

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

DIVISION OF WATER RIGHTS

AMENDED ORDER WR 2010-0031-DWR

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

AMENDED ORDER APPROVING TEMPORARY URGENCY CHANGE IN LICENSE CONDITIONS

BY THE DEPUTY DIRECTOR FOR WATER RIGHTS:

1.0 SUBSTANCE OF PETITIONS

On October 27, 2010, City of Los Angeles, Department of Water and Power (Los Angeles) filed two identical petitions with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), requesting approval of temporary urgency changes to water right Licenses 10191 and 10192 pursuant to Water Code section 1435. The petitions request authorization to temporarily deviate from the flow requirements of Decision 1631 and Order WR 98-05 in order to test the feasibility of new flow recommendations and other measures set forth in the April 30, 2010 *Synthesis of Instream Flow Recommendations Report* (Synthesis Report). Los Angeles followed these petitions up with a letter dated December 20, 2010, further clarifying its request.

The modifications proposed in Los Angeles' Operations Plan will not increase Los Angeles' annual export of 16,000 acre-feet¹ as specified in Decision 1631. However, the amended order allows a two-year measurement period for Los Angeles' export.

2.0 BACKGROUND

In Decision 1631 (D-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 four affected streams tributary to Mono Lake. The decision also established conditions to protect public trust resources at Mono Lake. State Water Board Orders WR 98-05 and WR 98-07 amended Decision 1631. Pursuant to the D-1631 and the subsequent Orders, Los Angeles is required to conduct fisheries studies and stream monitoring activities until the program (or elements thereof) is terminated by the State Water Board. Los Angeles has been conducting fisheries studies and stream monitoring for the past 12 years. These activities are conducted by State Water Board-approved Stream Scientists who: (a) oversee implementation of the stream monitoring and restoration program and (b) evaluate the results of the monitoring program and recommend modifications as necessary. In the Synthesis Report, the Stream Scientists recommended modification of the flow regime and other aspects of the Mono Basin stream

¹ 16,000 acre-feet may be exported when Mono Lake elevation is at or above 6,380 feet and below 6,391 feet.

monitoring and restoration program.

2.1 Description of the Temporary Urgency Change

The basis of the temporary urgency change petitions is to allow Los Angeles to test the Synthesis Report recommendations to improve fishery conditions, as identified in the Mono Basin One Year Temporary Operation Plan (Operation Plan) dated October 27, 2010, as follows:

- 1) Test the recommended flow changes for Rush and Lee Vining Creeks.
- 2) Test the implementation of operational measures that do not require facilities modifications.
- 3) Respond to questions regarding the feasibility of some of the operational changes by testing the changes, developing answers to operational questions raised in the Synthesis Report, and determining if there are better or alternative recommendations to improve fishery habitat.
- 4) Gather testing data regarding Synthesis Report recommendations to use as part of the planned facilitated resolution process. The facilitated process is being used to address differing opinions regarding the feasibility of some of the Synthesis Report re-operation proposals.

3.0 PUBLIC NOTICE OF THE PETITIONS

On November 2, 2010, the State Water Board issued and delivered to Los Angeles a notice of the temporary urgency changes pursuant to Water Code section 1438, subdivision (a). The Division did not receive any protests on the petitions prior to the December 1, 2010 protest deadline. Los Angeles notified the persons listed on the Mono Lake D-1631 mailing list of its December 20, 2010 request for modification of Order WR 2010-0031-DWR.

4.0 COMMENTS REGARDING THE PETITION

On October 6, 2010, Los Angeles circulated a draft of its Operation Plan by email to interested parties, including the Department of Fish and Game (DFG), California Trout, Mono Lake Committee, and the Stream Scientists for comments. Subsequently, California Trout, Mono Lake Committee, and the Stream Scientists commented on the proposed Operation Plan. On October 26, 2010, Los Angeles notified the interested parties by email that it had modified the plan based on the comments and provided a modified plan to interested parties. Los Angeles indicated in the October 26, 2010 email that the modified plan did not include a response to comments on the following issues: (1) curtailment of diversion from Walker and Parker Creeks, (2) snow course survey data collection, and; (3) installation of a new County Road stream gage. The Division notes that issues (1) and (2) are outside the scope of action relating to the Temporary Urgency Petitions. Regarding issue (3), Los Angeles states that establishing a new County Road gage is not feasible nor would the gage be reliable since the site is hydrologically unstable. However, Los Angeles plans to continue collecting synoptic measurement data to answer questions concerning flow losses and gains. The Final Operation Plan, dated October 27, 2010, was submitted to the State Water Board with the petitions.

On October 29, 2010, the Division consulted with DFG regarding the petitions, and DFG expressed its support of the petitions. DFG did not indicate that it would require any conditions associated with the temporary petition action.

On November 22, 2010, the Division received comments from California Fisheries and Water Unlimited (CFWU), which requested that Petitioner comply with DFG Code sections 5946 and 5947. CFWU also requested that the proposed streamflow modifications be discontinued if the modified flows harm the trout fishery. These concerns are addressed in section 6.3 of this order, which requires Los Angeles to monitor the streams for winter fish passage and icing concerns.

5.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Los Angeles, which would be lead agency if the proposed temporary changes constituted a project subject to the CEQA environmental documentation requirement, prepared a Notice of Exemption for the Temporary Urgency Change in License Conditions on October 27, 2010. 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. (Cal. Code Regs., tit. 14, § 15301, subd. (i).)

The State Water Board has independently reviewed the information submitted by Los Angeles and has determined that the petitions qualify for an exemption under CEQA. The State Water Board issued a Notice of Exemption for the temporary urgency change petitions when it approved Order WR 2010-0031-DWR. The modification requested on December 20, 2010 (see section 6.5 for a description of the modification) will not result in any increase in the rate of diversion, but will result in a temporary change in timing of exports to Los Angeles. The modification will result in negligible or no expansion of existing use, because water export will be capped at 32,000 af for a two-year period, which is consistent with the existing diversion limit.

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 petitions and the modification requested on December 20, 2010, which includes the continued monitoring and response program to address fish passage and the potential for icing of the streams during the winter months, 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, subdivision (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 Water Code section 1435, subdivision (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, subdivision (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 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, including the modification requested on December 20, 2010. There is only one known water diverter below Los Angeles' point of diversions in the affected stream reaches. The U.S. Inyo National Forest (National Forest) holds License 8959 (Application 13072) and a Statement of Water Diversion and Use (S010220). The National Forest diversions will be met irrespective of the change, because the diversion quantities are minor. The National Forest's water rights are currently being satisfied without regard to diversions by Los Angeles. The current petitions will not change the flows in a manner that will deprive the National Forest of the flows needed to serve its established rights.

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

The temporary urgency changes, including the modification requested on December 20, 2010, will not have unreasonable effects upon fish and wildlife resources since Los Angeles shall implement a monitoring program to monitor the streams for winter fish passage and icing concerns and a response program to ramp up flows as necessary to address fish passage or icing problems.

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.

6.5 Requested Amendment of Order

On December 20, 2010, Los Angeles requested that the Division modify the Order pursuant to the Boards continuing authority to supervise the temporary urgency changes. (Wat Code § 1439; see also Order WR 98-05, condition 6.) Los Angeles indicated that due to decreased winter baseflows in Rush and Lee Vining Creeks and a greater-than-average runoff year, Grant Lake Reservoir is filling up faster than anticipated and will most likely spill prior to the completion of an icing study. Spill is anticipated to occur in February 2011. The fishery stream scientist appointed by the State Water Board informed Los Angeles that an early spill downstream of Grant Lake, if large enough to mobilize the channel bed, would not be suitable for incubating brown trout eggs at that time of year. In order to allow the icing study to continue uninterrupted and for the protection of the fishery, Los Angeles proposes to export up to an additional 6,000 af during the current runoff year of April 1, 2010 through March 31, 2011 (RY 2010). Los Angeles would limit combined export for RY 2010 and RY 2011 to 32,000 af. This would result in no change in the two-year export quantity from the quantity authorized in Decision 1631. Los Angeles will follow its Operation Plan as approved by this Order and continue to implement the monitoring program for the investigation of fish passage and icing concerns in the creeks. Therefore, the Division concludes that there would be no injury to fish and wildlife as a result of the proposed temporary change.

Order WR 2010-0031-DWR conditionally approved Los Angeles' petitions and Operation Plan for a period of 180 days pursuant to the limitation contained in Water Code section 1440. This amended order temporarily changes the export measurement methodology.

The proposal includes an increase in exports in RY 2010, with a reduction of export by the same amount during the following runoff year. For the runoff year ending March 31, 2011, Los Angeles would like to export up to 22,000 af and reduce exports in the following year by the amount exported in excess of 16,000 af in the current year. Under Los Angeles' proposal the combined total export would remain unchanged at 32,000 af.

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

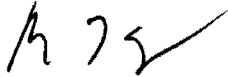
NOW, THEREFORE, IT IS ORDERED THAT the petitions for temporary change in Licenses 10191 and 10192 are approved for a period of 180 days. The 180 days began on the original date of issuance of Order WR 2010-0031-DWR, which was November 5, 2010.

1. All existing terms and conditions of Licenses 10191 and 10192 remain in effect, except as temporarily amended by this Order to incorporate the October 27, 2010 Operation Plan. The Operation Plan is approved, with the exception that the unidentified potential modification to the year type schedule (first full sentence on page 3 of Operation Plan) is not approved. Any modification to the existing year type schedule or year type schedule as proposed in the Synthesis Report shall require the approval of the Deputy Director for Water Rights prior to implementation of the revised year type schedule.
2. Los Angeles shall continue to implement the monitoring program for the investigation of fish passage and icing concerns in the creeks. If fish passage or icing issues occur, Los Angeles shall ramp flows up at the rate which the Stream Scientists recommend until the fish passage and/or icing concerns have been resolved 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 and other modifications authorized by the approved Operation Plan in a report for inclusion with the currently required annual reporting.
4. Exports under Licenses 10191 and 10192 shall be modified to the following:
 - a. Total exports for the period April 1, 2010 through March 31, 2012 shall not exceed 32,000 af;
 - b. The requirement to limit annual exports on a water year basis is temporarily suspended, subject to the above two-year diversion limitation. After March 31, 2012, the annual export limitation shall resume.

This term shall remain in effect through March 31, 2012.

5. 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.
6. 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.

STATE WATER RESOURCES CONTROL BOARD



*Barbara L. Evoy, Deputy Director
Division of Water Rights*

Date:

JAN 4 2011