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10 **STATE WATER RESOURCES CONTROL BOARD**
11 **FOR THE STATE OF CALIFORNIA**

12 In the matter of:)	TROUT UNLIMITED PETITION
)	FOR REVIEW OF LAHONTAN
13 National Pollutant Discharge)	REGIONAL WATER QUALITY
14 Elimination System (NPDES) Permit)	CONTROL BOARD FAILURE
For Paiute Cutthroat Trout)	TO ACT
Recovery Project – Alpine County, CA)	[Cal. Water Code § 13320;
)	Cal. Code Regs. tit. 23, § 2050]

15 **INTRODUCTION**

16 Pursuant to California Water Code § 13220 and Title 23, § 2050 of the California
17 Code of Regulations, Petitioner Trout Unlimited (“TU”) respectfully requests that the
18 State Water Resources Control Board (“SWRCB”) review the failure to act of the
19 Lahontan Regional Water Quality Control Board (“Regional Board”) to adopt its
20 proposed National Pollutant Discharge Elimination System (“NPDES”) permit for the use
21 of the piscicide rotenone in the California Department of Fish and Game’s (“CDFG”)
22 planned Endangered Species Act (“ESA”) project (“Restoration Project”) for the Paiute
23 Cutthroat Trout (“PCT”) in Silver King Creek in Alpine County, California. The
24 Regional Board failed to act on its proposed permit at a September 8, 2004 noticed-

1 meeting. TU respectfully requests that the SWRCB order the Regional Board to issue the
2 permit, or exercise its authority under the Water Code to issue the NPDES permit
3 directly. The address of Petitioner Trout Unlimited is 828 San Pablo Avenue, Suite 208,
4 Albany, CA 94706. TU has provided a copy of this petition to the Regional Board. TU
5 has also provided a copy to the "discharger," CDFG.
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7 **STATEMENT OF FACTS**

8 In 1970, the United States Fish and Wildlife Service ("FWS") listed California's
9 Paiute Cutthroat Trout as endangered under the federal ESA.¹ PCT are the rarest trout in
10 North America and, therefore, one of the rarest inland trout species in the world. These
11 trout are indigenous to only Silver King Creek inside the Carson Iceberg Wilderness on
12 the east slope of the Sierra Nevada Range, in Alpine County southeast of Lake Tahoe.
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14 The two main factors contributing to the PCT's status as threatened under the
15 ESA are its limited population size and the perpetual risk of hybridization with non-
16 native trout. During 1991 through 1993, CDFG treated Silver King Creek with the fish
17 restoration tool rotenone above Llewellyn Falls (an impassable natural barrier to non-
18 native trout on the creek) to remove hybridized PCT before restoring native, genetically
19 pure populations. Hybridization of the creek above and below the falls is traceable to
20 unauthorized introduction of rainbow trout.
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23 For almost twenty years resources agencies, including CDFG and FWS, have
24 know that two things must occur for the PCT to be considered recovered for purposes of
25 the ESA. First, a pure population of PCT must be reestablished in Silver King Creek
26 above Llewellyn Falls. Today, a robust and healthy genetically pure PCT population
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28 ¹ In 1975, FWS upgraded the species status to threatened.

1 exists above the falls. Second, a genetically pure PCT population must be successfully
2 reintroduced into the mainstem of Silver King Creek below Llewellyn Falls. To date this
3 second recovery requirement has not been met. The Restoration Project for which the
4 Regional Board failed to issue a NPDES permit will accomplish this second recovery
5 requirement. CDFG will employ the fish restoration tool rotenone to remove non-native
6 and hybridized fish from additional stream miles of habitat below the falls and in
7 tributaries to the mainstem of the creek. The rotenone treatment itself can be completed
8 within a few days. The whole treatment phase, which will include extensive monitoring,
9 may take between two to three years. Afterwards, CDFG will re-introduce genetically
10 pure PCT into lower Silver King Creek. The reintroduction and population recovery
11 phase of the Restoration Project should take up to eight years or less. The geographic
12 scope of the entire Restoration Project is only six stream miles below the falls and five
13 miles of limited tributary streams.
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16 One state agency, CDFG, and two federal agencies, the FWS, and the United
17 States Forest Service ("USFS"), Toiyabe National Forest, have been planning the project
18 for almost ten years. In that time, the Restoration Project has been subject to California
19 Environmental Quality Act ("CEQA") scrutiny. As the expert and lead agency under
20 CEQA, CDFG published a final Mitigated Negative Declaration, on April 10, 2003.
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23 The Restoration Project has also been fully analyzed under the National
24 Environmental Policy Act ("NEPA"). On May 5, 2004, the USFS published an
25 Environmental Assessment ("EA") under NEPA for the project. After receiving
26 comments on the EA, the USFS made a "Finding of No Significant Impact." The USFS
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1 upheld that finding after considering administrative appeals. Thus, all applicable state
2 and federal environmental review has been completed for the subject project.

3 The Regional Board actually issued a tentative NPDES permit for the Restoration
4 Project on July 8, 2004. Because of tight planning schedules and in order to implement
5 the first portion of the project this fall, CDFG, FWS, and USFS reasonably relied on the
6 Regional Board's action in July 2004 and began implementation preparations. However,
7 the Regional Board re-circulated a revised permit to interested parties on August 27,
8 2004. Despite comments for and against the project, the revised permit also
9 recommended issuing a final NPDES permit. At a publicly noticed September 8th
10 meeting, and with the Restoration Project on the agenda and its future hanging in the
11 balance, the Regional Board failed to take action on the revised NPDES permit. Because
12 the Regional Board completely failed to act, there is no copy of any order or resolution to
13 attach to this petition consistent with Cal. Code Regs. tit. 23, § 2050(2).
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16 **STATEMENT OF INTEREST**

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18 Petitioner TU is a national conservation organization with its national office in
19 Arlington, Virginia, and California offices in Albany and Santa Rosa, California. TU is a
20 nonprofit corporation organized under the laws of the State of Michigan. TU is the
21 nation's leading coldwater fisheries conservation organization. TU has approximately
22 125,000 members nationwide, and is dedicated to protecting, conserving, and restoring
23 North America's native trout and salmon resources.
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25 TU is involved in numerous natural resource conservation and advocacy projects
26 throughout California. TU members and staff use and enjoy the Carson Iceberg
27 Wilderness Area and Silver King Creek for recreational, educational, and aesthetic
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1 purposes. In California alone, TU has approximately 10,000 members. More
2 importantly, for at least fifteen years TU members have been actively and tirelessly
3 involved in restoration and recovery projects for PCT. Since the mid-1980s, TU
4 volunteers have built exclusionary fencing to keep cattle out of the creek, installed bank
5 erosion control structures, removed debris and old fencing from meadow areas, and
6 planted willows to stabilize banks. As recently as August 22-24, 2003, twenty TU
7 volunteers, along with FS, CDFG, and FWS staff, worked to capture, count and move
8 hybridized fish from a six mile reach of Silver King Creek below Llewellyn Falls.² TU
9 member in-kind contributions to the PCT recovery effort over the years have been
10 substantial.
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13 To be clear, TU is a fish conservation organization not a sport angling one. The
14 express mission of the organization is the protection, restoration, and conservation of
15 North America's trout, salmon, and steelhead. To be equally clear, we do not file this
16 petition as a rotenone proponent. In plain terms, our sustained efforts over the years have
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20 ² TU staff have also commented over the last two years on the NPDES issue. For example, on April
21 1, 2003, Donald Duff, the USFS coordinator for partnerships with TU, wrote the FWS, USFS, and CDFG
22 to express support for the Restoration Project and provide his opinion based on his experience as Regional
23 Fisheries Program Manager for the USFS's Region 4, that the Restoration Project was necessary. On April
24 3, 2002, TU's California Director, David Katz, wrote to CDFG to express TU's strong support for the
25 project. On June 7, 2004, Katz wrote to the Regional Board urging it to issue the NPDES permit for the
26 PCT Restoration Project, and in particular noting that the Regional Board had approved the water quality
27 and macroinvertebrate monitoring plans for the project in 2003. On September 10, 2004, Katz wrote to the
28 Executive Officer of the Regional Board to inquire why a June 7th letter from TU was not included in the
deliberation materials for the Regional Board at its September 8th hearing on the Restoration Project, where
it failed to act. On September 28, 2004, Alan Miller, Chief of the North Lahontan Rural Watersheds Unit,
Regional Board, wrote back to apologize for the administrative oversight. TU members attended and spoke
at the September 8th meeting.

Attached to this petition is a copy of TU's request to the Regional Board for preparation of the
record it relied on for its September 8th meeting. *See* Cal. Code Regs. tit. 23, § 2050(10). TU has also
requested a copy of the transcript from the September 8th meeting. We understand that the transcript may
not be available for some time.

1 been and will remain to be for the sole purpose of recovering these fish. The Regional
2 Board's failure to act jeopardizes the Restoration Project and TU's interest in these fish.

3 **STATEMENT OF REASONS AND SUPPORTING ARGUMENTS**

4 The Regional Board's failure to act was inappropriate and improper for several
5 reasons. First, the Regional Board's failure to act was improper under the federal ESA.
6 The FWS has published a "*Revised Recovery Plan for the Paiute Cutthroat Trout*," which
7 it released on August 10, 2004. This plan is a commitment by federal agencies to satisfy
8 Sections 4(f) and 7(a)(1) of the Act. *See* 16 U.S.C. §§ 1533(f), 1536(a)(1). The highest
9 obligation under the Act is the duty to conserve and that duty applied to PCT means using
10 all methods and procedures necessary to bring the fish to the point where ESA protection
11 is no longer needed. The recovery plan also includes a detailed implementation schedule
12 and the tasks in that schedule will involve considerable cooperation with the State of
13 California. *See* 16 U.S.C. § 1535. The Regional Board's failure to act effectively
14 overrides these statutory components of the ESA.

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18 Second, the Regional Board's failure to act was inappropriate because it
19 significantly and improperly limits CDFG's ability to adequately protect, conserve and
20 restore public trust resources. The tentative or draft Regional Board order ("Tentative
21 Permit") distributed on July 8, 2004 states: ". . . DFG is responsible for carrying out a
22 variety of fishery management activities. These activities are designed to protect and
23 maintain valuable sport fisheries and aquatic ecosystems. The DFG is responsible under
24 State and federal law for the restoration and protection of threatened and endangered
25 species." Tentative Permit, p. 1. Also according to the Tentative Permit, the Regional
26 Board amended the Basin Plan to allow for such uses of rotenone, subject to conditions.
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1 *See id.* at p.3. CDFG and the Regional Board entered into a Memorandum of
2 Understanding to implement this conditional approach to the use of rotenone in order to
3 balance the goals and objectives of the Basin Plan with the goals and objectives of
4 restoring and enhancing threatened and endangered species. *See id.*

5 Among other things, the Tentative Permit specifies that the conditional authority
6 of the Regional Board would require the Restoration Project to: (a) be subject to the
7 conditions of the Regional Board's amendments to the Basin Plan; (b) be subject to the
8 MOU regarding the rotenone policy between CDFG and the Regional Board; (c) be
9 subject to multiple, specific project requirements; (d) employ alternative formulations of
10 rotenone to release less objectionable inert ingredients; (e) implement a downstream
11 detoxification station and undertake an extensive fish salvage operation; (f) comply with
12 a Final Programmatic Environmental Impact Report entitled *Rotenone Use for Fisheries*
13 *Management*, July 1994; (g) comply with a CEQA Mitigated Negative Declaration,
14 certified on or about April 7, 2003, and, (h) comply with a June 15, 2003 Aquatic
15 Invertebrate Monitoring study plan involving pre and post project macroinvertebrate
16 surveys (with a budget of approximately \$25,000 and no less than six monitoring
17 stations), building on extensive studies conducted from 1991 to 1993. *See id.* at pp.2-8.

18 The Tentative Permit or Order would have created additional conditioning authority from
19 the Regional Board through the standard and specific terms of the actual NPDES permit.

20 On August 30, 2004, the Regional Board distributed a revised Proposed Order or
21 Permit ("Proposed Permit") responsive to comments—both pro and con, where the
22 comments against were often vociferous—on the Tentative Permit, and yet the revised
23 Proposed Permit *still* recommended adoption of the Order and final NPDES permit. *See*
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1 Proposed Permit at p.6. There is no question that the Regional Board and the SWRCB
2 carry important water quality duties. CDFG carries equally important public trust
3 resource duties. The significant and numerous conditions placed on the Restoration
4 Project in the Proposed Permit would help ensure a balance between these duties. The
5 Regional Board could have exercised its existing authority to implement additional
6 reasonable conditions to address any legitimate concerns that were based on the record.
7 Failure to act by the Regional Board, however, dramatically shifted a delicate regulatory
8 balance and now this state's public trust resources remain faced with a threatened
9 existence. CDFG must retain discretion to employ a suite of fish restoration tools,
10 including as a last resort rotenone, so long as it meets reasonable water quality
11 conditions.
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14 Of course, agency actions should today and tomorrow receive scrutiny under all
15 applicable law. This Restoration Project survived all environmental review, and would
16 have been subject to enumerated conditions under the Proposed Permit. The Regional
17 Board failure to act unilaterally defeated the project. The Paiute Cutthroat Trout, North
18 America's rarest inland trout species, is now doomed to at least another year of
19 regulatory uncertainty and possibly a future where it is permanently threatened with
20 extinction.
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23 Balance and reasonableness should prevail. There are approximately 30,000
24 stream miles in the state of California. In the Sierras for the Regional Board territory,
25 that number is approximately 3,000 miles. This Restoration Project concerns only six
26 stream miles of that number, or less than .2%. In all those miles and all those streams in
27 all of California, we have not recovered one threatened and endangered fish since the
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1 enactment of the ESA over thirty years ago. The Regional Board's failure to act
2 perpetuates this sad fact. Surely some balance must exist that can be struck by the terms
3 of an NPDES permit to allow the Restoration Project to move forward.

4 **REQUESTED RELIEF**

5 For the reasons stated above, TU respectfully requests that the SWRCB either
6 order the Regional Board to grant a NPDES permit for the Paiute Cutthroat Trout
7 Recovery Project, or exercise its own authority under the Water Code and issue a NPDES
8 permit.
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10 Dated: October 5, 2004

11 Respectfully submitted,

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14 Charlton H. Bonham
15 TROUT UNLIMITED

16 Attorney for Petitioner
17 Trout Unlimited
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ATTACHMENT 1