



## California Sportfishing Protection Alliance

*"An Advocate for Fisheries, Habitat and Water Quality"*

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Ms. Amber Villalobos  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000  
[avillalobos@waterboards.ca.gov](mailto:avillalobos@waterboards.ca.gov)

Via e-mail

RE: McCloud-Pit CEQA Section 15063(g) informal consultation

Dear Ms. Villalobos,

The California Sportfishing Protection Alliance (CSPA) appreciates the opportunity to comment on the forthcoming CEQA document for the issuance of 401 Water Quality Certification for the relicensing of the McCloud-Pit Project. In particular, CSPA appreciates the outreach the Board made in its October 26, 2012 Notice of Informal Consultation to parties in addition to "responsible and trustee agencies."

CSPA believes that the appropriate type of CEQA document for the issuance of the 401 will turn on the Board's need to analyze the impacts of the proposed project on habitat for anadromous salmon and steelhead, and on the Board's need to analyze the impacts of potential reintroduction of anadromous salmon and steelhead to the McCloud River.

**The Board must evaluate reintroduction of salmon and steelhead to the McCloud River in developing the 401 Water Quality Certification for the McCloud-Pit relicensing.**

CSPA intervened in the Federal Energy Regulatory Commission's (FERC) relicensing proceeding for the McCloud-Pit Project on January 12, 2010. In its Motion to Intervene, CSPA stated: "The new license should explicitly contemplate restoration, and facilitate future procedural measures to expedite reintroduction of salmon and steelhead into the McCloud River as soon as it is feasible."<sup>1</sup>

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<sup>1</sup> See CSPA's Motion to Intervene under P-2106-059, Federal Energy Regulatory Commission eLibrary 20100113-5008, pp. 5-6.

In our comments on FERC's Draft Environmental Impact Statement for McCloud-Pit relicensing, CSPA expanded the argument that relicensing should address reintroduction of salmon and steelhead to the McCloud River: "As a substantive matter, the Final EIS should evaluate under NEPA the reasonably foreseeable actions and effects that may come to pass through the future reintroduction of salmon and steelhead to the McCloud River."<sup>2</sup> Unfortunately, FERC did not correct the deficiency of its DEIS, and did not supplement the FEIS with analysis of project effects on anadromous fish habitat and analysis of the impacts of reintroduction of salmon and steelhead to project waters. Therefore, the State Board cannot rely on FERC's NEPA's document in order to address these and impacts under CEQA.

CSPA also stated in comments on the DEIS that FERC needed to consider reintroduction of salmon and steelhead during relicensing "...*while interests are being balanced with the active engagement of all regulators, the licensee, and other stakeholders*. ..."<sup>3</sup> In addition to obligations under NEPA, we argued that FERC is required in relicensing to balance reintroduction of salmon and steelhead to project waters in order to meet its obligations under the Comprehensive Planning requirements of Section 10(a)(1) of the Federal Power Act (FPA) and its requirement under Section 4(e) of the FPA to balance power and non-power uses. Instead, FERC deferred analysis: FERC required the licensee only to perform "adaptive monitoring" of sediment, water quality and temperature, and aquatic species, and to file an annual report that discusses whether listed anadromous species have become present in project waters.<sup>4</sup>

As has all too often been the case in recent history, the State Board is thus thrust into the position of using its authority under the Clean Water Act to balance beneficial uses in a circumstance where FERC has erred in stepping aside from exercising its own balancing authority under the Federal Power Act.

**Reintroduction of anadromous salmon and steelhead to the McCloud River is reasonably foreseeable under CEQA, and the Board must analyze impacts relating to such reintroduction in its CEQA document.**

The State Water Board's certification decision is an action that is subject to CEQA. State Board staff stated in its comments on the Draft EIS for the McCloud-Pit relicensings: "CEQA, unlike NEPA requires the identification of significant impacts, and the development of alternatives to avoid, reduce, or mitigate the impacts."<sup>5</sup> Also: "The State Water Board must prepare an Environmental Impact Report (EIR) if changes in the Project could have significant adverse environmental impacts or if the alternatives or mitigation measures could have significant adverse impacts, including incidental adverse impacts of changes that otherwise will provide an overall environmental benefit. For projects with less than significant impacts, a negative declaration or mitigated negative declaration can be issued."<sup>6</sup>

The Board's CEQA analysis must analyze cumulative impacts, which are defined as:

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<sup>2</sup> See CSPA's Comments on Draft EIS under P-21060959, eLibrary 20100922-5106, p. 3.

<sup>3</sup> *Ibid.* Emphasis in the original.

<sup>4</sup> See FEIS, eLibrary 201102254-4001, p. 389.

<sup>5</sup> See SWRCB comments on McCloud DEIS, eLibrary 20100928-0015, pp. 2-3.

<sup>6</sup> *Ibid.*, p. 2.

[T]wo or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.

(a) The individual effects may be changes resulting from a single project or a number of separate projects.

(b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.<sup>7</sup>

The cumulative impacts analysis must contain

(1) either (a) a list of past, present, *and reasonably anticipated future projects, including those projects outside the agency's control*, which produce related or cumulative impacts or (b) a summary of such projections contained in an adopted general plan or related planning document which evaluates regional or areawide conditions, (2) a summary of environmental effects expected to be produced by those projects, and (3) a reasonable analysis of the cumulative effects of the relevant projects and the options for mitigating or avoiding each of the significant cumulative effects.<sup>8</sup>

Beyond informing a decision whether an EIR should be prepared, the cumulative impacts analysis is used to show that the agency proposing to take the action (e.g., permit decision) “adequately considered the entire relevant environmental picture,” prior to its decision.<sup>9</sup> The agency must consider all significant impacts of its proposed action, regardless of whether those impacts occur offsite, and regardless of whether those activities would be attributable solely to the permitted activity or to that activity “in combination with other circumstances including but not necessarily limited to other past, present, and reasonably expect[ed] future activities in the relevant area.”<sup>10</sup> In every case the agency must make at least a preliminary search for potential environmental effects, and if any such effect were perceived, at least a preliminary assessment of its significant.<sup>11</sup> If the agency determined that there were one or more significant potential cumulative effects, then it would need to carefully consider those effects in determining whether and on what terms to condition the permit.<sup>12</sup> The administrative record must demonstrate the requisite consideration.<sup>13</sup>

In analyzing potential future impacts, agencies must do their best: “[d]rafting an EIR ... involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an

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<sup>7</sup> *Ibid.* at § 15355.

<sup>8</sup> *Citizens To Preserve the Ojai v. County of Ventura*, 176 Ca.App.3d 421, 429 (1985) (*citing* 14 CCR § 15130) (emphasis added).

<sup>9</sup> *Laupheimer v. State of California*, 200 Cal.App.3d 440, 462 (1988)

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 462-463.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* at 467.

agency must use its best efforts to find out and disclose all that it reasonably can.”<sup>14</sup> The agency’s finding(s) as to whether impacts are reasonably foreseeable must be based on evidence in the record.<sup>15</sup>

In commenting on the DEIS for the relicensing of the Middle Fork American project, where a remarkably similar fact set regarding reintroduction of anadromous fish exists, State Board staff commented that reintroduction must be analyzed under CEQA:

**Possible Reintroduction of Anadromous Fish**

The draft EIS makes mention several times of the possible reintroduction of anadromous steelhead to the Project waters as planned by the National Marine Fisheries Service (NMFS) in their Biological Opinion for Long-term Operations of the Central Valley Project and California State Water Project. The State Water Board believes that such a reintroduction would have multiple impacts to a variety of Project operations. The reintroduction of steelhead could occur within the term of the license issued for the Project by FERC. Possible environmental impacts to the Project from such a reintroduction should be evaluated under CEQA.<sup>16</sup>

Board Staff got the need for CEQA analysis of reintroduction for the Middle Fork American Project correct. CSPA respectfully points out that such analysis needs to address not only “possible environmental impacts to the Project from such a reintroduction,” but also effects of the proposed project on habitat for anadromous salmonids. Such needs pertain to the McCloud-Pit Project just as they apply the Middle Fork American Project.

Overall, depending on the outcome of the State Board’s independent analysis of the impacts of the proposed project on habitat for anadromous salmonids, and of the impacts of reintroduction of anadromous fish on the proposed project, the Board will need to determine whether impacts pertaining to reintroduction cross the thresholds that requires an EIR, or whether another form for its CEQA document may be appropriate.<sup>17</sup>

**Licensee Pacific Gas & Electric Company’s arguments against environmental analysis of reintroduction are not persuasive.**

In several filings in the FERC docket for the relicensing of the McCloud-Pit Project, Licensee Pacific Gas & Electric Company (PG&E) argues that FERC should not analyze reintroduction of anadromous salmon and steelhead to the McCloud River, and related issues, under NEPA. PG&E argues that anadromous fish are not present in the McCloud at this time, that reintroduction is not certain, and that FERC’s standard fish and wildlife “reopener” is the appropriate way to address reintroduction and makes analysis or specific measures related to reintroduction unnecessary. In a March 23, 2012 letter to the State Board, PG&E repeats these

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<sup>14</sup> *Laurel Heights Improvement Assn. v. Regents of U. of California*, 764 P.2d 278, 287 (1988) (citing 44 CCR 15144).

<sup>15</sup> *Muzzy Ranch Co. v. Solano County Airport Land Use Commn.*, 41 Cal.4<sup>th</sup> 372, 387 (2007).

<sup>16</sup> See Comments of SWRCB on Middle Fork American DEIS, eLibrary 20121029-0028, p.4

<sup>17</sup> Other identified significant impacts could also trigger the need for an EIR, but CSPA has not identified any at this time that would likely rise to that level.

arguments in the context of studies to inform the State Board's development of its 401 Water Quality Certification.<sup>18</sup> By inference, though without CEQA-specific legal argument, PG&E appears to make similar arguments regarding CEQA. We respond in brief to these points below.

The question under both NEPA and CEQA is whether it is reasonably foreseeable that anadromous salmon and steelhead will be reintroduced to Project waters in a timeframe that requires analysis now.<sup>19</sup> No one disagrees that anadromous salmon and steelhead are not present in the McCloud River today. However, these species do not need to be present today to trigger analysis under NEPA and CEQA.

In its FPA Section 10(j) recommendations to FERC, the National Marine Fisheries Service recommends analysis of reintroduction of salmon and steelhead to the McCloud River as an outcome of the Biological Opinion for the Operations and Criteria Plan of the State Water Project and Central Valley Project.<sup>20</sup> In its Reply Comments to comments on Ready for Environmental Analysis, PG&E argues that reintroduction as proposed by NMFS in its 10(j) recommendations is "fraught with uncertainty and feasibility issues; will require many years of activities, assessments and evaluations; and may be terminated entirely in 2016." PG&E concludes: "it is premature to include in the new license for the Project NMFS' recommendations to address species that may never make it into the McCloud River."<sup>21</sup> PG&E attempts to redefine the standard as one of certainty; then, PG&E restates its contention that restoration is not certain.

In a subsequent reply to a December 17, 2010 letter to FERC from NMFS, PG&E repeats the same arguments:

... none of these species are currently present above Shasta Dam (including in the McCloud River), and there is no certainty that efforts under the Reasonable and Prudent Alternative ("RPA") of the OCAP BiOp to restore these species above Shasta Dam, and potentially into the McCloud River, will be successful or even implemented. Consequently, it is premature to develop conditions for inclusion in the new License for McCloud-Pit to address these species.<sup>22</sup>

... [T]here is currently too much uncertainty associated with, and too many hurdles to overcome, to effectuate successful restoration of ESA-listed salmonids above Shasta Dam and potentially into the McCloud River.

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<sup>18</sup> See letter of PG&E to SWRCB, filed in FERC eLibrary 20120323-5059.

<sup>19</sup> In its comments on the Middle Fork American Project DEIS, the State Board recommends analysis because reintroduction may take place in a timeframe "within the term of the license issued for the Project by FERC." FERC licenses terms range from 30 to 50 years. The Board should state the temporal standard it is applying to determine the level of analysis that is required under CEQA for the 401 for McCloud-Pit. *See ibid.*

<sup>20</sup> *See* NMFS's 10(j) recommendations to FERC, eLibrary 20100129-5007.

<sup>21</sup> *See* PG&E Reply Comments to Comments, Recommendations, Terms and Conditions, eLibrary 20100316-5028, p. 16.

<sup>22</sup> *See* PG&E Response to the December 17, 2010 Letter from the National Marine Fisheries Service, eLibrary 20110118-5267, p. 2.

Consequently, this is not the appropriate time to craft License conditions to address such species. As PG&E has previously explained, the Commission can use its standard fish and wildlife reopener to address these species if they ever return to the McCloud River.<sup>23</sup>

Again, PG&E misstates the standard for environmental analysis and condemns NMFS does for failing to meet the incorrect standard.

The FPA Section 10(j) recommendations by NMFS and the March 6, 2012 list of recommended studies proposed by NMFS to the State Board and FERC provide information that the State Board should consider in exercising its required independent judgment as lead CEQA agency.<sup>24</sup> PG&E's objections to various details of NMFS's recommendations do not obviate the Board's obligation to evaluate whether reintroduction of salmon and steelhead to the McCloud River is reasonably foreseeable for analysis under CEQA. Indeed, PG&E notes in its March 23, 2012 reply to NMFS's March 6 list of studies states that existing data from relicensing studies is available to the Board for analysis of project effects on anadromous salmon and steelhead and their habitats.<sup>25</sup> In addition, PG&E has posted three supplemental technical memos to its McCloud-Pit relicensing website that are specific to anadromous salmon and steelhead: TM-79 (Salmon HSC Development); TM-80 (Spawning Gravel Mapping); and TM-81 (1-D PHABSIM Salmon-Steelhead).<sup>26</sup>

In several sets of comments, NMFS notes that its *Draft Recovery Plan* for Central Valley Salmonids foresees reintroduction of salmon and steelhead upstream of Shasta Reservoir.<sup>27</sup> Central Valley winter-run Chinook salmon in particular have extremely limited historic and potential future range. This Evolutionarily Significant Unit (ESU) is listed under the Federal Endangered Species Act as Endangered, a more at-risk condition than the Threatened status of the Central Valley spring-run Chinook and Central Valley steelhead ESU's. In brief, winter-run Chinook are at significant risk of extinction if they remain confined to their only current spawning habitat downstream of Keswick Dam on the lower Sacramento River. The McCloud and the upper Sacramento rivers (upstream of Shasta Reservoir) appear to us to be the only viable locations to reintroduce Central Valley winter-run Chinook, except perhaps for Battle Creek, where winter-run have long been absent. Of these potential locations for reintroduction of winter-run Chinook, the McCloud has more abundant and more reliable cold water. However, it may be necessary to restore winter-run Chinook in both the McCloud and the upper Sacramento in order to provide the spatial diversity needed to protect the species against stochastic events such as the 1991 metam sodium spill into the upper Sacramento River. Regardless of specific planning processes (which PG&E downplays) that are currently underway, the State Board must consider the overarching need and the scarcity of alternative

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<sup>23</sup> See *ibid*, p. 4.

<sup>24</sup> See NMFS's 10(j) recommendations to FERC, eLibrary 20100129-5007. See also NMFS's recommended studies for CEQA, available at FERC eLibrary 20120306-5068.

<sup>25</sup> See PG&E response to NMFS's recommended studies, 20120323-5059. Specifically, PG&E notes the availability of information relating to fish migration and water temperature (including a water temperature model).

<sup>26</sup> See <http://www.mccloud-pitrelicensing.com/>

<sup>27</sup> See *The Public Draft Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of Central Valley Steelhead*, October 2009. See pp. 159-160 for discussion of the McCloud.

winter-run reintroduction opportunities in weighing whether reintroduction of anadromous salmonids to McCloud is reasonably foreseeable.

### **FERC's arguments against analysis of reintroduction are not persuasive.**

State Board staff concluded in its comments on FERC's draft EIS that in FERC's final EIS: "Reintroduction of anadromous fish to the McCloud River must be included as an alternative." Board staff largely based this comment on the progress of the Reasonable and Prudent Alternative in NMFS's Biological Opinion for the long term operation (OCAP) of the Central Valley Project (CVP) and the State Water Project (SWP).<sup>28</sup>

In the Final EIS for the McCloud-Pit relicensing, FERC staff describes its rationale for rejecting Board staff's comment. FERC staff cites "lack of detail" and concludes: "As this reintroduction program continues to be in flux, with research, budget, and feasibility still undetermined, and no solid timeline for the salmonids to be fully present in project waters, we continue to find that this is not the appropriate time to consider project operational conditions for the benefit these listed species." FERC notes that in the future, NMFS may need to do its own NEPA analysis to support reintroduction to the McCloud River.<sup>29</sup>

Lack of detail in reintroduction plans, and the possible need for NMFS to conduct a future project-specific NEPA analysis, do not absolve FERC from needing to analyze reintroduction as a cumulative effect of its proposed action. The State Board must also not allow itself to be deflected from conducting a CEQA analysis in which it "use[s] its best efforts to find out and disclose all that it reasonably can."<sup>30</sup> According to PG&E, much of the information that pertains to project effects on anadromous fish habitat is already available; see above. The level of detail available for the timing and mechanisms of reintroduction is not needed to evaluate project effects on anadromous fish habitat. The Board can analyze potential power generation or other developmental impacts using a range of flows designed explicitly to support anadromous fish. The flows proposed by NMFS in its 10(j) recommendation would likely be at the upper end of potential developmental impacts; the Board could evaluate both NMFS's flows and the Forest Service's 4(e) flows for impacts to anadromous fish habitat and impacts to power. The Board could also evaluate an additional flow scenario or scenarios whose water cost was in between those associated with the flow proposed by these two agencies. All together, these would form the basis for several CEQA alternatives for reintroduction of salmon and steelhead to the McCloud River. As Board staff noted in its comments on FERC's DEIS: "Changes in project operations to support the reintroduction of anadromous fish are a reasonable alternative that can be feasibly achieved."<sup>31</sup>

The CEQA analysis of reintroduction that the Board must carry out now is similar to the requirements for a program EIR. The details and timing of a specific reintroduction project are not known at present. However, reintroduction of anadromous salmon and steelhead to the McCloud is very likely to happen. Project impacts on that likely reintroduction can be disclosed

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<sup>28</sup> See SWRCB comments on McCloud DEIS, eLibrary 20100928-0015, p. 4.

<sup>29</sup> See FEIS, pp. A-54 and A-55.

<sup>30</sup> *Laurel Heights Improvement Assn. v. Regents of U. of California, ibid.*

<sup>31</sup> See SWRCB comments on McCloud DEIS, *ibid.*

and analyzed now, and effects of such restoration on developmental and other values can also be reasonably evaluated now. This will provide the foundation for a future, project-specific EIR.

Board staff should also take note that the level of detail available concerning implementation of the RPA for the OCAP BiOp has expanded over the last year. In spite of court remand (but not vacation) of portions of NMFS's OCAP BiOp, the portion of the OCAP BiOp dealing with reintroduction of anadromous fish upstream of Shasta Reservoir was not invalidated by the court. The Bureau of Reclamation is proceeding with this portion of the RPA. Board staff should consult directly with staff from the Bureau and NMFS to better understand the current status of actions to implement the RPA upstream of Shasta Reservoir.

**If the State Board defers analysis and measures incident to reintroduction of anadromous fish to FERC's reliance on its standard fish and wildlife reopener, it will leave protection of beneficial uses under reintroduction dependent on a discretionary action by FERC or on the next round of FERC relicensing in 30 to 50 years.**

On September 20, 2012, FERC issued an Order Denying Rehearing in a docket for the Don Pedro Project that was opened in 2009.<sup>32</sup> In explaining to NMFS why FERC had elected not to act to order interim flows in the Lower Tuolumne River, the Commission shed considerable light on the legal and procedural obstacles to reopening a FERC license in order to improve conditions for fish.

The decision whether to exercise its prerogative in initiating a reopener clause in a license is at the complete discretion of the Commission. "The fact that the Commission suggested the possibility that interim measures may be needed in the future does not bind the Commission to imposing any measures."<sup>33</sup>

FERC explains in its order: "We explained that a decision was not unreasonably delayed because no action was called for in these circumstances."<sup>34</sup> There is thus no enforceable timeline for a reopener.

Moreover, licensee agreement is required: "Under section 6 of the FPA, licenses may be altered "only upon mutual agreement between the licensee and the Commission after thirty days' public notice."<sup>35</sup>

A start-from-scratch new round of NEPA is required: "NMFS overlooks the fact that we could not act under the FPA to reopen the license without notice and an opportunity for a hearing, and we could not require the requested flow regime without first conducting a full environmental review of the impacts of the flows and any alternatives. Thus, contrary to NMFS's suggestion, we lack the authority to take immediate action in this case."<sup>36</sup>

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<sup>32</sup> See Order Denying Rehearing, eLibrary 20120920-4017.

<sup>33</sup> *Ibid*, p. 7.

<sup>34</sup> *Ibid*, p. 6.

<sup>35</sup> *Ibid*, p. 8. [Internal citation to 16 U.S.C. § 799 (2006).]

<sup>36</sup> *Ibid*, pp. 12-13.

Of perhaps greater concern to the Board, the absence of action by FERC to exercise its reopener may leave the Board with no authority to change flows to protect beneficial uses. For the Don Pedro Project, NMFS argued for formal consultation under the Endangered Species Act for many years, most recently in April, 2012. The Commission declined to take action, and then denied the request for ESA consultation in the absence of a federal action that would require it. By making no decision FERC retained control and avoided a large amount of work, leaving NMFS powerless to improve flows for salmon and steelhead.

A similar predicament could face the Board if it simply cedes to FERC's approach and allows FERC to address salmon and steelhead in the McCloud with a reopener. In *Karuk v Regional Board*, the Court was very clear about both the breadth and the limitations of the Board's authority:

A determination of federal preemption does not automatically mean that state input is categorically prohibited and state opinion of no consequence. The Clean Water Act gives states what appears to be a very substantial role by requiring that an applicant for any federal license comply with state water quality procedures. (See fns. 17, *ante*; *S.D. Warren, supra*, 547 U.S. 370, 386; *PUD No. 1, supra*, 511 U.S. 700, 707, 713.) But the crucial points are (1) that it is Congress that determines what is the extent of state input, and (2) that input takes place within the context of FERC licensing procedures as specified in the FPA. It is only when states attempt to act outside of this federal context and this federal statutory scheme under authority of independent state law that such collateral assertions of state power are nullified.<sup>37</sup>

Any opportunity the Board may have to influence flows to benefit anadromous fish that are restored to the McCloud River is limited to "the context of FERC licensing procedures." The Board must assert its authority now. If the Board defers, it will rely on FERC to act before the Board has the opportunity to act again. Even if FERC acts, it is likely that the State Board's decision space will be limited to alternatives defined by FERC: the Board cannot issue a 401 on an amendment to a FERC license that re-evaluates the license outside the scope of the amendment.

For the State Board to protect beneficial uses under current conditions and under future conditions, its best course of action is to determine and set conditions now that will protect beneficial uses to support salmon and steelhead once they are reintroduced to the McCloud River. To do so, it must determine if it has adequate information to do so, and if not, it must collect that information. It must analyze that information, and potential impacts incident to reintroduction, in its CEQA document. Even if the State Board were to choose a course in which it issued a 401 Certification that allowed the Board to reset flows to support salmon and steelhead once they are reintroduced to the McCloud River, the Board still must support the exercise of this authority with an analysis of the impacts under CEQA.

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<sup>37</sup> See *Karuk Tribe v. California Regional Water Quality Control Board* (2010) 183 Cal. App 4th 330 at 360.

## Conclusion

Thank you very much for the opportunity to provide comments in response to informal consultation on the CEQA document for the issuance of the 401 Water Quality Certification for the relicensing of the McCloud-Pit Project.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Chris Shutes", with a long horizontal line extending to the right.

Chris Shutes  
FERC Projects Director  
California Sportfishing Protection Alliance