

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2009-0059-EXEC

IN THE MATTER OF LICENSES 10191 AND 10192 (APPLICATIONS 8042 AND 8043)

City of Los Angeles, Department of Water and Power

SOURCES: Rush Creek, Lee Vining Creek, Parker Creek and Walker Creek

COUNTY: Mono

ORDER APPROVING TEMPORARY URGENCY CHANGE IN LICENSE CONDITIONS

BY THE EXECUTIVE DIRECTOR:

1.0 SUBSTANCE OF PETITIONS

On September 22, 2009, City of Los Angeles, Department of Water and Power (Los Angeles) filed two petitions with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), requesting approval of Temporary Urgency Change to water right Licenses 10191 and 10192 pursuant to Water Code section 1435. The petitions under each license are identical and request authorization to:

- (1) Lower the required winter base flow in Rush Creek from 44 cubic feet per second (cfs) to a range of 28 to 32 cfs from October 3, 2009 to March 31, 2010; and
- (2) Lower the required winter base flow in Lee Vining Creek from 40 cfs to a range of 12 to 18 cfs as shown below.
 - a. Winter base flow range of 16 to 18 cfs in Lee Vining Creek from October 3 to December 31, 2009
 - b. Winter base flow range of 12 to 14 cfs in Lee Vining Creek from January 1 to March 31, 2010

Los Angeles' petitions state that the flows will be achieved by increasing or decreasing ramping with the existing ramping rate for both creeks based on Decision 1631 and Order 98-05. This modification will not increase Los Angeles' annual allowed diversion of 16,000 acre-feet under Decision 1631.

2.0 BACKGROUND

In Decision 1631, the State Water Board modified Licenses 10191 and 10192 for the purpose of establishing instream flow requirements below Los Angeles' points of diversion on the four affected streams, which are tributaries of Mono Lake. The decision also established conditions to protect public trust resources at Mono Lake. State Water Board Order WR 98-05 subsequently amended

Decision 1631. Pursuant to the State Water Board determinations, Los Angeles is required to conduct fisheries studies and stream monitoring. State Water Board-approved Stream Scientists perform these tasks.

2.1 Description of the Temporary Urgency Change

During the upcoming winter season (October 3, 2009 to March 31, 2010), Los Angeles requests to operate under the flow ranges recommended in the Rush and Lee Vining Creek Instream Flow Study Report prepared by the Stream Scientists. The temporary flow changes will allow Los Angeles and the Stream Scientists to test the flow changes to determine fishery response to the flows and conserve more water in Grant Lake for in-basin uses. Implementation of the recommended base flows is intended to improve and benefit fish habitat in the creeks by maximizing over-wintering trout holding habitats.

3.0 PUBLIC NOTICE OF THE PETITIONS

On September 25, 2009, the State Water Board issued and delivered to Los Angeles, a notice of the temporary urgency changes pursuant to Water Code section 1438(a). The comment period expires on October 15, 2009.

4.0 OBJECTION AND COMMENTS

The Division received an objection from California Fisheries and Water Unlimited (California Fisheries) against the petitions for Temporary Urgency Change, and comments from California Trout and Mono Lake Committee.

4.1 California Fisheries

California Fisheries objected to the proposed temporary urgency change by unsigned email dated September 27, 2009. California Fisheries objected on the basis that there may be no urgency to make the changes depending on water year type in the upcoming water year, and the fishery resource could be harmed due to the changes. The objection requests that studies be conducted to determine the effects of reducing the flows to the petitioned quantities, before implementing the flow changes.

The requested action is an interim modification for the purpose of conducting the studies that California Fisheries suggests are needed prior to making any long-term modification in the flows. It is in the public interest to allow Los Angeles an opportunity to implement the temporary change, obtain fisheries data, and refine its flow release program for the purposes of long-term operations. No further action is needed on this issue.

The objection raises the issue of whether the petitions meet the urgent need criteria. "Urgent need" for the purposes of Water Code section 1435(c) 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. Consequently, urgent need is not determined solely by water year type, as indicated in the objection. Los Angeles has based its urgency claim on the need to obtain data on fishery needs in accordance with the timelines in Decision 1631 and Order 98-05. The petitions meet the urgent need criteria.

4.2 California Trout

On September 29, 2009, California Trout indicated that it does not object to the requested changes, but would like the following points addressed: 1) clarification regarding selection of flow alternatives in the petitions; and 2) a monitoring program should be required. In regard to issue one, California Trout states

that the flows requested under the petitions are not the recommended flows as described in the Rush and Lee Vining Creeks Instream Flow Study report. Instead, the requested flows are those that "analyses suggest...would provide the most area of adult trout holding habitat in Rush Creek downstream of the Narrows." California Trout indicated that its comment was submitted for the purpose of clarifying the record. No further action will be taken on this issue. To address issue two, the Division will condition the order to require a monitoring program.

4.3 Mono Lake Committee (MLC)

MLC did not file an objection to the petitions. On September 30, 2009, MLC commented that the monitoring plan provided by Los Angeles is not specific and should include other components including side channel flow, synoptic flow measurements, groundwater monitoring, and other elements that the Stream Scientists may deem necessary. MLC recommended that the Stream Scientists provide a specific monitoring protocol to the State Water Board for approval by October 15, 2009. The order will be conditioned to require a monitoring program.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Los Angeles, as Lead Agency as defined in CEQA, prepared a Notice of Exemption for the Temporary Urgency Change in License Conditions on September 22, 2009. Los Angeles found that the change is categorically exempt from CEQA, as the project is for the use of existing facilities with negligible or no expansion of existing use for the purpose of maintaining fish and wildlife habitat areas, maintaining stream flows, and protecting fish and wildlife resources. (14 Cal. Code Regs. § 15301(i).)

As a responsible agency under CEQA, the State Water Board has reviewed the information submitted by Los Angeles and has determined that the petitions qualify for an exemption under CEQA. The State Water Board will issue a Notice of Exemption for the temporary urgency change petitions.

The State Water Board may approve a temporary urgency change only if it determines that the proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1435, subd. (b)(3).) In addition to any obligation the State Water Board may have under CEQA, the Board 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 [189 Cal.Rptr. 346].) There is no evidence that approval of the petition, with the monitoring of fish passage and potential icing of the streams, will unreasonably affect fish, wildlife, or other instream uses or have any adverse impacts on public trust resources.

6.0 CRITERIA FOR APPROVING THE PROPOSED TEMPORARY URGENCY CHANGE

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 can petition for a conditional temporary change order provided under Chapter 6.6 of part 2, division 2, of the Water Code, starting at section 1435. The State Water Board's regulation, at California Code of Regulations, title 23, section 791(e), provides that the State Water Board shall follow as nearly as possible the procedures for changes in point of diversion, place of use, or purpose of use when processing petitions for other types of changes in water right permits and licenses. Accordingly, the procedures under Water Code section 1435 are applicable to changes to terms and conditions of water right permits and licenses.

The State Water Board must make the findings specified in section 1435(b) when issuing a temporary change order pursuant to chapter 6.6. The required findings are:

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; and
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.

6.1 Urgency of the Proposed Change

Under Water Code section 1435 (c), an urgent need to make a proposed change exists when the State Water Board concludes 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. However, the State Water Board shall not find the need urgent if it concludes that the petitioner has failed to exercise due diligence in petitioning for a change pursuant to other appropriate provisions of the Water Code.

In this case, an urgent need exists for the proposed change in license conditions regarding fish flows for the purpose of conducting studies to further maintenance and enhancement of public trust resources.

6.2 No Injury to Any Other Lawful User of Water

There are no lawful users of water that will be affected by the proposed changes in instream flows. There are only two known water diverters in the affected stream reaches. The U.S. Inyo National Forest (National Forest) has filed a statement for use and diversion of water on Lee Vining Creek. The National Forest diversion will be met irrespective of the change, because the diversion quantity is minor.

6.3 No Unreasonable Effect Upon Fish, Wildlife, or Other Instream Beneficial Uses

The temporary urgency changes will not have unreasonable effects upon fish and wildlife resources since Los Angeles shall implement a monitoring program to monitor the streams for fish passage and icing concerns.

6.4 The Proposed Change is in the Public Interest

The proposed change would assist Los Angeles in maintaining the fishery in good condition. Maintenance of the fishery is in the public interest.

7.0 CONCLUSIONS

The State Water Board has adequate information in its files to make the evaluation required by Water Code section 1435.

I conclude that, based on the available evidence:

1. The licensee has an urgent need to make the proposed changes;
2. The petitioned changes will not operate to the injury of any other lawful user of water.
3. The petitioned changes will not have an unreasonable effect upon fish, wildlife, or other instream beneficial uses; and,
4. The petitioned changes are in the public interest.

ORDER

NOW, THEREFORE, IT IS ORDERED that the filed petitions for temporary change are approved through March 31, 2010.

All existing terms and conditions of Licenses 10191 and 10192 remain in effect, except as temporarily amended by the following provisions:

1. The Rush Creek required base flow is lowered from 44 cubic feet per second (cfs) to a range of 28 to 32 cfs from date of Order issuance through March 31, 2010.

The Lee Vining Creek required base flow is lowered from 40 cfs to a range of 12 to 18 cfs as follows:

- a. Winter base flow range of 16 to 18 cfs from the date of Order issuance through December 31, 2009.
 - b. Winter base flow range of 12 to 14 cfs from January 1 to March 31, 2010.
2. Los Angeles shall implement a monitoring program for the investigation of fish passage and icing concerns in the creeks. The monitoring program should be developed and reviewed with the Stream Scientists and shall be submitted to the Division of Water Rights by November 15, 2009 for review, modification, and approval. If fish passage or icing issues occur, Los Angeles shall ramp flows up at the rate which the Stream Scientists recommend and report to the Deputy Director for Water Rights within one week of the occurrence.
 3. Los Angeles shall document the results of the revised flows for inclusion in the Synthesis Report being prepared by the Stream Scientists.
 4. This Order does not authorize any act that results in the taking of a threatened or endangered species, or any act that is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this Order, the licensee shall obtain authorization for an incidental take permit prior to construction or operation. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the temporary urgency change authorized under this Order.
 5. The State Water Board reserves jurisdiction to supervise the temporary urgency changes 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.

Dated: 10-12-09



Dorothy Rice
Executive Director