



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-11

July 7, 1998

**To:** Board of Directors (Committee on Communications and Legislation--Information)  
(Water Planning and Resources Committee--Information)

**From:** *for* General Manager

*Edward J. Meystle*  

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*Debra C. Man*  

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**Submitted by:** Debra C. Man, Chief  
Planning and Resources

**Subject:** Report on draft Water Rights Protection and Short-term Water Transfers Act of 1998

**RECOMMENDATION**

For information only.

**DETAILED REPORT**

Members of the California business community have developed a proposal for water transfer legislation (attached) entitled "The Water Rights Protection and Short-term Water Transfers Act of 1998". This proposal is a limited amendment to the California Water Code which is intended to improve the efficiency of the State's water transfer markets by 1) streamlining the State Water Resources Control Board's (SWRCB) review and approval of temporary changes in a water right permit or license for the purposes of transfer or exchange, 2) expanding the definition of a "temporary change" from one to two years, and 3) reiterating existing protections for water right holders seeking to transfer water. It is anticipated that the proposed draft will be incorporated as proposed amendments to SB1011, which is currently a spot bill addressing water transfers sponsored by Senator Jim Costa (D-Fresno).

The proposal is consistent with your Board's water transfer policy principles and furthering the development of cost-effective water supplies. Staff has reviewed the proposal and would add additional language requiring the SWRCB to notice all water transfer petitions at a centrally located, easily accessible site. Staff will work with the bill's sponsors to help ensure that any water transfer legislation remains consistent with your Board's Water Transfer Policy Statement.

As the business community becomes more involved in water matters, especially CALFED, it is recognizing the need for implementing an array of tools to resolve the State's water issues. As well as supporting water transfer language, the business community is involved in identifying a preferred CALFED alternative and developing a water resources bond issue to help fund other water quality and reliability solutions identified by CALFED. The participation of the business community in the CALFED process is critical and should be encouraged through support of sensible legislative improvements to water transfers procedures, such as those in this draft proposal.

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Attachment

**THE WATER RIGHTS PROTECTION AND  
SHORT-TERM WATER TRANSFER ACT OF 1998**

**Proposed Amendments to Water Code Division 2, Part 2**

June 26, 1998 5:00 PM

**Chapter 10.5, Article 1**

**Section 1725:** Existing Code included for information and clarification. No changes proposed.

A permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if 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, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses. For purposes of this article, "consumptively used" means 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.

**Section 1726:** Delete existing language and replace with:

All petitions for temporary change of water rights shall be filed by the water right holder. If the proposed temporary change is for the benefit of a contractor or user supplied directly or indirectly by the water right holder, the water right holder may authorize the contractor or user to participate as co-petitioner. The water right holder shall notify the Board in the petition of all co-petitioners

- a. *Petition.* A water right holder who proposes a temporary change shall submit to the Board a petition to change the terms of the permit, license, or decreed right as required to accomplish the proposed temporary change. The petition shall include proof that the transferor has the legal right to use the water proposed to be transferred throughout the term of the proposed temporary change. The petition also shall include a written explanation of the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, and water quality or instream flows that are likely to occur as a result of the proposed temporary change.

The petition shall be accompanied by a copy of the water transfer or water exchange agreement. The petitioner may omit the financial terms of the agreement from its submission to the Board.

The petitioner shall provide copies of the petition and accompanying documents to the California Department of Fish and Game, the Supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, and the Supervisors of the county or counties to which the water is proposed to be transferred or exchanged.

- b. *Notice.* Within ten days of submission of the petition to the Board, the petitioner shall cause to be published in at least one newspaper of general circulation in the county or counties in which the petitioner currently stores or uses the water subject to the petition a notice of the petition and a brief description of the terms of the proposed temporary change. The Board may impose other reasonable notice requirements on the petitioner.
- c. *Investigation.* Within ten days of receipt of the petition, the Board shall begin an investigation of the proposed temporary change. The Board shall determine whether the petitioner has a valid water right to use the water included in the petition throughout the term of the proposed temporary change. The Board also shall evaluate the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, and water quality or instream flows that would be likely to occur as a result of the proposed temporary change.
- d. *Protests.* Water users that may be affected by the proposed temporary change and other interested parties may file written protests with the Board. Protests shall be filed no later than thirty days after publication of the notice required by subsection (b). Copies of the protest and supporting documentation shall be served on the petitioner, the California Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), and the proposed transferee.
- e. *Decision.* The Board shall render a decision on the petition, without a hearing, no later than thirty days after commencement of the investigation. For good cause, the Board may extend this time period for no more than twenty days. The petitioner may stipulate to an extension of time for decision or a hearing if necessary for the Board to make the findings required by Section 1727.

The Board shall render its decision in accordance with the substantive standards set forth in section 1727. The Board shall explain its decision in writing and shall serve copies of the decision on the petitioner, the Department of Fish and Game, the Board of Supervisors of the county or counties described in subsection (a), the proposed transferee, and any party who has filed a written protest.

**Section 1727:** Delete existing language and replace with:

The State Water Resources Control Board shall review petitions for temporary changes of water rights according to the standards set forth in this section.

- a. *General Standards.* The Board shall grant the petition if it concludes that:
  - (1) the proposed temporary change would not injure any legal user of the water, during any potential hydrologic condition, through resulting 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.
- b. *Standard of Proof.* The standard of proof under subsection (a) shall be by a preponderance of the evidence.
- c. *Burden of Proof.* The petitioner shall have the burden of establishing that the proposed temporary change would comply with the standards set forth in subsection (a). The establishment of this *prima facie* case shall shift the burden of proof to those parties (if any) that have filed protests in accordance with the requirements of section 1726 to prove that the proposed temporary change would not comply with the standards set forth in subsection (a).
- d. *Compliance With Permits and Licenses.* In reviewing the petition for the temporary change in the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights, the Board shall not modify any terms and conditions of the petitioner's permit or license, including those terms that protect other legal water users, fish, wildlife, and other instream beneficial uses, except as necessary to carry out the temporary change in compliance with this Section.
- e. *Causation.* In applying the standards set forth in subsections (a) the Board shall not deny or place conditions on the temporary change to avoid or mitigate impacts that are not caused by the temporary change.

Neither the Department of Fish and Game nor any other state agency that comments on the proposed temporary change shall propose conditions to mitigate effects on fish, wildlife, or other instream beneficial uses that were caused or would be caused by factors other than the proposed temporary change.

This subsection does not limit the authority of the Board in proceedings pursuant to any other provision of law other than this Article..

**Section 1728:** Amend this section to read:

For the purpose of this article, a temporary change means any change in point of diversion, place of use, or purpose of use involving a transfer or exchange of water or water rights for a period of two years or less.

**Section 1732:** Delete existing language and replace with:

The petitioner shall not initiate or increase the use of groundwater to replace surface water transferred or exchanged pursuant to the provisions of this Article except in compliance with this Article and Article 4, Sections 1745.10 and 1745.11.

#### **Proposed Amendments to Water Code Division 2, Part 2, Chapter 10**

**Section 1707:** Add new subsections:

(c) Water that is transferred to instream uses pursuant to this section shall be in addition to the water that must be devoted to instream uses to satisfy senior water rights and federal, state, and local regulatory requirements governing water quantity, water quality, instream flows, fish and wildlife, wetlands, recreation, and other instream beneficial uses. Federal, state, and local agencies, as well as the courts, shall exclude water transferred to instream uses pursuant to this section from their determinations of the amounts of water or flows required to comply with these regulatory requirements.

The regulatory requirements described in this section include, but are not limited to, the following laws and their implementing regulations: the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, as amended; the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, as amended; the National Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 *et seq.*, as amended; Article X, Section 2 of the California Constitution; the California Wild and Scenic Rivers Act, Public Resources Code §§ 5093.50 *et seq.*, as amended; the California Endangered Species Act, Fish and Game Code §§ 2050 *et seq.*, as amended; Fish and Game Code § 5937; other applicable provisions of this Code; terms and conditions imposed by permit or license administered by the State Water Resources Control Board; and other judicial and administrative decisions respecting water rights, water quality, and other beneficial uses.

This subsection shall not apply to the extent it is preempted by federal law.

(d) Notwithstanding the provisions of subsection (c), the petitioner may transfer water to instream uses for the purpose of satisfying, or partly satisfying, its obligations under the regulatory requirements described in subsection (c). If the petitioner so requests, the Board shall note this regulatory credit in its final decision, and the agencies and courts shall include the credited water in all subsequent determinations of the amount of water or flows required of the petitioner to comply with such regulatory requirements.

**Section 1708:**

The transfer or exchange of water shall not cause, or be the basis of, a forfeiture or abandonment of any water rights, contract rights, or other rights to the use of such water. Nor shall the offer of water for transfer or exchange, the contract negotiations, or the transfer or exchange agreement be used as evidence of the petitioner's waste or unreasonable use, or cessation of use, of the water made available for transfer or exchange.

**Section 1709:**

Throughout the term of all water transfer or exchange agreements, compliance with Article X, Section 2 of the California Constitution, sections 100 through 101, 1410, and 1675 of this Code, and any other legislative, administrative, or judicial limitation on water rights shall be determined based on an assessment of the reasonableness of the transferee's use of the transferred water. If the transferee's right to use transferred water is reduced or divested on the basis of the transferee's abandonment, forfeiture, waste, or unreasonable use, the reduced or divested rights shall revert immediately to the transferor.

**Section 1710:**

At the conclusion of the term of a water transfer or exchange agreement, all rights in, and to the use of, the water subject to the agreement shall revert back to the petitioner. Following the conclusion of the term of a water transfer or exchange agreement, neither the transferee nor any other beneficiary of the transfer or exchange may bring any claim for a continuation of the water supply made available by the agreement. Nor may the transferee or any beneficiary of the transfer or exchange claim any right to a continued supply of water based on reliance, estoppel, intervening public use, prescription, water shortage emergency, unforeseen or unforeseeable increases in demand, or any other cause.

**Section 1711:**

The conservation, salvage, or other reduction in the use of water for the purpose of transferring or exchanging the amount so conserved, salvaged, or reduced in accordance with Water Code section 1011 shall be deemed a reasonable and beneficial use of water.