

**BEFORE THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

**In the Matter of
Water Quality Certification for the
Cinnamon Ranch Hydroelectric Project**

FERC Project No. 6885

**FRIENDS OF THE RIVER'S
PETITION FOR RECONSIDERATION
AND REQUEST FOR STAY OF
THE WATER QUALITY CERTIFICATION
FOR THE CINNAMON RANCH HYDROELECTRIC PROJECT**

INTRODUCTION

On May 11, 2010, the Executive Director of the State Water Resources Control Board (State Water Board or Boards), acting pursuant to Section 401 of the federal Clean Water Act, U.S.C. § 1341, issued a water quality certification (Certification) for Mr. Richard Moss' (applicant) Cinnamon Ranch Hydroelectric Project (Project), Federal Energy Regulatory Commission (FERC) Project No. 6885. Because Friends of the River has serious concerns with the Certification for its failure to adequately protect the beneficial uses of water, Friends of the River is filing this timely Petition for Reconsideration and Request for Stay (Petition) pursuant to Title 23 of the California Code of Regulations, Section 3876(c).

I. NAME AND ADDRESS OF PETITIONERS

Alexandra Borack
Conservation Advocate
FRIENDS OF THE RIVER
1418 20th Street, Suite 100, Sacramento CA 95811
(916) 442-3155 x 216
(916) 442-3396
Alexandra@friendsoftheriver.org

II. SPECIFIC ACTION OF THE STATE WATER BOARD

As noted above, on May 11, 2010, the State Water Board's Executive Director issued a Section 401 certification for the Cinnamon Ranch Hydroelectric Project, FERC No. 6885. The certification is Attachment A hereto.

III. DATE ON WHICH THE STATE BOARD ACTED

The Certification is dated May 11, 2010. Friends of the River is filing this Petition for Reconsideration on June 10, 2010 in compliance with the thirty (30) day deadline for filing such Petitions set forth at Title 23, Section 3867(c) of the California Code of Regulations.

IV. STATEMENT OF REASONS WHY THE ACTION WAS INNAPROPRIATE OR IMPROPER

Issuance of the State Water Board's Certification was improper for several reasons. The State Water Board failed to evaluate whether the operation of the Project would comply with the Lahontan Regional Water Quality Control Plan (Basin Plan), and if it did not, failed to formulate measures necessary to protect the beneficial uses for the applicable water bodies listed in the Basin Plan¹. For example, the Certification fails to include any specific conditions, such as bypass flows, necessary to protect the beneficial uses of Pellisier Creek, Middle Canyon Creek, and Birch Creek, which are completely dewatered by the project². In fact, the Certification lacks any specific conditions to address how the Project should operate in conformance with the Basin Plan, and instead simply approves the

¹ See Water Quality Certification for Federal Permit or License for Cinnamon Ranch Hydroelectric Project, Regulatory Authority No. 19 for a list of the beneficial uses for the designated water bodies. Footnotes shall refer to various sections contained within the Water Quality Certification document.

² Project Description No. 3 – “No minimum bypass flows are required by the FERC license below the diversions on Pellisier Creek, Middle Canyon Creek, and Birch Creek.”
Aquatic Resources No. 13 – “Applicant diverts the majority of Pellisier Creek and Middle Canyon Creek to the de-silting pond.”

current operations which have negative impacts on the beneficial uses³. Instead of requiring specific measures to protect the beneficial uses, the State Water Board requires that the applicant develop “monitoring plans” to address the lack of information currently on record. Friends of the River believes and agrees with the State Water Board’s own assessment that the information requested as part of the monitoring plans is fundamental to understanding how the project operates and critical to formulate measures necessary to protect the beneficial uses⁴. Therefore, this information should have been developed and provided before the State Water Board certified that the Project complied with the Clean Water Act.

The State Water Board acted arbitrarily and irresponsibly by issuing the Certification for continued operation of the Project without providing a rational basis for their decision. By the State Water Board’s own admission, continued operation has significant impacts on the beneficial uses that remain unevaluated and unaddressed in the Certification⁵. As per the State Water Board’s own regulations the information needed should have been addressed in a complete application⁶, but it appears from a lack of information on record that the State Water Board failed to address this need before certifying the Project.

With regard to the “monitoring plans” required by the certification, Friends of the River is does not understand what useful information can or will be collected by an ambient fishery and bio-assessment of Pellisier Creek, Middle Canyon Creek, or Birch Creek below Project diversions, when the Project already dewateres these creeks by diverting all of the natural streamflow. Aerial inspection via Google Earth satellite reveals that these creeks lie barren and dry below the diversion points, therefore it would appear that no fish or fishery habitat exist in the dry creek beds.

³ Aquatic Resources No. 11 – “Rainbow and brook trout have been found in the Applicant’s Birch Creek de-silting pond / forebay.” This implies that fish and potentially other aquatic organisms are diverted and entrained in the Project works and are lost as salvage.

⁴ Aquatic Resources No. 14 – “There are insufficient data on the stream flow and water quality of Pellisier Creek, Middle Canyon Creek, and Birch Creek, and bioassessments and fishery surveys have not been conducted. This information is needed to evaluate the health of the aquatic resources in Pellisier Creek, Middle Canyon Creek, and Birch Creek and to formulate the minimum bypass flows requirements downstream of the Applicant’s diversions.”

⁵ See Footnotes 2, 3, and 4

⁶ Cal. Code Regs., tit. 23, § 3856(b) and (g)(6)

Furthermore, Friends of the River is concerned that the State Water Board's certification may unknowingly permit the take of threatened and endangered species by allowing the Project to affect listed species or critical habitat. Even though the Certification does not explicitly authorize any act that results in the take of threatened or endangered species, it is unknown what effect the Project does have on endangered species since no biological assessment was provided by the Applicant. Friends of the River acknowledges that the Board may have done their own biological assessment to determine that no listed species exist within the Project area⁷, however Friends of the River cannot find any documentation by the State Water Board to support this claim.

Finally, the Board violated the California Environmental Quality Act (CEQA), Public Resources Code §§ 21000 et seq., by adopting a Categorical Exemption for the Project. In failing to formulate measures necessary to meet the Basin Plan objectives, the Board did not analyze the full context of relicensing the Project. Such measures may require new physical or operational modifications to the Project that could result in significant impacts to the environment. CEQA defines a project as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” and that requires a discretionary approval from a public agency (Cal. Code Regs., tit. 14, § 15378, subd. (a)(3)). The State Water Board confusingly adopts the analysis provided by the applicant and FERC⁸ that the Project would have no significant effect on the environment, believing that the State Water Board's own requirements to protect the beneficial uses in the Basin Plan are somehow satisfied because no “environmental effects” were found. Adding to the confusion, the State Water Board will later “re-evaluate” project impacts in order to comply with “CEQA”⁹. This statement implies that the State Water Board 1) has not fully analyzed project impacts to the Basin Plan, 2) has concluded that no such impact exists, contradicting statements

⁷ Aquatic Resources No. 10 – “There are no endangered or threatened species listed under either the State Endangered Species Act or federal Endangered Species Act within Pellisier Creek, Middle Canyon Creek, and Birch Creek, and no biological assessment of the three creeks was provided by the Applicant.” This finding of fact bears special note, as the State Water Board first concludes that there are no listed species found within the Project area and then admits that no information was provided (in the form of a biological assessment) that could lead the agency to make such a determination.

⁸ See Regulatory Authority No. 24

⁹ See Regulatory Authority No. 26

made in other sections of the Certification that impacts occur¹⁰, or 3) is trying to tier its CEQA analysis for a later date. Therefore it is unclear how, as required under General Condition No. 5, the Applicant shall take reasonable measures to protect the beneficial uses of the named water bodies when the Certification and associated CEQA “document” provide no conditions to do so.

V. MANNER IN WHICH PETITIONER IS AGGRIEVED.

Friends of the River (Petitioner) 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, including their habitat. The State Water Board’s Certification would allow the applicant to continue dewatering several streams in violation of the Board’s responsibility to protect the beneficial uses of water and the public trust resources of California. As a result, these streambeds cannot serve as suitable habitat for fish and wildlife, which the Petitioner seeks to protect. Therefore, Friends of the River and its members are aggrieved by the State Board’s Certification.

VI. SPECIFIC ACTION OF THE STATE BOARD REQUESTED BY THE PETITIONER

For reasons provided in Section IV of this petition, Friends of the River requests that the Water Board (1) revoke its 401 certification for the Project; (2) prepare an appropriate CEQA document to analyze the full context of relicensing of the Project; and (3) either deny or substantially modify the certification to impose appropriate conditions to protect the beneficial uses of the water bodies affected, by requiring appropriate screening of the diversions and minimum instream flows for the bypassed reaches to protect fish and wildlife habitat. Friends of the River also request that the State Water Board stay the effect of its 401 certification pending reconsideration.

¹⁰ See Footnote 5, *supra*.

VII. LISTS OF PERSONS OTHER THAN PETITIONER AND APPLICANT KNOWN TO HAVE AN INTEREST IN THE SUBJECT MATTER OF THE PETITION

- a. California Hydropower Reform Coalition
- b. California Sportfishing Protection Alliance

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

Friends of the River has sent electronic and hard copies of this Petition to Executive Director Dorothy Rice and hard copies to the applicant Richard Moss.

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

Friends of the River requests that the Executive Director prepare the State Board staff record for this Certification, to the extent such a record exists.

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

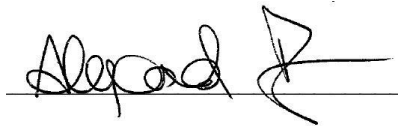
Friends of the River has not submitted any comments or communicated with State Water Board staff regarding the Project prior to the Petition. To the Petitioner's knowledge, no hearing, Draft Certification, or official notice was posted regarding the Certification being issued, thus Petitioners were not able to participate at an earlier period to submit comments or provide input regarding the relicensing of the Project.

XI. REQUEST FOR STAY

As discussed in Section IV above there are substantial legal questions regarding the adequacy of the environmental review conducted by the State Water Board and the sufficiency of the Conditions in the Certification to meet the requirements of the Clean Water Act. The State Water Board may grant a stay if a Petitioner alleges facts or produces proof of: 1) substantial harm to the Petitioner or the public interest if the stay is not granted; 2) substantial questions of fact or law regarding the disputed action. Friends of the River and the public interest would be harmed if the Project is allowed to operate in violation of the Basin Plan. Therefore, a stay of the Certification is proper and warranted.

June 10, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alexandra Borack", written over a horizontal line.

Alexandra Borack
Conservation Advocate
FRIENDS OF THE RIVER
1418 20th Street, Suite 100, Sacramento CA 95811
(916) 442-3155 x 216
(916) 442-3396
Alexandra@friendsoftheriver.org