Management Standard.

In regard to the transfer timing and Folsom Reservoir cold water pool issue raised by Reclamation, PCWA and Reclamation have agreed to a term that would condition approval of the transfer on Reclamation's determination that the cold water pool is not being negatively affected by transfer water temperature.

In regards to not injuring any legal user of water, the environmental commenters express concern about carryover storage, PCWA's refill obligations, and future water for PCWA customers. The 2014 transfer water will be "new" water introduced into the system and no downstream water rights will be adversely impacted. Moreover, absent the transfer, the water would have remained in MFP storage. The water will augment downstream water flows over and above that which would have occurred absent the transfer. Accounting of transfer water will be contingent with the execution of a Refill Agreement with Reclamation taking into full account the outstanding 2013 carryover Refill Reservation of 20,000 af for which PCWA will continue to be responsible for maintaining until certain Folsom hydrologic conditions are met.

By maintaining a carryover of 110,000 af, PCWA would have a more than sufficient water supply in storage to meet future Place County water supply demands and PCWA's ability to meet the minimum instream flow requirements downstream of MFP reservoirs required to maintain instream beneficial uses and public trust resources would not be affected.

PCWA noted that it has an obligation under the WFA to ensure that the resources in the American River watershed are managed in a balanced fashion. The release of transfer water through the lower American River serves this purpose.

### **3.6 State Water Board Response to Comments**

In evaluating and processing a transfer petition, the State Water Board is required to make findings pursuant to Water Code section 1727. This section of the Water Code directs the Board to approve a temporary change if it determines that a preponderance of the evidence shows both of the following: (1) 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; and (2) the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. The petitioner has the burden of establishing that a proposed temporary change would comply with the items listed above. The State Water Board has considered the comments and has reviewed the information in the record in evaluating the proposed transfer.

The comments/objections request that transfer water be released to maintain Bay-Delta resources and objectives. The Division notes that the transfer is conditioned on meeting temperature requirements at Folsom Reservoir. The transfer water will be conveyed downstream to the point of rediversion. To the extent that this will result in cooler water downstream of Folsom Reservoir and additional flow in the lower American River, the transfer will benefit the Bay-Delta. The Division notes that the benefits that will accrue to the lower American River are particularly useful for fisheries purposes, because this is a critical reach for threatened Central Valley steelhead and fall-run Chinook salmon. However, requiring the transfer water (or a portion thereof) be set aside to maintain Bay-Delta resources downstream of the point of rediversion is outside the scope of the proposed transfer. The State Water Board cannot deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change.

Insofar as general impacts to public trust resources are concerned, Reclamation has indicated that depending on the timing of the transfer, there could be impacts to the cold water pool in Folsom Reservoir due to transfer of water. Reclamation and PCWA have agreed that transfer of water after

June 1, 2014 be conditioned to ensure that there are no negative impacts on the Folsom Reservoir cold water pool due to the transfer. The transfer order condition provides for real-time monitoring and determination of cold water impacts, on a weekly basis (or other time-step acceptable to Reclamation and the transferor). This will ensure that the transfer stops at any time that there could be impacts to the cold water pool, but allows resumption during any time period when impacts will not occur. With the incorporation of this term and a term requiring redirection of water at FRWP to be subject to compliance with all applicable biological opinions, and any other conditions imposed by other regulatory agencies (including the State Water Board conditions set forth in the June 15, 2006 Order approving use of the FRWP by Reclamation to serve EBMUD), there will be no unreasonable effects to fish, wildlife or other instream beneficial uses. In addition, the transfer water will assist in meeting the WFA fishery obligations in the lower American River from Folsom Reservoir to the point of redirection at FRWP.

PCWA's response to comments and the transfer petition materials document that the transfer will not result in negative impacts to other right holders or instream resources during refill operations, because the Reservoir Refill Agreement will limit refill to periods of non-injury.

#### **4.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

The petitioner filed the petition for temporary transfer of water pursuant to Water Code section 1725, et seq. Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of CEQA. (Pub. Resources Code, § 21000, et seq.) The State Water Board will issue a Notice of Exemption for this project.

In addition to any obligation the State Water Board may have under CEQA, the Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The State Water Board may approve a temporary change due to a transfer of water only if it determines that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) The independent evaluation of impacts to public trust resources was conducted concurrent with the Water Code section 1727 evaluation.

#### **5.0 REQUIRED FINDINGS OF FACT**

##### **5.1 Transfers Only Involve Water That Would Have Been Consumptively Used or Stored**

Before approving a temporary change due to a transfer or exchange of water pursuant to Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change or conserved pursuant to Section 1011. (Wat. Code, §§ 1725, 1726.) Water Code section 1725 defines "consumptively used" to mean "the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion." PCWA's petition states that the 20,000 af of proposed transfer water is currently in storage in the MFP reservoirs and would remain in storage absent the transfer.

In light of the above, I find in accordance with Water Code section 1726, subdivision (e) that the water proposed for transfer pursuant to this Order would be stored in MFP reservoirs in the absence of the proposed temporary change.

##### **5.2 No Injury to Other Legal Users of Water**

Before approving a temporary change due to a transfer or exchange of water pursuant to Article 1 of Chapter 10.5 of Part 2 of Division 2 of the Water Code, the State Water Board must find that the transfer would not injure any legal user of the water during any potential hydrologic condition that the

Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows. (Wat Code, § 1727, subd. (b)(1).) The water proposed for transfer pursuant to this temporary change consists of water previously stored in French Meadows Reservoir and Hell Hole Reservoir pursuant to Permit 13856. In the absence of the proposed transfer, the water would remain in storage for future use by PCWA and would not be available to other water users. Since the water would otherwise have remained in storage, there will be no changes in return flows as a result of the transfer.

PCWA will enter into a Reservoir Refill Agreement with Reclamation (that is acceptable to DWR), ensuring that future refill of any storage space in MFP reservoirs and/or Folsom Reservoir created by the transfer will not reduce the amount of water that Reclamation, DWR, or other water users could otherwise divert under their water rights. Therefore, no injury to other legal users of water would occur due to the transfer.

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

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

Before approving a temporary change due to a transfer of water, the State Water Board must find that the proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1727, subd. (b)(2).) PCWA has indicated that although the primary purpose of the transfer is for consumptive and beneficial municipal and industrial uses within the EBMUD service area, the transfer release from the MFP reservoirs will provide up to 20,000 af of supplemental flows in the Middle Fork and North Fork American Rivers to the point of redirection (PORD) at the FRWP intake facility. These supplemental releases would also be made pursuant to PCWA's PSA under the American River Water Forum Agreement which requires transfer water to flow through the lower American River in drier water years to offset pumping at the ARPS. Therefore, the increases in flows resulting from the transfer would likely enhance aquatic habitats, potential white-water boating and recreational opportunities, as well as potentially improving and/or maintaining persistence of the cold water pool in Folsom Reservoir given the current storage levels. The Division received a letter of support for the transfer from white-water boating interests. In addition, the transfer water would likely have the same benefits for the Sacramento River to the PORD at the FRWA. The transfer would improve water quality and thereby benefit instream beneficial uses including those for fish and wildlife. As a condition of redirecting the transfer water at the FRWP intake facility, PCWA has committed to following all existing state and federal regulations, including any requirements of Decision 1641, State and Federal endangered species acts, and all state and federal regulations and permits that apply to the proposed PORD.

There is a potential for the transfer to negatively affect the cold water pool in Folsom Reservoir if water is transferred after June 1, 2014. As indicated in Section 3.6 regarding the State Water Board's response to Reclamation's concerns on this issue, the Division will condition approval of the transfer with a term to ensure that there are no negative impacts on Folsom Reservoir's cold water pool due to potential input of warmer water temperatures associated with the transfer.

With the incorporation of the terms and conditions listed in the Order, there is no evidence in the record that the proposed transfer of water would have an unreasonable effect on fish, wildlife, or other instream beneficial uses. In addition to ensuring that the California Department of Fish and Wildlife (CDFW) received copy of the petition, on March 17, 2014, Division staff inquired whether CDFW had any concerns related to the temporary change. DFW did not submit comments or relay any concerns regarding the temporary change.

In light of the above, I find in accordance with Water Code section 1727, subdivision (b)(2) that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses.

## **6.0 STATE WATER BOARD'S DELEGATION OF AUTHORITY**

On June 5, 2012, the State Water Board adopted Resolution 2012-0029, delegating to the Deputy Director for Water Rights the authority to act on petitions for temporary change if the State Water Board does not hold a hearing. This Order is adopted pursuant to the delegation of authority in section 4.4.2 of Resolution 2010-0029.

## **7.0 CONCLUSIONS**

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1727, and therefore I find as follows:

I conclude that, based on the available evidence:

1. The proposed transfer involves only an amount of water that would have been consumptively used or stored in the absence of the temporary change.
2. The proposed temporary change will not injure any legal user of water.
3. The proposed temporary change will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses.

## **ORDER**

**NOW, THEREFORE, IT IS ORDERED** that the petition filed for temporary change for the transfer of up to 20,000 af of water under Permit 13856 is approved.

All existing terms and conditions of Permit 13856 remain in effect, except as temporarily amended by the following provisions:

1. The transfer is limited to the period commencing on the date of this Order and continuing for one year. Beginning June 1, 2014, no water can be transferred unless Reclamation concurs that the transfer will not result in increased risks of negative impacts to the cold water pool at Folsom Reservoir resulting from incoming transfer water. Such approval may be given on a weekly basis or other time-step acceptable to Reclamation and the transferor. Transferor shall provide documentation to the Deputy Director for Water Rights by email of any Reclamation approvals issued after June 1, 2014.
2. The place of use under Permit 13856 is temporarily expanded to include the service area of EBMUD which includes the cities of Alameda, Albany, Berkeley, El Cerrito, Emeryville, Hercules, Oakland, Piedmont, Pinole, Richmond, San Leandro, San Pablo, Walnut Creek, and the City of Brentwood and unincorporated areas in Alameda and Contra Costa Counties; as shown on EBMUD's December 6, 2010 Map 1932-R filed with the State Water Board under Permit 10478 (Application 13156).
3. EBMUD's FRWP intake facility is temporarily added as an authorized PORD under Permit 13856. The FRWP intake is located within the SW  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of Section 11, T7N, R4E, MDB&M.
4. Rediversion of water at FRWP is subject to compliance with all applicable biological opinions, and any other conditions imposed by other regulatory agencies (including the conditions set forth in the State Water Board's Order dated June 15, 2006, approving use of the FRWP by Reclamation to serve EBMUD) applicable to this facility.

5. Water may not be transferred to the FRWP intake until petitioner has implemented a Refill Agreement between Reclamation and petitioner to address potential refill concerns in PCWA's MFP reservoirs, and Folsom Reservoir, if applicable. The executed Refill Agreement must also be acceptable to DWR. Documentation that an acceptable Refill Agreement has been agreed to by Reclamation, DWR, and petitioner shall be submitted to the Deputy Director for Water Rights within 15 days of the date of execution of the agreement. Petitioner shall submit an unimpaired flow forecast of the MFP, reservoirs carryover storage, and reservoir operations information to Reclamation for evaluation and prior approval.
6. Petitioner shall ensure that EBMUD has executed any required Warren Act contract with Reclamation prior to transferring water through Folsom Reservoir under this Order. Petitioner shall provide confirmation from Reclamation and EBMUD to the Deputy Director for Water Rights (email confirmation is acceptable) that this condition has been complied with, within 30 days of issuance of this Order.
7. During the period of transfer, petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies. This Order shall not be construed as authorizing the violation of any agreement entered into by the petitioner.
8. Within 90 days of the completion of the transfer, but no later than October 1, 2015, the petitioner shall provide the Deputy Director for Water Rights a report describing the transfer authorized by this Order. The report shall include the following information:
  - a. The duration and magnitude of the increased releases of water and the corresponding volume of water released from MFP reservoirs as a result of this transfer (reported on a daily basis);
  - b. The average daily release rates and corresponding volume of water released from Folsom Reservoir as a result of this transfer (reported on a daily basis); and
  - c. The value of the Refill Reservation as defined in the Refill Agreement (reported on a daily basis).

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

9. Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this transfer and temporary change order, including method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the State Water Board also may be exercised by imposing specific requirements over and above those contained in this Order to minimize waste of water and to meet reasonable water requirements without unreasonable draft on the source.

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

11. 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:

*Barbara Evoy, Deputy Director*  
*Division of Water Rights*

Dated: APR 02 2014