



State Water Resources Control Board



Division of Water Rights

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

DIVISION OF WATER RIGHTS

ORDER WR 2011-0011-DWR

IN THE MATTER OF PETITIONS FOR TEMPORARY URGENCY CHANGE
IN 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

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 change to water right Licenses 10191 and 10192 pursuant to Water Code section 1435. The petitions were approved in Order 2010-0031-DWR.

The petitions requested 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' proposed changes were provided in a Mono Basin One-Year Temporary Operation Plan (Operation Plan) dated October 27, 2010 and December 20, 2010 letter. Order 2010-0031-DWR approved the petitions for a 180-day period ending on May 4, 2011. Los Angeles filed temporary urgency change (petitions) on April 14, 2011 to renew the temporary change order for another 180 day period to continue implementation of the Operation Plan.

The modifications proposed in Los Angeles' Operation Plan will not increase Los Angeles' annual export of 16,000 acre-feet¹ as specified in Decision 1631. However, this order will continue the two-year measurement period for Los Angeles' export as approved in Amended Order 2010-0031-DWR.

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

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 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 a State Water Board-approved stream monitoring team (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 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 Operation Plan, 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 April 19, 2011, the Division: (a) issued and delivered to Los Angeles a notice of the temporary urgency changes pursuant to Water Code section 1438, subdivision (a), and (b) provided the notice to its Mono Lake interested parties list. The period to file an objection will end on May 18, 2011. To date, the Division has not received any objections to the petitions. Pursuant to Water Code section 1438, subdivision (a), the board may issue a temporary change order in advance of the notice. In this case, Los Angeles has requested that the Division approve the petitions for temporary urgency change to begin May 4, 2011 in order for Los Angeles to continue operating under the Operations Plan approved in Order 2010-0031-DWR. Any timely filed objections received after order issuance will be processed in accordance with Water Code section 1438.

4.0 COMMENTS REGARDING THE PETITIONS

On April 22, 2011, Division staff contacted the stream scientists to determine if they had any concerns regarding the petitions. The stream scientists include a fisheries expert and a geomorphology/riparian expert. An email comment was received on April 22, 2011 from the fisheries expert regarding the following Operation Plan elements: (1) the Lee Vining Creek 5-siphons test, (2) Parker-Walker diversions during dry run-off year types, (3) water export to Los Angeles, (4) Grant Lake Reservoir temperature and dissolved oxygen profiles, and (5) stream recorder location.

The concern regarding item (1) has been addressed in the order by requiring consultation with the stream scientists when the siphons test is done. No action is needed regarding item (2) because the water year classification is not "dry". Regarding item (3), the stream scientist sought clarification regarding the allowed export quantity for 2011. Amended Order 2010-0031-DWR instituted a two-year measurement period for the 16,000 af per annum export to Los Angeles. This order retains the ongoing two-year measurement period. In item (4), the stream scientist explained the monitoring that should be implemented if low dissolved oxygen (DO) is measured in Grant Lake Reservoir. The stream scientist did not, however, indicate that approval of the petitions would affect DO in Grant Lake Reservoir or result in low DO conditions. Consequently, the Division will address the concern by consultation with the stream scientists and Los Angeles should low DO conditions occur. In item (5), the stream scientist requests verification whether a specific stream recorder is located in the optimum location. This concern will also be addressed through consultation, and not in the order.

The Department of Fish and Game (DFG) was contacted on April 22, 2011 to identify any concerns or comments. To date, DFG has not indicated any concerns regarding the proposed re-operations.

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 April 12, 2011. 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 will issue a Notice of Exemption for the temporary urgency change petitions. The modification requested on December 20, 2010 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, 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. Los Angeles has indicated that renewal of the petitions is urgent because Los Angeles seeks to continue operating under the Operations Plan for a one-year period in order to test operational feasibility of the Synthesis Report.

6.2 No Injury to Any Other Lawful User of Water

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 will not have unreasonable effects upon fish and wildlife resources since Los Angeles shall continue to follow monitoring requirements currently in place under D-1631 and Order 98-05. The State Water Board shall supervise diversion and use of water under the temporary urgency change order for the protection of fish, wildlife, or other instream beneficial uses (Water Code section 1439).

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 Previous Amendment of Order 2010-0031-DWR

Amended Order 2010-0031-DWR contains a provision modifying the export methodology of Decision 1631. The amended order allowed an increase in exports to the Los Angeles place of use in the 2010 runoff year (RY) with a reduction of export by the same amount during the following runoff year. This is achieved by allowing exports to be calculated over a two-year period. Since RY 2011 is the second year of the two-year calculation period, the export limit shall be carried forward in the current order.

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 shall begin on May 4, 2011.

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 following exceptions: 1) 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) prior to testing the Lee Vining Creek 5-siphons facility, Los Angeles shall consult with the stream monitoring team. The test shall only be conducted after it is approved by the stream monitoring team and with notification of the Deputy Director for Water Rights. If the stream monitoring team is in disagreement, the Deputy Director for Water Rights shall decide the matter.
2. 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.
3. 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.

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.

STATE WATER RESOURCES CONTROL BOARD



Barbara L. Evoy, Deputy Director
Division of Water Rights

Date: MAY 4 2011