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July 27, 2009

Via E-Mail and Federal Express

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Re: COMMENT LETTER—CALIFORNIA AQUEDUCT PETITION
DRAFT ORDER

Dear Dr. Watts:

Shute, Mihaly and Weinberger LLP submits this letter on behalf of California Trout (“CalTrout”) and Friends of the River (“FOR”) to provide comments on the Draft Order Partially Granting Petition for Reconsideration of Water Quality Certification for the California Aqueduct Hydroelectric Project (FERC No. 2426), Ventura and Los Angeles Counties (“Draft Order”). We conclude that the Draft Order demonstrates that a supplemental or subsequent environmental impact report (“SEIR”) is required prior to the issuance of any water quality certification for this hydroelectric project, in order to comply with the California Environmental Quality Act, Public Resources Code § 21000 *et seq.* (“CEQA”).

On December 9, 2008, the State Water Resources Control Board (“the Board”) issued a water quality certification under section 401 of the federal Clean Water Act (33 U.S.C. § 1341) to the Department of Water Resource and the City of Los Angeles Department of Water and Power (collectively, “DWR”) for the proposed license

amendment for the California Aqueduct Hydroelectric Project (FERC Project No. 2426) (“401 certification” or “the Project”). CalTrout and FOR subsequently petitioned the Board to reconsider the 401 certification. *See* Petition for Reconsideration and Request for Stay (“Pet.”) at 1.

The Draft Order grants CalTrout and FOR’s Petition for Reconsideration in part, modifying the 401 certification to include findings as required by CEQA. *See* Draft Order at 25-28. The Draft Order rejects the remainder of CalTrout and FOR’s grounds for reconsideration, including the Board’s obligation to prepare an SEIR pursuant to CEQA and the Project’s failure to protect the beneficial uses of Piru Creek, to comply with numerical water quality standards or to fulfill state and federal antidegradation policies. *See* Draft Order at 5-25; *see also* Pet. at 7-14.

Prior to petitioning the Board for reconsideration, CalTrout and FOR submitted comment letters on November 2, 2007 and December 4, 2008 and provided additional memoranda by Land Protection Partners on April 14, 2009 and May 11, 2009. This letter does not attempt to reargue all the points that have been stated in CalTrout and FOR’s prior submissions and rejected by the Board.¹ Instead, this letter focuses on the implications of the Draft Order’s CEQA findings and its stated reasons for rejecting the new information and changed circumstances presented by CalTrout and FOR.

In the Draft Order, the Board determines that it does not need to prepare an SEIR. Draft Order at 15-24. The Board’s determination is not supported by substantial evidence. *See* Guidelines § 15162. The Board’s *own findings* are based upon new information and changed circumstances that trigger the requirement that the Board prepare an SEIR with regard to the Project’s impacts on recreational opportunities for anglers, native rainbow trout, endangered steelhead and nearby recreational facilities. As set forth in more detail below, the Board finds that impacts to recreational fishing (Impact R-3) are significant and unavoidable because the mitigation proposed by the 2005 EIR is no longer feasible due to the listing of Piru Creek on a no-stocking list by the Department of Fish and Game (“DFG”) and the 2006 DFG study provided by CalTrout and FOR; nonetheless, the Board inexplicably concludes that these changed circumstances and new information do *not* indicate that the Project will result in new or substantially more severe significant effects. *Compare* Draft Order at 26-28 *with id.* at 18-19.

¹ CalTrout and FOR’s comment letters dated November 2, 2007 and December 4, 2008 and the Land Protection Partners memoranda dated January 5, 2009, April 14, 2009 and May 11, 2009 are hereby incorporated by reference.

In addition, the Board's conclusions as to new information and changed circumstances regarding other impacts, including impacts to the California red-legged frog and impacts due to climate change, are not supported by substantial evidence. Under CEQA, these impacts also must be further analyzed in an SEIR.

I. THE BOARD'S FINDINGS INDICATE THAT A SUPPLEMENTAL OR SUBSEQUENT EIR IS REQUIRED.

A. The Board's Finding Regarding Impacts to Recreational Opportunities for Anglers Demonstrates that a Supplemental or Subsequent EIR Is Required.

Under CEQA, as a responsible agency, the Board is required to consider the EIR prepared by the lead agency and to reach its own conclusions on whether and how to approve the project. 14 Cal. Code Regulations § 15096(a) (hereinafter "Guidelines"). The Board must consider the environmental effects of the project as shown in the EIR, and may only require preparation of a subsequent or supplemental EIR as provided in sections 15162 or 15163 of the Guidelines. *Id.* § 15096(f). A subsequent or supplemental EIR is required if, among other factors, the record reveals either substantial changes in the circumstances under which the project is undertaken or new information of substantial importance, and these changed circumstances or new information show that the project will result in either new or substantially more severe significant effects. *Id.* § 15162(a)(2),(3); *see also* § 15163(a).

In adopting findings required by CEQA for the Project, the Board concludes, contrary to the conclusion of DWR in the 2005 EIR, that impacts to recreational opportunities for anglers ("Impact R-3") cannot be mitigated and will be significant and unavoidable. Draft Order at 26-28. In the 2005 EIR, DWR found that fishing in the catch-and-release area above the weir would be adversely affected by the Project, because naturally reproducing rainbow trout living above the weir would die during the dry summer months without minimum in-stream flows, leading to a reduction in the naturally-reproducing fish population and fishing opportunities in the catch-and-release area during the fishing season. 2005 EIR at 3-97-98. DWR further found that Impact R-3 could be mitigated by stocking up to 1,000 pounds of hatchery-raised rainbow trout above the weir in the fall and winter months. 2005 EIR at 3-98. DWR concluded that this mitigation was appropriate based upon evidence suggesting the naturally reproducing rainbow trout above the weir were genetically related to hatchery trout, rather than to steelhead. 2005 EIR at 3-97.

In the Draft Order, the Board concludes that the fish stocking mitigation proposed in the 2005 DEIR is infeasible for two reasons. Draft Order at 26-28. First, the Department of Fish and Game (“DFG”) has identified Piru Creek as a stream where fish will not be stocked pursuant to a court order requiring DFG to discontinue fish stocking in areas meeting certain criteria (including the presence of native fish and amphibians), at least until DFG complies with CEQA for its fish stocking program. Draft Order at 27; *see also* DFG Fish Stocking (Planting) 11/24/2008 through 1/1/2010, *available at* <http://www.dfg.ca.gov/news/stocking/> (last visited July 22, 2009) (attached hereto as Exhibit 1). Second, the Board concludes that fish stocking “would be inconsistent with the option of managing the upper portion of the reach as a fishery based on a naturally reproducing population.” Draft Order at 27. In a footnote supporting this second reason, the Board observes that, based upon the 2006 DFG study indicating that native rainbow trout in Piru Creek are genetically identical to endangered steelhead (submitted to the Board by CalTrout and FOR), “the mitigation measure proposed in the EIR to plant trout above the passage barrier may no longer be appropriate.” Draft Order at 27, n.19.

The Board’s finding of significance with regard to Impact R-3 triggers the requirement that an SEIR be prepared for the Project. *See* Guidelines §§ 15162; 15163. Impact R-3 had been mitigated to a less-than-significant level in the 2005 EIR. *See* 2005 EIR at 3-98. By proposing to adopt a statement of overriding considerations for Impact R-3, the Board concedes that this impact is a new or substantially more severe significant impact. *See* Guidelines § 15093(b) (statement of overriding considerations required when agency finds that significant effects are not avoided or substantially lessened).

In sum, the Board identifies both changed circumstances and new information that prevent it from concurring with DWR’s prior finding with regard to impact R-3. *See* Draft Order at 26-28. Both the inclusion of Piru Creek as an area that will not be stocked by DFG pending completion of the EIR for its fish stocking program and the fact that the fish living above the weir are related to endangered steelhead rather than to hatchery trout constitute “substantial changes. . .with respect to the circumstances under which the project is undertaken.” Guidelines § 15162(a)(2). At the same time, the DFG list promulgated pursuant to court order constitutes “new information of substantial importance” (Guidelines § 15162(a)(3)); the 2006 DFG study likewise constitutes new information. *See infra*, Section I.A. Because these changed circumstances and new information reveal a new or substantially more severe significant effect—impacts on recreational opportunities for anglers—an SEIR must be prepared. *See* Guidelines §§ 15162; 15163.

B. The Board's Conclusion that the 2006 DFG Study Is Not New Information Requiring an SEIR Is Not Supported by Substantial Evidence.

The Board's finding that Impact R-3 (impacts on recreational opportunities for anglers) is significant and unavoidable is based in part upon the "more recent evidence" that the rainbow trout above the weir are related to native rainbow trout (and therefore, to the endangered steelhead). Draft Order at 27 and n.19. Thus, the Board's finding amounts to a concession that 2006 DFG study is "new information of substantial importance" which was not known at the time the 2005 EIR was certified and which shows new or substantially more severe significant impacts. Guidelines § 15162(a)(3).

Nevertheless, the Board concludes in the Draft Order that the 2006 DFG report does not constitute such new information. Draft Order at 18-19. The Board's reason for this conclusion is that the information contained in the 2006 DFG study is "not entirely new." Draft Order at 19. While the Board is correct that NOAA Fisheries mentioned the preliminary results of the 2006 DFG study in its comments on the draft 2005 EIR, the Board fails to mention that DWR *rejected* this comment by NOAA Fisheries and expressly based its analysis and proposed mitigation on the assumption that the trout above the weir were related to hatchery trout. See 2005 EIR Appendix A at A-13-14; A-16.

DWR's rejection of the 2006 DFG study may have been understandable at the time, given the preliminary status of the study and the mere mention of it in NOAA Fisheries' comments. See, e.g., *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1422 (1995) (finding that letter from professor of engineering did not constitute substantial evidence because it was "not clearly based on an adequate foundation of factual information about the Project"). As it stands now, however, the DFG study has been finalized; it became available after certification of the 2005 EIR, is currently available to the Board, and has been consistently relied upon by NOAA Fisheries since its issuance to assert the Project's potential to cause significant impacts on native rainbow trout and endangered steelhead. See NOAA Fisheries Motion to Intervene and Comments on Draft Environmental Assessment re: FERC Project No. 2426-197 (May 3, 2007), attached hereto as Exhibit 2; NOAA Fisheries Request for Rehearing of Notice Denying Late Intervention for the California Aqueduct Project, FERC Project No. 2426-197 (June 13, 2007), attached hereto as Exhibit 3 (attachments omitted).² Accordingly, the 2006 DFG

² In its response to comments in the 2005 EIR, DWR stated its intent "to coordinate closely with affected agencies regarding this issue [the genetic status of (footnote continued)]

study constitutes new information of substantial importance that shows that the Project will result in significant impacts. *See* Guidelines § 15162(a)(3).

The Board also notes that NOAA Fisheries stated, in its comments on the draft 2005 EIR, that the Project was “generally compatible” with its recovery efforts for steelhead. Draft Order at 19 (citing Letter from NOAA Fisheries to Department of Water Resources re: Draft Environmental Impact Statement for Simulation of Natural Flows in Piru Creek (January 11, 2005) (hereinafter (“2005 NOAA Fisheries letter”). However, the Board fails to mention that the 2005 NOAA Fisheries letter enumerates various ways in which the draft 2005 EIR’s analysis of impacts on native rainbow trout and endangered steelhead was deficient; these deficiencies include its flawed analysis of hydrological impacts related to eliminating in-stream flows and information regarding the historic and current status of native rainbow trout and their relationship to endangered steelhead, and the lack of analysis of impacts of the Project on steelhead recovery efforts. 2005 EIR, Comment Letter # 8 (2005 NOAA Fisheries letter) at 4-7.³ Accordingly, the Board’s assertion that “[i]f restoration to natural conditions will be beneficial to recovery of steelhead, the presence of remnant steelhead populations is not a significant impact warranting a subsequent EIR,” Draft Order at 19, finds no support in the 2005 NOAA Fisheries letter.

C. The DFG Fish Stocking List Also Constitutes New Information Requiring Preparation of a Supplemental or Subsequent EIR.

In any event, even if the Board concludes—contrary to its finding regarding Impact R-3—that the 2006 DFG study is not new information triggering the need for an SEIR, the listing of Piru Creek as a no-stocking area by DFG itself constitutes independent changed circumstances and new information requiring analysis in an SEIR. This list was not available until late November 2008—long after certification of the 2005 EIR, but before the Board issued the 401 certification for the Project. Tellingly, the Board bases its finding that impacts to recreational opportunities for anglers are

naturally reproducing trout in middle Piru Creek] as needed in response to new information or changes in the regulatory setting.” 2005 EIR at A-16. This coordination has not happened. Instead, comments by NOAA Fisheries repeatedly have been rejected, and that federal agency has been barred from becoming a party in the federal license amendment proceedings.

³ DWR rejected all of NOAA Fisheries’ critical comments and suggestions in the 2005 EIR. 2005 EIR at A-13-17.

significant and unavoidable in part on the listing of Piru Creek as a no-stocking area. Draft Order at 27. Accordingly, an SEIR is required to analyze the significant impact on recreational opportunities for anglers. *See* Guidelines §§ 15162, 15163.

D. The Board's Finding Regarding R-3 Demonstrates that the Project Will Have Additional Significant Impacts.

The Board's finding that R-3 is a significant impact also reveals additional significant impacts based upon the changed circumstances and new information identified by the Board. For example, the 2005 EIR concluded, in its discussion of Impact B-1, that impacts to "non-sensitive plants and wildlife," including rainbow trout, would be less than significant. 2005 EIR at 3-29-30. DWR acknowledged that the Project would result in a reduction of the naturally reproducing rainbow trout population above the weir and that this impact would be adverse. *Id.* at 3-30.⁴ However, DWR concluded that the impact to rainbow trout was not significant because "the rainbow trout occurring in the catch and release area are descendents of hatchery raised fish rather than native rainbow trout." *Id.* Given that the Board relies on the 2006 DFG study to conclude that stocking hatchery-raised trout is inconsistent with managing for a naturally reproducing population of native rainbow trout, it must also reconsider DWR's finding regarding impacts to native rainbow trout in the 2005 EIR discussion of Impact B-1.⁵ In addition, the 2005 EIR did not identify or analyze impacts on endangered Southern California steelhead in its discussion of impacts to sensitive fauna (Impact B-4). *See* 2005 EIR at 3-32. Impacts to Southern California steelhead must be analyzed in an SEIR in light of the Board's finding acknowledging that the impacted native rainbow trout are genetically related to the endangered steelhead.

⁴ In the section of the Draft Order discussing antidegradation policies, the Board makes the assertion that "While the certification may not fully protect trout for the entire reach in which they now live, Petitioner does not assert that the fish will not be able to migrate to other locations (including Lake Piru) when conditions in the creek reach are not suitable." Draft Order at 14. There is no evidence before the Board that indicates that native rainbow trout are able to migrate effectively to other areas when middle Piru Creek is dry or contains only intermittent pools. Indeed, the 2005 EIR acknowledges that the naturally-reproducing trout above the weir will become isolated in deep pools and the majority will likely die during summer drought or dry conditions. *See* 2005 EIR at 3-29-30.

⁵ The 2005 EIR identifies, as a significance criterion, "substantial loss of species or community diversity in natural vegetation and wildlife habitat." 2005 EIR at 3-28.

The Board must also reconsider DWR's finding regarding altered use of other nearby recreational facilities that could result in their physical deterioration (Impact R-2). DWR did not discuss impacts to other catch-and-release fishing destinations in the region in its analysis, likely because it proposed on-site fish stocking as mitigation for this impact in its discussion of Impact R-3. *See* 2005 EIR at 3-95-98. Because the Board now finds that fish stocking is no longer a feasible mitigation measure, fly-fishermen likely will be diverted to the only other catch-and-release fly-fishing location in Los Angeles County, the West Fork of the San Gabriel River. The diversion of recreational fishing activities to the West Fork may result in significant physical deterioration of this relatively pristine fishing location. This impact must be analyzed and mitigated as appropriate in an SEIR. *See* CEQA Guidelines Appendix G, Environmental Checklist at XIV ("Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?") Moreover, in light of the DFG's current limitations on fish-stocking throughout California, the Board must analyze cumulative impacts of the Project on recreational opportunities for anglers. *See, e.g., Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 573 (1990) (holding that an agency "need not, indeed *it may not*, ignore regional needs and cumulative impacts") (emphasis added).

II. THE BOARD'S ANALYSIS OF NEW INFORMATION AND CHANGED CIRCUMSTANCES REGARDING OTHER IMPACTS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Documented Presence of California Red-legged Frog in Middle Piru Creek is New Information Requiring Preparation of an SEIR.

The California red-legged frog is a federally-listed threatened species and a state species of special concern. 2005 EIR at 3-35. Although the 2005 EIR found no CRLF present in the Project area, DWR nevertheless identified several potentially significant impacts on CRLF and its habitat, including loss of riparian vegetation used by CRLF for breeding and shelter, the potential for large scouring events to wash egg masses and larvae downstream, and potential mortality from increased predator activity during summer months. 2005 EIR at 3-35-36. As noted by the Board, the 2005 EIR concludes that, even if CRLF are present, these impacts will be less than significant, in part because such impacts will be "offset" by a reduction in predators, particularly the bullfrog. 2005 EIR at 3-35-36.

The Middle Piru Creek Arroyo Toad Clutch Surveys (February 2006) prepared by Nancy Sandburg ("2005 Sandburg report") and submitted to the Board by CalTrout and FOR revealed that, contrary to the analysis contained in the 2005 EIR, CRLF inhabits the

Project area. The Board contends that the 2005 Sandburg report's finding that CRLF are present in middle Piru Creek "does not show any significant effect not discussed in the EIR." Draft Order at 21. However, the 2005 EIR did not evaluate effects based upon the presence of CRLF in the Project area.

A public agency cannot insulate itself from analyzing the significant impacts associated with the discovery of threatened or endangered species in a project area by relying on a more general prior analysis. *See Mira Monte Homeowners Association v. County of Ventura*, 165 Cal.App.3d 357, 362-64 (hereinafter *Mira Monte*) (rejecting argument that discovery of specific encroachment on wetlands was subsumed in more general analysis of impacts on wetlands and finding changed circumstances based upon the discovery of the specific encroachment required preparation of an SEIR). The significance criteria identified in the 2005 EIR include "substantial loss of populations or habitat of a Federal Species of Concern . . . that would jeopardize the continued existence of the species within the region." 2005 EIR at 3-28. Moreover, the CEQA Guidelines provide that an agency must make a mandatory finding of significance if the project has the potential to "reduce or restrict the range of a rare or endangered plant or animal." CEQA Guidelines § 15065(a)(1). These significance criteria are triggered by the discovery of CRLF on the Project site, which occurred after the certification of the 2005 EIR. Because CRLF are extremely rare in the region, adverse effects on *any* CRLF in the Project area could result in a restriction of its range or a substantial loss that jeopardizes the existence of the species within the region. The 2005 Sandburg report reveals that CRLF persist in the Project area. Thus, this impact must be analyzed in an SEIR.

The Board contends that because the simulated natural flow regime will reduce threats to CRLF from bullfrog predation, no significant impacts will occur. *See* Draft Order at 20. This claim is not supported by the evidence before the Board. As a preliminary matter, the Middle Piru Creek Arroyo Toad Clutch Surveys 2007 prepared by Nancy Sandburg (January 2008) (hereinafter "2007 Sandburg report"), attached hereto as Exhibit 4, indicates that the interim simulated flow regime, which is very similar to the Project, has not reduced the number of bullfrogs in the Project area. *See* 2007 Sandburg report ("Bullfrogs (*Rana catesbiana*) have returned to near pre-2005 flood range, with larvae and adults located along all sections of the survey area of middle Piru Creek with the exception of fast flowing reaches.") In other words, the simulated natural flow regime has been in place since 2005 and has not reduced the presence of bullfrogs. Accordingly, the evidence before the Board reveals that the 2005 EIR's reliance on the "net" benefit of predator reduction to offset significant impacts on CRLF is unfounded, and significant impacts on CRLF remain unmitigated.

Further, even if bullfrog predation were to be reduced by the Project, the Project still has other significant adverse effects on CRLF, such as preventing successful breeding and reducing available vegetation for habitat. *See* 2005 EIR at 3-35-36; *see also Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal.App.4th 1170, 1200 (2005) (CEQA is not satisfied by a “net” analysis of significant effects). Given the discovery of CRLF in the Project area, these impacts must be analyzed and mitigated in an SEIR.

B. New Information Regarding Reproductive Success of Arroyo Toad in High-flow Summer Conditions Requires Preparation of an SEIR.

CalTrout and FOR also submitted the 2005 Sandburg report as new information that supports their proposed alternative flow regime, which is a feasible alternative that would reduce at least one significant impact and that DWR has declined to adopt. *See* Guidelines § 15162(a)(3)(C). The 2005 Sandburg report disclosed that arroyo toads had a highly successful breeding season during particularly high summer flows. 2005 Sandburg report at 46.

The Board rejects the 2005 Sandburg report as new information of substantial importance, contending that “it is not appropriate to consider only one year of arroyo toad breeding data as justification for the flow regime proposed by Petitioners.” Draft Order at 20. This argument is not tenable. As a preliminary matter, the summer flow levels proposed by CalTrout and FOR are supported by historical arroyo toad breeding patterns in addition to the 2005 Sandburg report. *See* Land Protection Partners, *Alternative Flow Regime to Protect Rare Native Species in Middle Piru Creek* 7-8 (January 5, 2009). Nevertheless, the 2005 Sandburg report constitutes new information of substantial importance because, at the time CalTrout and FOR submitted it, it was the only study available addressing the interim flow regime imposed by DWR. *See id.* at 8 (relying on 2005 Sandburg report to show that large winter flows resulting in scouring in addition to high summer flows resulted in strong arroyo toad breeding). This evidence indicates that a higher summer flow alternative is feasible because it would not harm the arroyo toad and would reduce significant impacts on other species, including CRLF and native rainbow trout.

The Board also contends that the more recent surveys discussed in the 2007 Sandburg report show that the arroyo toad has reproductive success in low summer flow conditions. Draft Order at 20. While the 2007 Sandburg report does support this assertion, it is irrelevant to whether CalTrout and FOR’s alternative flow regime is a feasible alternative that has not been adopted by DWR. CalTrout and FOR have proposed an alternative that would reduce significant impacts on CRLF and native

rainbow trout, *in addition* to providing benefits for the arroyo toad.⁶ At most, the 2005 and 2007 Sandburg reports demonstrate that the arroyo toad appears to have reproductive success regardless of whether there are high or low summer flows, as long as winter scouring events occur.

In addition, the Board asserts that rejection of CalTrout and FOR's alternative flow regime is supported by the 2007 Sandburg report's conclusion that low summer flows are necessary to eradicate vegetative encroachment and bullfrogs. Draft Order at 20. Although the 2007 Sandburg report states that conclusion, there is no evidence in the report to support it. The 2007 Sandburg report discusses the conditions found in middle Piru Creek during a year with lower precipitation levels. 2007 Sandburg report at 14. The report makes two important findings regarding conditions after a dry year. First, the report finds that vegetative encroachment occurred quickly after winter scouring under the interim flow regime. 2007 Sandburg report at 16. Second, the report finds that bullfrogs rapidly reached their pre-2005 levels under the interim flow regime. *Id.* At 18. The findings of the 2007 Sandburg report, therefore, are contrary to the assertion that low summer flows are necessary to eradicate vegetative encroachment and bullfrogs. Indeed, it appears that low summer flows are, at best, having *no effect* on these threats to the arroyo toad.

Finally, as demonstrated by the discussion in Section II.A and II.B of this letter, the 2007 Sandburg report itself constitutes additional new information requiring preparation of an SEIR. First, the 2007 Sandburg report reveals that the interim flow regime is not reducing bullfrog predation, which undercuts the 2005 EIR's finding that impacts to the CRLF will be "offset" by benefits due to reduced bullfrog predation. The 2007 Sandburg report therefore indicates that the Project will have a significant effect on CRLF that was not discussed in the 2005 EIR. Second, read together, the 2005 and 2007 Sandburg reports support CalTrout and FOR's alternative flow regime as a feasible alternative that DWR has declined to adopt. The 2007 Sandburg report therefore

⁶ In the section of the Draft Order discussing state and federal antidegradation policies, the Board indicates that it is balancing harms to the endangered arroyo toad against harms to the non-protected native rainbow trout. Draft Order at 14. This assertion ignores the new information contained in the 2006 DFG study which reveals that the native rainbow trout are related to endangered steelhead, as well as the position taken by NOAA Fisheries that the Project may result in unauthorized take of endangered steelhead. *See* Ex. 2 at 7-8. Moreover, as discussed in Section II.A, the Project will also result in harm to the federally threatened CRLF.

constitutes new information of substantial importance requiring preparation of an SEIR. *See* Guidelines § 15162(a)(3).

Accordingly, the Board's stated reasons for rejecting the 2005 Sandburg report as new information of substantial importance supporting CalTrout and FOR's alternative flow regime as feasible are not supported by the evidence, including the 2007 Sandburg report. This information and the alternative proposed by CalTrout and FOR require analysis in an SEIR.

C. New Information Regarding Effects of Climate Change on Stream Flow Conditions, Native Rainbow Trout and Steelhead in the Project Area Requires Preparation of an SEIR.

The Board finds that new information regarding the effects of climate change on stream flow conditions in Piru Creek does not constitute new information for purposes of preparing an SEIR. Draft Order at 21. The Board reasons that "existence of climate change and the potential effects on California water supplies were well known in February 2005, when the final EIR was certified." *Id.* The Board also asserts that CalTrout and FOR presented only general information regarding climate change that was not specific to the Project. *Id.* at 21 n.15.

Although the existence of climate change may have been generally known in 2005, the specific impacts of climate change on stream flows, native rainbow trout and endangered steelhead were not generally known or understood in 2005. The information submitted to the Board by CalTrout and FOR includes three post-2005 reports analyzing the effects of climate change on water supply and stream flows. CalTrout and FOR also submitted two 2008 reports addressing the critically endangered status of Southern California Coast steelhead, both of which conclude that the steelhead is in danger of extinction within 25 to 50 years, in part because of the exacerbating effects of climate change. *See* California Trout, "SOS: California's Native Fish Crisis" 54-55 (2008); Peter B. Moyle, et al., U.C. Davis Center for Watershed Sciences, "Salmon, Steelhead and Trout in California" 95 (2008). These reports also identify the Southern California Coast steelhead's range, which is essentially limited to coastal streams in Southern California. The Santa Clara River watershed—the watershed where the Project is located—is identified as one of the few areas that provides habitat for the endangered steelhead. *See* California Trout, "SOS: California's Native Fish Crisis" 55 (2008); Peter B. Moyle, et al., U.C. Davis Center for Watershed Sciences, "Salmon, Steelhead and Trout in California" 86-87 (2008).

Taken together, these reports provide evidence of Project-specific impacts of climate change on endangered steelhead. They therefore constitute new information of substantial importance showing that the Project will have a significant effects related to climate change that were not discussed in the 2005 EIR. Accordingly, an SEIR analyzing these effects must be prepared. *See* Guidelines §§ 15162; 15163.

III. THE BOARD MUST PREPARE AN SEIR TO CONSIDER ALTERNATIVES AND MITIGATION THAT WOULD REDUCE SIGNIFICANT IMPACTS

As the California Supreme Court has repeatedly emphasized, “the chief goal of CEQA is mitigation or avoidance of environmental harm.” *Laurel Heights Improvement Assn. v. Regents of the University of California*, 47 Cal.3d 376, 403 (1988); *see Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (1990). Indeed, the Legislature has expressly declared that “it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . .” Pub. Resources Code § 21002. CEQA requires public agencies such as the Board to implement this goal via a three-step process. First, the Board must accurately identify, analyze, and disclose the adverse impacts of a Project, taking care to provide decisionmakers and the public with sufficient information to enable them intelligently to consider the extent of that impact. *Stanislaus National Heritage Project v. County of Stanislaus*, 48 Cal.App.4th 182, 196-97 (1996). Second, the Board must “identify mitigation measures for each significant environmental effect.” Guidelines § 15126.4(a)(1)(A); *see id.* (“An EIR shall describe feasible mitigation measures which could minimize significant adverse impacts . . .”) (emphasis added). And third, the Board must actually adopt such mitigation measures, unless it is infeasible to do so. Pub. Resources Code § 21002.1(b) (“Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”) (emphasis added); *Sierra Club v. Gilroy City Council*, 222 Cal.App.3d 30, 41 (1990).

The Board’s status as a responsible agency does not alter its duty to identify, analyze and mitigate the significant environmental impacts of a project, where, as here, the requirements triggering preparation of an SEIR are met. *See* Guidelines §§ 15096(f); 15162-15163; *see also Mira Monte*, 165 Cal.App.3d at 365 (where requirements triggering SEIR are met, agency must “consider the full range and effectiveness of alternatives and mitigation measures”).

Here, rather than preparing an SEIR fully analyzing the new or substantially more severe significant impacts of the Project (discussed in detail in Sections I and II, above), the Board's Draft Order only briefly mentions two alternative flow proposals as possible mitigation for Impact R-3 and rejects them both as infeasible. Draft Order at 27-28. Not only does the Board fail to identify feasible mitigation for Impact R-3, but it also entirely fails to identify, analyze or propose mitigation for the additional significant impacts identified in Sections I and II, above, such as impacts to native rainbow trout and endangered steelhead.


The Draft Order's discussion of alternatives and mitigation does not constitute the full range of alternatives and mitigation contemplated by CEQA. *See Mira Monte*, 165 Cal.App.3d at 365. For example, the Board could consider whether minimum in-stream flows lower than those proposed by Alternative 2 in the 2005 EIR or those proposed by CalTrout and FOR (e.g., 10 c.f.s. or 5 c.f.s.) could provide feasible mitigation for impacts on recreational opportunities for anglers, native trout and endangered steelhead. Moreover, the proper vehicle for the Board's analysis of alternatives and mitigation is in an SEIR—not in its findings. *See Mira Monte*, 165 Cal.App.3d at 365 (administrative findings regarding mitigation do not cure failure to proceed as required by CEQA). The Board's failure to prepare an SEIR deprives the public of the opportunity to meaningfully participate in the analysis and potential mitigation of these impacts. *Id.* at 365-66. Finally, because the Board must consider a full range of alternatives and mitigation in an SEIR, its adoption of a statement of overriding considerations with regard to Impact R-3 is premature.

For all of the foregoing reasons, CalTrout and FOR urge the Board (1) to revise the Draft Order to reflect the need to prepare an SEIR for the Project; (2) to authorize preparation of an SEIR addressing the new or substantially more severe significant impacts revealed by new information and changed circumstances identified by the Board, CalTrout and FOR; and (3) to deny the 401 certification until such time as the agency complies with CEQA. Finally, we note that, for all of the reasons stated in our prior comment letters, the 401 certification also would not be consistent with the requirements of the Clean Water Act. Thank you for the opportunity to comment on the Draft Order.

Jennifer Watts, Ph.D.
July 27, 2009
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Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP


Amanda R. Garcia *(by WK)*

Attachments

- Exhibit 1: DFG Fish Stocking (Planting) 11/24/2009 – 1/1/2010
- Exhibit 2: NOAA Fisheries Motion to Intervene and Comments on Draft Environmental Assessment re: FERC Project No. 2426-197 (May 3, 2007)
- Exhibit 3: NOAA Fisheries Request for Rehearing of Notice Denying Late Intervention for the California Aqueduct Project, FERC Project No 2426-197 (June 13, 2007)
- Exhibit 4: Middle Piru Creek Arroyo Toad Clutch Surveys 2007 prepared by Nancy Sandberg (January 2008)

Cc: Nica Knite, California Trout
Steve Evans, Friends of the River
Matthew Bullock, California Department of Justice, Natural Resources Section
Federal Energy Regulatory Commission