



HUNTON & WILLIAMS LLP
550 SOUTH HOPE STREET, SUITE 2000
LOS ANGELES, CALIFORNIA 90071-2627

TEL 213 • 532 • 2000
FAX 213 • 532 • 2020

CHRIS M. AMANTEA
DIRECT DIAL: 213 • 532 • 2102
EMAIL: camantea@hunton.com

November 2, 2009

Via E-mail

Jeannette L. Bashaw
Legal Analyst
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, California 95814

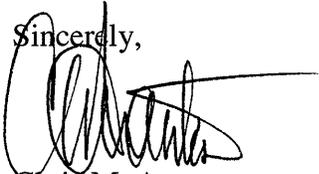
Re: The Nevada Hydro Company, Inc. — Petition for Reconsideration

Dear Ms. Rice:

On behalf of The Nevada Hydro Company, Inc. (“TNHC”), I enclose for filing with the State Water Resources Control Board (“State Board”) a Petition for Reconsideration, including a three volume Compendium of Exhibits (containing Exhibits A through S) in connection with the State Board’s October 1, 2009 denial of TNHC’s application for State Water Quality Certification for the proposed Lake Elsinore Advanced Pumped Storage Project, and its associated and related transmission lines and other appurtenant facilities.

We will provide you with one paper copy of this Petition for Reconsideration and the associated exhibits, via overnight mail, for delivery on November 3, 2009.

Sincerely,



Chris M. Amantea

Attachments

BEFORE THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of

Water Quality Certification for the

Lake Elsinore Advanced Pumped Storage Project

FERC Project No. 11858

**THE NEVADA HYDRO COMPANY PETITION FOR RECONSIDERATION OF
STATE WATER RESOURCES CONTROL BOARD DENIAL OF REQUEST
FOR CERTIFICATION PURSUANT TO SECTION 401(A)(1) OF THE
FEDERAL CLEAN WATER ACT FOR THE LAKE ELSINORE ADVANCED
PUMPED STORAGE PROJECT**

INTRODUCTION

By letter, dated October 1, 2009, the Executive Director of the State Water Resources Control Board (“SWRCB” or “State Board”) denied without prejudice the Nevada Hydro Company, Inc.’s (“Petitioner” or “TNHC”) and Elsinore Valley Municipal Water District’s (“EVMWD”) January 21, 2009 application for State Water Quality Certification for the proposed Lake Elsinore Advanced Pumped Storage Project, Federal Energy Regulatory Commission (“FERC”) Project No. 11858 (“LEAPS”), and its associated and related transmission lines and other appurtenant facilities.¹ In particular those other facilities include, the Talega-Escondido/Valley-Serrano 500-kV Interconnect Project (“TE/Vs Interconnect”), including all system upgrades associated therewith or related thereto (the LEAPS and the TE/Vs Interconnect are collectively referred to as the “Project”). Although Petitioner and EVMWD seek State water quality certification for the Project, this Petition for Reconsideration (“Petition”) is filed solely by the Petitioner.

In its October 1, 2009 letter, the State Board states that “[a] final and valid CEQA document has not been issued for the LEAPS project and therefore, you are hereby notified that your January 21, 2009 request for water quality certification is denied without prejudice.” *See* State Board letter (October 1, 2009) (Declaration of Peter

¹ The State Board was purporting to act pursuant to Section 401 of the federal Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1341.

Lewandowski (“Lewandowski Decl.”), Ex. A).² The State Board apparently based its denial on its conclusion that: “the California Public Utilities Commission (“CPUC”), acting as lead agency under CEQA, dismissed an application from TNHC without prejudice, and in so doing, discharged its obligation to prepare a final CEQA document for LEAPS.” *See id.*, p. 1.³

As further discussed below, the State Board’s action ignores substantial evidence in the record and is an abuse of discretion in that final and valid California Environmental Quality Act (“CEQA”) documentation **does** exist for the Project and has been provided to the State Board—namely, (1) the Final Environmental Impact Statement prepared by the FERC and the United States Forest Service (“USFS”), dated January 2007 (“Project Final EIS”) (which addressed CEQA elements) (*see* Project Final EIS, Section 1.6 (Lewandowski Decl., Ex. B)); (2) the Final Environmental Impact Report/Environmental Impact Statement prepared for San Diego Gas & Electric Company’s Sunrise Powerlink Project (“Sunrise Powerlink Final EIR/EIS”) (Lewandowski Decl., Ex. C (excerpts only)) that contains the relevant sections of the Sunrise Powerlink Final EIR/EIS, which addressed environmental impacts associated with the Project; and (3) the memorandum, dated October 1, 2007 from the Santa Ana Regional Water Quality Control Board (“Santa Ana Regional Board”) to the State Board, which specifically provided that:

Board staff believes that we now have sufficient information and understanding of the LEAPS project , and its likely potential effects on water quality standards in the Santa Ana Region , to assist SWRCB to craft appropriate conditions for the issuance of 401 water quality certifications for the project, and to provide meaningful comments on the draft certification for it. Presently, Board staff has no outstanding issues with the LEAPS Project in advance of drafting 401 certification conditions. Studies conducted by Dr. Anderson suggest that operation of the LEAPS Project is not likely to cause widespread adverse impacts on

² The documents referenced in this Petition are contained in Petitioner’s Compendium of Exhibits, filed concurrently with this Petition (“Compendium”). All such documents are incorporated by reference in this Petition, including all appendices thereof whether or not submitted as an exhibit to the Petition.

³ For the reasons discussed in this Petition, Petitioner believes that the State Board has before it the CEQA-compliant environmental documentation necessary to evaluate the merits of Petitioner’s application for water quality certification. Nonetheless, if the State Board believes that a lead agency is necessary prior to evaluating the merits of Petitioner’s application for water quality certification, or that a dispute exists regarding which agency properly should be the lead agency for the Project, Petitioner is willing to work with the State Board to address any such concerns.

Lake Elsinore's water quality standards, provided the project is built and operates in the manner considered by Dr. Anderson's studies.

Santa Ana Regional Board letter (October 1, 2007) (Lewandowski Decl., Ex. D). To be sure, the Santa Ana Regional Board is specifically tasked by the State Water Board with evaluating and ensuring the quality of waters in watersheds within its jurisdiction and has the most direct interest in ensuring the water quality of Lake Elsinore.

Further, the State Board acted contrary to California law and State Board practice by denying Petitioner's application for certification without providing the Petitioner an opportunity to withdraw the application before the one-year deadline specified in Section 401(a)(1) of the Act by which the State Board must make its decision. *See, e.g.*, 23 C.C.R. § 3836(c).

The State Board's denial of the certification application jeopardizes Petitioner's and the EVMWD's application before the FERC for a federal license to construct, operate, and maintain the Project. Most importantly, if this Project ultimately is rejected by FERC due to the State Board's improper denial of a Section 401 water quality certification, the Petitioner and California utility customers and rate payers will suffer substantial economic harm; not to mention the fact that the Project (as discussed below) will have beneficial environmental impacts on Lake Elsinore. Accordingly, Petitioner submits this Petition to the State Board pursuant to Title 23 of the California Code of Regulations, Section 3867(c).

I. NAME AND ADDRESS OF THE PETITIONER

Peter Lewandowski, President
The Hydro Company, Inc. (dba The Nevada Hydro Company, Inc.)
2416 Cades Way
Vista, California 92081
Telephone: (760) 599-0086
Facsimile: (760) 599-1815
E-mail: environment@cox.net

II. SPECIFIC ACTION OF THE STATE BOARD

The specific action at issue in this Petition is the improper denial by the State Board Executive Director of Petitioner's 401 certification application for the Project. The State Board's denial letter is Exhibit A to the Lewandowski Decl. filed in support of this Petition.

III. DATE ON WHICH THE STATE BOARD ACTED

The State Board denied Petitioner's Application by letter dated October 1, 2009.

IV. STATEMENT OF REASONS WHY THE STATE BOARD'S ACTION WAS INAPPROPRIATE OR IMPROPER

A. Background Facts

On February 2, 2004, the Petitioner and EVMWD filed with FERC an application for an original license to construct the Project, a 500-megawatt pumped storage hydropower project in Decker Canyon of the Cleveland National Forest located, in part, in Riverside, San Diego, Orange, and San Bernardino Counties, California. The Project is within the jurisdictional areas of the Santa Ana Regional Board and the San Diego Regional Water Quality Control Board ("San Diego Regional Board").

On March 11, 2005, Petitioner and EVMWD first filed with the State Board an application for water quality certification for the Project pursuant to Section 401 of the CWA, 33 U.S.C. § 1341. In accordance with the State Board's recommendation and as contemplated by 23 C.C.R. § 3836(c), Petitioner voluntarily withdrew and simultaneously re-filed its application for water quality certification on an annual basis beginning in 2006. The State Board requested that Petitioner withdraw and re-file its certification application each year because the State Board's failure to act on a certification application within one year constitutes a waiver of Section 401's certification requirement. 33 U.S.C. § 1341(a)(1). Petitioner accommodated the State Board's oral request by letters dated February 24, 2006 (which became effective on March 1, 2006), February 15, 2007 (which became effective on February 21, 2007), and

February 5, 2008.⁴ Petitioner’s current application (its fifth application) before the State Board was filed on January 21, 2009, transmitted by letter dated January 20, 2009. *See* Lewandowski Decl., Ex. R.

On March 7, 2008 — three years after Petitioner’s initial filing of its application—the State Board first provided comments to Petitioner on its application for water quality certification. In its March 7, 2008 letter, the State Board stated, *inter alia*, that “[although] a final CEQA document is not required for complete application for water quality certification, a final copy of a valid document must be provided before issuance of certification can be considered.” State Board letter (March 7, 2008), p. 2 (Lewandowski Decl., Ex. E).

The March 7, 2008 letter also provided that “[i]f TNHC and [EVMWD] does not provide . . . the final environmental documentation soon enough for the State Board to properly review it before the one-year federal period for certification expires, the State Board staff will recommend denial of water quality certification without prejudice . . . Alternatively, the applicant could choose to withdraw its request for water quality certification and file a new request for water quality certification.” *Id.* (emphasis added).

The State Board also has correctly noted in correspondence that “CEQA . . . encourages state and local agencies to use documents prepared pursuant to . . . NEPA to avoid duplication and costs if the NEPA document will be prepared before a CEQA document otherwise would be prepared and the NEPA document, in the judgment of the state agency, meets the requirements of CEQA.” *See, e.g.*, State Board letter, dated July 5, 2006 (Lewandowski Decl., Ex. S).

In response to Petitioner’s application to FERC, and in compliance with state and federal statutes, FERC and the USFS prepared the Project Final EIS. (Lewandowski Decl., Ex. B). The Project Final EIS evaluates both the generation (pumped storage) and transmission “parts” of the Project and was prepared in compliance with the procedural

⁴ A single consolidated application was filed in March 11, 2005. Beginning with the February 24, 2006 filing, two separate applications were filed with the State Board and were resubmitted in 2007, 2008, and 2009.

and substantive requirements of the National Environmental Policy Act (“NEPA”) and CEQA. *See id.*, at § 1.6.

In addition, the Sunrise Powerlink Final EIR/EIS,⁵ as prepared jointly by the CPUC and Bureau of Land Management (“BLM”) specifically and comprehensively addresses, as system alternatives to the Sunrise Powerlink Project, environmental impacts associated with the Project, including both the generation (pumped storage) and transmission elements, as well as a “transmission-only” alternative. *See* Powerlink Final EIR/EIS, Section E.7 (Lewandowski Decl., Ex. C). TNHC specifically requested that State Board staff use that EIR/EIS as the CEQA document for the Project. TNHC letter (July 10, 2009), p. 4 (Lewandowski Decl., Ex. F). However, the State Board improperly refused to consider the Sunrise Powerlink Final EIR/EIS.

Both the FERC Project Final EIS and the Sunrise Powerlink Final EIR/EIS have been provided by Petitioner to the State Board in connection with Petitioner’s application for 401 certification. In addition, the Santa Ana Regional Board concluded, in 2007, that there is sufficient understanding of the Project, and its likely and potential effects on water quality standards in the Santa Ana Region, to assist the State Board to craft appropriate conditions for the issuance of Section 401 water quality certifications. *See* Santa Ana Regional Board letter (October 1, 2007) (Lewandowski Decl., Ex. D).

The Santa Ana Regional Board’s analysis was based on comprehensive studies conducted by Dr. Michael Anderson, who is well-known and respected by the Santa Ana Regional Board staff because of his work in support of other Lake Elsinore water quality improvement projects, including the development of total maximum daily loads (“TMDLs”) for Lake Elsinore. Dr. Anderson prepared three reports that address potential water quality impacts associated with the Project: (1) Technical Analysis of the Potential Water Quality Impacts of the LEAPS on Lake Elsinore, dated January 31, 2006 (“Dr. Anderson Report #1”) (Lewandowski Decl., Ex. G); (2) Effects of LEAPS Operation on Lake Elsinore: Predictions from 3-D Hydrodynamic Modeling, dated April 23, 2007 (“Dr. Anderson Report #2”) (Lewandowski Decl., Ex. H); and (3) Ecological Impacts

⁵ Certified and adopted by the California Public Utility Commission (“CPUC”) and the U.S. Department of the Interior – Bureau of Land Management (“BLM”) on December 18, 2008.

from LEAPS Operation: Predictions Using A Simple Linear Food Chain Model, dated May 29, 2007 (“Dr. Anderson Report #3”) (Lewandowski Decl., Ex. I).

B. The State Board’s Action In Denying Petitioner’s 401 Certification Was Inappropriate And An Abuse Of The Board’s Discretion

The State Board apparently denied Petitioner’s 401 certification application simply because the CPUC dismissed Petitioner’s Application for a Certificate of Public Convenience and Necessity (“CPCN”) for the transmission line portion of the Project and, therefore (as the State Board put it) “discharged its obligation to prepare a final CEQA document for LEAPS.” See State Board letter (October 1, 2009) (Lewandowski Decl., Ex. A). The State Board’s conclusion apparently was reached based upon a CPUC decision dismissing Petitioner’s CPCN Application for the TE/VS Interconnect. CPUC Decision Dismissing Application Without Prejudice (Application 09-02-012; 07-10-005) (April 16, 2009), at 1 (Lewandowski Decl., Ex. J).

Clearly, sufficient CEQA-compliant environmental documentation has been presented and is available to the State Board from which it can craft appropriate conditions and issue a draft 401 certification for the Project. Importantly, the CPUC has no jurisdiction over the pumped storage portion of the Project and would have included an environmental analysis of that portion of the Project only because, under CEQA, it would have been required to evaluate the “whole of the action.”⁶

Regardless, in denying Petitioner’s 401 certification on this basis, the State Board acted inappropriately and abused its discretion inasmuch as final and valid CEQA-compliant documentation already has been proffered to the State Board for the Project (as discussed above), including the Sunrise Powerlink Final Project EIR/EIS, which, among other things, included a complete analysis of the Project and an analysis of mitigation measures, as well as a mitigation, monitoring and reporting plan for any significant impacts that cannot be mitigated. See e.g., FERC letter (June 30, 2008), (Lewandowski Decl., Ex. K) (“Our [FERC’s] review of the CPUC draft EIR [for the Sunrise Powerlink project] indicates that it includes a mitigation, monitoring, compliance, and reporting table (Table E.7.3-1)”). This table identifies the effectiveness of mitigation measures for

⁶ In CEQA, “project” is defined as “the whole of an action, which has the potential for resulting in a physical change in the environment, directly or ultimately.” Title 14 Cal. Code Regs. § 15378(a).

LEAPS including the specific measures recommended by both [FERC] staff and the U.S. Forest Service in our joint January 2007 NEPA final EIS.”). Moreover, the Sunrise Powerlink Final EIR/EIS was certified and approved by the CPUC and the BLM.

Further, the State Board acted contrary to California law and its own established practice by denying Petitioner’s application for certification without providing an opportunity for the Petitioner to voluntarily withdraw the application within one year of its being filed. *See* 23 Cal. Code Regs. § 3836(c). Section 3836(c) of the California Code of Regulations specifically contemplates giving applicants the right to withdraw a 401 certification request before it is denied. As the facts amply demonstrate, the State Board permitted Petitioner to voluntarily withdraw each of its prior applications and to concurrently re-submit each of those applications before the federal one-year deadline. Indeed, as noted above, the State Board’s March 2008 letter expressly advised Petitioner that “[a]ternatively, the applicant could choose to withdraw its request for water quality certification and file a new request for water quality certification.” State Board letter (March 7, 2008) (Lewandowski Decl., Ex. E).

Petitioner has relied on the State Board’s custom and practice and did not have any notice that the October 1, 2009 denial would issue until it received that letter. For the reasons discussed in the Section V, below, State Board’s denial, even without prejudice, has a very significant impact on the Project’s status.

In sum, the stated basis upon which the State Board has denied Petitioner’s application for 401 certification is inappropriate and an abuse of discretion in that the stated reason for denial lacks substantial evidence, among other deficiencies. Regardless of the improper basis for the State Board’s denial of Petitioner’s application, the State Board, at the very least, should have provided Petitioner with an opportunity to withdraw its application before issuing the denial as it did in every other prior year.

Petitioner incorporates herein each and every other reason set forth in Section V, below, and elsewhere in this Petition.

V. MANNER IN WHICH THE PETITIONER IS AGGRIEVED

A. Under Section 401 Of The Clean Water Act, The State Board Is Responsible For Evaluating Water Quality Impacts Associated With FERC-Licensed Projects, Including The LEAPS

Section 401 of the Act, 33 U.S.C. §1341, requires every applicant for a federal license or permit, which may result in a discharge into navigable waters, to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the Act, including water quality standards and implementation plans promulgated pursuant to section 303 of the Act, 33 U.S.C. § 1313. In deciding whether to grant or deny certification, the state considers whether the proposed activity will comply with state water quality standards (and several other CWA provisions). 33 U.S.C. 1341(a)(1); *see also* § 1313(a) (discussing continuation of existing state water quality standards).

Section 401 of the Clean Water Act directs the agency responsible for certification to prescribe effluent limitations and other limitations, as necessary, to ensure compliance with the Clean Water Act and with any other appropriate requirement of state law. Section 401 further provides that state certification conditions shall become conditions of any federal license or permit for the project. The State Board has delegated this function to the Executive Director by regulation. Title 23 Cal. Code Regs. § 3838(a). By granting water quality certification, a state is certifying that the proposed activity will not violate state water quality standards. If a state denies certification for procedural reasons or because the proposed activity will not comply with water quality requirements, the federal permitting agency is prohibited from issuing the permit or license. 33 U.S.C. § 1341(a)(1). Section 401(d) gives states the option of placing conditions on the certification to assure compliance with water quality standards and these conditions are then incorporated into the federal permit. By failing to act on a certification request within one year, the state forfeits its authority and the certification requirement is waived. *Id.*

Although states can impose conditions on FERC licensing (or relicensing) of hydropower facilities, states cannot inappropriately use the 401 certification process to

intentionally delay or prohibit such projects from going forward. In a letter, dated June 30, 2008, FERC wrote to Governor Schwarzenegger about the State Board's inaction in evaluating and granting water quality certifications, including specifically its inaction in granting water quality certifications for the Project. FERC letter (June 30, 2008) (Lewandowski Decl., Ex. K).

FERC noted that "the Water Board is extending an already time-intensive and costly licensing process." *Id.* This is certainly true with respect to LEAPS. In that letter, FERC specifically referenced the Project and notes, *inter alia*, that "[i]t is unclear why the CPUC's EIR [for the Sunrise Powerlink Project] and the [FERC's] final EIS cannot satisfy the state's CEQA requirements for LEAPS. Together, the [FERC's] FEIS and the CPUC's Draft EIR [now final] represent a substantial record of several hundred pages, and so it appears that the Water Board has the needed technical information necessary to issue a decision on water quality certification for the project." *Id.*

Petitioner seeks to have the State Board review the substantial CEQA-compliant environmental documentation available for the Project and, based upon that documentation issue a 401 certification with appropriate conditions. The CPUC's denial, without prejudice, of Petitioner's CPCN and application for the transmission-only portion of the Project, based on purported deficiencies in TNHC's application and not for substantive reasons, is not an appropriate or sufficient basis for denial by the State Board of Petitioner's certification application. If, after considering this Petition for Reconsideration, the State Board determines that "procedural defects" remain with Petitioner's application, Petitioner requests that the State Board withdraw or rescind its denial and permit Petitioner to voluntarily withdraw and re-submit its application in order for Petitioner to correct any such defects to avoid having FERC deny Petitioner's licensing application for the Project. If the State Board grants the Petition and withdraws its denial (and its evaluation of the Project continues on January 21, 2010), Petitioner is willing to voluntarily withdraw and re-submit its application prior to such date, as it has consistently done.

B. The Environmental Documents Addressing The Project Comply With CEQA And Provide A Sufficient Basis Upon Which The State Board Can Evaluate Potential Water Quality Impacts

1. An EIS Can be Used in Place of an EIR to the Extent that the EIS Complies with the Provisions of CEQA

NEPA, 42 U.S.C. § 4321 *et seq.*, is the federal environmental law on which CEQA is modeled. NEPA requires the preparation of an environmental impact statement (“EIS”) for proposed federal actions that have the potential to significantly affect the quality of the human environment. While CEQA applies to state and local agency actions, NEPA applies to proposals of federal agencies. NEPA will typically apply when a federal agency is participating in the project or the project is on federal land, subject to federal permits, or federally funded. Because many state and local projects also involve federal agencies, NEPA has become increasingly important in California. Some projects will be subject to environmental review under both CEQA and NEPA. To reduce duplication of effort, the CEQA Guidelines, Title 14 Cal. Code Regs. §§ 15000-15387, encourage state and local agencies to cooperate with federal agencies to the fullest extent possible. This cooperation may include joint planning processes, environmental research and studies, public hearings, and environmental documents. 14 Cal. Code Reg. §§ 15006 and 15226; *see* 40 C.F.R. § 1506.2 (similar cooperation by federal agencies with state and local agencies is encouraged).

This is exactly what happened with the Project, where the EVMWD and FERC held joint project scoping sessions and agreed that FERC, in preparing its environmental impact statement (“EIS”) would address the elements required by CEQA to avoid the necessity for duplication of efforts. *See* FERC letter (July 8, 2004) (Lewandowski Decl., Ex. L); EVMWD letter (June 8, 2005) (Lewandowski Decl., Ex. M).

When the same project requires both CEQA and NEPA review, a state or local agency must, whenever possible, use a federal EIS in place of an environmental impact report (“EIR”) if the EIS complies with CEQA Guideline requirements. Bass & Herson, *What CEQA Practitioners Must Know About NEPA*, Land Use Forum, Vol. 2, No. 2, Spring 1993 (Cal. C.E.B.). The CEQA Guidelines encourage both the use of EISs to replace EIRs and the use of Findings of No Significant Impact (“FONSI”) to replace

Negative Declarations, Gov. Code §§ 67575.9, 67679.5., provided that the NEPA process is proceeding faster than the CEQA process and that the EIS or FONSI complies with the CEQA Guideline requirements. For an EIS to be used in place of an EIR, the EIS discussion of mitigation measures and growth-inducing impact must be either identified or supplemented (as it was in the FERC Project Final EIS). These two topics, although ordinarily discussed somewhere in an EIS, are not required to be separate discussions under NEPA, whereas they are under CEQA. 14 Cal. Code Reg. § 15221; *see* 40 C.F.R. § 1508.13. For the purposes of CEQA compliance, the Project Final EIS included separate discussions of growth-inducing impacts and mitigation reporting and monitoring requirements. Executive Summary, Project Final EIS, pp. 1-10 and 1-11 (Lewandowski Decl., Ex. B).

To be sure, an EIS can be used as an EIR to the extent that the EIS complies with the provisions of the CEQA Guidelines as the requirements of NEPA and CEQA largely overlap. 14 Cal. Code Reg. § 21083.5, CEQA Guidelines § 15221. Recognizing that an EIS will not necessarily look like an EIR and that the CEQA Guidelines Section 15120 provides that there is no mandatory format for EIRs, lead agencies disregard superficial differences and focus on the overall contents of the EIS. If the public had notice and the opportunity for review and comment provided in accordance with CEQA procedures (as it did in this case), then Section 15225 of the CEQA Guidelines enables the local agency to use the EIS as the equivalent of an EIR without additional circulation.

2. The environmental review already completed by FERC, the Santa Ana Regional Board, the CPUC and the EVMWD Comply with CEQA
 - a. The Project Final EIS

On February 17, 2006, FERC/USFS issued its draft EIS for the licensing of the Project, and requested that comments be filed by April 25, 2006. On October 3, 2006, FERC/USFS also issued a public notice to landowners of property crossed by or near either the proposed or alternative routes for the transmission line and other interested parties to the proceeding. The maps attached to this notice showed two transmission alignments: (1) the co-applicants' then current proposal, modified in response to staff's draft EIS and filed with the Commission on June 12, 2006; and (2) the FERC/USFS staff alternative alignment being considered for the final EIS. The October notice invited

comments within 30 days of the date of the letter. As far back as 2004, FERC indicated to Petitioner that it intended to prepare an EIS that would eliminate the need to duplicate any additional environmental analysis to satisfy CEQA. FERC letter (July 8, 2004) (Lewandowski Decl., Ex. M). In particular, FERC stated that Petitioner “may be able to adopt our document, in whole or in part, to meet your CEQA requirements, thus eliminating the need for a separate CEQA document.” *Id.* at 2. Significantly, the Project Final EIS concludes that “[a]lthough this document is not a joint environmental impact report/EIS, [EVMWD] has the opportunity to use this document, as appropriate, to satisfy its responsibilities under CEQA.” Project Final EIS, at 1-10 (Lewandowski Decl., Ex. B).

On August 9, 2004, FERC published a “Notice of Intent” to announce the preparation of environmental documents. On September 13, 2004, EVMWD issued a companion “Notice of Preparation” (SCH No. 2004091057) for a draft EIR for the Project. FERC and the EVMWD conducted joint NEPA/CEQA public scoping meetings on September 8 and 9, 2004 to receive comments from the public and other interested parties. The Notice of Preparation was reissued by EVMWD on June 1, 2006, inviting comments within 30 days of the date of the notice because of the length of time that has elapsed and clarification in the proposed project design. The State Board’s narrow reliance on the CPUC’s dismissal of Petitioner’s CPCN application, without prejudice, as a basis for denial ignores the fact that sufficient and substantial documentation satisfying CEQA is available for the Project—the Project Final EIS and the Sunshine Powerlink Final EIR/EIS—which comprehensively evaluated LEAPS as an alternative. *See Sunrise Powerlink Final EIR/EIS* (Lewandowski Decl., Ex. C).

In addition, the Santa Ana Regional Board concluded in 2007 that there is “sufficient understanding of the LEAPS Project, and its likely and potential effects on water quality standards in the Region, to assist SWRCB to craft appropriate conditions for the issuance of Section 401 water quality certifications for the project and to provide meaningful comments on the draft certification for it. Presently, Board staff has no outstanding issue with the LEAPS Project that need to be addressed in advance of drafting 401 certification conditions.” Santa Ana Regional Board letter (October 1, 2007), p. 2 (Lewandowski Decl., Ex. D).

b. Sunrise Powerlink Final EIR/EIS

The Sunrise Powerlink Final EIR/EIS, which explicitly addresses both LEAPS and the TE/VS Interconnect, was certified and adopted by the CPUC and BLM on December 18, 2008. LEAPS and the TE/VS Interconnect were included in the CPUC/BLM's environmental notices and scoping activities. Both projects were examined to the same level of detail as the Sunrise Powerlink Project and Project-specific mitigation measures were included to reduce the Project's impacts to the maximum extent feasible. Under CEQA and NEPA, the CPUC and BLM had (and likely retains) the opportunity to select LEAPS and the TE/VS Interconnect as the preferred project and to issue a CPCN for the TE/VS Interconnect. The substantive requirements of a CEQA-compliant EIR are before the State Board now and it must consider the merits of Petitioner's application.

C. The Board's Premature Dismissal Of Petitioner's Application Violates California Law

1. State Board Regulations Allow Applicants to Withdraw 401 Application Prior to the Federal One-year Anniversary

Even if the State Board did have an adequate basis for denial (which Petitioner disputes), Title 23, Section 3836(c) of the California Code of Regulations contemplates that applicants have an opportunity to withdraw their certification application before it is denied. This is consistent with State Board practice and with its custom and practice in this case.

In 2009 and in each of the preceding four years, Petitioner filed with the State Board an application for State Water quality certification of the Project under Section 401 of the CWA. As each successive one-year period neared its end, the Petitioner was advised and encouraged by the State Board to withdraw the then current application and concurrently submit a new application or merely to file the prior year's application. *See* Lewandowski Decl., Ex. R.

Within a one-year timeframe of filing, the Petitioner voluntarily withdrew each of those applications and, through the same correspondence by which those applications were withdrawn, submitted new applications or re-filed a previous year's application for a Section 401 water quality certification to the State Board.

The State Board did not deny any of the Petitioner's prior 401 certification applications and did not notify Petitioner at any time during its discussion with the State Board that it intended to deviate from its policy and practice regarding withdrawal of the January 21, 2009 application. Further, here, the State Board unnecessarily issued its denial letter for the Project certification on or about October 1, 2009, over three months before the one-year deadline. Thus, the State Board's October 1, 2009 denial is inconsistent with and contradictory to its own policy and practice.

2. Petitioner Justifiability Relied on State Board Policy

Since initially filing its application in 2005, it has been the State Board's position that: (1) no action would be taken prior to the expiration of the one-year federal time period specified in Section 401(a)(1) of the CWA; (2) a recommendation for denial would be formulated prior to any actual denial and that recommendation would be conveyed to the Petitioner; and (3) the Petitioner would be allowed to withdraw Petitioner's pending application and re-file an application prior to any denial taking effect.

Agency practices consistently followed for long periods of time may be entitled to judicial deference. *Aliceville Hydro Assoc. v. FERC*, 800 F.2d 1147, 1151 (D.C. Cir. 1986) ("Members of the public [are] entitled to look upon the practice as an expression of [administrative agency] policy just as they might look to [its] regulations."). Practices of an agency that become crystallized may be in the nature of law, whether or not they are developed pursuant to a delegation of power. *Id.* (quoting K. Davis, *Administrative Law Treatise* § 7:23 at 113 (2d ed. 1983)); *see also Associated Gas Distributors v. FERC*, 738 F.2d 1388 (D.C. Cir. 1984). Significantly, an agency interpretation which does not correspond with the plain meaning of a rule or its longstanding application constitutes an interpretive rule which must be adopted by a rulemaking procedure. *Ebenezer Soc. v. Minnesota Dep't of Human Services*, 433 N.W.2d 436 (Ct. App. Minn. 1988).

Consistent with Title 23, Section 3836(c) of the California Code of Regulations, the State Board has specifically requested and permitted certification applicants to withdraw a pending application on which the State Board has not acted, before the end of

the one year statutory period, and to re-submit the application at a late date, to avoid waiving the State Board's ability to review the Project under Section 401.⁷

Petitioner has acted in reliance on this State Board practice since its initial certification application in 2005, and every year the Board has allowed this practice. The State Board now, without notice, and without cause has deviated from its long-established practice. In doing so, it has deprived Petitioner of the option to voluntarily withdraw its application and submit a new one. A regulatory agency "must always provide 'fair notice' of its regulatory interpretations to the regulated public." *General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). "[F]ull and explicit notice is the heart of administrative fairness." *Radio Athens, Inc. v. Federal Communications Com.*, 401 F.2d 398, 404 (D.C. Cir. 1968). Indeed, elementary fairness compels the State Board to provide notice to Petitioner of its intent to deny TNHC's application. Had the State Board provided such notice, the Petitioner, as it has every other year, would have voluntarily withdrew the current year application in order to not risk FERC's denial of THNC's and EVMWD's federal hydropower license.

D. State Board's Denial of Petitioner's Application for 401 Certification Will Cause Substantial Economic Harm to Petitioner, California Utility Customers, and the State's Economy

1. State Board's Denial of Petitioner's Application Could Result in FERC's Dismissal of the Project's License Application

As a matter of policy, FERC will dismiss an original license application after denial of a second certification request, unless an appeal of the first denial is pending, in order to free up the site for potential hydroelectric development or other purposes. *See City of Harrisburg, Pa.*, 45 FERC P61,053 (1988); *FPL Energy Maine Hydro LLC*, 108 F.E.R.C. P61,261 (2004). It is FERC's policy that, if a license applicant's first request for water quality certification is denied, it will dismiss the license application unless, within 90 days, the applicant reports that it has filed a timely appeal of the denial or a second certification request, or both. FERC will keep the license application on file until the applicant has exhausted its remedies on administrative and judicial appeal, so long as

⁷ *See, e.g., Pacific Gas & Electric Company's Petition for Reconsideration and Request for a Stay of the Water Quality Certification for the Spring Gap-Stanislaus Hydroelectric Project (FERC Project No. 2130) (October 13, 2008), at 3.*

the applicant continues to demonstrate, through periodic status reports, due diligence in pursuing the remedies. If the second certification request is denied, FERC will dismiss the license application, unless an appeal of the first denial is pending. *See City of Harrisburg, Pa.*, 45 FERC P61,053 (1988); *Northbrook Carolina Hydro, L.L.C.*, 95 F.E.R.C. P62,297 (2001). This policy was developed in the context of applications for original license, under the rationale that, “at some point, the public interest in freeing up potential sites for hydroelectric development or for other purposes will outweigh the private interest in maintaining the application on file while repeated requests for certification are pursued.” *North Star Hydro Ltd.*, 51 FERC P61,017 (1990), at 61,844; *West Penn Power Company*, 74 F.E.R.C. P61, 287 (1996). Given FERC’s policy, if the Petitioner’s application is denied a second time, Petitioner would require the re-initiation of a 10-year federal-licensing process and, as reported by the EVMWD, result in the forfeiture of over \$2 million in EVMWD rate-payer funds. Lewandowski Decl., ¶19.

2. The Project Will Provide Environmental and Economic Benefits to California

a. Environmental Benefits of the Project

(1) Benefits to Water Quality Standards

Section 303(d) of the CWA requires states to identify waterbodies that are unable to meet applicable water quality standards through technology-based effluent limitations. For such “303(d)-listed” waterbodies (also known as “impaired” waterbodies), the state must develop and implement TMDLs, which establish the maximum amount of each impairing pollutant that can be discharged to the water body. The Santa Ana Regional Board has designated Lake Elsinore as impaired for, among other water quality standards, dissolved oxygen.

In the Draft Program Environmental Impact Report for the Lake Elsinore Stabilization and Enhancement Project (“Lake Elsinore Draft EIR”), Dr. Alex Horne, Professor Emeritus at University of California, Berkeley, studied Lake Elsinore extensively and concluded that there would be considerable water quality benefits as a result of the Project. Lake Elsinore Draft EIR, at 5-4 (Lewandowski Decl., Ex. N). Dr. Horne found that “a large improvement in lake water quality is possible if the inflow and

of the pumped water is used correctly,” and that the Project “could result in major improvements in Lake Elsinore from an ecological and recreational standpoint, with some modification.” *Id.* at 5-11, 5-12. In particular, Dr. Horne concluded that the Project would help improve (increase) the dissolved oxygen level (for which Lake Elsinore is TMDL-listed) “[i]f the outflow water were both well-oxygenated and cold, which would “enhance the lake’s deep water oxygen depletion and reduce the cost of operating the current and proposed lake mixing/aeration system.” *Id.*

(2) Reduction of Greenhouse Gas Emissions and Contributing to California’s Renewable Portfolio Standard

Unreasonable and inappropriate delay by the State Board is particularly surprising given the State’s greenhouse gas (“GHG”) reduction requirements, LEAP’s ability to store and shape critical renewable energy, and the State’s requirements for use of renewable energy sources under Assembly Bill 32, the California Global Warming Solutions Act of 2006, (“AB 32”), as described in the California Air Resources Board (“ARB”) AB 32 Scoping Plan. AB 32 sets forth an aggressive timetable for reducing GHG emissions. AB 32 requires the ARB to limit statewide emissions of GHGs to 1990 levels by 2020, adopt regulations requiring the mandatory reporting of GHG emissions, and implement other programs and regulations, all designed to encourage rapid and permanent reductions in GHG emissions statewide. *See* ARB Climate Change Scoping Plan, at 5 (Dec. 2008) (Lewandowski Decl., Ex. O).

In 2002, California also adopted an aggressive “Renewable Portfolio Standard” (“RPS”) under Senate Bill 1078. The RPS program requires electric corporations to increase procurement from eligible renewable energy resources by at least 1% of their retail sales annually, until they reach 20% by 2010. In 2008, Governor Schwarzenegger signed Executive Order S-14-08, requiring California utilities to procure 33% of their energy needs from renewable resources by 2020. CPUC and the California Energy Commission endorsed this change and it is a key GHG reduction strategy in ARB’s AB 32 Scoping Plan. *See id.*, at 16, 17, 44. The Project will store off-peak and discharge on-peak renewable power, including wind energy, assisting California utilities in meeting the very aggressive 33% renewables goal imposed by the RPS, by the 2020 deadline.

In a significant number of cases, renewable resources are located in areas that are remote to the State's load centers. As such, additional transmission infrastructure will be required for the State's Load Serving Entities ("LSEs") to access the pool of available renewable resources in as cost efficient manner as possible. *See id.*, at 45 ("A key prerequisite to reaching a target of 33 percent renewables will be to provide sufficient electric transmission lines to renewable resource zones and system changes to allow integration of large quantities of intermittent wind and solar generation.").

As indicated in California's "2007 Integrated Energy Policy Report," the CEC "has expressed concern that SDG&E's margin of safety is not large enough to ensure that it meets the 20 percent by 2010 goal and has encouraged SDG&E to procure, through contracts or development of utility owned facilities, RPS energy equivalent to 20 percent by 2010 plus a 20 to 30 percent margin of error." California Energy Commission, 2007 Integrated Energy Policy Report, p. 120 (Lewandowski Decl., Ex. P). The TE/VS Interconnect will provide SDG&E with access to renewable energy resources, and may increase the depth of the pool of renewable suppliers to SDG&E. For example, the TE/VS Interconnect will facilitate access for SDG&E consumers to renewable resources located north of San Diego, including Tehachapi wind resources, as well as Pacific Northwest, other western U.S. and Canadian renewable resources.

Without the Project, LSEs will have to seek other alternatives, which are not currently sufficient to meet RPS requirements and, if not properly planned for, may lead to unnecessarily high integration costs. Without the additional regulation and quick responding spin capacity that LEAPS provides, the most optimistic scenario would have California Independent System Operator ("CAISO") operators adjusting up or down the output of slow responding, fossil fuel thermal generation to integrate the additional capacity. Increased reliance on fossil fuel thermal generation for purposes of integrating resources would be contrary to California's RPS and GHG emission reduction objectives.

b. Economic Benefits of the Project

The TE/VS Interconnect will provide 1000 megawatt (MW) of additional transmission import capacity to the SDG&E system. Prepared Direct Testimony of

Philippe Auclair (“Auclair Testimony”), at 11⁸ (Lewandowski Decl., Ex. Q). This increase in import capacity will provide SDG&E and the residents and businesses in the San Diego Metropolitan area access to a larger pool of lower cost generation for SDG&E customers. It therefore will provide an energy price benefit by reducing the energy market clearing prices (*i.e.*, location marginal prices, or LMPs) to CAISO consumers. *Id.*, at 10. In addition, the TE/VS line could also provide SDG&E customers with access to renewable energy resources to the east of San Diego. *Id.* The TE/VS Interconnect will be well-positioned to assist SDG&E in meeting its RPS compliance objectives.

In addition, by increasing the transmission import capacity to the San Diego Local Capacity Requirement (“LCR”) area by 1000 MW, the TE/VS Interconnect will reduce SDG&E’s local reliability compliance costs relative to the base case. *Id.* Finally, by interconnecting LEAPS to the CAISO high voltage transmission system, TE/VS Interconnect will permit CAISO customers to realize the economic benefits provided by LEAPS. *Id.* LEAPS will be able to provide up to 500 MW to the grid within 15 seconds in response to a CAISO dispatch notice. *Id.*, at 11. These operational characteristics make LEAPS one of the best sources of regulation and spinning reserve capacity for the grid operator. *Id.* LEAPS’ rapid dispatch response and ramping capability also will enable it to efficiently provide load-following service, should the CAISO decide to adopt a load-following product as an Ancillary Service. The ability to provide 500 MW in under one minute will be a very valuable service in times of system emergency. *Id.*, at 11-12.

In contrast, combustion turbines (“CTs”) require anywhere from 10 to 60 minutes to respond to a dispatch signal and do not provide regulation or spinning reserve capability. *Id.*, at 12. Combined cycle CTs take anywhere from one to four hours to respond to a dispatch signal, have no black start capability, and, compared with a plant like LEAPS, have a much more limited capability to provide regulation and spinning reserve services. *Id.* Combined cycle units also may take hours to ramp up to full capability, e.g., to provide 500 MW to the grid in one minute may require 10 to 12

⁸ Application for TE/VS Interconnect, CPUC Application No. A.09-02-012 (February 20, 2009), and No. A.07-10-005 (October 9, 2007).

combined cycle units, each of 500 MW generating capacity. *Id.* LEAPS represents a clean, efficient, cost-effective source of regulation, spinning reserve and load-following services. Estimates are that the combined *net* economic benefit of LEAPS and TE/VS to CAISO rate payers will be approximately \$165 million per year in 2015, when the project is finished. *Id.*, at 21. In other words, without LEAPS and the TE/VS Interconnect, CAISO rate payers will be paying approximately \$165 million per year more than they would if the projects were implemented.

Sites for pumped storage hydroelectricity facilities are relatively rare, particularly so in southern California. The location identified for LEAPS is likely the only site capable of efficiently supporting a large scale facility. If the State is to utilize and capture the benefits of pumped storage, LEAPS must be connected to the CAISO controlled grid.

VI. SPECIFIC ACTION BY THE STATE BOARD WHICH THE PETITIONER REQUESTS

For the reasons stated in this Petition, TNHC requests that the State Board withdraw or rescind its denial of Petitioner's application for 401 certification. TNHC further requests that the State Board review the substantial CEQA-compliant environmental documentation available for the Project and, based upon that documentation, issue a draft 401 certification with appropriate conditions. If that cannot be accomplished before the one-year deadline or, if the State Board believes that valid CEQA documentation has not been provided for the Project, TNHC requests that it be afforded the opportunity to voluntarily withdraw and re-submit its application prior to the one-year deadline.

VII. LIST OF INTERESTED PARTIES

Please see below the list of parties that have an interest in this matter.

Federal Energy Regulatory Commission
Office of Energy Projects
Attn: Kimberly D. Bose, Secretary
888 First Street, N.E.
Washington, DC 20426

Federal Energy Regulatory Commission
Office of Energy Projects
Timothy J. Welch, Hydro West Branch Chief 2
888 First Street, N.E.
Washington, DC 20426

U.S. Environmental Protection Agency, Region
Attn: Alexis Strauss, Water Division Director
75 Hawthorne Street
San Francisco, California 94105

California Environmental Protection Agency
Attn: Linda S. Adams, Secretary for Environmental Protection
1001 "T" Street
P.O. Box 2815
Sacramento, California 95812-2815

California Public Utilities Commission
Attn: Paul Clanon, Executive Director
505 Van Ness Avenue, 5th Floor
San Francisco, California 94102

California Public Utilities Commission
Transmission Permitting and Environmental Review Section
Attn: Chloe Lukins, Program and Project Supervisor
505 Van Ness Avenue, 4th Floor
San Francisco, California 94102

California Public Utilities Commission
Attn: Nicholas Sher, Legal Department
505 Van Ness Avenue, 4th Floor
San Francisco, California 94102

California Regional Water Quality Control Board
Santa Ana Region
Attn: Gerald J. Thibeault, Executive Director
3737 Main Street, Suite 500
Riverside, California 92501-3348

California Regional Water Quality Control Board
San Diego Region
Attn: John Robertus, Executive Officer
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

Elsinore Valley Municipal Water District (EVMWD)
Attn: Ronald Young, General Manager
31315 Chaney Street
P.O. Box 3000
Lake Elsinore, California 92531-3000

VIII. STATEMENT THAT COPIES OF THIS PETITION FOR RECONSIDERATION HAVE BEEN SENT TO THE APPROPRIATE REGIONAL BOARD

A true and correct copy of this Petition for Reconsideration was sent, via e-mail on November 2, 2009 to the Santa Ana and San Diego Regional Boards, and true and correct copy of all exhibits to this Petition were sent to such regional water quality control boards, via FedEx Overnight Delivery, on the same date.

IX. A COPY OF A REQUEST TO THE EXECUTIVE DIRECTOR TO PREPARE THE STATE BOARD RECORD

TNHC has submitted a request, dated November 2, 2009, to the Executive Director of the SWRCB for the preparation of the State Board staff record related to TNHC's and EVMWD's application for 401 certification, if available, in connection with this Petition. A copy of this request, as required by 23 CCR § 3867(d)(9), is attached as "Attachment 1" to this Petition.

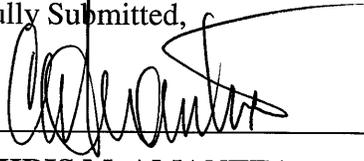
X. A SUMMARY OF THE MANNER IN WHICH AND TO WHAT EXTENT THE PETITIONER PARTICIPATED IN ANY PROCESS LEADING TO THE ACTION IN QUESTION

As discussed above, the Petitioner and EVMWD filed with FERC an application for an original license to construct the Project on February 2, 2004. Petitioner filed applications with the State Board for Section 401 water quality certifications on March 11, 2005, March 1, 2006, February 21, 2007, February 5, 2008, and again on January 21, 2009. During that time period, Petitioner has met and exchanged extensive written correspondence with numerous representatives of federal, state, and local agencies regarding the permitting, approval and licensing of the Project. These agencies include the State Board, FERC, CPUC, Santa Ana Regional Board, San Diego Regional Board, EVMWD, the California and U.S. Environmental Protection Agency, and the California Governor's Office. Further, Petitioner has participated in and provided testimony before such agencies as part of this extensive administrative approval process.

Given the length of time during which the Petitioner has been working to secure a Section 401 water quality certification from the State Board and the numerous administrative agencies with jurisdiction of certain aspects of the Project, it is impractical to provide a complete list of all meetings and correspondence between Petitioner and such public agencies. Petitioner has regularly and repeatedly communicated directly with all of these federal, state and local agencies, and has provided discussion of the relevant aspects of such process leading to this Petition for Reconsideration.

Respectfully Submitted,

By: _____


CHRIS M. AMANTEA

Chris M. Amantea
Malcolm C. Weiss
Michael Balster
HUNTON & WILLIAMS LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071
Telephone: (213) 532-2102
Facsimile: (213) 532-2020
E-mail: camantea@hunton.com
mweiss@hunton.com
Attorneys for Petitioner,
The Hydro Company, Inc. (dba The Nevada
Hydro Company, Inc.)

ATTACHMENT 1



HUNTON & WILLIAMS LLP
550 SOUTH HOPE STREET, SUITE 2000
LOS ANGELES, CALIFORNIA 90071-2627

TEL 213 • 532 • 2000
FAX 213 • 532 • 2020

CHRIS M. AMANTEA
DIRECT DIAL: 213 • 532 • 2102
EMAIL: camantea@hunton.com

November 2, 2009

Via E-mail

Ms. Dorothy Rice
Executive Director
California State Water Resources Control Board
1001 "T" Street
Sacramento, CA 95814

**Re: The Nevada Hydro Company, Inc. — Petition for Reconsideration
Request for Preparation of State Board and Regional Board Staff Record**

Dear Ms. Rice:

In accordance with Section 3867(d)(9) of the California Code of Regulations, we hereby request, on behalf of the Nevada Hydro Company, Inc. ("TNHC"), that the State Water Resources Control Board ("State Board") staff prepare the record of the State Board (including any documents in the possession of the Santa Ana and San Diego Regional Water Quality Control Boards) that relates, in anyway, to the subject matter of TNHC's *Petition for Reconsideration of the State Board's Denial of TNHC's Request for Certification Pursuant to Section 401 of the Clean Water Act for the Lake Elsinore Advanced Pump Storage Project*. Such record shall include any tape recording or transcripts of any pertinent State Board or such regional board or staff hearings.

Sincerely,

Chris M. Amantea

BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of

Water Quality Certification for the

Lake Elsinore Advanced Pumped Storage Project

FERC Project No. 11858

**THE NEVADA HYDRO COMPANY PETITION FOR RECONSIDERATION OF STATE
WATER RESOURCES CONTROL BOARD DENIAL OF REQUEST FOR
CERTIFICATION PURSUANT TO SECTION 401(A)(1) OF THE FEDERAL CLEAN
WATER ACT FOR THE LAKE ELSINORE ADVANCED PUMPED STORAGE
PROJECT**

DECLARATION OF PETER LEWANDOWSKI

I, Peter Lewandowski, declare:

1. I am the President of The Hydro Company, Inc., doing business in California as The Nevada Hydro Company, Inc. (“TNHC” or “Petitioner”), and have personal knowledge of the facts herein and, if called as a witness, I could and would testify competently thereto.

2. Exhibit A of the Compendium of Exhibits filed in support of TNHC’s Petition for Reconsideration (“Compendium”) is a true and correct copy of the State Water Resources Control Board (“State Board”) letter denying Petitioner’s request for Water Quality Certification, dated October 1, 2009.

3. Exhibit B of the Compendium is a true and correct copy of the Final Environmental Impact Statement for the Lake Elsinore Advanced Pumped Storage Project (“Project Final EIS”) prepared by the Federal Energy Regulatory Commission (“FERC”) and the United States Forest Service (“USFS”), dated January 2007.

4. Exhibit C of the Compendium contains true and correct copies of excerpts from the Final Environmental Impact Report /Environmental Impact Statement for San Diego Gas &

Electric Company's Sunrise Powerlink Project ("Sunrise Powerlink Final EIR/EIS") prepared by the California Public Utilities Commission ("CPUC") and Bureau of Land Management ("BLM"), dated October 2008.

5. Exhibit D of the Compendium is a true and correct copy of the Santa Ana Regional Water Quality Control Board letter to the State Board, dated October 1, 2007.

6. Exhibit E of the Compendium is a true and correct copy of March 7, 2008 letter from the State Board.

7. Exhibit F of the Compendium is a true and correct copy of the TNHC's letter to the SWRCB, dated July 10, 2009.

8. Exhibit G of the Compendium is a true and correct copy of Dr. Michael Anderson's report titled, "Technical Analysis of the Potential Water Quality Impacts of the LEAPS Project on Lake Elsinore," dated January 31, 2006.

9. Exhibit H of the Compendium is a true and correct copy of Dr. Michael Anderson's report titled, "Effects of LEAPS Operation on Lake Elsinore: Predictions from 3-D Hydrodynamic Modeling," dated April 23, 2007.

10. Exhibit I of the Compendium is a true and correct copy of Dr. Michael Anderson's report titled, "Ecological Impacts from LEAPS Operation: Predictions Using a Simple Linear Food Chain Model," dated May 29, 2007.

11. Exhibit J of the Compendium is a true and correct copy of the CPUC Decision dated April 16, 2009, dismissing Application Nos. 09-02-012 and 07-10-005 without prejudice.

12. Exhibit K of the Compendium is a true and correct copy of the June 30, 2008 letter from FERC to Governor Arnold Schwarzenegger.

13. Exhibit L of the Compendium is a true and correct copy of the letter from FERC to Elsinore Valley Municipal Water District ("EVMWD"), dated July 8, 2004.

14. Exhibit M of the Compendium is a true and correct copy of the letter from EVMWD to FERC, dated June 8, 2005.

15. Exhibit N of the Compendium contains true and correct copies of excerpts from the Lake Elsinore Stabilization and Enhancement Project Draft EIR, dated March 2005.

16. Exhibit O of the Compendium is a true and correct copy of the California Air Water Resources Board's Climate Change Scoping Plan, dated December 2008.

17. Exhibit P of the Compendium is a true and correct copy of the California Energy Commission's 2007 Integrated Energy Policy Report.

18. Exhibit Q of the Compendium is a true and correct copy of the Prepared Direct Testimony of Philippe Auclair to CPUC for the application for the TE/VS Interconnect (CPUC Application No. A.09-02-012 (February 20, 2009) and No. A.07-10-005 (October 9, 2007).

19. Exhibit R of the Compendium contains true and correct copies of five (5) TNHC letters to the SWRCB, dated March 11, 2005, February 24, 2006, February 15, 2007, February 5, 2008 and January 20, 2009, respectively.

20. Exhibit S of the Compendium is a true and correct copy of the July 5, 2006 letter from the SWRCB to EVMWD.

21. If the Petitioner and the EVMWD's application to the State Board for 401 certification of the Project is denied a second time, Petitioner would require the re-initiation of a 10-year federal-licensing process with FERC and, would result in the forfeiture of over \$2 million in EVMWD rate-payer funds.

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

Executed this 2nd day of November 2009 at Vista, California.



PETER LEWANDOWSKI