



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

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June 14, 2010

Ms. Victoria Whitney, Deputy Director  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000  
(via e-mail and surface mail)

Re: Protest/Comments on Petition for Temporary Change under License 11360  
(Application 12622) of the City of Sacramento and the Sacramento Suburban Water  
District

Dear Ms. Whitney:

The California Sportfishing Protection Alliance (CSPA) has reviewed the petition for a proposed Temporary Change under License 11360, Application 12622 of the City of Sacramento and the Sacramento Suburban Water District, to transfer 4,377 acre-feet of water to eight State Water Contractor Agencies between July 1, 2010 and September 30, 2010. The petition was noticed on May 13, 2010. We offer the following comments.

### **The proposed temporary change is not temporary.**

Water Code Section 1728 defines a temporary change: "For the purposes of this article, a temporary change means any change of point of diversion, place of use, or purpose of use involving a transfer or exchange of water or water rights for a period of one year or less." Water Code Section 1735 says: "A long-term transfer shall be for any period in excess of one year."

Petitioner states on page 2 of its petition: "The proposed transfer would substantially repeat the 2009 water transfer SSWD made through DWR's Drought Water Bank, which was approved by the SWRCB in Order WR 2009-0054-DWR."

This is thus the second consecutive year that Sacramento Suburban has petitioned for water transfer to many if not most of the same recipients. By the plain meaning of Water Code Section 1728, this petition should not be considered as a temporary transfer because it contemplates a second year of the same action. It should be considered a long-term transfer under Section 1735 of the Water Code.

Unlike changes, including transfers, under Water Code Section 1728, transfers under Water Code Section 1735 are not exempt from CEQA analysis under the Water Code Section 1729 exemption. The proposed change should therefore be analyzed under CEQA.

Falling under the requirement for CEQA analysis, the rules governing analysis of cumulative effects of the proposed long-term transfer should also apply. This is in notable distinction from Water Code Section 1727(e), which limits consideration of effects to the incremental effect of a temporary transfer alone, as opposed to the more comprehensive burden of the cumulative effects analysis under CEQA, which requires analysis of a proposed project in combination with other known or reasonably foreseeable actions that affect the environment.

The statutory limitation under Water Code Section 1727(d), which does not allow consideration of the ongoing effects to the public trust under the water right for which a temporary change is sought, also does not apply to long-term transfers. In addition to a CEQA analysis, a public trust analysis of License 12622, Application 11360 should therefore be conducted by the State Board.

**Non-response by the Department of Fish and Game does not necessarily denote absence of fisheries impacts.**

In response to several comment letters regarding water transfers that CSPA filed in 2009, the State Board included a default response that read: “DFG was provided a copy of the subject petition and did not submit comments or concerns regarding the temporary change” (see, e.g., Order WR 2009-0040-DWR, page 6). The decision by DFG not to comment on transfers in 2009 reflected a policy decision and perhaps a workload decision made by DFG management, and likely its superiors in Resources and the Governor’s office. The State Board should not draw conclusions of substance based on failure by DFG to engage procedurally, either in 2009 or, should it come to pass, in 2010. The CEQA and public trust analyses that are required for the City of Sacramento and Sacramento Suburban’s proposed transfer due to its long-term character will adequately disclose and analyze impacts to fisheries, including cumulative impacts in the Bay-Delta. CSPA reminds the Board that DFG submitted substantial written and oral testimony in the Delta Flow Proceeding conducted by the Board in January through March, 2010 regarding the dire condition of Bay-Delta fisheries, and also submitted extensive recommendations for greatly increased Delta outflow based on an equitable allocation of responsibility. The CEQA and public trust analyses for the proposed transfer should consider cumulative effects of the proposed project in light of the recommendations of DFG and other resource agencies and non-governmental organizations, including CSPA, in the Delta Flow Proceeding.

## **Conclusion**

The requested transfer should be denied as a temporary transfer under Section 1725 of the Water Code. As a long-term transfer under Section 1735 of the Water Code, the proposed transfer should be analyzed under CEQA. The CEQA analysis should evaluate cumulative effects, not merely incremental effects.

As part of consideration of the long-term transfer, the Board should also conduct a public trust analysis of the petitioner's license.

Thank you for the opportunity to comment on the Petition for Temporary Change under License 11360 (Application 12622) of the City of Sacramento and the Sacramento Suburban Water District.

Respectfully submitted,



Chris Shutes  
Water Rights Advocate  
California Sportfishing Protection Alliance

**Certificate of Service**

I hereby certify that on this day, June 14, 2010, I, Chris Shutes, have placed in first class mail at Berkeley, California, a true copy of this protest mailed to:

City of Sacramento  
c/o Joe Robinson, Senior Deputy City Attorney  
City Attorney's Office  
915 I Street, 4<sup>th</sup> Floor  
Sacramento, CA 95814

and

Sacramento Suburban Water District  
c/o Joshua Horowitz  
Bartkiewicz, Kronick & Shananan  
1011 22<sup>nd</sup> St.  
Sacramento, CA 95816-4907

  
Chris Shutes