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CALIFORNIA TROUT, INC. and FRIENDS OF THE RIVER

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Water Quality)
Certification for the Re-Operation of)
Pyramid Dam for the California)
Aqueduct Hydroelectric Project, FERC) **Petition for Reconsideration and**
Project No. 2426, Ventura and Los) **Request for Stay**
Angeles Counties)
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Pursuant to California Code of Regulations, Title 23, Section 3867, California Trout, Inc. ("CalTrout") and Friends of the River ("FOR") (together, "Petitioners") request that the State Water Resources Control Board ("State Water Board" or "Board") reconsider the water quality certification it issued under section 401 of the Clean Water Act (33 U.S.C. § 1341) to the Department of Water Resources ("DWR") and the City of Los Angeles Department of Water and Power ("LADWP") (together, "Licensee") for the California Aqueduct Hydroelectric Project,

FERC Project No. 2426. Petitioners further request that the Board stay the effect of the issued water quality certification, in accordance with California Code of Regulations, Title 23, Section 3869(d), pending reconsideration.

1. NAME, ADDRESS, AND TELEPHONE NUMBER OF PETITIONERS

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2. SPECIFIC ACTION STATE WATER BOARD IS REQUESTED TO RECONSIDER

CalTrout and FOR request that the State Water Board reconsider its Water Quality Certification for the Re-Operation of Pyramid Dam for the California Aqueduct Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2426 (“401 certification” or “the Project”). A copy of the Board’s certification is attached hereto as **Exhibit A**.

3. DATE OF STATE WATER BOARD ACTION

The State Water Board issued this 401 certification on December 9, 2008.

4. STATEMENT OF REASONS WHY THE ACTION WAS INAPPROPRIATE OR IMPROPER

As described below, the Board’s 401 certification was improper for at least two reasons. *First*, it failed to include conditions necessary to protect the beneficial uses of Piru Creek as required by the federal Clean Water Act (“CWA”), 33 U.S.C. § 1341. *See also* Cal. Water Code § 13160. For example, the absence of any requirement that DWR maintain minimum instream

summer flows will significantly affect spawning habitat, cold freshwater habitat, and recreational uses, all designated beneficial uses of Piru Creek. According to a report prepared by Land Protection Partners (“LPP Report”), attached to this petition and discussed further below, the elimination of minimum summer instream flows will adversely impact the RARE beneficial use of middle Piru Creek by eliminating conditions necessary for breeding for the endangered arroyo toad and the threatened California red-legged frog (“CRLF”). The LPP Report thus suggests an alternative flow regime that would protect both the arroyo toad and the CRLF, as well as other endangered, threatened, and native species in middle Piru Creek.

Second, the Board violated the California Environmental Quality Act, Public Resources Code §§ 21000 et seq. (“CEQA”), and its implementing regulations, 14 Cal. Code Reg. §§ 15000 et seq. (“Guidelines”), by approving the certification without first analyzing significant new information and changed circumstances in a subsequent or supplemental environmental impact report (“SEIR”). In addition, the Board failed to adopt findings showing how the Project’s significant environmental impacts will be mitigated, as required by CEQA § 21081 and Guidelines § 15096(h).

For all of these reasons, CalTrout and FOR respectfully request that the State Water Board revoke its 401 certification, prepare a subsequent or supplemental environmental impact report to analyze the new information and changed circumstances presented by Petitioners, and adopt the recommended conditions to protect all the beneficial uses of Piru Creek. Further, Petitioners request that the State Water Board stay the effect of the issued 401 certification for the pendency of these reconsideration proceedings.

A. BACKGROUND

i. PROPOSED LICENSE AMENDMENT

On December 9, 2008, the State Water Board issued a 401 certification to Licensee in connection with that agency's application to the Federal Energy Regulatory Commission ("FERC") to amend its license for the California Aqueduct. As discussed in more detail in CalTrout and FOR's previous correspondence to the Board, the license amendment proposed by Licensee would change the minimum instream flows released from Pyramid Dam into Piru Creek. *See* Letter from Rachel B. Hooper & Doug A. Obegi to Victoria A. Whitney, Nov. 2, 2007 ("Nov. 2, 2007 Letter") at 3-4.¹ In the past, Licensee was required to maintain minimum flows of 25 cubic feet per second ("cfs") in Piru Creek during the summer months (April through August). These minimum flows were required to protect the fish in Piru Creek, as well as the arroyo toad, a federally listed species.

However, in 2003, the U.S. Fish and Wildlife Service ("USFWS") informed Licensee that the existing flow regime was causing adverse effects on the arroyo toad. Subsequently, Licensee applied for an amendment to its FERC license, ostensibly to protect this listed species. The amendment proposes to eliminate entirely the requirements for minimum instream flows in Piru Creek during the summer months. Instead, water releases from Pyramid Dam into Piru Creek would roughly equal inflow into Pyramid Lake during all months of the year. The effect of the amendment is to increase flows during winter months when there are heavy rains, and to reduce flows during summer months when little rain generally falls. As a result, during very dry summer periods when there is no water flowing into Pyramid Lake, there could be limited or no

¹ Petitioners were advised by Matthew Bullock, counsel for the Board, that it was not necessary to attach as exhibits to this Petition for Reconsideration documents and letters that they had previously submitted to the State Water Board. By referencing these documents here, Petitioners incorporate their contents into this Petition for Reconsideration.

flows in middle Piru Creek, downstream of Pyramid Dam. Such a reduction in flows would eradicate the habitat for native trout and other aquatic species, and harm both the arroyo toad and the CRLF.

ii. CALTROUT AND FOR'S PARTICIPATION IN STATE WATER BOARD'S CERTIFICATION PROCESS

CalTrout and FOR have been active participants in the State Water Board's certification process. On November 2, 2007, these organizations submitted a lengthy and detailed comment letter to the Board, requesting that the Board deny the 401 certification with prejudice because the license amendment: (1) would adversely affect several designated beneficial uses for Piru Creek, including spawning habitat (SPWN), coldwater habitat for native trout (COLD), and fishing, swimming, and other water contact recreation (REC1); (2) was not necessary to protect the arroyo toad, and, in fact, would harm the toad and other federally listed species; (3) would result in violations to the temperature and dissolved oxygen water quality standards for Piru Creek; and (4) would violate the state and federal anti-degradation standards. *See generally* Nov. 2, 2007 Letter. This letter also noted that the State Water Board was required to conduct additional environmental review under CEQA prior to approving the proposed license amendment, and that the previous environmental review—DWR's EIR—was outdated and inadequate. *Id.* at 11-14.

On December 4, 2008, CalTrout and FOR supplemented their original letter with additional information in support of their request that the Board deny the 401 certification or, at the very least, impose mandatory conditions, after full compliance with CEQA, to ensure that the Project does not impair the beneficial uses of the Creek or result in a violation of numeric water quality standards. *See generally* Letter from Rachel B. Hooper to Victoria A. Whitney, Dec. 4, 2008 ("Dec. 4, 2008 Letter"). That letter presented several new reports on climate change and its

effects on California's water resources, as well as a new report released by California Trout analyzing the impacts to California's native steelhead, salmon, and trout populations caused by dams and global warming.

Along with these letters and reports, CalTrout and FOR provided the State Board with their comments on the environmental assessment ("EA") and final EA ("FEA") prepared by FERC for the license amendment. *See* Letter from Rachel B. Hooper and Doug A. Obegi to Magalie R. Salas, April 30, 2007 ("Apr. 30, 2007 Letter"); Letter from Amanda R. Garcia to Kimberly D. Bose, Nov. 21, 2008 ("Nov. 21, 2008 Letter"). These voluminous comments and exhibits not only describe the inadequacies of the EA and FEA, but also include a scientific report prepared by Land Protection Partners, dated April 30, 2007, identifying conditions and alternatives that could be adopted to prevent the Project's significant impacts on the beneficial uses of Piru Creek.²

iii. STATE WATER BOARD'S 401 CERTIFICATION

Despite the comments, information, and analysis submitted by CalTrout and FOR, the State Water Board issued its 401 certification without imposing any conditions on Licensee to maintain minimum instream flows during the summer months. Moreover, the Board relied on DWR's 2005 EIR as the sole environmental analysis for the proposed Project, and did not conduct any supplemental environmental review to analyze the critical new information and changed circumstances that had arisen since 2005. As discussed below, this new information identified significant environmental impacts not analyzed in the 2005 EIR. The Board also

² CalTrout and FOR were not alone in their concerns about the adequacy of the EA and FEA. National Marine Fisheries Service ("NMFS") also submitted comments to FERC on this Project, copies of which are attached hereto as **Exhibit B**. Like Petitioners, NMFS moved to intervene in the FERC proceeding, but was denied late intervention.

failed to adopt any findings, required by CEQA, demonstrating how the Project's mitigation measures would reduce its significant impacts to a less than significant level.

B. ARGUMENT

i. THE 401 CERTIFICATION VIOLATED THE CWA AND OTHER STATE AND FEDERAL WATER QUALITY PROVISIONS.

a. THE 401 CERTIFICATION WAS IMPROPER BECAUSE IT FAILED TO INCLUDE CONDITIONS NECESSARY TO PROTECT THE BENEFICIAL USES OF PIRU CREEK.

To issue a 401 certification for a project, the State Water Board must have "reasonable assurance" that the project "will not reduce water quality below applicable standards." Cal. Water Code § 13160. Certification is only proper in circumstances where the discharge meets applicable quantitative and qualitative water quality standards. *PUD No. 1 of Jefferson Co. v. Wash. Dep't of Ecology* (1994) 511 U.S. 700, 714-15. As the Board acknowledges in its 401 certification here, the beneficial uses and water quality objectives contained in the water quality control plan ("Basin Plan") for the region are "state water quality standards" under CWA section 303. *See* Exhibit A, pg. 4. The beneficial uses designated in the Basin Plan for Piru Creek include Water Contact Recreation (REC1), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), and Spawning, Reproduction, and Early Development of Fish (SPWN). LARQCB, Los Angeles Basin Plan 2-7 (1994); *see also* Letter from Victoria Whitney, State Water Resources Control Board Division of Water Rights Chief, to Jim Edmondson, CalTrout Southern California Manager (Feb. 14, 2007).

To ensure these water quality standards are met, the Board has the authority to add conditions and limitations to certifications. 23 Cal. Code Regs. § 3859; *see* 33 U.S.C. § 1341(d). The Board may also deny the certification request if either (1) the project will not comply with applicable water quality standards or other appropriate requirements, or (2) the application

suffers from a procedural inadequacy (*e.g.*, fails to comply with CEQA). 23 Cal. Code Regs. § 3837.

As described in more detail in the attached LPP Report, the conditions imposed on the Project are insufficient to protect the beneficial uses of Piru Creek. For instance, although the asserted purpose of the license amendment is to protect the arroyo toad, the elimination of any minimum summer instream flows may actually hurt that species by eliminating shallow pool conditions necessary for successful breeding and forcing the toads to share the remaining deeper pools with bullfrogs, an exotic predator. Similarly, CRLF larvae may require breeding pools as late as June or July. Thus, in a dry year and without any minimum summer instream flow requirement, this threatened species may suffer significant, adverse impacts.

To mitigate these adverse impacts, the LPP Report suggests an alternative flow regime that would support the arroyo toad, the CRLF, and other listed and native species in middle Piru Creek. This alternative flow regime would include the following requirements:

- From the period of the first winter storm to March 15, a volume of water equivalent to that which flows into Lake Pyramid shall be released from it, within the operational constraints of Pyramid Dam.
- At a period of at least once every five to seven years, a release event of significant volume adequate to produce scouring flows must be implemented if such flows do not occur naturally from rainfall events.
- Any water deliveries shall take place during the winter period (November to February) and be released to emulate the flows of a winter storm in volume and timing.

- From March 15 through August 31, water shall be released at a minimum of 15 cfs (or natural inflows, whichever is greater), then decreased by 1 cfs every 2 days between September 1 and September 20 to achieve and maintain a 5 cfs minimum flow from September 20 until the first winter storm.
- Flows shall be increased gradually to meet the 15 cfs flows in March during years when flows are less than 15 cfs leading up to March 15.
- Licensee shall adopt an adaptive management program to monitor and mitigate the adverse effects of the license amendment, especially the effects on the CRLF.
- Licensee shall commit to a sediment replenishment program, placing fine sand and gravel below Pyramid Dam in amounts commensurate with winter rainfall and allowing this sediment to be incorporated into the morphology of Piru Creek to restore and maintain habitat for native amphibians and fishes.
- Licensee shall selectively remove adult bullfrogs in arroyo toad breeding habitat during breeding season.

According to the LPP Report, this alternative flow regime would be sufficient to sustain native trout populations and the coldwater fish habitat in middle Piru Creek. The scouring would preserve essential arroyo toad breeding habitat by eliminating vegetation and exotic plant species on the banks of the Creek. Maintaining summer instream flows would help buffer both the arroyo toad and the CRLF from the adverse impacts of bullfrogs by creating a sufficient variety and number of pools and habitat so reproduction of the native species is maximized and the species are able to segregate into their preferred habitats. The adaptive management program would ensure that any adverse impacts of the license amendment would be mitigated. Finally,

the removal of adult bullfrogs from arroyo toad breeding habitat would be a more effective method of dealing with this invasive predator than reducing summer instream flows.

b. THE 401 CERTIFICATION FAILED TO PROVIDE REASONABLE ASSURANCE THAT THE PROJECT WOULD COMPLY WITH NUMERICAL WATER QUALITY STANDARDS.

The State Board also failed to ensure that the Project would not violate numerical water quality standards for temperature and dissolved oxygen. These numerical standards are designed to ensure that the beneficial uses of the water body are protected. *See* LA Basin Plan 3-11, 3-16. Although Petitioners previously raised this issue in their comments to the State Board, the State Board did not include any conditions in the 401 certification that address the violation of water quality standards that will result from this Project. *See* Nov. 2, 2007 Letter p. 9-10; Dec. 4, 2008 Letter p. 2.

c. THE 401 CERTIFICATION VIOLATES STATE AND FEDERAL ANTIDegradation POLICIES.

Finally, the CWA and California law require maintenance of existing water quality to protect the designated uses of waterbodies. *See* 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12(a)(1); State Board Resolution 68-16 (Certified Oct. 28, 1968)³. California's "antidegradation policy" demands stringent protection of water quality, requiring the Board to maintain the water quality at its existing levels, even if these levels exceed the minimum level required to permit the designated uses, unless it has been demonstrated "that any change [1] will be consistent with maximum benefit to the people of the State, [2] will not unreasonably affect present and anticipated beneficial use of such water and [3] will not result in water quality less than that prescribed in the policies." *See* State Board Resolution 68-16; LARQCB, Los Angeles Basin Plan 3-1 to 3-3 (1994).

³ Available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1968/rs68_016.pdf.

As demonstrated in Petitioners' previous comments, the Board has not and cannot make the findings required in California's antidegradation policy. *See* Nov. 2, 2007 Letter p. 10-11; *see also* State Board Resolution 68-16. Therefore, the State Board should have required conditions as part of the 401 certification to ensure that existing water quality and uses would be maintained. Petitioners request the State Board reconsider this 401 certification and incorporate conditions necessary to maintain existing water quality.

ii. THE STATE WATER BOARD'S ACTION VIOLATED THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

a. New Information and Changed Circumstances Require the Preparation of a Subsequent or Supplemental Environmental Impact Report.

In issuing the 401 certification, the State Water Board relied on the Environmental Impact Report ("EIR") approved by DWR in 2005. *See* 401 Certification, p. 5. However, under CEQA, a responsible agency, which the State Water Board is in this instance, may not simply accept a prior EIR prepared by the lead agency in approving a project. Instead, CEQA demands that a responsible agency "consider[] the EIR" and "reach[] its *own* conclusions on whether and how to approve the project." CEQA Guidelines § 15096(a) (emphasis added). Thus, if the State Water Board determines that the DWR EIR is inadequate or that the proposed flow regime is ill-conceived, then the Board should deny the 401 certification or condition it to remedy the Project's flaws; the mere existence of the DWR EIR does not dissolve the State Water Board's responsibility or discretion.

Moreover, as CalTrout and FOR have previously noted in comments to the Board (*see generally* Nov. 2, 2007 Letter and Dec. 4, 2008 Letter), the State Water Board must prepare a subsequent or supplemental EIR ("SEIR") to analyze any changed circumstances and new information that was not available at the time the EIR was certified. *See* CEQA Guidelines §§

15162-63; *Moss v. County of Humboldt*, 162 Cal.App.4th 1041, 1066 (2008) (finding substantial evidence to support County's decision to prepare SEIR where new report indicated project could significantly impact population of Coastal Cutthroat Trout, a species of concern); *Mira Monte Homeowners Assoc. v. County of Ventura*, 165 Cal App.3d 357, 364-65 (1985) (requiring preparation of SEIR upon discovery of new significant impacts). Here, new information indicates that the Project's impacts will be significantly greater than anticipated in 2005, and that there are additional alternatives to the proposed license amendment that would protect the arroyo toad while also protecting other beneficial uses of Piru Creek. For example:

- A study conducted for the California Department of Fish and Game and published in 2006 demonstrated that middle Piru Creek contains not only hatchery fish, but also a population of trout genetically related to the endangered steelhead. A copy of this study is attached hereto as **Exhibit C**. This study was not available in 2005 or analyzed in DWR's EIR. In fact, DWR concluded that the license amendment's impacts on trout were not significant precisely because it had (erroneously) concluded that the fish in middle Piru Creek were hatchery fish, rather than native trout.
- The Sandburg Report, issued after the EIR was certified, contains two new critical pieces of information. See Apr. 30, 2007 Letter, Exhibit B. First, it shows that arroyo toads had exceptional reproductive success during a year when summer flows were consistently over 15 cfs and winter flows scoured streamside vegetation. This report, which was not available at the time DWR certified the EIR, supports Petitioners' assertion that an alternative to the proposed license amendment including minimum summer flow requirements could protect both the arroyo toad and the native trout in Piru Creek. Second, the Sandburg Report identified a population of threatened California red-legged frogs in the Project area. Prior to this 2006 report, no adult CLRF had been observed in this area since 1949.
- Changes to the amount and timing of rainfall in California—and therefore on the management of water resources in the state—due to global warming have changed the circumstances under which the proposed license amendment will be carried out. In addition, recent studies and reports with new information about the significant impacts of climate change on the state's water resources have been published since the certification of DWR's EIR. The EIR did not even analyze the impacts of climate change on the proposed license amendment.

- A new report⁴ released by CalTrout based on a study by a scientific team at UC Davis shows that the threat posed by dams and global climate change to trout in Southern California is more severe than previously thought. This new information indicates the Project may have a more significant impact than that analyzed in DWR's EIR, and therefore must be analyzed in an SEIR.

Along with this petition, CalTrout and FOR are also submitting another report prepared by Land Protection Partners, which includes new and previously unavailable information about the breeding habits and needs of the arroyo toad. See **Exhibit D**, at 7. According to this information and analysis, "the reduction of summer flows [in middle Piru Creek] may have a far more adverse effect on arroyo toads than on bullfrogs by limiting the length of the arroyo toad breeding season and by concentrating arroyo toad larvae (and subsequently neonates) in deeper pools that, unlike their quintessential breeding habitat, also more likely harbor bullfrogs (and bullfrog larvae)" *Id.* As a result, depredation of arroyo toad by bullfrogs will be more likely under the proposed license amendment. *Id.*

Finally, by requiring DWR to conduct annual breeding surveys of the arroyo toad as a condition of approving the 401 certification, the Board itself appears to recognize that the Project may significantly impact the arroyo toad. Such an impact was not adequately analyzed in DWR's EIR, and therefore must be analyzed in an SEIR. To the extent the Board intended the annual breeding survey condition to mitigate this potentially significant impact, the condition is inadequate, as it defers any analysis or mitigation to some future date. Such deferral is impermissible under CEQA. See *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 307 (1988).

⁴ See Dec. 4, 2008 Letter, Exhibit I 54-55; see also *id.*, Exhibit J 91-92, 95, 96.

In sum, to comply with CEQA, the State Water Board must revoke its 401 certification and prepare an SEIR analyzing this new information.⁵

b. The Board Failed to Make the Requisite CEQA Findings.

In its 2005 EIR, DWR concluded that the license amendment would have several potentially significant impacts. *See* DWR Final EIR at ES-5 – ES-6. In particular, the FEIR concluded that the proposed license amendment could alter the drainage pattern in a way that results in erosion, could expose people to danger caused by flooding, and could reduce opportunities for angling in middle Piru Creek. *Id.* Thus, the State Water Board, as a responsible agency, was required to make one of the following findings: (1) mitigation measures or changes in the Project have reduced any significant environmental effects to a level of insignificance, (2) such measures or changes are within the responsibility and jurisdiction of another agency, or (3) any mitigation of the impacts is infeasible. CEQA Guidelines §§ 15096(h), 15091. Here, the State Water Board made no such findings. This omission alone requires the Board to revoke its certification.

5. MANNER IN WHICH PETITIONERS ARE AGGRIEVED

CalTrout is a nonprofit organization of conservation-minded members who fish, recreate on or otherwise enjoy the Piru Creek watershed and seek to protect California's native steelhead trout from extinction. FOR is a statewide conservation organization whose mission is to preserve, protect and restore California's rivers, streams, watersheds, aquatic ecosystems, and associated fish and wildlife and their habitat. FOR members visit and use Piru Creek for outdoor recreation and spiritual renewal. The State Water Board's 401 certification would allow Licensee to obtain a license amendment eliminating any minimum instream flow requirements

⁵ Nor can the State Board rely on the environmental assessment ("EA") prepared by FERC as a supplement to DWR's EIR. That document's analysis is wholly inadequate, as CalTrout and FOR have demonstrated in letters to FERC. *See* Apr. 30, 2007 Letter & Nov. 21, 2008 Letter.

for middle Piru Creek. As a result, middle Piru Creek could become either too warm or too dry to serve as habitat for the native rainbow trout and CRLF populations in the Creek, and could otherwise become unsuitable for recreation. Therefore CalTrout, FOR and their members are aggrieved by the State Water Board's 401 certification.

6. SPECIFIC ACTION BY THE STATE BOARD WHICH PETITIONERS REQUEST.

For the reasons provided in Section 4(B) of this petition, Petitioners request that the State Water Board (1) revoke its 401 certification for the proposed license amendment; (2) prepare an SEIR to analyze the new information and changed circumstances presented by Petitioners; and (3) either deny the 401 certification or impose conditions on the certification requiring minimum instream flows as described in the LPP Report, Exhibit D.

For the reasons set forth in Section 11, below, Petitioners also request that the State Water Board stay the effect of its 401 certification pending reconsideration.

7. LIST OF PERSONS OTHER THAN THE PETITIONERS AND APPLICANT KNOWN TO HAVE AN INTEREST IN THE SUBJECT MATTER OF THE PETITION.

- a. Los Angeles Department of Water and Power (co-licensee with applicant DWR)
- b. Federal Energy Regulatory Commission
- c. United Water Conservation District
- d. Ventura County Watershed Protection District
- e. Casitas Municipal Water District

8. STATEMENT THAT THE PETITION HAS BEEN SENT TO THE EXECUTIVE OFFICER AND TO THE APPLICANT

Petitioners have sent copies of this Petition to Executive Director Dorothy Rice, the Department of Water Resources, and the Los Angeles Department of Water and Power.

9. COPY OF REQUEST TO THE EXECUTIVE DIRECTOR FOR PREPARATION OF THE STATE BOARD STAFF RECORD.

Petitioners have requested that the Executive Director prepare the State Board staff record for this 401 certification, to the extent such a record exists. A copy of the letter requesting the record is attached hereto as **Exhibit E**.

10. SUMMARY OF THE MANNER IN WHICH AND TO WHAT EXTENT PETITIONERS PARTICIPATED IN ANY PROCESS LEADING TO THE ACTION.

Petitioners met with State Water Board staff to discuss their concerns about the Project in September 2007. As described in Section 4(A)(ii) above, CalTrout and FOR submitted two comment letters to the State Water Board, expressing their concerns over this Project.

Petitioners also submitted to the Board copies of their comments to FERC on the proposed license amendment. Finally, Petitioners have spoken on several occasions with Victoria Whitney and Matthew Bullock in an attempt to resolve the issues presented in this petition for reconsideration. To Petitioners' knowledge, no hearing was held prior to the Board's issuance of the 401 certification.

11. REQUEST FOR STAY

According to California Code of Regulations, Title 23, Section 3869(d), the State Water Board may grant a stay if petitioner alleges facts and produces proof of:

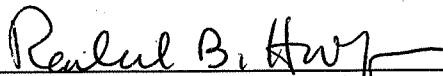
- (A) substantial harm to the petitioner or to the public interest if the stay is not granted;
- (B) lack of substantial harm to other interested persons and the public interest if a stay is granted, or the harm which would result from the stay being granted substantially outweighed by the harm which would occur if no stay is granted;
and
- (C) substantial questions of fact or law regarding the disputed action.

Here, Petitioners and the public interest would suffer substantial harm if the State Water Board does not grant a stay. Having received the 401 certification, Licensee may now seek to obtain the final license amendment from FERC. This license amendment does not contain any minimum instream flow requirements for middle Piru Creek, and thus could result in irreparable damage to the Piru Creek ecosystem and its recreational uses. Moreover, in the absence of a stay, any new conditions added or other changes made to the 401 certification as a result of the Board's reconsideration process may be for naught if FERC declines to incorporate these changes after issuing the final license amendment. On the other hand, no substantial harm will result from granting a stay. The Licensee can continue to operate their facility under the interim license, which is substantially similar to the final license amendment they are seeking from FERC, pending the outcome of the reconsideration process.

Finally, as discussed in Section 4(B), above, there are substantial legal questions regarding the adequacy of environmental review conducted by the Board and the sufficiency of the conditions in this 401 certification to meet the requirements of the CWA. The information submitted with this petition also raises substantial questions of fact, such as whether the lack of minimum instream flows will harm the threatened CRLF, the native rainbow trout, and even the arroyo toad. Therefore, a stay of the Board's 401 certification is proper.

Dated: January 6, 2009

Respectfully submitted,



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Exhibits:

- A. 401 Water Quality Certification for the California Aqueduct Hydroelectric Project, Federal Energy Regulatory Commission Project No. 2426
- B. National Marine Fisheries Service's Comments on the Draft Environmental Assessment, Apr. 27, 2007.
- C. Derek Girman & John Carlos Garza, *Population Structure and Ancestry of O. mykiss Populations in South-Central California Based on Genetic Analysis of Microsatellite Data* (Nov. 2006).
- D. Land Protection Partners, Alternate Flow Regime to Protect Rare Native Species in Middle Piru Creek, Jan. 5, 2009.
- E. Letter from Winter King to Dorothy Rice, Executive Director, Re: Request for Record Preparation, Jan. 5, 2009.