

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

DIVISION OF WATER RIGHTS

**IN THE MATTER OF WATER RIGHT PERMIT 15026 (APPLICATION 5632)
OF YUBA COUNTY WATER AGENCY**

**PETITION FOR TEMPORARY CHANGE INVOLVING THE TRANSFER OF UP TO
25,000 ACRE-FEET OF WATER TO CONTRA COSTA WATER DISTRICT AND
EAST BAY MUNICIPAL UTILITY DISTRICT**

SOURCES: NORTH YUBA RIVER AND YUBA RIVER

COUNTIES: SIERRA AND YUBA

ORDER APPROVING TEMPORARY CHANGES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 OVERVIEW

On February 4, 2022, Yuba County Water Agency¹ (YCWA or Petitioner) filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) a petition for temporary change (Petition) involving the transfer of water under water right Permit 15026 (Application 5632), pursuant to Water Code section 1725 et seq. Under the proposed transfer, up to 25,000 acre-feet (af) of water would be transferred to Contra Costa Water District (Contra Costa WD), East Bay Municipal Utilities District (East Bay MUD), or both (collectively, Transfer Recipients). The transfer is requested to begin April 1, 2022 and extend through November 30, 2022. Temporary transfers are effective for up to one year from the date of approval.

2.0 BACKGROUND

YCWA is currently authorized under State Water Board Corrected Order WR 2008-0014 (Corrected Order) to transfer up to 200,000 af per calendar year of water under Permit 15026 until December 31, 2025, subject to the terms and conditions established in that Order. The Corrected Order: (a) approved the inclusion of Lower Yuba River

¹ Doing business as Yuba Water Agency.

Accord (Yuba Accord)² streamflow requirements in the permit; (b) added the service areas of the State Water Project (SWP) and the Central Valley Project (CVP) to the place of use in Permit 15026 for the duration of the long-term transfer; and (c) approved the addition of the CVP and the SWP (collectively, Projects) south San Francisco Bay/Sacramento-San Joaquin Delta (Delta) export diversion facilities as points of rediversion (PORD) in Permit 15026 for the term of the Water Purchase Agreement, which ends on December 31, 2025. On June 9, 2014, the State Water Board also approved the addition of a PORD at the Freeport Regional Water Project (Freeport Project).

Approval of YCWA's Petition to add three PORDs in Contra Costa County would enable the Transfer Recipients to receive Yuba Accord transfer water.

3.0 PETITIONS FOR TEMPORARY CHANGE INVOLVING TRANSFER

3.1 Description of the proposed temporary changes

In order to facilitate the transfer, YCWA proposes to temporarily add the following points of rediversion to Permit 15026, referred to in this Order as the Contra Costa PORDs:

- 1) Rock Slough Intake – being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 33, T2N, R3E, MDB&M
- 2) Old River Intake – being within NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 31, T1N, R4E, MDB&M
- 3) Middle River Intake – being within NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 9, T1S, R4E, MDB&M

As indicated in the Petition, the Corrected Order authorizes YCWA to transfer Yuba Accord flows to the CVP place of use pursuant to the terms and conditions specified in that order. As such, the service areas for both Contra Costa WD and East Bay MUD are already within the authorized place of use under Permit 15026 through December 31, 2025, as part of a long-term transfer. The additional PORDs requested under the Petition would be necessary for YCWA to transfer Yuba Accord water to the Transfer Recipients. Petitioner states that approval of the Contra Costa PORDs would not change any operations or any streamflow requirements from those already approved in the Corrected Order.

² The Yuba Accord is composed of three separate but related agreements: (1) the Lower Yuba River Fisheries Agreement, (2) the Water Purchase Agreement, and (3) Conjunctive Use Agreements. The Corrected Order provided for implementation of the Yuba Accord.

3.2 Petitioner's Analysis of Transfer Timing and Flow Scenarios

The Petition indicates there are two scenarios for both the spring-time transfer window (April through June) and the summer/fall transfer window (July through November). The Petition includes information detailing how the Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation) manage Yuba Accord transfer water based on Delta conditions. Spring-time transfer associated with the temporary changes to add the Contra Costa PORs would occur: (1) when DWR could back the transfer water into Oroville Reservoir (or other CVP/SWP north of Delta Reservoirs) during balanced conditions³ in the Delta; or (2) when DWR could not back the transfer water into Oroville Reservoir. Summer/fall period transfer would occur: (1) during balanced conditions and the CVP or SWP have export capacity; or (2) during balanced conditions without sufficient CVP or SWP export capacity.

The Petition contains an analysis for each scenario and indicates that during the spring-time transfer window, increased flow due to the transfer would be a small portion of the inflow to the Delta from the Sacramento River and would not cause negative impacts to any legal users of water or fish and wildlife. For the summer/fall period, the analysis indicates that increased flow due to the transfer would be a small portion of the inflow to the Delta from the Sacramento River and would not cause negative impacts to any legal users of water or fish and wildlife.

4.0 PUBLIC NOTICE OF THE PROPOSED TEMPORARY CHANGE

On February 14, 2022, a public notice of the proposed transfer was provided by posting on the Division's website and via the State Water Board's electronic subscription mailing list. The comment deadline was March 1, 2022. Timely comments on the proposed transfer were received from Reclamation, DWR, and the Central Delta Water Agency (CDWA). On March 10, 2022, following further discussions with YCWA, Reclamation withdrew its objection letter on the proposed water transfer. Reclamation indicated that consistent with the Petition, water would be transferred under balanced conditions and not utilizing Reclamation's rights and would not harm Reclamation or other legal users of water. Petitioner provided responses to the remaining comments by letter to the Division dated March 11, 2022. All comments and responses are available in the record for Permit 15026.

³ The Delta is in balanced conditions when the SWP and CVP agree that releases from upstream reservoirs, plus unregulated flow, approximately equal water supply needed to meet Sacramento Valley in-basin uses and Project exports. During balanced conditions in the Delta when water must be withdrawn from storage to meet Sacramento Valley and Delta requirements, 75 percent of the responsibility to withdraw from storage is borne by the CVP and 25 percent by the SWP.

Comments by DWR

On March 1, 2022, DWR submitted comments on the Petition proposing 35 percent carriage water losses for the spring months, as has occurred in recent water transfer years. DWR requested that the remaining portion of transfer water moved during the typical transfer window (July 1 through November 30) be subject to the calculated carriage loss determined by DWR and Reclamation. Finally, due to the uncertainty caused by the drought, DWR requested the right to seek further conditions should the State Water Board take any action that causes this transfer to injure the State Water Project.

Petitioner's Response:

On March 11, 2022, YCWA submitted a response to DWR's comments indicating that YCWA and Contra Costa WD agree to and will comply with the 35 percent carriage water requirement DWR determined would be necessary to maintain Delta water quality during the spring months of the transfer.

Comments by CDWA

On March 1, 2022, CDWA submitted comments on the Petition. CDWA does not object to use of water within the Delta, but voiced concerns of whether or not the proposed transfer would adversely impact the ability to meet Decision 1641 salinity control standards. CDWA objects to transfer water provided for export areas outside the Delta which may directly or indirectly contribute to San Joaquin River salinity or increasing of groundwater salinity. Finally, CDWA expressed concern over whether the proposed transfer altered timing and path of flow in tributaries, thereby decreasing groundwater or accretions and making management of salinity control more difficult.

Petitioner's Response:

On March 11, 2022, YCWA submitted a response regarding the concerns raised in CDWA's comment letter and confirmed that the change petition would not: (1) maintain or provide water to the Delta export areas; or (2) alter the timing and path of flows in tributaries, which could result in increased losses to groundwater or accretion decline such that the maintenance of Delta salinity control would be made more difficult.

State Water Board's Response to Comments

The proposed transfer is not expected to negatively affect groundwater salinity of the San Joaquin River, since the Transfer Recipients would be receiving water through Contra Costa PORs located downstream of where the San Joaquin River joins the Delta. Additionally, as the Petition explains, transfer operations would be coordinated with CVP and SWP operations so that the Delta flow and water quality requirements to protect fish and other beneficial uses of water would not be adversely impacted by the

transfer. The State Water Board reserves authority 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. Relevant discussion is also included in the State Water Board's findings, discussed below in Section 8.

This order contains a requirement for YCWA to apply a carriage water loss of 35 percent to water transferred during the spring months (April through June) and to apply either a carriage water loss of 35 percent or the carriage water loss rate determined necessary by DWR and Reclamation during any transfer of water during the summer/fall (July through November) period.

5.0 POTENTIAL FOR CURTAILMENT

During any period in 2022 that YCWA's right under Permit 15026 is curtailed, YCWA will be required to cease all diversions in accordance with the curtailment order, including any diversions for temporary transfer, regardless of whether the actual diversion would be facilitated by DWR or other SWP facilities. A condition is therefore included in this Order that the transfer shall be consistent with curtailment requirements should the Division curtail YCWA's right under Permit 15026.

6.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Water Code section 1729 exempts temporary changes involving a transfer of water from the requirements of the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.) The State Water Board will file a Notice of Exemption.

7.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY CHANGES

The State Water Board shall approve a temporary change 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 change would not injure any legal user of 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 water, or reduction in return flows.
- b. The proposed change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(Wat. Code, § 1727, subd. (b).)

In addition, the proposed change must involve only the amount of water that would have been consumptively used or stored in the absence of the temporary change. (*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 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.) 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 section 1727, subdivision (b)(2) (see Section 8.3 of this Order).

8.0 REQUIRED FINDINGS OF FACT

8.1 Transfer Only Involves 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 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.”

As previously indicated, the Corrected Order authorizes YCWA to transfer Yuba Accord water pursuant to the terms and conditions listed in that order. The proposal under this Petition is to add three PORs at Contra Costa WD’s existing Delta diversion facilities in order to receive transfer water from YCWA.

The State Water Board conducted an independent evaluation of its records. The combined annual use under Permit 15026 was 186,446 af, 155,948 af, 257,053 af, 164,679 af, and 375,370 af during 2016, 2017, 2018, 2019, and 2020, respectively. These data indicate that YCWA has put the amount proposed to be transferred to recent beneficial use.

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

8.2 No Injury to Other Legal Users of the Water

Before approving a temporary change due to a transfer or exchange of water, 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 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).)

Thus, with respect to the “no injury” inquiry under Water Code section 1727, the State Water Board must evaluate whether the change will injure any legal user of the water involved in the change. The controlling consideration in the State Water Board’s inquiry is the effect of the change on the rights of others. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 743, 805.) A person who claims injury from a proposed change “must show the change will interfere with his or her *right* to use the water, whatever the source of that right may be.” (*Id.* at p. 805, italics in original.) It is not enough for a water user to show that it will receive less water as a result of the change. Instead, a water user claiming injury must demonstrate that it has a right to the greater amount of water claimed and that the proposed change will interfere with that right. (*Ibid.*)

Petitioner proposes transfer of Yuba Accord water to Transfer Recipients via three new PORs that are located between the approved points of diversion for YCWA’s long-term transfer operations at the Freeport Project and the SWP’s Harvey O. Banks Pumping Plant. Petitioner has stated there would be no changes to operations of Yuba Project facilities nor any changes in flows on the Yuba River due to the transfer. The temporary transfer would only require a minor re-operation of Contra Costa WD’s existing facilities, which are operated under existing permits that govern Contra Costa WD’s operations in the Delta.

As stated in the Petition, rediversion of Yuba Accord water would be water deemed new to the system, and this transfer water would not be available to other legal users of water absent the transfer. Upon agreement with DWR, YCWA has committed to accounting principles for transfer water to Transfer Recipients that ensure the effects of the transfer would not impact SWP or CVP water supplies. This commitment includes a reduction in transfer water to Transfer Recipients by the amount of carriage water Reclamation and DWR determine would be needed to maintain Delta water quality. Therefore, with a carriage water cost applied to the transfer, all Delta standards would continue to be met, and DWR, Reclamation, and other legal users of the water would not be injured.

Petitioner's transfer to Transfer Recipients would comport with Amendment 5 of Petitioner's Water Purchase Agreement with DWR and its accounting principles for Yuba Accord transfer water. Accordingly, transfer water to Transfer Recipients would be accounted for by the Petitioner at the Marysville Gage on the Lower Yuba River. In order to avoid impacts to the Projects' water supplies, Petitioner has agreed that the amount of transfer water rediverted at the Contra Costa PORs compared to the amount of transfer water accounted for at the Marysville Gage would be reduced by the amount of carriage water that DWR and Reclamation determine would be needed to maintain Delta water quality. Therefore, with a carriage water cost applied to the transfer, DWR and Reclamation would not be injured by the temporary transfer.

In light of the above, and in accordance with Water Code section 1727, subdivision (b)(1), the State Water Board finds that the proposed temporary 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 change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows, or otherwise unreasonably affect a legal user of water.

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

Before approving a temporary change in order to facilitate 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).) Petitioner provided the California Department of Fish and Wildlife (CDFW) and the Central Valley Regional Water Quality Control Board (Central Valley Water Board) with a copy of the petition in accordance with California Code of Regulations, title 23, section 794, subdivision (c). The Central Valley Water Board and CDFW did not provide any comments to the State Water Board regarding potential effects of the proposed changes on water quality, fish, wildlife, or other instream beneficial uses.

In general, North of Delta transfers result in an incremental increase in instream flows between Petitioner's point of diversion and the location where the water is removed from the stream system. The increase in flows is not anticipated to be harmful to instream resources, provided that the transfer water does not cause instream temperatures to increase to harmful levels and also does not result in false fish attraction flows to streams not suited for fish rearing. No information is available that suggests the transfer flows will contribute to false fish attraction flows or significantly change stream temperatures or water quality. The transfer will also be subject to all applicable federal and California Endangered Species Act requirements, including applicable Biological Opinions, Incidental Take Permits, court orders, and any other conditions imposed by other regulatory agencies applicable to diversions and exports of water at the Projects' Delta pumps.

In this case, Petitioner is requesting additional PORDs to transfer Yuba Accord water. Approval of the Contra Costa PORDs would not change any of YCWA's operations, or any streamflow requirements set forth in the Corrected Order.

According to YCWA's Petition, diversion of transfer water at the Contra Costa PORDs, as compared to DWR backing the transfer water up into storage, would slightly increase flows in the Feather River, Sacramento River, and the Delta but would not significantly impact fish or wildlife. Flows resulting from the transfer would be within the range of effects analyzed in the Yuba Accord environmental documentation prepared to support the long-term transfer approved in the Corrected Order. In addition, the Contra Costa PORDs are all equipped with state-of-the-art resource agency-approved fish screens, which have been demonstrated to be effective in minimizing or avoiding take.

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

9.0 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.

10.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1725 et seq.

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 neither injure, nor unreasonably affect, any legal user of water, including 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 water or return flows.
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 25,000 acre-feet (af) of water under Yuba County Water Agency's (YCWA or Petitioner) Permit 15026 is approved.

All existing conditions of Permit 15026 remain in effect, except as temporarily amended by the following provisions:

1. The temporary change is limited to a period commencing from the date of this Order and continuing through November 30, 2022.
2. The total quantity of water to be rediverted at the new points of diversion shall not exceed 25,000 acre-feet, including 10,000 acre-feet to be transferred during the summer transfer window of July 1 through November 30. YCWA shall make such transfer water available consistent with the terms of the Lower Yuba River Accord (Yuba Accord) and State Water Board Corrected Order WR 2008--0014 (Corrected Order).
3. The following points of diversion are temporarily added to Permit 15026, referred to as the Contra Costa PORs in this Order:
 - 1) Rock Slough Intake – being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 33, T2N, R3E, MDB&M
 - 2) Old River Intake – being within NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 31, T1N, R4E, MDB&M
 - 3) Middle River Intake – being within NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of projected Section 9, T1S, R4E, MDB&M
4. During the period of transfer, Petitioner shall comply with applicable terms and conditions imposed by other regulatory agencies, including applicable conditions in the Federal Energy Regulatory Commission license issued for Project No. 2246. This Order shall not be construed as authorizing the violation of any agreement entered by Petitioner.
5. If, at any time prior to or during the period of transfer, the State Water Board curtails Permit 15026, only water collected to storage during a period when Permit 15026 was not required to cease diversions may be transferred.
6. Carriage water losses of 35 percent shall be deducted from any water transferred through the Delta and delivered under this Order between April and June. Absent an alternative determination by DWR and Reclamation, carriage water losses of 35 percent shall be deducted from any water transferred through the Delta and delivered under this Order during the summer/fall (July through November) period.

7. YCWA shall comply with all applicable requirements of State Water Board Revised Decision 1644, as amended by the Corrected Order. All of the instantaneous and annual limits on pages 59-60 of the Corrected Order shall apply to the total of all rediversion under Permit 15026 at the Contra Costa PORs and the other points of diversion authorized for Yuba Accord transfer water.
8. Diversions at the new points of rediversion will be subject to all terms and conditions that presently apply to Contra Costa WD's diversions of water.
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 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.

10. 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 (ESA) (Fish & G. Code, §§ 2050-2097) or the federal ESA (16 U.S.C. §§ 1531-1544). If a "take" will result from any act authorized under this temporary transfer, Petitioner shall obtain authorization for an incidental take prior to commencing transfer of water. Petitioner shall be responsible for meeting all requirements of the applicable ESA for the temporary transfer authorized under this Order.
11. The State Water Board reserves authority 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:

Erik Ekdahl, Deputy Director
Division of Water Rights

Dated: APR 01, 2022