Appendix F
Transparency in Water Contracting

THIS PAGE INTENTIONALLY BLANK

Appendix F1
Select DWR Policies Regarding Contract Negotiations and Water Transfers

THIS PAGE INTENTIONALLY BLANK

STATE OF CALIFORNIA • RESOURCES AGENCY • DEPARTMENT OF WATER RESOURCES

NOTICE TO

STATE WATER PROJECT CONTRACTORS

NUMBER: 03-09

DATE: 7/3/03

SUBJECT: Guidelines for Review of Proposed Permanent Transfers of State Water Project Annual Table A Amounts

FROM: INTERIM DIRECTOR, DEPARTMENT OF WATER RESOURCES

The Department of Water Resources is issuing the following guidelines prepared in connection with the Settlement Agreement, dated May 5, 2003, reached in *Planning and Conservation League et al. v. Department of Water Resources, 83 Cal. App. 4th 892 (2000).* These guidelines are effective upon the superior court's approval of the Settlement Agreement on May 20, 2003.

1. Purpose: The purpose of these guidelines is to describe the process for DWR's review of proposed permanent transfers of State Water Project Annual Table A Amounts and, by so doing, provide disclosure to SWP contractors and to the public of DWR's process and policy for approving permanent transfer of SWP Annual Table A Amounts. Such disclosure should assist contractors in developing their transfer proposals and obtaining DWR review expeditiously, and assist the public in participating in that review.

2. Coverage: These guidelines will apply to DWR's approval of proposed permanent transfers of water among existing SWP contractors and, if and when appropriate, to proposed permanent transfers of water from an existing SWP contractor to a new SWP contractor.

3. Interpretation: These guidelines are in furtherance of the State policy in favor of voluntary water transfers and shall be interpreted consistent with the law, including but not limited to Water Code Section 109, the Burns-Porter Act, the Central Valley Project Act, the California Environmental Quality Act, area of origin laws, the public trust doctrine, and with existing contracts and bond covenants. These guidelines are not intended to change or augment existing law.

4. Revisions: Revisions may be made to these guidelines as necessary to meet changed circumstances, changes in the law or long-term water supply contracts, or to address conditions unanticipated when the guidelines are adopted. Revisions shall be in accordance with the Settlement Agreement.

5. Distribution: The transfer guidelines shall be published by DWR in the next available edition of Bulletin 132, and also as part of the biennial disclosure of SWP reliability as described in the Settlement Agreement.

6. Contract Amendment: Permanent transfers of SWP water are accomplished by amendment of each participating contractor's long-term water supply contract. The amendment consists of amending the Table A upwards for a buying contractor and downwards for a selling contractor. The amendment shall be in conformity with all provisions of the long-term water supply contracts, applicable laws, and bond covenants. Other issues to be addressed in the contract amendment will be subject to negotiation among DWR and the two participating contractors. The negotiations will be conducted in public, pursuant to the Settlement Agreement and Notice to State Water Project Contractors Number 03-10.

7. Financial Issues: The purchasing contractor must demonstrate to DWR's satisfaction that it has the financial ability to assume payments associated with the transferred water. If the purchasing entity was not a SWP contractor as of 2001, special financial requirements pertain as described below, as well as additional qualifications.

8. Compliance with CEQA: Consistent with CEQA, the State's policy to preserve and enhance environmental quality will guide DWR's consideration of transfer proposals (Public Resources Code Section 21000). Identification of the appropriate lead agency will be based on CEQA, the CEQA Guidelines, and applicable case law, including *PCL v. DWR.* CEQA requires the lead agency at a minimum to address the feasible alternatives to the proposed transfer and its potentially significant environmental impacts (1) in the selling contractor's service area; (2) in the buying contractor's service area; (3) on SWP facilities and operations; and (4) on the Delta and areas of origin and other regions as appropriate. Impacts that may occur outside of the transferring SWP contractors' service areas and on fish and wildlife shall be included in the environmental analysis. DWR will not approve a transfer proposal until CEQA compliance is completed. The lead agency shall consult with responsible and trustee agencies and affected cities and counties and, when DWR is not the lead agency, shall provide an administrative draft of the draft EIR or Initial Study/Negative Declaration to DWR prior to the public review period. A descriptive narrative must accompany a checklist, if a checklist is used. The lead agency shall conduct a public hearing on the EIR during the public comment period and notify DWR's State Water Project Analysis Office of the time and place of such hearing in addition to other notice required by law.

9. Place of Use: The purchasing contractor must identify the place and purpose of use of the purchased water, including the reasonable and beneficial use of the water.

Typically, this information would be included in the environmental documentation. If a specific transfer proposal does not fit precisely into any of the alternatives listed below, DWR will use the principles described in these Guidelines to define the process to be followed. The information to be provided under this paragraph is in addition to the CEQA information described in Paragraph 8 of these guidelines.

a. If the place of use is within the contractor's service area, the contractor should disclose the purpose of the transferred water, such as whether the water is being acquired for a specific development project, to enhance overall water supply reliability in the contractor's service area, or some other purpose. If the transferred water is for a municipal purpose, the contractor should state whether the transfer is consistent with its own Urban Water Management Plan or that of its member unit(s) receiving the water.

b. If the place of use is outside the contractor's service area, but within the SWP authorized place of use, and service is to be provided by an existing SWP contractor, then, in addition to Paragraph 9(a) above, the contractor should provide DWR with copies of LAFCO approval and consent of the water agency with authority to serve that area, if any. In some instances, DWR's separate consent is required for annexations in addition to the approval for the transfer.

c. If the place of use is outside the SWP authorized place of use and service is to be provided by an existing SWP contractor, the contractor should provide information in Paragraph 9(a) and 9(b). Prior to approving the transfer, DWR will consider project delivery capability, demands for water supply from the SWP, and the impact, if any, of the proposed transfer on such demand. If DWR approves the transfer, DWR will petition State Water Resources Control Board for approval of expansion of authorized place of use. Water will not be delivered until the place of use has been approved by the SWRCB and will be delivered in compliance with any terms imposed by the SWRCB.

d. If the place of use is outside the SWP authorized place of use and service is not to be provided by an existing SWP contractor, DWR will consider the transfer proposal as a proposal to become a new SWP contractor. Prior to adding a new SWP contractor, DWR will consider project delivery capability, demands for water supply from the SWP, and the impact, if any, of the proposed transfer on such demand. DWR will consult with existing SWP contractors regarding their water supply needs and the proposed transfer. In addition to the information in Paragraph 9(a), 9(b), and 9(c), the new contractor should provide information similar to that provided by the original SWP contractors in the 1960's Bulletin 119 feasibility report addressing hydrology, demand for water supply, population growth, financial feasibility, etc.

DWR will evaluate these issues independently and ordinarily will act as lead agency for CEQA purposes. In addition, issues such as area of origin claims, priorities, environmental impacts and use of water will be addressed. The selling contractor may not be released from financial obligations. The contract will be subject to a CCP 860 validation action initiated by the new contractor. If DWR approves the transfer, DWR will petition the SWRCB for approval of expansion of authorized place of use. Water will not be delivered until the place of use has been approved by the SWRCB and will be delivered in compliance with any terms imposed by the SWRCB.

10. DWR Discretion: Consistent with the long-term water supply contract provisions, CEQA, and other provisions of law, DWR has discretion to approve or deny transfers. DWR's exercise of discretion will incorporate the following principles:

    a. As required by CEQA, DWR as an agency with statewide authority will implement feasible mitigation measures for any significant environmental impacts resulting from a transfer if such impacts and their mitigation are not addressed by other public agencies and are within DWR's jurisdiction.

    b. DWR will invoke "overriding considerations" in approving a transfer only as authorized by law, including but not limited to CEQA, and, to the extent applicable, the public trust doctrine and area of origin laws.

If you have any questions or need further information, please contact Dan Flory, Chief of DWR's State Water Project Analysis Office, at (916) 653-4313 or Nancy Quan of his staff at (916) 653-0190.

STATE OF CALIFORNIA • RESOURCES AGENCY • DEPARTMENT OF WATER RESOURCES

NOTICE TO
STATE WATER PROJECT CONTRACTORS

NUMBER: 03-10

DATE: 7/3/03

SUBJECT: Principles Regarding Public Participation Process in State Water Project Contract Negotiations

FROM: Michael J. Spear
INTERIM DIRECTOR, DEPARTMENT OF WATER RESOURCES

The Department of Water Resources is issuing the following guidelines prepared in connection with the Settlement Agreement, dated May 5, 2003, reached in *Planning and Conservation League et al. v. Department of Water Resources, 83 Cal. App. 4th 892 (2000).* These guidelines are effective upon the superior court's approval of the Settlement Agreement on May 20, 2003.

1. Policy: Given the importance of the State Water Project to the State of California, and the key role that the long-term water supply contracts play in the administration of the SWP, DWR agrees that public review of significant changes to these contracts is beneficial and in the public interest.

2. Types of Activities to be Covered: Project-wide contract amendments (i.e., contracts with substantially similar terms intended to be offered to all long-term SWP Contractors) and contract amendments to transfer Table A amounts between existing SWP contractors will not be offered to the contractors for execution unless DWR has first complied with the public participation process as described in Paragraphs (3), (4), (5), and (6).

3. The Public Participation Process:

   1) Negotiations will be conducted in public.

   2) The public will be provided with advance notice of the time and place of the negotiations.

   3) The public will be provided the opportunity to observe negotiations and comment in each negotiating session.

4. Timing of Public Participation: Public participation ordinarily will precede the formulation of the project description in the California Environmental Quality Act process in order to assure that the public participation is meaningful. When DWR is a responsible agency, (e.g., when existing SWP contractors agree to transfer Table A amounts between themselves), the public participation will be scheduled to facilitate coordination with the lead agency's CEQA process.

5. Activities That Will Not Be Subject to Public Participation: Informal discussions prior to exchange of formal drafts and discussion of topics that are authorized to be kept confidential by law will not be subject to the public participation process.

6. Contract Amendments Resulting From Litigation: If litigation has been formally initiated, and settlement negotiations result in a proposal to adopt project-wide amendments to settle the litigation, all proposed contract amendments shall be subject to the public participation process before they are approved by DWR.

Notices of public negotiations will be put on the DWR website.

If you have any questions or need further information, please contact Dan Flory, Chief of DWR's State Water Project Analysis Office, at (916) 653-4313, or Nancy Quan of his staff at (916) 653-0190.

Appendix F2
Federal Law Regarding Water Contracting

THIS PAGE INTENTIONALLY BLANK

Public Law 97-293

Title II, Reclamation Reform Act of 1982

Section 226: Public Participation

SEC. 226: Public Participation

Section 9 of the Reclamation Project Act of 1939 (43 U.S.C. 485h) is amended by adding at the end the following new subsection:

"(f) No less than sixty days before entering into or amending any repayment contract or any contract for the delivery of irrigation water (except any contract for the delivery of surplus or interim irrigation water whose duration is for one year or less) the Secretary shall—

"(1) publish notice of the proposed contract or amendment in newspapers of general circulation in the affected area and shall make reasonable efforts to otherwise notify interested parties which may be affected by such contract or amendment, together with information indicating to whom comments or inquiries concerning the proposed actions can be addressed; and

"(2) provide an opportunity for submission of written data, views and arguments, and shall consider all substantive comments so received."

Title 34, Public Law 102-575

Central Valley Project Improvement Act

Section 3405.

Water Transfers, Improved Water Management and Conservation

The Law

Section 3405. Water Transfers, Improved Water Management & Conservation

(a) Water Transfers.--In order to assist California urban areas, agricultural water users, and others in meeting their future water needs, subject to the conditions and requirements of this subsection, all individuals or districts who receive Central Valley Project water under water service or repayment contracts, water rights settlement contracts or exchange contracts entered into prior to or after the date of enactment of this title are authorized to transfer all or a portion of the water subject to such contract to any other California water user or water agency, State or Federal agency, Indian Tribe, or private non-profit organization for project purposes or any purpose recognized as beneficial under applicable State law. Except as provided herein, the terms of such transfers shall be set by mutual agreement between the transferee and the transferor.

(1) Conditions for Transfers.--All transfers to Central Valley Project water authorized by this subsection shall be subject to review and approval by the Secretary under the conditions specified in this subsection. Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract within any contracting district or agency shall also be subject to review and approval by such district or agency under the conditions specified in this subsection:

(A) No transfer to combination of transfers authorized by this subsection shall exceed, in any year, the average annual quantity of water under contract actually delivered to the contracting district or agency during the last three years of normal water delivery prior to the date of enactment of this title.

(B) All water under the contract which is transferred under authority of this subsection to any district or agency which is not a Central Valley Project contractor at the time of enactment of this title shall, if used for irrigation purposes, be repaid at the greater of the full-cost or cost of service rates, or, if the water is used for municipal and industrial purposes, at the greater of the cost of service or municipal and industrial rates.

(C) No transfers authorized by this subsection shall be approved unless the transfer is between a willing buyer and a willing seller under such terms and conditions as may be mutually agreed upon.

(D) No transfer authorized by this subsection shall be approved unless the transfer is consistent with State law,

including but not limited to provisions of the California Environmental Quality Act.

(E) All transfers authorized by this subsection shall be deemed a beneficial use of water by the transferor for the purposes of section 8 of the Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. 372.

(F) All transfers entered into pursuant to this subsection for uses outside the Central Valley Project service area shall be subject to a right of first refusal on the same terms and conditions by entities within the Central Valley Project service area. The right of first refusal must be exercised within ninety days from the date that notice is provided of the proposed transfer. Should an entity exercise the right of first refusal, it must compensate the transferee who had negotiated the agreement upon which the right of first refusal is being exercised for that entity's total costs associated with the development and negotiation of the transfer.

(G) No transfer authorized by this subsection shall be considered by the Secretary as conferring supplemental or additional benefits on Central Valley Project water contractors as provided in section 203 of Public Law 97-293 (43 U.S.C. 390(cc)).

(H) The Secretary shall not approve a transfer authorized by this subsection unless the Secretary has determined, consistent with paragraph 3405(a) (2) of this title, that the transfer will not violate the provisions of this title or other Federal law and will have no significant adverse effect on the Secretary's ability to deliver water pursuant to the Secretary's Central Valley Project contractual obligations or fish and wildlife obligations under this title because of limitations in conveyance or pumping capacity.

(I) The water subject to any transfer undertaken pursuant to this subsection shall be limited to water that would have been consumptively used or irretrievably lost to beneficial use during the year or years of the transfer.

(J) The Secretary shall not approve a transfer authorized by this subsection unless the Secretary determines, consistent with paragraph 3405(a) (2) of this title, that such transfer will have no significant long-term adverse impact on groundwater conditions in the transferor's service area.

(K) The Secretary shall not approve a transfer unless the Secretary determines, consistent with paragraph 3405(a) (2) of this title, that such transfer will have no unreasonable impact on the water supply, operations, or financial

conditions of the transferor's contracting district or agency or its water users.

(L) The Secretary shall not approve a transfer if the Secretary determines, consistent with paragraph 3405(a) (2) of this title, that such transfer would result in a significant reduction in the quantity or decrease in the quality of water supplies currently used for fish and wildlife purposes, unless the Secretary determines pursuant to finding setting forth the basis for such determination that such adverse effects would be more than offset by the benefits of the proposed transfer. In the event of such a determination, the Secretary shall develop and implement alternative measures and mitigation activities as integral and concurrent elements of any such transfer to provide fish and wildlife benefits substantially equivalent to those lost as a consequence of such transfer.

(M) Transfers between Central Valley Project contractors within countries, watersheds, or other areas of origin, as those terms are utilized under California law, shall be deemed to meet the conditions set forth in subparagraphs (A) and (I) of this paragraph.

(2) Review and Approval of Transfers.--All transfers subject to review and approval under this subsection shall be reviewed and approved in a manner consistent with the following:

(A) Decisions on water transfers subject to review by a contracting district or agency or by the Secretary shall be rendered within ninety days of receiving a written transfer proposal from the transferee or transferor. Such written proposal should provide all information reasonably necessary to determine whether the transfer complies with the terms and conditions of this subsection.

(B) All transfers subject to review by a contracting district or agency shall be reviewed in a public process similar to that provided for in section 226 of Pub. L. 97-293.

(C) The contracting district or agency or the Secretary shall approve all transfers subject to review and approval by such entity if such transfers are consistent with the terms and conditions of this subsection. To disapprove a transfer, the contracting district or agency or the Secretary shall inform the transferee and transferor, in writing, why the transfer does not comply with the terms and conditions of this subsection and what alternatives, if any, could be included so that the transfer would reasonably comply with the requirements of this subsection.

(D) If the contracting district or agency or the Secretary fails to approve or disapprove a proposed transfer within ninety

days of receiving a complete written proposal from the transferee or transferor, then the transfer shall be deemed approved.

(3) Transfers executed after September 30, 1999 shall only be governed by the provisions of subparagraphs 3405(a) (1) (A) -(C), (E), (G), (H), (I), (L), and (M) of this title, and by State law.

(f) Increased Revenues.--All revenues received by the Secretary as a result of the increased repayment rates applicable to water transferred from irrigation use to municipal and industrial use under subsection 3405(a) of this section, and all increased revenues received by the Secretary as a result of the increased water prices established under subsection 3405(d) of this section, shall be covered to the Restoration Fund.

Section 3407(d)(2)(a). Restoration Fund

(d) Adjustment and Assessment of Mitigation and Restoration Payments.--

(1) In assessing the annual payments to carry out subsection (c) of this section, the Secretary shall, prior to each fiscal year, estimate the amount that could be collected in each fiscal year pursuant to subparagraphs 2(A) and (B) of this subsection. The Secretary shall decrease all such payments on a proportionate basis from amounts contained in the estimate so that an aggregate amount is collected pursuant to the requirements of paragraph (c) (2) of this section.

(2) The Secretary shall assess and collect the following mitigation and restoration payments, to be covered to the Restoration Fund, subject to the requirements of paragraph (1) of this subsection:

(A) The Secretary shall require Central Valley Project water and power contractors to make such additional annual payments as are necessary to yield, together with all other receipts, the amount required under paragraph (c) (2) of this subsection; Provided, That such additional payments shall not exceed $30,000,000 (October 1992 price levels) on a three-year rolling average basis; Provided further, That such additional annual payments shall be allocated so as not to exceed $6.00 per acre-foot (October 1992 price levels) for agricultural water sold and delivered by the Central Valley Project, and $12.00 per acre-foot (October 1992 price levels) for municipal and industrial water sold and delivered by the Central Valley Project;

Provided further, that the charge imposed on agricultural water shall be reduced, if necessary, to an amount within the probable ability of the water users to pay as determined and adjusted by the Secretary no less than every five years, taking into account the benefits resulting from implementation of this title; Provided further, That the Secretary shall impose an additional annual charge of $25.00 per acre-foot (October

1992 price levels) for Central Valley Project water sold or transferred to any State or local agency or other entity which has not previously been a Central Valley Project customer and which contracts with the Secretary or any other individual or district receiving Central Valley Project water to purchase or otherwise transfer any such water for its own use for municipal and industrial purposes, to be deposited in the Restoration Fund; And Provided further, That upon the completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406 of this title, the Secretary shall reduce the sums described in paragraph (c)(2) of this section to $35,000,000 per year (October 1992 price levels) and shall reduce the annual mitigation and restoration payment ceiling established under this subsection to $15,000,000 (October 1992 price levels) on a three-year rolling average basis. The amount of the mitigation and restoration payment made by Central Valley Project water and power users, taking into account all funds collected under this title, shall, to the greatest degree practicable, be assessed in the same proportion, measured over a ten-year rolling average, as water and power users' respective allocations for repayment of the Central Valley Project.

For additional information, please contact CVPIA Program Manager (916) 978-5190
February 4, 2011

Back