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January 14, 2005

Ms. Laurie Kemper, P.E.
Division Manager, North Lahontan Watersheds
California Regional Water Quality
Control Board, Lahontan Region
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

Dear Ms. Kemper:

Subject: Lower Owens River Project Permits

Thank you for your cooperation in assisting the Los Angeles Department of Water and Power (LADWP) in the application process for the appropriate state and federal water quality permits for the Lower Owens River Project (LORP). As you know, the LORP is one of the most critical environmental enhancement projects to take place in the Eastern Sierra region in recent years. The completion of the project and the commencement of the re-watering of the 62-mile stretch of the historical Lower Owens River is a high priority for the City of Los Angeles, as well as a myriad of State of California resource agencies, local government, and non-governmental organizations in the Owens Valley. We are pleased with the progress made to date and look forward to the final completion of the LORP.

Enclosed please find the additional information you requested for Certification under Section 401 of the Clean Water Act (33 U.S.C. §1341). This information is responsive to your letter of December 29, 2004, in which you requested additional information in order to process the City of Los Angeles' previous application. As you stated in that letter, our prompt submission of information relevant to the LORP will enable the California Regional Water Quality Control Board, Lahontan Region (Regional Board) to process our application for water quality certification and an exemption from certain waste discharge prohibitions contained in the *Water Quality Control Plan for the Lahontan Region ("Basin Plan")*.

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We have not applied for the individual permits you suggested in your December 29 letter because we feel that there is no factual or legal basis for the Regional Board to deny this project coverage under the appropriate General Permits. The construction and long-term operation of the LORP meet all of the criteria for the National Pollutant Discharge Elimination System (NPDES) General Permits. Contrary to the assumptions made in your December 29 letter, the construction of the LORP does not involve the discharge of pollutants into Waters of the United States, except for the temporary discharges involved in the construction of the LORP. In California, such discharges are uniformly addressed through the issuance of General Permits. As described in page 3-11 of the attachment to our November 26, 2004 letter, our application for the General Permit for Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity is justified. The LORP clearly meets the criteria set forth for this General Permit. The construction project will cause soil disturbances of more than one acre. Also, as described in page 3-15 of the attachment to our November 26 letter, our application for the Revised Waste Discharge Requirements and NPDES for Limited Threat Discharges to Surface Waters is justified. The LORP clearly meets the criteria set forth for this General Permit. Any construction dewatering will not cause or have reasonable potential to cause a degradation of water quality or impair beneficial uses of receiving waters. These actions will not cause acute or chronic toxicity to the receiving waters. All discharges are expected to be intermittent, seasonal and short term. In addition, the discharges fall under the categories that the Regional Board has determined are covered by this permit. Lastly, as described in pages 3-13 to 3-14 of the attachment to our November 26 letter, our application for the Statewide General Waste Discharge Requirements to Land with a Low Threat to Water Quality is justified. The LORP clearly meets the criteria set forth for this General Permit. The discharges to land shall be low in volume and the types of discharges fall under the categories determined by the State Water Resources Control Board.

While we concede that the Regional Board maintains discretion to require individual permits for certain activities, such discretion must be exercised in a reasonable manner. Requiring an individual NPDES permit where one is not required as a matter of law would constitute an abuse of discretion.

The long-term operation of the LORP will involve the water of the Owens River continuing in the Owens River's natural channel--two parts of a single water body--without the addition of pollutants. The U.S. Supreme Court recently confirmed that NPDES permits are not necessary for such activities in the case of *South Water Management District v. Miccosukee Tribe of Indians*, (2004) 124 S.Ct. 1537 (*Miccosukee*; mixing of waters from the same basin does not require NPDES permit; remanded for further proceedings). In that case, the Supreme Court made its point by using the following analogy:

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"If one takes a ladle from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."
Miccosukee at 1545, citing Catskill Mountains Chapter of Trout Unlimited, et al v. City of New York et al, (2001) 273 F.3d 481 at 492.

The Lower Owens River is part of the same pot of soup as the upper Owens River. All planned activities will involve the same source water.

In addition, we must take issue with the implication in your December 29 letter that the Los Angeles Aqueduct is a water of the United States. The Los Angeles Aqueduct is not a water of the United States. The Regional Board has no jurisdiction to require any state or federal permits for discharges into the Los Angeles Aqueduct. The Basin Plan does not list the Los Angeles Aqueduct as a water body under the Regional Board's jurisdiction, and the City of Los Angeles does not intend to cede jurisdiction over its municipal drinking water supply for unauthorized regulatory purposes. If Regional Board staff possesses any confusion over the location of the Los Angeles Aqueduct, as it relates to the LORP, please refer to the maps contained in Appendix A of the LORP Final Environmental Impact Report (<http://www.ladwp.com/ladwp/cms/ladwp005749.jsp>). All of the water that flows from the existing Owens River channel into the historic lower Owens River channel is the subject of the Regional Board's regulatory authority. However, once the water has traveled through the lower Owens River channel, some of it will be pumped back into the Los Angeles Aqueduct through pipes installed as part of the project. The water returned to the Los Angeles Aqueduct should not be subject to an NPDES permit. The Los Angeles Aqueduct is not a receiving water for the purposes of the Clean Water Act. The water returned to the Los Angeles Aqueduct will be used solely for municipal purposes, and once it is in the Aqueduct, it can no longer be considered a water of the United States for the Regional Board's jurisdictional purposes. The water at that point has been removed from the realm of nature and placed in a manmade water conveyance structure, which by law may not be used for commerce of any kind.

To our knowledge, no other regional board in California has subjected the aqueducts of water suppliers of the state to treatment as a receiving water body subject to the requirements of NPDES permits. We hope this characterization of the Los Angeles Aqueduct was merely an error and does not represent the Regional Board's foray into a regulatory realm into which it has never been authorized by the California Legislature or Congress. Such an extreme departure from the traditional actions of regional water quality control boards is certainly an issue of statewide concern.

Completed applications for coverage under the three appropriate General Permits shall be sent to the Regional Board under separate covers.

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We hope this letter will resolve any confusion that may have surrounded the planned construction of LORP and its operations. If we can be of assistance in responding to questions, please feel free to contact Mr. Brian Tillemans at (760) 873-0214. We would appreciate notification of the date that your Board will consider our 401 Certification application. We look forward to your continued cooperation in protecting our natural resources and the timely implementation of the LORP.

Sincerely,

A handwritten signature in cursive script that reads "Gene L. Coufal".

Gene L. Coufal

Manager

Aqueduct Business Group

VIA CERTIFIED MAIL

Enclosure

c: Mr. Brian Tillemans

The Los Angeles Department of Water and Power (LADWP) submitted to Lahontan Regional Water Quality Control Board (RWQCB) an application for Water Quality Certification (WQC) for the Lower Owens River Project (LORP) on July 27, 2004 (WQC form plus attachments). RWQCB requested additional information on August 27, 2004, October 26, 2004, and December 29, 2004. The following table cross-references information requests by the RWQCB with information submittals provided by LADWP (July 27, 2004 and November 26, 2004).

Information Requested by RWQCB	Cross-Reference to Information Submitted by LADWP
<i>RWQCB Letter dated August 27, 2004</i>	
Pg. 4, Item a) -- Extent of affected water body	11/26/04 Submittal Sec. 3.3.1 (Table 3-5)
Pg. 4, Item b) -- Name and title of person delineating extent of waters	11/26/04 Submittal Sec. 3.4 (pg. 3-16) Names (Titles): Sherman Jensen (Soil Scientist/Physical Ecologist and President, White Horse Associates) and Frank Smith (Botanist, White Horse Associates) Wetlands Delineator Certification Information: Sherman Jensen is certified by the U.S. Army Corps of Engineers (Sacramento District, Utah Regulatory Office) to conduct wetland delineations.
Pg. 4, Item c) -- Measures to avoid impacts to waters	11/26/04 Submittal Secs. 4.4.2 – 4.4.7 11/26/04 Submittal Sec. 5 (see pgs. 5-4, 5-5, and 5-8)
Pg. 5, Item d) -- Type and amount of discharge of dredged or fill materials	11/26/04 Submittal Sec. 3.3.1 (Table 3-4)
Pg. 5, Item e) -- Mitigation for impacted waters	11/26/04 Submittal Sec. 3.4 (see esp. Sec. 3.4.5)
Pg. 5, Item 1) -- Disclosure regarding contributions to Regional Board members	11/26/04 Submittal Sec. 3.2.6
Pg. 6, Item 2) -- Description of project activities	7/27/04 Submittal Sec. 2 11/26/04 Submittal Secs. 3.3.1 and 3.4
Pg. 6, Item 3)	
<ul style="list-style-type: none"> ▪ Analysis of impacts to water quality and beneficial uses 	7/27/04 Submittal Sec. 4 11/26/04 Submittal Sec. 4.3 (Table 4-1) 11/26/04 Submittal Sec. 5
<ul style="list-style-type: none"> ▪ Measures to avoid, minimize, or mitigate impacts to water quality and beneficial uses 	11/26/04 Submittal Secs. 4.4.2 – 4.4.7 11/26/04 Submittal Sec. 5 (see esp. pgs. 5-4, 5-5, and 5-8) Water quality monitoring during initial flow releases detailed in Final EIR Sec. 2.3.5. See 11/26/04 Submittal

Information Requested by RWQCB	Cross-Reference to Information Submitted by LADWP
	Sec. 4.5.1.4 regarding water quality monitoring related to construction activities.
<ul style="list-style-type: none"> ▪ Duration of expected impacts to water quality 	11/26/04 Submittal Sec. 5 (see esp. pgs. 5-3 to 5-4)
<ul style="list-style-type: none"> ▪ Wetland functions and values of wetlands to be impacted and created 	11/26/04 Submittal Sec. 3.4.3 (summary) White Horse Associates DVD (November 2004, attachment to 11/26/04 Submittal)
<ul style="list-style-type: none"> ▪ Degree to which existing wetlands will be impacted 	11/26/04 Submittal Sec. 3.4.1 (summary, Table 3-8) White Horse Associates DVD (November 2004, attachment to 11/26/04 Submittal)
<ul style="list-style-type: none"> ▪ Measures to avoid and minimize impacts to wetlands 	11/26/04 Submittal Secs. 4.4.2 – 4.4.7 11/26/04 Submittal Sec. 5 (pg. 5-8)
<ul style="list-style-type: none"> ▪ Mitigation plan for unavoidable impacts to wetlands 	11/26/04 Submittal Sec. 3.4 (pg. 3-21)
<ul style="list-style-type: none"> ▪ Wetland delineation 	11/26/04 Submittal Sec. 3.4.1 (summary, Table 3-8) White Horse Associates DVD (November 2004, attachment to 11/26/04 Submittal)
Pg. 6, Item 4)	
<ul style="list-style-type: none"> ▪ Wetland delineation for the Delta 	11/26/04 Submittal Sec. 3.4.1 (summary, Table 3-8) White Horse Associates DVD (November 2004, attachment to 11/26/04 Submittal)
<ul style="list-style-type: none"> ▪ Average and range of historical flows to the Delta ▪ Analysis of impacts to Delta wetlands ▪ Mitigation plan for unavoidable impacts to Delta wetlands 	11/26/04 Submittal Sec. 3.4.2.3 Final EIR Sec. 6.3.1 and 6.3.6 Final EIR Table 6-7 (pg. 6-18) White Horse Associates DVD (November 2004, attachment to 11/26/04 Submittal)
<i>RWQCB Letter dated October 26, 2004</i>	
Pg. 2, Information to support an exemption request from waste discharge prohibitions	11/26/04 Submittal Sec. 5
Pg. 4, Item 1 – Form 200	See cover letter to this submittal (1/13/05).
Pg. 4, Item 2 – Permit applications for other activities	Application for general permits (WQO-99-08, WQO-2003-0003, WQO-2003-0034) completed or forthcoming

Information Requested by RWQCB	Cross-Reference to Information Submitted by LADWP
Pg. 4, Item 3 – Information regarding flushing flows	11/26/04 Submittal Sec. 5 (pg. 5-7) Note, further discussion regarding an additional flow release (one time) subsequent to the first seasonal habitat flow was conducted on December 17, 2004. Participants included Alan Miller (RWQCB), John Steude (RWQCB), Brian Tillemans (LADWP), Lori Dermody (LADWP), Mark Hill (Ecosystem Sciences) and Sarah Garber (MWH).
Pg. 4, Item 4 – Information on impact to historic average and range of flows to the Delta	11/26/04 Submittal Sec. 3.4.2.3 Final EIR Sec. 6.3.1 and 6.3.6 Final EIR Table 6-7 (pg. 6-18) White Horse Associates DVD (November 2004, attachment to 11/26/04 Submittal)
Pg. 4, Item 5 – Information on hydrologic modifications to wetlands	7/27/04 Submittal Sec. 2 11/26/04 Submittal Sec. 3.3.1 11/26/04 Submittal Sec. 3.4.2
Pg. 4, Item 6 – BMP Plan	11/26/04 Submittal Sec. 4.4
<i>RWQCB Letter dated December 29, 2004</i>	
Pg. 3, Item B – Information regarding areas in the Delta indicated as jurisdictional status “Not determined” in the 11/29/04 delineation report	Areas of the Delta delineated as “Not determined” in Appendix D, Map 3 (pg. D-4) of the Delineation, Prediction, and Assessment Report (White Horse Associates, November 2004) have wetland hydrology and hydric soil, but are essentially barren (i.e., hydrophytic vegetation is not present). Subsequent to preparation of the report, the Corps indicated that hydrophytic vegetation must be present to warrant wetland status (Bruce Henderson, pers. comm. to S. Jensen, November 16, 2004). These areas are also above the ordinary high water mark of the brine pool (3,553.55 feet elevation), below which the Corps defines as jurisdictional waters. Therefore, the areas previously identified as “Not determined” are non-jurisdictional.