

A Practitioner's Guide to Instream Flow Transactions in California

Appendix B – Water Code Sections

WATER CODE SECTION 1435: Urgent

1435. (a) Any permittee or licensee who has an urgent need to change a point of diversion, place of use, or purpose of use from that specified in the permit or license may petition for, and the board may issue, a conditional, temporary change order without complying with other procedures or provisions of this division, but subject to all requirements of this chapter.

(b) Prior to issuing a change order pursuant to this chapter, the board shall make all of the following findings:

(1) The permittee or licensee has an urgent need to make the proposed change.

(2) The proposed change may be made without injury to any other lawful user of water.

(3) The proposed change may be made without unreasonable effect upon fish, wildlife, or other instream beneficial uses.

(4) The proposed change is in the public interest, including findings to support change order conditions imposed to ensure that the change is in the public interest, and may be made without injury to any other lawful user of the water, and without unreasonable effect upon fish, wildlife, and other instream beneficial uses.

(c) "Urgent need," for the purposes of this chapter, means the existence of circumstances from which the board may in its judgment conclude that the proposed temporary change is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the fullest extent of which they are capable and that waste of water be prevented; except that the board shall not find a petitioner's need to be urgent if the board in its judgment concludes, if applicable, that the petitioner has not exercised due diligence either (1) in petitioning for a change pursuant to provisions of this division other than this chapter, or (2) in pursuing that petition for change.

(d) The board may delegate to any officer or employee of the board all or any of its functions under this chapter.

1436. The petition for a temporary change order shall be completed in accordance with the rules of the board, and the petitioner shall pay the fee required by Chapter 8 (commencing with Section 1525).

1437. Before making the findings required by Section 1435, the board shall review available records, files, and decisions which relate to the rights of other legal users of water, consult with representatives of the Department of Fish and Game, and make a field investigation if the investigation is necessary or desirable in the opinion of the board.

WATER CODE SECTIONS 1700-1707

1700. Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose, but the purpose of the use of such water may be changed as provided in this code.

1701. At any time after notice of an application is given, an applicant, permittee, or licensee may change the point of diversion, place of use, or purpose of use from that specified in the application, permit, or license; but such change may be made only upon permission of the board.

1701.1. A petition for change filed after notice of an application shall meet all of the following requirements:

- (a) State the name and address of the petitioner.
- (b) Be signed by the petitioner, or the petitioner's agent or attorney.
- (c) Set forth amendments to the application or an amended application reflecting the proposed change, including any information necessary for the amended application to comply with Section 1260.
- (d) Include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.
- (e) Contain other appropriate information and be in the form required by applicable regulations.

1701.2. A petition for change in a permit or license shall meet all of the following requirements:

- (a) State the name and address of the petitioner.
- (b) Be signed by the petitioner, or the petitioner's agent or attorney.
- (c) Include all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and Game, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.
- (d) Include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.
- (e) Contain other appropriate information and be in the form required by applicable regulations.

1701.3. (a) After a petition is filed, the board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be

Appendix B – Water Code Sections

submitted under this chapter. The board shall provide a reasonable period for submitting the information.

(b) The additional information may include, but need not be limited to, any of the following:

(1) Information needed to demonstrate that the change will not injure any other legal user of water.

(2) Information needed to demonstrate that the change will comply with any applicable requirements of the Fish and Game Code or the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.).

(3) Information needed to comply with Division 13 (commencing with Section 21000) of the Public Resources Code.

1701.4. If, within the period provided, the petitioner does not provide the information requested pursuant to Section 1701.3, the board shall cancel the petition, unless, for good cause shown, the board allows additional time to submit the requested information.

1702. Before permission to make such a change is granted the petitioner shall establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved.

1703. After filing a petition for permission to make a change, the petitioner, in case the board so requires, shall cause notice thereof to be given or published in the manner prescribed by the board. In all cases the petitioner shall notify the Department of Fish and Game in writing of the proposed change.

1703.1. Any interested person, within the time allowed in the notice of petition, or within the time the board may allow for good cause shown, may file with the board a written protest against approval of the petition.

1703.2. The protest shall meet all of the following requirements:

(a) State the name and address of the protestant.

(b) Be signed by the protestant, or the protestant's agent or attorney.

(c) Clearly and specifically set forth the protestant's objections to the approval of the petition, and state the bases for these objections.

(d) Contain other appropriate information and be in the form required by applicable regulations.

(e) Be served on the petitioner by the protestant by mailing a duplicate copy of the protest to the petitioner or through service undertaken in another manner determined to be adequate by the board.

1703.3. The board may request from the protestant additional information reasonably necessary to clarify, amplify, correct, or

Appendix B – Water Code Sections

otherwise supplement the information required to be submitted pursuant to Section 1703.2. The board shall provide a reasonable period for submitting the information, and may allow additional time for good cause shown.

1703.4. The protestant and the petitioner shall make a good faith effort to resolve the protest not later than 180 days from the date the period provided pursuant to Section 1703.1 expires. For good cause, the board may allow additional time for the protestant and the petitioner to attempt to resolve the protest.

1703.5. The board may request from the protestant or the petitioner additional information that the board determines is reasonably necessary to attempt to resolve the protest. The board shall provide a reasonable period for submitting the information, and may allow additional time for good cause shown.

1703.6. (a) The board may cancel a protest or petition for failure to provide information requested by the board under this chapter within the period provided.

(b) Except as provided in subdivisions (c) and (d), the board shall not cancel a protest for failure to submit information not in the possession or under the control of the protestant if the protest meets the requirements of Section 1703.2 and the petitioner is or could be required to submit the information under Section 1701.1, 1701.2, or 1701.3.

(c) If a protest is based on injury to a legal user of water, the board may cancel the protest if the protestant fails to submit any of the following information requested by the board:

(1) Information that the protestant is required to submit to the board to comply with Part 5.1 (commencing with Section 5100) during any period after the protest is filed.

(2) Information that is reasonably necessary to determine if the protestant is a legal user of water.

(3) Information concerning the protestant's historical, current, or proposed future diversion and use of water that is reasonably necessary to determine if the proposed change will result in injury to the protestant's exercise of its water right or other legal use of water.

(d) If the protest is based on an allegation other than injury to a legal user of water, the board may cancel the protest for failure to submit information requested by the board if the board determines both of the following:

(1) The public review period has expired for any draft environmental document or negative declaration required to be circulated for public review and comment pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

(2) In the absence of the requested information, there is no

Appendix B – Water Code Sections

substantial evidence in light of the whole record to support the allegation.

(e) If a protest is subject to both subdivisions (c) and (d), the part of the protest subject to subdivision (c) may be canceled pursuant to subdivision (c) and the part of the protest subject to subdivision (d) may be canceled pursuant to subdivision (d).

1704. (a) The board, after a hearing, may approve with conditions, or deny, a petition.

(b) Notice of hearing shall be given by mailing the notice not less than 20 days before the date of hearing to the petitioner and to any protestant by registered mail.

(c) (1) The board may, but is not required to, hold a hearing prior to approving an unprotested petition.

(2) The board may, but is not required to, hold a hearing if the board determines that undisputed facts support the approval of the petition and there is no disputed issue of material fact.

(3) The board may, but is not required to, hold a hearing prior to denying a petition, if, after notice, the board determines that the petition is defective, the petition fails to provide information requested by the board, or undisputed facts support the denial of the petition and there is no disputed issue of material fact.

1704.1. The Division of Water Rights shall conduct a field investigation of all minor protested petitions for change. The board shall notify the parties of the field investigation not less than 20 days prior to conducting the field investigation, to enable the parties to attend and present information to the board.

1704.2. The Division of Water Rights may request the parties to submit information in support of their positions. The Division of Water Rights may request information before, during, or after the field investigation. After the field investigation, the Division of Water Rights may conduct additional proceedings in accordance with Article 10 (commencing with Section 11445.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

1704.3. Based upon the field investigation and any other information obtained under this chapter, the Division of Water Rights shall issue an order acting on the minor petition for change unless the board in its discretion determines that additional proceedings should be conducted under Section 183. An order of the Division of Water Rights is subject to review as provided in Chapter 4 (commencing with Section 1120) of Part 1.

1704.4. For purposes of this chapter, a minor petition for change shall mean any petition which does not involve direct diversions in excess of three cubic-feet per second or storage in excess of 200

Appendix B – Water Code Sections

acre-feet per year.

1705. After the hearing the board shall grant or refuse, as the facts warrant, permission to change the point of diversion, place of use, or purpose of use.

1706. The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

1707. (a) (1) Any person entitled to the use of water, whether based upon an appropriative, riparian, or other right, may petition the board pursuant to this chapter, Chapter 6.6 (commencing with Section 1435) or Chapter 10.5 (commencing with Section 1725) for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

(2) The petition may be submitted for any of the purposes described in paragraph (1) and may, but is not required to, be submitted in combination with a petition to make any other change authorized pursuant to this part. The petition shall specify the time, location, and scope of the requested change, and other relevant information relating thereto.

(b) The board may approve the petition filed pursuant to subdivision (a), subject to any terms and conditions which, in the board's judgment, will best develop, conserve, and utilize, in the public interest, the water proposed to be used as part of the change, whether or not the proposed use involves a diversion of water, if the board determines that the proposed change meets all of the following requirements:

(1) Will not increase the amount of water the person is entitled to use.

(2) Will not unreasonably affect any legal user of water.

(3) Otherwise meets the requirements of this division.

(c) (1) Upon the request of the petitioner, the board may specify, as part of its approval of the petition, that the water that is subject to the approval pursuant to this section shall be in addition to water that is required, if any, to be used for instream purposes to satisfy any applicable federal, state, or local regulatory requirements governing water quantity, water quality, instream flows, fish and wildlife, wetlands, recreation, and other instream beneficial uses. If the request is approved by the board, state and local agencies, as well as the courts, shall not credit the water subject to that petition towards compliance with any of the regulatory requirements described in this subdivision. A federal agency shall comply with the requirement imposed by this paragraph to

the extent required by federal law, or to the extent that it chooses to comply.

(2) For the purposes of this subdivision, "requirements" includes requirements or obligations that have not been formally established or allocated at the time of the petition, and obligations under any agreement entered into to meet those requirements. Neither any petition filed pursuant to this section nor any documents or statements made in connection therewith shall be construed or used as an admission, evidence, or indication of any obligation to meet any of the requirements described in this subdivision.

(d) Except as provided in subdivision (c), water that is subject to a petition granted pursuant to this section shall be used to meet, in whole or in part, any requirement described in subdivision (c) if any of these requirements exist. The water shall be credited to the petitioner, or to any other person or entity designated by the petitioner, whenever that person or entity has, or may have, obligations to meet one or more of the requirements described in subdivision (c). The water shall be credited towards compliance with any requirements described in subdivision (c), by state and local agencies, as well as the courts. A federal agency shall comply with the requirement imposed by this subdivision to the extent required by federal law, or to the extent that it chooses to comply.

WATER CODE SECTIONS 1725-1732: Temporary

1725. 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.

1726. (a) (1) A permittee or licensee who proposes a temporary change shall submit to the board a petition to change the terms of the permit or license as required to accomplish the proposed temporary change. Any petition for a temporary change shall be filed by the permittee or licensee. If the proposed temporary change is for the benefit of a contractor or user supplied directly or indirectly by the permittee or licensee, the permittee or licensee may authorize the contractor or user to participate as a copetitioner. The

permittee or licensee shall identify any copetitioner in the petition.

(2) A contractor or user described in paragraph (1), whether or not designated as a copetitioner, and the person to whom the water is proposed to be transferred, shall be named as parties to the proceeding, with the same rights to receive notices, respond to board determinations, and petition for writ of mandate as the petitioner.

(b) A petition shall include both of the following:

(1) Reference to the permit or license that serves as the basis for the water transfer.

(2) A written description 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 of instream flows that are likely to occur as a result of the proposed temporary change.

(c) A petitioner shall provide a copy of the petition to the Department of Fish and Game, the board of supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, and the board of supervisors of the county or counties to which the water is proposed to be transferred.

(d) Within 10 days of the date of submission of a petition to the board, the petitioner shall publish in not less than 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 shall, in a timely manner, provide to the petitioner a list of water right holders of record on file with the board who may be affected by the transfer, and the petitioner shall provide written notice to those water right holders not later than 10 days after the date on which the petition is submitted. The board shall post the notice of petition on its Internet web site not later than 10 days after the date on which the petition is submitted. The notice of the petition shall specify the date on which comments are due. The board may impose on the petitioner any other notice requirement it determines to be necessary.

(e) Within 10 days of the date of receipt of a petition, the board shall commence an investigation of the proposed temporary change. Pursuant to that investigation, the board shall determine if the water proposed to be transferred would have been consumptively used or stored pursuant to the petitioner's permit or license in the absence of the proposed transfer or conserved pursuant to Section 1011. 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, water quality, and instream flows, and other changes that are likely to occur as a result of the proposed temporary change.

(f) Water users that may be affected by a proposed temporary change and any other interested party may file a written comment

regarding a petition with the board. Comments shall be filed not later than 30 days after the date that the notice was published pursuant to subdivision (d). The board shall evaluate and take into consideration all comments that are filed in a timely manner.

(g) (1) Except as specified in paragraphs (2) and (3), the board shall render a decision on the petition not later than 35 days after the date that investigation commenced or the date that the notice was published, whichever is later. The board's decision shall be in accordance with the substantive standards set forth in Section 1727. The board shall explain its decision in writing and shall send copies of the decision to the petitioner, the Department of Fish and Game, the board of supervisors of the county or counties described in subdivision (c), the proposed transferee, and any party who has filed a written comment in accordance with subdivision (f).

(2) If comments are filed in accordance with subdivision (f), or for any other good cause, the board may extend the date of its decision for up to 20 days.

(3) If the board or the petitioner determines that an additional extension of time for a decision is necessary for the board to make the findings required by Section 1727, or that a hearing is necessary for the board to make those findings, the board may extend the time for a decision with the consent of the petitioner. If the petitioner agrees to a hearing, the board shall identify the issues for which additional evidence is required and shall fix a time and place for the hearing. The board shall provide notice of the time, place, and subject matter of the hearing to the petitioner, the Department of Fish and Game, the board of supervisors of the county or counties described in subdivision (c), the water right holders of record identified pursuant to subdivision (d), the proposed transferee, and any party who has filed a written comment in accordance with subdivision (f).

1727. (a) The board shall review a petition for a temporary change of water rights in accordance with this section.

(b) The board shall 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 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.

(2) The proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(c) The petitioner shall have the burden of establishing that a proposed temporary change would comply with paragraphs (1) and (2) of subdivision (b). If the board determines that that petitioner has established a prima facie case, the burden of proof shall shift to

Appendix B – Water Code Sections

any party that has filed a comment pursuant to subdivision (f) of Section 1726 to prove that the proposed temporary change would not comply with paragraphs (1) and (2) of subdivision (b). The board may make a determination required by this subdivision without a hearing.

(d) In reviewing a petition for a temporary change, the board shall not modify any term or condition of the petitioner's permit or license, including those terms that protect other legal users of water, fish, wildlife, and other instream beneficial uses, except as necessary to carry out the temporary change in accordance with this article.

(e) In applying the standards set forth in paragraphs (1) and (2) of subdivision (b), the board shall not deny, or place conditions on, a 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 caused by factors other than the proposed temporary change. This subdivision does not limit the board, the Department of Fish and Game, or any other state agency, in proceedings pursuant to any provision of law other than this article.

1728. 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. The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out. If, within a period of one year or less, the water involved in the temporary change is moved to off-stream storage outside of the watershed where the water originated, the change shall be considered a temporary change, and the water moved to off-stream storage outside the watershed where the water originated may be put to beneficial use in the place of use and for the purposes of use specified in the board's order approving the temporary change either during or after that period.

1729. A proposed temporary change under this article shall be exempt from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code. [CEQA]

1731. Following the expiration of the temporary change period, all rights shall automatically revert to the original holder of the right without any action by the board.

1732. The petitioner shall not initiate or increase the use of groundwater to replace surface water transferred pursuant to this article, except in compliance with Sections 1745.10 and 1745.11.

WATER CODE SECTION 1735-1737: Long-term

1735. The board may consider a petition for a long-term transfer of water or water rights involving a change of point of diversion, place of use, or purpose of use. A long-term transfer shall be for any period in excess of one year.

1736. The board, after providing notice and opportunity for a hearing, including, but not limited to, written notice to, and an opportunity for review and recommendation by, the Department of Fish and Game, may approve such a petition for a long-term transfer where the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other instream beneficial uses.

1737. Following the expiration of the long-term transfer period, all rights shall automatically revert to the original holders of the right without any action by the board.