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January 25, 2010

VIA E-MAIL CKWILLIAMS@WATERBOARDS.CA.GOV

Camilla Williams
State Water Resources Control Board
1001 I Street
P.O. Box 2000
Sacramento, CA 95812-200

Re: Response to Petition for Reconsideration of Denial of Application for Water Quality Certification, Lake Elsinore Advanced Pumped Storage Project; Federal Energy Regulatory Commission Project No. 11858

Dear Ms. Williams:

This firm is counsel for Friesian Focus, LLC; the Fernandez Trust; and Joseph and Joan Fernandez (collectively the "Fernandez Parties"), and hereby submits this written response to the Petition for Reconsideration filed by The Nevada Hydro Company, Inc. ("TNHC"). The Fernandez Parties own a 40-acre property in southern Riverside County and are concerned about the potential environmental impacts of the Lake Elsinore Advanced Pumped Storage Project ("LEAPS"). Moreover, given the proximity of the LEAPS project to their property, they are also concerned about its impacts to their health and livelihood as they are currently finalizing the development of their property as a residence and business where they will operate Friesian Focus, LLC, which imports, keeps, breeds and ultimately sells rare Friesian horses from Holland.

Specifically, I write today to (i) express the Fernandez Parties' support of the State Water Resources Control Board's ("SWRCB") denial of TNHC's request for certification pursuant to section 401(A)(1) of the Federal Clean Water Act for the Lake Elsinore Advanced Pumped Storage Project ("LEAPS"), and (ii) dispel the notion that legally adequate environmental review under the California Environmental Quality Act ("CEQA") has already been completed for the LEAPS project as alleged by TNHC in its Petition for Reconsideration.

The SWRCB Properly Denied TNHC's 401 Certification Application:

There is no question that the issuance of a water quality certification is a discretionary action that requires the SWRCB to comply with CEQA. Similarly, it is

widely understood that the issuance of a Certificate of Public Convenience and Necessity ("CPCN") is also a discretionary action that requires the California Public Utilities Commission ("CPUC") to comply with CEQA. Thus, it was entirely reasonable for the SWRCB to look to the history of TNHC's LEAPS project before the CPUC, particularly TNHC's difficulties in preparing an adequate Proponent's Environmental Assessment, in deciding how to address TNHC's most recent application for water quality certification.

Upon realizing that FERC does not have the legal authority to approve the extensive network of new electric transmission lines and facilities proposed for the LEAPS project, TNHC applied for a CPCN from the CPUC in October 2007. That application, however, was denied in April 2009 by the CPUC when it determined that, despite numerous opportunities, TNHC was either incapable or unwilling to provide the information necessary for the CPUC to satisfy its legal obligation to comply with CEQA. In essence, the CPUC grew tired of wasting time (17 months) and money (untold time and resources expended by CPUC staff, consultants and interested parties) and was ultimately unwilling to give TNHC yet another chance to provide it with the information necessary to comply with CEQA.

In its Petition for Reconsideration, TNHC points to the same information that the CPUC repeatedly found inadequate in an attempt to convince the SWRCB that it already has enough information to adequately identify, evaluate and address LEAPS' environmental impacts under CEQA. As discussed below, the documents TNHC cobbles together and asserts comply with CEQA fall far short. Accordingly, the Fernandez Parties support the SWRCB's decision to deny TNHC's water quality certification application and respectfully request that the Petition for Reconsideration be similarly denied.

No Agency Has Adequately Analyzed LEAPS Under CEQA:

TNHC's Petition for Reconsideration incorrectly asserts that LEAPS has already been adequately analyzed under CEQA. The documents identified by TNHC as being "CEQA compliant," and the reasons why they, in fact, are not "CEQA compliant," are as follows:

(1) **FERC's Final Environmental Impact Statement ("EIS") for the LEAPS project:**

FERC's EIS for the LEAPS project was prepared pursuant to the National Environmental Policy Act ("NEPA"), **not** CEQA. While TNHC and its co-applicant the Elsinore Valley Municipal Water District originally hoped that a joint EIS/EIR could be prepared in accordance with both NEPA and CEQA, that never happened and FERC's environmental review of the LEAPS project was conducted pursuant to NEPA alone. This is significant because while there are several similarities between NEPA and CEQA, there are also significant differences. The biggest substantive difference is that while NEPA only requires federal agencies to "consider" the

potential significant adverse impacts of their actions (and ultimately permits economic growth to trump environmental values), CEQA requires public agencies to adopt project alternatives and mitigation measures to reduce environmental impacts to levels of insignificance unless such measures are "infeasible." (See, e.g., *San Francisco Ecology Ctr. V. City & County of San Francisco* (1975) 48 Cal.App.3d 584, 590.) Accordingly, CEQA is regarded as being more environmentally protective than NEPA. TNHC fails to cite a single authority, and we have yet to locate one, which has held that environmental review conducted under NEPA also *ipso facto* satisfies CEQA.

(2) CPUC's Sunrise Powerlink Final EIR/EIS:

The Sunrise Powerlink project involves the construction of an approximately 150-mile transmission line from San Diego Gas & Electric Company's Imperial Valley Substation near El Centro to its Penasquitos Substation in coastal San Diego. While it is true that the joint EIR/EIS prepared by the CPUC for that project discussed and analyzed Nevada Hydro's LEAPS project as an alternative to the Sunrise Powerlink project, that analysis falls far short of the project level review required by CEQA and in no way amounts to an adequate substitute for an EIR focused on LEAPS. The reasons for this are many, but the most important is that CEQA permits alternatives to be evaluated and analyzed in less detail than the proposed project. (See "CEQA Guidelines," 14 Cal. Code Regs. § 15126.6(d).) Under TNHC's faulty logic, LEAPS, and any/all of the other 26 project alternatives included in the Sunrise Powerlink EIR/EIS have already been adequately analyzed under CEQA and are ready for agency approval and construction. The CPUC's denial of TNHC's CPCN application underscores the fatal flaw in this argument given that it was the agency that prepared the Sunrise Powerlink EIR/EIS and knows best of all whether the alternatives analysis therein is enough to evaluate LEAPS alone on a project level. The fact that the CPUC didn't simply rely on its evaluation of LEAPS in the Sunrise Powerlink EIR/EIS should itself convince the SWRCB that it shouldn't either.

(3) October 2007 Santa Ana Regional Water Quality Control Board Memo:

TNHC's final argument that the SWRCB need not require any further environmental review of its LEAPS project, pursuant to statements in the Regional Board's memo, fares no better than its other arguments. First, contrary to TNHC's implication, the Regional Board does not conclude that CEQA review need not take place, but rather, that it has sufficient information and understanding of the LEAPS project to assist the SWRCB in its water quality certification process. Moreover, even if the studies cited by the Regional Board *suggesting* that LEAPS is not *likely* to cause *widespread* adverse impacts were adequate – which they are not – they would still have to be incorporated into a project level EIR and circulated for the required public and agency review and comment period before they could legally be relied upon to claim CEQA compliance.

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Conclusion

For the above stated reasons, the SWRCB should deny TNHC's Petition for Reconsideration. Furthermore, given the fact that TNHC's 2009 application for water quality certification was its 5th consecutive application to be submitted and withdrawn/denied, the SWRCB should adopt the approach taken by the CPUC and condition any subsequent applications on prior CEQA compliance.

Very truly yours,

MILLER, STARR & REGALIA



Stephen E. Velyvis

SEV:nmt

cc: Nathan Jacobsen (via e-mail [njacobsen@waterboards.ca.gov]))

PROOF OF SERVICE
LAKE ELSINORE ADVANCED PUMP STORAGE PROJECT
FEDERAL ENERGY REGULATORY COMMISSION PROJECT NO. 11858

I, Nancy M. Troche, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1331 N. California Blvd., Fifth Floor, Post Office Box 8177, Walnut Creek, CA 94596.

On January 25, 2010, I served the within letter regarding **Petition for Reconsideration of Denial of Application for Water Quality Certification, Lake Elsinore Advanced Pumped Storage Project, Federal Energy Regulatory Commission Project No. 11858** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.

Ronald E. Young, General Manager
EVMWD
31315 Chaney Street
Lake Elsinore, CA 92531

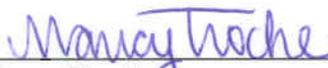
Peter Lewandowski, President
The Nevada Hydro Company
2416 Cades Way
Vista, CA 92083

David Kates
The Nevada Hydro Company
3510 Unocal Place, Suite 200
Santa Rosa, CA 95403

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2010, at Walnut Creek, California.



Nancy Troche