

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**

SOURCE: YUBA RIVER

COUNTY: YUBA

ORDER APPROVING TEMPORARY CHANGES

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 OVERVIEW

On November 16, 2023, Yuba County Water Agency¹ (YWA 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). The transfer is requested to extend through December 31, 2024. Temporary transfers are effective for up to one year from the date of approval.

2.0 BACKGROUND

YWA is currently authorized under State Water Board Corrected Order WR 2008-0014 (Corrected Order) to transfer up to 200,000 af of water per calendar year 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 YWA's Petition to add three PORD in Contra Costa County would enable Contra Costa WD 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, YWA proposes to temporarily add the following points of rediversion to Permit 15026, referred to in this Order as the Contra Costa WD PORD:

- 1) Rock Slough Intake – California Coordinate System, NAD 83, Zone 3, North 2,179,904 feet and East 6,232,668 feet being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 33, T2N, R3E, MDB&M
- 2) Old River Intake – California Coordinate System, NAD 83, Zone 3, North 2,147,455 feet and East 6,250,918 feet being within NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 31, T1N, R4E, MDB&M
- 3) Middle River Intake on Victoria Canal – California Coordinate System, NAD 83, Zone 3, North 2,139,610 feet and East 6,259,970 feet 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 YWA 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 area for Contra Costa WD is already within the authorized place of use under Permit 15026 through December 31, 2025, as part of a long-term transfer. The additional PORD requested under the Petition would be necessary for YWA to transfer Yuba Accord water to Contra Costa WD. Petitioner states that approval of the Contra Costa WD PORD 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 WD PORD 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 November 27, 2023, 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 December 27, 2023. Timely comments on the proposed transfer were received from DWR and Reclamation. Petitioner provided a response to DWR's and Reclamation's comments by email to the Division dated December 15, 2023. 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 December 8, 2023, DWR submitted comments on the Petition requesting refill accounting and 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. DWR also recommended 35 percent carriage water losses for the typical transfer window if a determination is not made by DWR and Reclamation.

Comments by Reclamation

On December 15, 2023, Reclamation submitted comments on the Petition. Reclamation received a letter dated December 11, 2023 from the Petitioner indicating that the transfer would be in accordance with the Water Purchase Agreement per the Yuba Accord which specifies refill criteria. Reclamation also received a copy of DWR's December 8, 2023 comment letter. Reclamation stated it does not object to the transfer provided that refill criteria will apply and that DWR's carriage water requirements are followed.

Petitioner's Response:

On December 15, 2023, YWA submitted a response to DWR's comments indicating that YWA 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 as well as a 35 percent carriage water requirement for the summer/fall period, unless another amount is determined by DWR and Reclamation.

In its December 15, 2023 response, YWA included a copy of its December 11, 2023 letter to Reclamation indicating that refill criteria will apply to the proposed temporary transfer.

State Water Board's Response to Comments

The Petition explains that transfer operations would be coordinated with CVP and SWP operations so that the Delta flow and water quality requirements to protect fish and wildlife 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 YWA 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 2024 that YWA's right under Permit 15026 is curtailed, YWA 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 YWA'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, § 1728, 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, § 1725.5, subd. (b).) “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 1728, 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, 1725.5, 1726.) Water Code section 1725.5 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 YWA to transfer Yuba Accord water pursuant to the terms and conditions listed in that order. The proposal under this Petition is to add three PORD at Contra Costa WD’s existing Delta diversion facilities in order to receive transfer water from YWA.

The State Water Board conducted an independent evaluation of its records. The combined annual use under Permit 15026 was 155,948 af, 257,053 af, 164,679 af, 375,370 af, 195,560 af, and 186,306 af during 2017, 2018, 2019, 2020, 2021, and 2022, respectively. These data indicate that YWA 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, § 1728, subd. (b)(1).)

Thus, with respect to the “no injury” inquiry under Water Code section 1728, 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 Contra Costa WD via three new PORD that are located between the approved points of diversion for YWA’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, YWA has committed to accounting principles for transfer water to Contra Costa WD that ensure the effects of the transfer would not impact SWP or CVP water supplies. This commitment includes a reduction in transfer water to Contra Costa WD 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 Contra Costa WD 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 Contra Costa WD 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 WD PORD 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 1728, 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, § 1728, 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 PORD to transfer Yuba Accord water. Approval of the Contra Costa WD PORD would not change any of YWA's operations, or any streamflow requirements set forth in the Corrected Order.

According to YWA's Petition, diversion of transfer water at the Contra Costa WD PORD, 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 WD PORD 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 1728, 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 and the Deputy Director for Water Rights redelegation of authority dated April 20, 2023.

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 (YWA 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 on the date of this Order and continuing through December 31, 2024.
2. The total quantity of water to be rediverted at the new points of rediversion shall not exceed 25,000 acre-feet, including 10,000 acre-feet to be transferred during the summer/fall transfer window of July 1 through November 30. YWA 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 rediversion are temporarily added to Permit 15026, referred to as the Contra Costa WD PORD in this Order:
 - 1) Rock Slough Intake – California Coordinate System, NAD 83, Zone 3, North 2,179,904 feet and East 6,232,668 feet being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of projected Section 33, T2N, R3E, MDB&M
 - 2) Old River Intake – California Coordinate System, NAD 83, Zone 3, North 2,147,455 feet and East 6,250,918 feet being within NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of projected Section 31, T1N, R4E, MDB&M
 - 3) Middle River Intake on Victoria Canal – California Coordinate System, NAD 83, Zone 3, North 2,139,610 feet and East 6,259,970 feet 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. YWA 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 WD PORD 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: JANUARY 19, 2024