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February 19, 2009

**Via Electronic Mail and U.S. Mail**

Ms. Camilla Williams  
State Water Resources Control Board  
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HO CHI MINH CITY

**Re: Response and Objection to Petition for Reconsideration re 401 Water  
Quality Certification for the California Aqueduct Hydroelectric Project  
Federal Energy Regulatory Commission, Project No. 2426**

Dear Ms. Williams:

The State Water Contractors, Inc. ("SWC"), through its counsel, submits these comments in response to the Petition for Reconsideration and Request for Stay ("Petition") submitted by California Trout, Inc. ("CalTrout") and Friends of the River ("FOR") regarding the water quality certification issued by the State Water Resources Control Board ("State Board") for the proposed amendment to the existing FERC license for the California Aqueduct Hydroelectric Project, FERC Project No. 2426, Ventura and Los Angeles Counties ("Project").

SWC objects to the Petition and respectfully requests that the State Board deny CalTrout's and FOR's (collectively, "Petitioners") requests for reconsideration and for a stay. Petitioners' challenge is not appropriate since the substantive issues were already decided, based on substantial evidence, by the State Board in its December 9, 2008 issuance of the certification, the Federal Energy Regulatory Commission ("FERC") in its 2008 Final Environmental Assessment, and the California Department of Water Resources ("DWR") in its 2005 Final Environmental Impact Review.

**Background**

SWC is a non-profit, mutual benefit corporation organized under the laws of the State of California, comprised of 27 public agencies holding contracts to purchase water delivered by the State Water Resources Development System, otherwise known as the State Water Project ("SWP"), which is owned and operated by DWR. SWC's public agency members are the

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beneficial users of the SWP, which provides water for drinking, commercial, industrial, and agricultural purposes to a population of more than 20 million people and to over 750,000 acres of farmland throughout the San Francisco Bay-Area, the Central Valley of California, and Southern California.

SWC was formed to further the common interest of its members with respect to the operation and administration of the SWP. SWC represents the interests and views of its members regarding the SWP before state and federal legislative bodies and administrative and regulatory agencies. Individual member agencies of SWC retain their right to file comments independent of SWC. Pyramid Dam is a critical part of the SWP's water conveyance and hydroelectric system that delivers water to SWC and thus, SWC has a substantial interest in the Project and the outcome of the current 401 certification proceedings.

DWR owns and operates Pyramid Dam, which is part of the SWP. Pyramid Dam is located in Los Angeles County, and is used to store water and regulate flows in the aqueduct system, as well as to provide a forebay for diversion of water to the Castaic Pumping-Generating Plant upstream of Elderberry Dam. In or about 2003, at the request of the U.S. Fish and Wildlife Service ("FWS"), DWR began to consider modified operations at Pyramid Dam to accommodate concerns regarding the endangered arroyo toad. DWR subsequently asked FERC to amend its operating license. As part of the FERC licensing process, DWR prepared and circulated a Final Environmental Impact Report, dated January 2005 ("FEIR"). Over two years later, Petitioners sought to intervene in the FERC proceeding and FERC denied these requests as untimely.

Petitioners' belated efforts were in response to FERC's issuance of its draft Environmental Assessment, issued in March 2007, to support its decision to approve the license amendment. FERC issued its Final Environmental Assessment and a Finding of No Significant Impact (collectively, "EA") on June 12, 2008.

As part of the licensing process and concurrent with FERC's efforts, the State Board is required to issue a water quality certification ("WQC") pursuant to Section 401 of the Clean Water Act. The State Board issued the WQC on December 9, 2008. Petitioners responded by filing a request for reconsideration and for a stay. On January 30, 2009, the State Board gave notice of the request for reconsideration and asked that responses be filed within 20 days.

### **Argument**

Parties may seek reconsideration of a State Board certification, within 30 days of the decision, only if they are able to show that the State Board's "action or failure to act was inappropriate or improper." See 23 C.C.R. § 3867; Cal. Water Code §§ 1058 and 13160.1. Interested parties, like SWC, have 20 days to provide a response to such petitions. 23 C.C.R. § 3867.1.

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In the Petition, CalTrout and FOR allege that the State Board's decision was improper because it did not consider certain environmental impacts of the proposed amended license, in particular, impacts to allegedly protected trout, arroyo toads, and California redlegged frogs ("CRLF") in Piru Creek. To the contrary, these topics were raised and addressed in the record that was before the State Board when it issued the WQC.

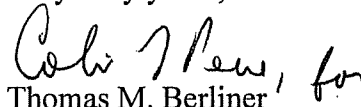
More specifically, these topics were addressed in DWR's 2005 FEIR and FERC's 2008 EA. Petitioners commented on FERC's EA and the arguments raised in this Petition were in FERC's administrative record and considered as part of the decision to issue the EA. There has been substantial debate since DWR's FEIR was published in 2005 regarding the competing fish and wildlife resources in Piru Creek in both the FERC proceeding related to revised operation of Pyramid Dam, and the related downstream FERC proceeding regarding the Santa Felicia Project (FERC Project No. 2153) and the issues raised by the Petitioners were thoroughly considered and addressed.<sup>1</sup>

Independently, the State Board reviewed these prior records, DWR's 2005 FEIR, and the records in the two related FERC proceedings, along with Petitioners' extensive comments on the same issues that they reiterated in this Petition. Taking Petitioners' concerns into consideration, along with the extensive prior administrative records, the State Board issued the WQC on December 9, 2008. Accordingly, the State Board's decision issuing the WQC was based on substantial evidence in multiple administrative proceedings, and Petitioners' arguments to the contrary are without merit.

In conclusion, the Petition does not raise any new issues, nor does it raise any issues that the State Board, DWR, FWS, and FERC have not already considered and addressed. Accordingly, the request for reconsideration is inappropriate and should be denied.

Please feel free to contact me if you have questions at (415) 957-3333.

Very truly yours,



Thomas M. Berliner  
Attorney for State Water Contractors, Inc.

Attachments - Certificate of Service and Service List

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<sup>1</sup> Petitioners' arguments rest on the assumption that the rainbow trout affected by the Project are actually endangered steelhead trout. However, the regulatory agencies have not concurred with this assumption, nor has it altered their decisions in the multiple prior proceedings, despite having Petitioners' comments on the issue. See FERC Letter to National Marine Fisheries Service ("NMFS") (January 11, 2008); NMFS' Comment on Draft Environmental Assessment for the P-2426 at 5 (April 27, 2007); FWS Letter to DWR (August 27, 2007); NMFS' Final Biological Opinion regarding Santa Felicia Hydroelectric Project (P-2153-012) (May 5, 2008) at 9.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 19<sup>th</sup> day of February, 2009 served a copy of the foregoing document on each person designated on the attached service list

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