

BEFORE THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

**In the Matter of
Water Quality Certification for the
Spring Gap-Stanislus Hydroelectric Project**

FERC Project No. 2130

**PACIFIC GAS AND ELECTRIC COMPANY'S
PETITION FOR RECONSIDERATION
AND REQUEST FOR A STAY OF
THE WATER QUALITY CERTIFICATION
FOR THE SPRING GAP-STANISLAUS HYDROELECTRIC PROJECT**

INTRODUCTION

On September 15, 2008, the Executive Director of the State Water Resources Control Board ("SWRCB" or "Board"), acting pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, issued a water quality certification ("Certification") for Pacific Gas and Electric Company's ("PG&E") Spring Gap-Stanislus Hydroelectric Project, Federal Energy Regulatory Commission ("FERC") Project No. 2130 ("Project"). The Certification was issued in draft form on August 1, 2007. By letter dated September 4, 2007, PG&E timely submitted numerous comments on the draft Certification. With one minor exception, PG&E's substantive comments were not incorporated into the final Certification. This outcome is puzzling given that PG&E's comments were based on a multi-party collaborative settlement agreement, five years in the making, which Board staff, with few exceptions, helped craft. It also represents a missed opportunity to support this collaborative settlement, preserve and enhance the sometimes

conflicting beneficial water uses it addresses, and establish a sustainable balance among these beneficial uses without additional protracted proceedings. Because PG&E continues to have concerns with several provisions of the final Certification, PG&E is filing this Petition for Reconsideration and Request for a Stay ("Petition") pursuant to Title 23 of the California Code of Regulations, Section 3867(c).

I. NAME AND ADDRESS OF PETITIONERS.

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II. SPECIFIC ACTION OF THE STATE WATER BOARD.

As noted above, on September 15, 2008, the SWRCB's Executive Director issued a Section 401 Certification for PG&E's Spring Gap-Stanislaus Hydroelectric Project, FERC No. 2130. The Certification is Attachment A hereto. PG&E is also attaching the SWRCB's August 1, 2007 draft Certification as Attachment B. PG&E's September 4, 2007 Comments on the August 1, 2007 draft Certification is Attachment C hereto.

III. DATE ON WHICH THE STATE WATER BOARD ACTED.

The Certification is dated September 15, 2008. PG&E is filing this Petition for Reconsideration on October 14, 2008 in compliance with the thirty (30) day deadline for filing such Petitions set forth at Title 23, Section 3867(c) of the California Code of Regulations.

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IV. STATEMENT OF REASONS WHY THE ACTION WAS INAPPROPRIATE OR IMPROPER.

On December 26, 2002, PG&E filed with FERC an application for new license for its Spring Gap-Stanislaus Project, a 98 MW project on the South and Middle Forks of the Stanislaus River in Calaveras and Tuolumne Counties. On December 5, 2002, PG&E filed with the Board an application for water quality certification for the Project pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. At the Board's request, PG&E withdrew and simultaneously re-filed its application for water quality certification on an annual basis each of the next five years.¹

In 1999, prior to PG&E submitting its license application to FERC, a collaborative group of stakeholders including PG&E, federal and state resource agencies, non-governmental organizations, and Board staff formed to develop recommended resource measures for the Project. On March 1, 2004, after some five years of study, analysis and discussion, the collaborative group, called the Stanislaus Planning Action Team ("SPLAT")², submitted to FERC numerous recommended protection, mitigation, and enhancement measures for the Project.³ The Board staff was actively engaged in the SPLAT negotiations. On November 30, 2004, the United States Forest Service ("USFS"), another active participant in the SPLAT negotiations, filed with FERC for inclusion in the Project license, its final terms and conditions

¹ The Board requested that PG&E serially withdraw and re-file its certification application because the 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). PG&E accommodated the Board's request by letters dated November 26, 2003, November 1, 2004, October 3, 2005, October 2, 2006, and September 13, 2007.

² SPLAT consists of the following entities: State Water Resources Control Board, United States Forest Service, National Park Service, PG&E, American Whitewater, Central Sierra Environmental Resources Center, Friends of the River, Tri-Dam Project, Trout Unlimited, and Tuolumne Utilities District.

³ The SPLAT Recommended Resource Measures are Attachment D hereto.

pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e).⁴ The USFS's terms and conditions were consistent with the corresponding measures negotiated by the SPLAT collaborative group. FERC issued its final Environmental Impact Statement ("EIS") for the Project in March, 2005. FERC's recommended resource measures contained in the EIS were also generally consistent with the corresponding measures negotiated by the SPLAT collaborative group.⁵

The Board issued the current Certification in draft form on August 1, 2007. By letter dated September 4, 2007, PG&E submitted comments on the draft Certification. PG&E was concerned, among other things, that the Board, in many instances, had in some respects rejected the carefully crafted resource measures developed by the USFS and SPLAT (and recommended by FERC) in favor of its own measures that, in PG&E's view, failed to as effectively balance the beneficial uses of consumptive water supply, ecological protection, recreation and power generation. While the USFS conditions and SPLAT measures established a collaborative approach to the various challenges of water management on the South Fork Stanislaus River ("SFSR"), the Board's staff set its own requirements without as balanced consideration for conflicting beneficial water uses. Additionally, the draft Certification contained measures that PG&E could not comply with as operational matters, that could cause PG&E to be subject to conflicting mandatory requirements, and that would cause undue and unnecessary administrative burdens. In these instances, PG&E requested that the Board modify its conditions to parallel the analogous provisions of the USFS conditions and SPLAT measures.

In addition to the operational complications created by the draft Certification's unilateral

⁴ The USFS Final 4(e) Terms and Conditions are Attachment E hereto.

⁵ Relevant excerpts of the FERC EIS are included as Attachment F hereto. The complete EIS is available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20050301-4004

mandates, PG&E was concerned that were the Board to ignore the USFS conditions and SPLAT measures that had been developed through collaboration and consensus, and instead impose different conditions, it would adversely impact the ability and willingness of stakeholders in the future to dedicate the time and resources necessary to reach consensus on the challenging issues posed by this and other hydroelectric project relicensings. In PG&E's view, the Board risked upsetting the delicate balance struck by the various stakeholders through more than five years of collaborative negotiations in which the Board's staff participated, and thereby further complicate an already complex hydroelectric relicensing process.

After PG&E submitted its comments on the draft Certification by letter dated September 4, 2007, Board staff did not contact PG&E to attempt to resolve the comments. See Attachment G, Affidavit of Steven Peirano, ¶ 4. Shortly before the Certification was released in final form, PG&E expressly requested to meet with Board staff to discuss its comments. Id. Board staff declined the request. Id. PG&E's in-house counsel also requested of Board counsel to discuss PG&E's comments. See Attachment H, Affidavit of Matthew A. Fogelson, ¶ 3. Board counsel declined, advising that the only vehicle for furthering dialogue with the Board was through the filing of the instant Petition for Reconsideration. Id. Consequently, PG&E was not able to discuss its comments with Board staff or counsel prior to the issuance of the Certification in final form.

Almost inexplicably, the final Certification, with one minor exception, fails to incorporate any of PG&E's substantive comments. Instead, the final Certification, issued more than a year after the draft Certification, repeats nearly verbatim all of the conditions stated in the draft. In short, the Board's staff has chosen to override recommendations resulting from the SPLAT collaborative process in ways great and small, from setting its own rigid flow measure

on the SFSR that elevates recreation objectives above all others, including consumptive water supply, to denying PG&E's seemingly modest request that the Board coordinate the timeframes of certain resource management activities with the corresponding timeframes established by the USFS conditions, SPLAT recommended measures, and FERC recommended measures, which in many cases were identical.

In support of its decision not to modify the draft Certification in any material respect, the Board's staff issued a six-page Response to Comments document with the final Certification, three-and-a-half pages of which responded to the comments filed on the draft Certification by numerous parties. Because this Response to Comments document fails to address seriously, substantively, or at any length, PG&E's comments on the draft Certification, and because Board staff declined to meet with PG&E to discuss its comments, PG&E has no choice but to file the instant Petition for Reconsideration and Request for a Stay.⁶

V. MANNER IN WHICH THE PETITIONER IS AGGRIEVED.

A. Condition 4 – Streamflow Measures for South Fork Stanislaus River.

1. Introduction.

Pinecrest Lake is a 299-acre lake on the SFSR that provides for many different beneficial uses of SFSR water. PG&E generates electricity by releasing water from Pinecrest Lake down the SFSR for 3.9 miles, and then diverting some of the water into the Philadelphia

⁶ PG&E hereby requests a stay of the Certification, pursuant to 23 CCR § 3869(d), until such time as the Board rules on PG&E's Petition for Reconsideration. As discussed throughout this Petition for Reconsideration, PG&E will suffer substantial harm if the stay is not granted and if FERC issues PG&E a new Project license containing the Certification Conditions. See generally Attachment G, ¶ 5. In addition, neither the Board nor the public will suffer substantial harm should a stay be granted. A stay will simply delay the effective date of the Certification until such time as the Board rules on PG&E's Petition for Reconsideration. Given that the Certification remained in draft form for over a year before the Board finalized it on September 15, 2008, any modest delay associated with the granting of a stay in this matter would not cause the Board any harm. Moreover, as discussed throughout, PG&E's Petition for Reconsideration raises substantial questions of both fact and law regarding the disputed action. Consequently, it is appropriate for the Board to grant PG&E's request for a stay.

Canal where the water flows to PG&E's Spring Gap Powerhouse on the Middle Fork Stanislaus River. From the Middle Fork Stanislaus River, a portion of that water is then diverted into the Stanislaus Power Tunnel to PG&E's Stanislaus Powerhouse on the main stem of the Stanislaus River. The Spring Gap Powerhouse has an installed capacity of 7 MW and the Stanislaus Powerhouse has an installed capacity of 91 MW.

In addition to power generation, water in Pinecrest Lake is used for consumptive purposes. Specifically, PG&E releases water from Pinecrest Lake down the SFSR past the Philadelphia Canal to Lyons Reservoir, a 184-acre lake, where PG&E then diverts the water into its Main Tuolumne Canal to provide water for power generation at its Phoenix Powerhouse and for the Tuolumne Utility District's ("TUD") consumptive needs.⁷

Pinecrest Lake is also used by thousands of California residents for recreation, particularly in the summer months.

And, of course, water in Pinecrest Lake serves important ecological functions, providing habitat for various aquatic and terrestrial species, both in and around the lake itself, as well as in the SFSR downstream of the lake.

In an effort to balance these often competing beneficial uses, the SPLAT collaborative group, including the USFS and with input from the Board's staff, after years of negotiations, settled on a process for determining how much water in any given year should be left in Pinecrest Lake to support recreation, how much should be withdrawn to satisfy the consumptive needs of TUD's customers, how much should be withdrawn to generate electricity, and how the various flows should be managed to support the ecology of the lake and SFSR downstream. The resulting measure, adopted by SPLAT, the USFS, and FERC, begins by

⁷ PG&E provides the water to TUD pursuant to a 1983 contract with TUD's predecessor, County of Tuolumne.

expressly articulating the various objectives to be achieved for each competing beneficial use of the water. For example, consumptive use is expressly recognized as an operational objective with water deliveries to TUD managed consistent with the recreational and ecological objectives “to the greatest extent feasible”⁸; with respect to environmental protection, streamflow targets in various SFSR reaches are established to best enhance the ecological benefits of the Project⁹; with respect to recreation, Pinecrest Lake is to be “maintained as high as feasible, consistent with achieving the specified Ecological and Consumptive Water Supply Operational Objectives”, and above Elevation 5,610 feet “for as many days as feasible beginning Memorial Day weekend and extending through Labor Day weekend”¹⁰; and, finally, with respect to power generation, flows in the Philadelphia Canal are to be maintained at sufficient levels to keep the canal free of debris, ice, and ready for emergency operation.¹¹

With these principles in mind, the USFS condition, SPLAT measure, and FERC measure require PG&E each year to develop a proposed drawdown curve for Pinecrest Lake based on the year’s hydrological conditions and in consultation with the USFS, the Board, the California Department of Fish and Game, and TUD.¹² If the USFS or the Board do not approve PG&E’s proposed drawdown curve, PG&E is to develop an alternate drawdown curve again subject to approval by the USFS and the Board.¹³ If this alternate drawdown curve is not

⁸ USFS Final 4(e) Condition 34; SPLAT Measure 32, FERC Recommended Measure 7.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

approved by the USFS and the Board, those agencies can propose their own alternate drawdown curve which PG&E is then required to implement.¹⁴ Thus, the Board was to have a central role in developing and approving the drawdown curve for Pinecrest Lake.

In contrast to the consultative process established by the USFS condition, SPLAT measure, and FERC measure, the Board's SFSR flow measure, Certification Condition 4, rejects the annual consultation concept in favor of staff's own fixed and unilateral approach. First, the Board's staff eliminated the delicately crafted language articulating and balancing the objectives to be achieved in terms of recreation, consumptive use, power generation and ecological protection. Second, staff set a "target elevation" for Pinecrest Lake of 5,610 feet from the end of the spring spill period through Labor Day.¹⁵ Although stated as a "target", in practice, the Certification Condition transforms the USFS, SPLAT, and FERC staff recreational objective to keep Pinecrest Lake above 5,610 "for as many days as feasible" into a minimum lake elevation mandate. Third, in years when Pinecrest Lake cannot be maintained above 5,610 feet (presumably from the end of the spring spill period through Labor Day), PG&E may release water only to meet the minimum streamflow schedule set forth in the Certification Condition and to provide no more than 5 cubic feet per second (cfs) of water to Spring Gap Powerhouse. Finally, the Certification Condition requires PG&E to draw down Pinecrest Lake by two feet, from 5,617 feet to 5,615 feet, "as early as reasonably feasible" each year at the end of the spring spill period (assuming that in doing so the lake level can still be maintained at 5,610 feet through

¹⁴ Id. In the unlikely event that the agencies propose an alternate drawdown curve that cannot be physically implemented due to actual physical conditions or the agencies submit multiple conflicting alternate drawdown curves, then PG&E is to implement its proposed alternate drawdown curve upon approval of that drawdown curve by FERC. Id.

¹⁵ This elevation may be reduced to not lower than 5,608 feet if it is demonstrated that recreation benefits can be maintained at this lower level. Certification Condition 4.

Labor Day).¹⁶

The primary consequence of the regime established in Certification Condition 4 is to elevate recreational use above both consumptive use and power generation and thereby unravel the delicate balance struck by the collaborative group. Perhaps most striking, the Certification Condition could halt water deliveries to TUD over the summer if Pinecrest Lake cannot be maintained above 5,610 feet through Labor Day.

2. Compliance Issues Related to Pinecrest Lake Elevation Mandate.

The adoption of the 5,610-foot elevation as a mandate for Pinecrest Lake rather than a target has the potential to create significant compliance issues for PG&E. For example, Certification Condition 4 establishes certain minimum instream flow requirements. To ensure compliance with such requirements, PG&E's practice is to release more than the required minimum streamflow given that flow monitoring equipment can sometimes be imprecise and to account for variations in flows caused by operational conditions. See Attachment I, Affidavit of Scott Fee, ¶ 5. PG&E is concerned that should it prove not possible to maintain Pinecrest Lake at the 5,610-foot elevation through Labor Day, the Board could find PG&E to be in violation of the minimum elevation requirement by virtue of the "over-releases" made to ensure compliance with the minimum instream flow requirements. There is certainly nothing in the Certification to prevent the Board (and FERC) from so finding. If the 5,610-foot elevation were a target rather than a mandate (as contemplated by the USFS condition, SPLAT measure, and FERC measure), this compliance issue would not be present.

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¹⁶ In critically dry water years, PG&E may propose modifications to the flow requirements, subject to Board approval. Certification Condition 5.

Similarly, PG&E, as a practical matter, would attempt to maintain Pinecrest Lake above 5,610 feet, perhaps at 5,611 feet, to ensure it was in compliance with the 5,610-foot minimum elevation requirement on Labor Day. Id. at ¶ 4. This would impact the timing of PG&E's effort to draw the lake down to 5,615 feet at the end of the spring spill season, as the Board also requires. Id. In any given year, the Board could conclude that it was "feasible" for PG&E to draw down the lake earlier than it did had PG&E not established as large an elevation "buffer." Again, there is nothing in the Certification to prevent the Board (and FERC) from so finding. If the 5,610-foot elevation were a target rather than a mandate, this compliance issue would not be present.

As these two examples demonstrate, reservoir operations by their nature require some degree of flexibility to meet competing goals without subjecting the licensee to potential violations. Establishing a target lake elevation, with inherent operational room on the margins, is a standard mechanism for providing that flexibility. Regrettably, the Board has chosen not to provide PG&E with that needed flexibility.

In addition, PG&E is concerned that it could face two competing drawdown curves for Pinecrest Lake. As noted, the Board has established a lake elevation of 5,610 feet through Labor Day as its top priority to enhance recreation. The corresponding USFS condition, in contrast, provides: "In all water year types, once spill at Strawberry Dam stops, the water surface of Pinecrest Lake is maintained as high as feasible, *consistent with achieving the specified Ecological and Consumptive Water Supply Operational Objectives*, and above elevation 5,610 feet (PG&E Datum) for as many days as feasible beginning Memorial Day weekend and extending through Labor Day weekend." USFS Final 4(e) Condition 34 (emphasis supplied). Consequently, it stands to reason that the drawdown curve developed by the USFS

with other SPLAT stakeholders will differ from that necessitated by the Board's requirement to maintain the specified lake elevation for recreation purposes, regardless of other interests. It is not clear to PG&E how it would reconcile two, potentially mutually exclusive, directives.¹⁷

3. Compliance Issues Related to Philadelphia Canal.

Certification Condition 4 also unduly restricts the amount of water PG&E can release down the Philadelphia Canal to the Spring Gap Powerhouse over the summer months. Certification Condition 4 limits flows in the Philadelphia Canal to a maximum of 5 cfs from the end of the spring spill season through Labor Day. See Certification Condition 4.¹⁸ The corresponding USFS condition, SPLAT measure, and FERC measure do not include a maximum flow limit in the Philadelphia Canal. See Attachments D, E and F. PG&E questions the need for such a restriction given the Board's requirement that PG&E maintain Pinecrest Lake at an elevation of 5,610 feet through Labor Day. That requirement by itself limits how much water PG&E can release from Pinecrest Lake.¹⁹ There would appear to be no need for additional operational constraints to limit how much water PG&E can divert to the Philadelphia Canal from Pinecrest Lake, assuming all instream flow requirements downstream of Pinecrest Lake are met.

¹⁷ A similar problem is posed by Certification Condition 5, relating to modifications of flow requirements in Critically Dry water years. This condition conflicts with the analogous provisions in USFS Final 4(e) Condition 34, SPLAT Measures 30, 31 and 32, and FERC measures 4, 5 and 7. The USFS condition, SPLAT measures, and FERC measures contemplate the development of modifications to flow requirements in Critically Dry water years through a consultation process that includes the Board. The Board's Draft Condition 5, in contrast, removes itself from the consultation process, reserving for itself the authority to approve streamflow modifications. As a result, PG&E could be placed in the untenable position of having two different stream flow management directives in Critically Dry water years. Consequently, PG&E requested that the Board revise Condition 5 to make it consistent with USFS Final 4(e) Condition 34 and SPLAT Measures 30, 31 and 32. The Board declined stating that doing so would not "change the potential for disputes during critically dry year consultation." Response to Comments, p. 4. This is no doubt true. But what it would do is establish a single process for resolving those disputes such that PG&E would ultimately be subject to only one streamflow requirement.

¹⁸ This requirement is subject to certain limited exceptions. See Certification Condition 4.

¹⁹ This would be true even if the Board adopts PG&E's request to make the 5,610-foot elevation requirement a target.

Stated differently, limiting flows in the Philadelphia Canal will have no additional impact on the elevation level of Pinecrest Lake, which is the Board's primary concern. Nor has the Board offered any ecological or other justification for limiting flows in the Philadelphia Canal.

Nonetheless, PG&E is willing to accept a reasonable limitation on flows in the Philadelphia Canal during the summer months. But in its comments on the draft Certification, PG&E requested that the 5 cfs requirement be a "target" rather than a "maximum" flow to allow PG&E to meet the operational objective of keeping the canal ready for emergency operation. While the Board did endeavor to give PG&E some additional flexibility (by allowing PG&E to average the 5 cfs over a 24-hour period and to exceed it on an instantaneous and infrequent basis by up to 1 cfs),²⁰ the additional flexibility is inadequate. As noted above, it is PG&E's practice in all instances to allow for a compliance buffer. Consequently, to meet the 5 cfs maximum limit, PG&E would operate the Philadelphia Canal at only about 4 cfs. See Attachment I, ¶ 6. PG&E would likely choose to shut the Spring Gap Powerhouse down rather than run it at such a low load given the resulting wear and tear on the unit. Id. If the Spring Gap Powerhouse is shut down, it is more difficult for PG&E to respond to emergencies and outages on the nearby Donnell's Curtis 115KV line. Id. In such circumstances, the Spring Gap Powerhouse is the only source of electrical power for local residents. Id. If the Powerhouse is shut down and needs to be re-started, particularly after an extended shut down period, operators will need to make sure the unit is operating properly and troubleshoot any issues that arise, thereby increasing the response time to a transmission related outage. Id. In short, PG&E believes the public interest

²⁰ This is the one instance where Board staff changed substantive language in response to PG&E's comments on the draft Certification. PG&E notes that it is standard to allow for this type of compliance margin. Indeed, the Certification establishes such a buffer with respect to the minimum instream flow requirements. See Certification Condition 4 ("The specified minimum streamflow schedule in this condition is the mean flow over a continuous 24-hour period. Instantaneous streamflow may, on an infrequent basis, deviate below the specified minimum streamflow by up to 10 percent").

requires that it be allowed to run a full 5 cfs through the Philadelphia Canal. If the Board agrees, then it should establish a target of 5 cfs rather than a maximum of this magnitude.

The 5 cfs maximum not only hampers PG&E's ability to put a full 5 cfs in the Philadelphia Canal on a regular basis, it also creates a significant compliance risk for PG&E. Even if PG&E endeavored to keep a maximum of only 4 cfs in the Philadelphia Canal as a compliance buffer, it could not ensure flows would never go above 6 cfs for an instant, thereby triggering a violation of the Condition. Anytime PG&E releases water from Pinecrest Lake to meet minimum instream flow requirements, there is the potential for some fraction of that water to enter the Philadelphia Canal for a short period of time until the system regulates itself. *Id.* at ¶ 7. This is an unavoidable consequence of canal operations. *Id.* Thus, flows in the Philadelphia Canal could easily increase from 4 cfs to slightly above 6 cfs for some small increment of time. This constitutes a significant FERC license compliance risk for PG&E. PG&E respectfully suggests that it is an unnecessary one. Again, PG&E questions the need for any maximum on flows in the Philadelphia Canal given that the flows will already be restricted by the Pinecrest Lake elevation requirement. But to the extent the Board is persuaded one is necessary, surely a requirement that PG&E establish 5 cfs as a maximum target for flows in the Philadelphia Canal will satisfy whatever concerns the Board may have. This will also relieve PG&E of the significant FERC license compliance risk associated with an unnecessary instantaneous maximum flow requirement.

4. Infringement of PG&E's Pre-1914 Water Rights.

Finally, PG&E notes that Certification Condition 4 restricts PG&E's pre-1914 water rights. PG&E has a pre-1914 right to store 18,312 acre-feet in Pinecrest Lake for power purposes. See Attachment J, Affidavit of Joseph Ray, ¶ 4. PG&E has a pre-1914 right to store

839 acre-feet in Lyons Reservoir for power and public service purposes. Id. at ¶ 5. And PG&E has a pre-1914 right to divert 52 cfs from the SFSR into the Tuolumne Canal for power and public service purposes. Id. at ¶ 6. The Board's requirement to maintain Pinecrest Lake at 5,610 feet through Labor Day restricts PG&E's use of stored water at Pinecrest Lake, its ability to store water at Lyons Reservoir, and its ability to divert its full water right at the Tuolumne Canal. Id. at ¶¶ 7-9.

Absent this relicensing proceeding, PG&E questions whether the Board would have the legal authority to so restrict PG&E's water rights. Section 401 of the federal Clean Water Act does not expand a State's authority to regulate. Rather, it ensures that any federal permit resulting in a discharge into navigable waters "will comply with the applicable water quality parameters in the Act," and "with appropriate state law related to water quality."²¹ This verbiage assumes the State has the requisite independent authority under State law to impose the requirement. If it does not, Section 401 of the Clean Water Act does not confer it. In short, the Board would not appear to be able to do indirectly through the Section 401 process what it cannot do directly under established state authorities. And since the Board may not directly regulate PG&E's pre-1914 water rights, PG&E is not certain it may do so through the Section 401 certification process.

5. The Board's Streamflow Measures for the South Fork Stanislaus River Are Not Justified.

As discussed above, the Board's staff declined to adopt the collaboratively-developed SPLAT measures that balance the water resources of the SFSR, opting instead for a fixed elevation level for Pinecrest Lake at a certain date. Staff seeks to justify its unilateral

²¹ State Water Resources Control Board, Initial Study, Spring Gap-Stanislaus Hydroelectric Project, p. 1. See also 33 U.S.C. § 1341(d).

approach by noting that the SPLAT agreement is “not a legally binding contract or settlement agreement.” Response to Comments, p. 3. However, the USFS conditions, once they are incorporated verbatim into the Project license by FERC,²² will be legally binding on PG&E. And, of course, were the Board to include the measures as conditions in its Certification, they “shall become a condition” in the FERC license as well. 33 U.S.C. § 1341(d).

The Board’s staff also expressed concern over the lack of certainty inherent in the USFS and SPLAT collaborative process since what the Pinecrest Lake drawdown curve will look like in any given year cannot be known in advance. Response to Comments, p. 3. But the staff, in attempting to create certainty, has sacrificed the flexibility essential to balancing competing beneficial water uses. Certainty is not a valid policy goal in and of itself. It must be balanced with reasonableness, effectiveness, and legitimacy.

In its comments on the Draft Certification, PG&E urged that if the Board truly intended to mandate a specific elevation level for Pinecrest Lake, that it performs a rigorous analysis with stakeholder consultation to determine an elevation that provides sufficient flexibility to support all of the beneficial uses of the water resource. This analysis, PG&E suggested, should consider all of the objectives in the USFS condition and SPLAT measure.

As noted, the Board’s staff failed to undertake this analysis, opting instead for what amounts to an arbitrary elevation level that while workable as a flexible target, is not workable, nor legally supportable, as a rigid mandate. Staff’s Response to Comments document states that the 5,610-foot elevation level was based on data collected by the USFS and “from discussion by the Stanislaus Planning Action Team (SPLAT) during the relicensing process.”

²² FERC must adopt terms and conditions submitted by federal agencies of jurisdiction. City of Tacoma, Washington v. FERC, 460 F.3d 53, 67 (2006)(“the FPA gives FERC no discretion to reject Interior’s section 4(e) conditions”).

The specific data is not identified, nor discussed, let alone rigorously analyzed for impacts on the various resource interests. And, of course, the SPLAT discussions of lake elevation were in the context of setting a reasonable target, not a fixed mandate. If the SPLAT participants had known that their lake elevation target would be treated as a mandate, they might have chosen, at a minimum, a different elevation level, or, indeed, a completely different mechanism for balancing the competing interests.

Regrettably, the Board's staff, in its pursuit of certainty, has limited reasonable and needed flexibility for PG&E to manage effectively the limited water resource. Rather than giving due deference to all competing water resource beneficial uses, the Board has elevated recreational use above all others and, in the process, assigned to the licensee untenable license compliance risks. PG&E respectfully suggests that this is improper. The Legislature, in enacting the Porter-Cologne Water Quality Control Act, stated its overarching policy as follows: "The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality *which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.*" Water Code § 13000 (emphasis supplied). Putting aside the fact that the rigid mandates in Certification Condition 4 are designed more to enhance recreation than water quality, it remains improper to elevate recreation over all other beneficial uses. See also Cal. Water Code § 106 ("It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation").

As stated in its comments on the draft Certification, PG&E believes a collaborative approach for developing a drawdown curve for Pinecrest Lake and related flow

measures best preserves, protects and enhances the existing beneficial uses of the water resources since it expressly allows for consideration of all beneficial uses while providing the flexibility to address those uses in a way that stakeholders can support. Consequently, PG&E renews its request that the Board revise Certification Conditions 4 and 5 to make them consistent with USFS Final 4(e) Condition 34, SPLAT Recommended Resource Measure 32, and FERC Recommended Measure 7.

B. Condition 15 - Spill Channel Management Plan.

PG&E utilizes spill channels at its powerhouse forebays as an alternate means to return water to the river in case of unplanned powerhouse shutdowns (tripping) and other operational needs. Water released through spill channels is returned to the river without first flowing through a powerhouse. Certification Condition 15 requires PG&E to submit to the Board a spill channel management plan that includes measures to “minimize the use of the spill channels, reduce the magnitude and duration of spills, monitor channel stability, and monitor[] and report[] . . . water quality impacts during spill events.” PG&E does not believe that the Board is empowered to impose mitigation measures that could restrict how PG&E operates its hydroelectric project absent a connection to water quality. Simply stated, Certification Conditions must serve an express water quality objective. 33 U.S.C. § 1341(d). The Board’s spill channel measure, as currently drafted, does not.

The Board’s spill channel Certification Condition is not expressly tied to achieving environmental objectives. Rather, it requires PG&E, for example, to submit a plan that includes measures to “reduce the magnitude and duration of spills” irrespective of the potential benefits, or lack thereof, to water quality. PG&E could be forced to change its operations simply to meet a requirement to reduce the duration of a spill even though doing so may not enhance the

Board's water quality objectives. The measure is unduly burdensome in that it seeks to control operational parameters (i.e., use of the spill channels, reduction in magnitude and duration of spills) that may not be within PG&E's control or which could adversely affect operational flexibility.

For example, Spring Gap Powerhouse operates on "float control" which means that the Spring Gap forebay remains at a constant elevation no matter how much water is flowing into it. See Attachment I, ¶ 8. The generating unit uses the amount of water necessary to keep the forebay at this constant elevation. Id. Consequently, if the powerhouse trips offline stopping flow through the generating unit, there will be a spill as the forebay elevation increases by a few inches. Id. There will also be spills every time the generating unit is used to govern local load. Id. These spills occur because PG&E must have more water available in the canal feeding the forebay than the current electric demand requires so as to ensure it can provide additional generation if the demand increases. Id. Thus, occasional spills are an unavoidable consequence of the operations of the Spring Gap unit. To effectively reduce the number of spills at Spring Gap Powerhouse, PG&E would have to completely re-engineer the system. Id.

Spills also occur at Stanislaus Forebay for reasons beyond PG&E's control. Unlike Spring Gap forebay, the elevation of Stanislaus forebay fluctuates significantly as the California Independent System Operator ("CAISO"), which manages the output of the unit, makes decisions in real-time about energy requirements for the system. Id. at ¶ 9. Should the Stanislaus unit trip offline when the forebay happens to be high, a spill will occur. Id. Again, there is no way to guard against such a spill other than perpetually keeping the forebay at an artificially low elevation which will hamper the CAISO's ability to dispatch power. Id. In short, a requirement limiting the number, duration and/or magnitude of spills would impose significant

limitations on PG&E's operations. Such limitations cannot be justified absent a direct and substantial connection to water quality.

In this instance, there is no connection to water quality, let alone a direct and substantial connection. The Certification itself states that "[b]ased on results of monitoring, short term spills will not result in significant impacts to aquatic resources." Certification, p. 4. In its Response to Comments document, Board staff again acknowledges that "[s]tudies conducted by PG&E showed that the channels, under the flow conditions tested, will have a minimum impact on water quality standards." Response to Comments, p. 6.

Notwithstanding the data, Certification Condition 15 requires a burdensome spill channel management plan that could place constraints on PG&E's operations. The Certification justifies this Condition with the conclusory statement that it is necessary "both from a water use standpoint and for protection of water quality and environmental resources." Certification, p. 4. Neither justification withstands scrutiny. With respect to water use, PG&E is as concerned, if not more so, with minimizing spills than anyone else given that water that spills is not available to generate electricity. The Certification need not include any spill channel management plan to incent PG&E to reduce spills.

With respect to water quality, Certification Condition 15 ignores the undisputed evidence in the administrative record demonstrating that the spills at issue have negligible impacts on water quality. Staff dismisses this evidence with the truism that the tests PG&E conducted "may not represent all operational scenarios and potential impacts." Response to Comments, p. 6. The problem with this statement, of course, is that as a technical and scientific matter, it is impossible to test for "all operational scenarios and potential impacts." PG&E respectfully suggests that it is arbitrary and unfair for to disregard undisputed evidence in the record and instead require PG&E

to prove the negative. If the Board wishes to impose a burdensome spill channel management plan, it must do more than state equivocally and without any supporting evidence, that “[t]he operation of the spill channels has *possibly* significant impacts on water quality.” Response to Comments, p. 6 (emphasis supplied).

PG&E is not opposed to a spill channel management measure that is expressly tied to stated environmental objectives rather than to operational parameters. Indeed, the USFS’ spill channel condition does precisely that and PG&E supports it. Specifically, the USFS condition states that its objective is to “minimize environmental impacts to National Forest lands over which spills occur.” USFS Final 4(e) Condition 35. The USFS condition requires PG&E to “first evaluate the magnitude of problems associated with spill channel water and sediment discharge to determine a reasonable course of mitigation and monitoring to meet Plan objectives.” *Id.* Importantly, the USFS condition does not require PG&E to reduce the “magnitude and duration of spills” as an end in itself; rather, PG&E is required to minimize the magnitude and duration of spills if doing so is necessary to “minimize environmental impacts to National Forest lands.”²³ PG&E respectfully suggests that the Board does not have the authority to dictate operational parameters in the absence of a showing that the requirements are necessary to meet specific water quality objectives. The Certification Condition, in un-tethering itself from express environmental objectives, and in failing to address, let alone document, a connection between its required operational conditions and water quality objectives, is not legally supportable. Consequently, PG&E requests that the Board revise Certification Condition 15 to make it consistent with USFS Final 4(e) Condition 35.

²³ FERC staff also tied its recommended spill channel management plan to water quality objectives. See Attachment F, p. 410, FERC Recommended Additional Measure 2 (PG&E is required to “identify reasonable measures to minimize erosion and protect the water quality of the [Middle Fork Stanislaus River], as appropriate”).

C. Condition 10 – Recreational Streamflow Event.

Certification Condition 10 requires PG&E to provide a recreation streamflow event immediately below Sand Bar Diversion Dam on the Middle Fork Stanislaus River at certain times and under certain conditions. The Condition is problematic because it does not allow PG&E time to make facility modifications necessary to provide the recreation streamflow event. The Condition requires PG&E to ensure that during the event, flows below the dam are between 700 cfs and 2,000 cfs. However, PG&E cannot currently measure the required streamflows below Sand Bar Diversion Dam because they are above the rated capacity for the existing gauging facility. See Attachment I, ¶ 10. To do so, it must modify the existing weir. Id. PG&E can only estimate flows until the weir is improved and other flow monitoring equipment is installed, a construction project that will take substantial time to scope, engineer and build. Id. Recognizing this limitation, the SPLAT recreational streamflow event measure allows PG&E three years to make the necessary modifications and requires PG&E, prior to such facility modifications, to “make a good faith effort” to provide the recreation streamflow event within the capabilities of the existing facilities. SPLAT Recommended Resource Measure 21. PG&E renews its request that the Board adopt this same approach.²⁴

Certification Condition 10 also removes a limitation on PG&E’s obligation to provide a recreation streamflow event. While PG&E intends to comply with recreational flow requirements, under certain CAISO emergency stage alert situations, the Board should excuse PG&E from providing an otherwise required recreational streamflow event. The corresponding

²⁴ In its Response to Comments, the Board stated that if PG&E submitted evidence demonstrating that the current facilities are inadequate to provide the recreation streamflow events, then the Board would “evaluate the information and make a determination on whether additional time is necessary to make facility modifications.” Response to Comments, p. 6.

SPLAT measure states that PG&E is relieved from providing a recreation streamflow event if “long term forecasts of electric system reserves or short term electric system conditions cause the value of the water for electric generation to more than triple what it otherwise would have been.” SPLAT Recommended Resource Measure 21. This language was designed in part to balance beneficial uses by protecting PG&E’s customers from excessive electricity rates and to help ensure grid reliability. PG&E requested in its comments on the draft Certification that the Board inserts this text into Condition 10. Staff declined. It stated that the energy market has changed since the SPLAT measure was negotiated and in the current context “price differential is not a valid indicator of electrical grid conditions that would trigger a need to eliminate recreation streamflow events.” Response to Comments, p. 6. While PG&E agrees that electric market prices may no longer be the best indicator of an impending grid emergency event, it remains appropriate to have some trigger. Consequently, PG&E recommends replacing the price trigger with a more direct indicator of system conditions as determined and reported by the CAISO, whose responsibility is to ensure grid reliability. Specifically, the CAISO advises electric market participants of the electric grid status when emergency conditions threaten reliability by initiating alerts, publishing market notices, and implementing Stage 1, 2 & 3 level Emergency Notices. See Attachment K, Affidavit of Kevin Ballard, ¶ 4. PG&E respectfully suggests that when the CAISO initiates the broadcast and implements the conditions of these notices, PG&E should be relieved of the obligation to provide a recreation streamflow event so as to allow the Stanislaus Powerhouse unit to provide additional grid support. This will help protect electricity customers in the CAISO’s operating territory from possible rotating power outages, as the water required to be released by PG&E to establish a recreation streamflow event could produce electricity equivalent to the amount of energy needed to serve approximately 35,000 homes. Id. at ¶ 5.

D. Inconsistent Timeframes.

Several of the Certification Conditions require actions by PG&E within prescribed timeframes that differ from corresponding timeframes for identical requirements in the USFS conditions, SPLAT measures, and FERC measures. These latter timeframes were carefully developed through collaborative negotiations in which the Board's staff participated. The disparity creates an undue administrative burden with no added value or purpose and, in fact, it may be impossible for PG&E to comply with some of the timeframes specified in the Certification. In its comments on the draft Certification, PG&E requested that the Board conforms its timelines to the corresponding timelines in the USFS conditions and SPLAT measures. Staff declined to do so. Consequently, PG&E renews its request below.

1. Condition 8 – Fish Screen for Stanislaus Power Tunnel.

Certification Condition 8 requires PG&E to construct a fish screen at the entrance to the Stanislaus Power Tunnel within four years following approval of the plans and drawings by the Board. Because PG&E will need approvals from both the Board and FERC prior to commencing construction, PG&E is concerned that one agency could approve the drawings and plans well in advance of the other, thereby making it difficult for PG&E to comply with or fully utilize both four-year timelines. PG&E, therefore, requested in its comments on the draft Certification that the Board revise Condition 8 to state that PG&E must construct the fish screen within four years of the date the plans and drawings are approved by both the Board and FERC, the same timeframe adopted by the SPLAT collaborative group.²⁵

The Board's staff declined PG&E's request. It stated that to avoid a conflict, PG&E could merely "submit the plans for the State Water Board and FERC concurrently and

²⁵ See SPLAT Recommended Resource Measure 33.

receive concurrent approvals.” Response to Comments, p. 5. While it is certainly possible that PG&E could receive concurrent approvals by submitting the plans concurrently (and PG&E will endeavor to do so), it is also possible that the two agencies’ approvals will occur on different time horizons. Indeed, this seems like the more realistic scenario. PG&E fails to understand why the Certification cannot accommodate what is essentially a ministerial request. It is not clear how the Board’s interests would be substantially compromised by such a minor revision. On the other hand, the requested change would relieve PG&E of the potentially significant administrative and compliance burden associated with having to work within two distinct time frames. For example, were the Board to approve the fish screen plan before FERC, PG&E would not begin to act on the plan until it had received approval from FERC, both because PG&E could not, as a legal matter, do so and because, as a practical matter, FERC could modify the plan in some material way. Meanwhile, the Board’s 4-year clock would tick in the interim. It is unfair to hold PG&E to a timeline predicated on Board approval where the Board knows in advance that there is a distinct possibility that PG&E may not be able to act upon Board approval. PG&E respectfully suggests that whatever delays to the four-year window may occur while PG&E awaits approval from both the Board and FERC will be insubstantial compared to the burdens visited on PG&E by imposing a timeline that begins to run before PG&E may act.

2. Condition 8 – Hardhead Monitoring.

Certification Condition 8 requires PG&E, within six months of license issuance, to submit to the Board a plan to determine if the specified streamflow regime affects hardhead habitat in certain areas by evaluating hardhead distribution and abundance in those areas. The Certification Condition further requires PG&E, within twelve months of license issuance, to conduct a snorkel survey and a survey of algae abundance. The timeframe established by this

Condition is problematic since it could prove impossible for PG&E to comply with it. By way of example, were PG&E to receive its FERC license in June, it would need to submit its hardhead monitoring plan to the Board by December. Assuming the Board approved the plan shortly after submittal, PG&E would be required to complete the snorkel and algae surveys during the winter so that they would be completed by the following June. However, snorkel and algae monitoring surveys are generally not conducted in the winter both because of high river flows and cold water temperatures in the winter, and because fish are more active and algal production is greatest during the summer months. See Attachment L, Affidavit of Thomas K. Studley, ¶ 4. PG&E believes the intent of the collaboratively-developed study was to conduct the majority of the work in the summer and fall periods. Id.

It is precisely for this reason that the collaborative group agreed to require PG&E to perform the hardhead snorkel and algae surveys in the first full calendar year after issuance of the new license. USFS Final 4(e) Condition 39; SPLAT Measure 34.²⁶ In its comments on the draft Certification, PG&E requested that the Board modify Condition 8 to make it consistent with the corresponding USFS condition and SPLAT measure. Staff declined. Because it may very well prove impossible to comply with, PG&E renews its request that the Board revise Certification Condition 8 to make the timeframes consistent with the corresponding USFS condition and SPLAT measure.

3. Condition 15 – Spill Channel Management Plan.

As discussed above, Certification Condition 15 requires PG&E to submit to the

²⁶ A similar problem arises with the Board's requirement to collect additional algae abundance information, if needed, "within 24 months of license issuance." To address this issue, the USFS Condition and SPLAT Measure require that the work be completed in the second full calendar year after license issuance. USFS Final 4(e) Condition 39; SPLAT Measure 34.

Board a spill channel management plan that includes measures to, among other things, minimize the use of the spill channels and reduce the magnitude and duration of spills. The Condition requires PG&E to submit the spill channel management plan to the Board within six months of license issuance. The corresponding USFS condition requires PG&E to submit a spill channel management plan within one year of license issuance. USFS Final 4(e) Condition 35.²⁷ In its comments on the draft Certification, PG&E, in addition to requesting that the spill channel management plan focus on mitigating the environmental impacts of spill channel usage rather than on limiting operations, also requested that the Board adopt the same one-year timeframe for submission of the plan imposed by the USFS. Staff declined stating that PG&E could meet the six-month deadline. While the staff may be correct, PG&E is left questioning why it went to the effort to negotiate a one-year timeframe with every other stakeholder if the staff, which participated in those very same discussions, would ultimately ignore the compromise reached. PG&E respectfully suggests that the Certification adopt the same one year time frame as the corresponding USFS final 4(e) Condition.

4. **Condition 8 – Relief Reach Riparian Vegetation Restoration and Stabilization.**

Certification Condition 8 requires PG&E, within six months of license issuance, to submit to the Board a plan to restore and stabilize riparian vegetation along the Relief Reach, the 15.8 mile-long reach of Summit Creek and the Middle Fork Stanislaus River from Relief Dam to Donnell's Reservoir. The Certification Condition further requires PG&E to develop recommendations for focused studies "within 12 months of license issuance."

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²⁷ The corresponding FERC measure also contains a one-year timeframe for this deliverable. FERC Recommended Additional Measure 2

The corresponding USFS condition, SPLAT measure, and FERC measure require PG&E to develop study recommendations within the first full calendar year following issuance of a new license. USFS Final 4(e) Condition 39; SPLAT Recommended Resource Measure 34; FERC Recommended Measure 15. To avoid multiple timelines for the same deliverable, PG&E requested that the Board modify Condition 8 to make this provision consistent with the USFS condition and SPLAT measure. Staff declined. Again, while PG&E can perhaps comply with the more stringent timeframe specified in the Certification, the Board, through its unilateral actions, is creating a disincentive for stakeholders to spend the resources to reach agreement on these issues. PG&E respectfully suggests that it would serve the overarching hydroelectric relicensing process much better were the Board to act in a way that supports collaboratively reached solutions, unless it is absolutely mission critical for the Board to act unilaterally.

E. Condition 22.

In its Response to Comments, the Board agreed with PG&E to remove this Condition, yet it remains in the text of the Certification.²⁸ PG&E assumes this was an oversight and that it will be deleted.

F. Conclusion.

In summary, PG&E remains puzzled that staff did not adopt any of PG&E's substantive comments on the draft Certification. PG&E respectfully suggests that this rejection does a disservice to the collaborative process in which Board staff participated, fails to advance clear water quality objectives, and places PG&E at unnecessary risk of license compliance violations. For these reasons, PG&E requests that the Board grant its Petition for Reconsideration and modify the Certification as discussed herein.

²⁸ This Condition appeared in the draft Certification as Condition 23.

VI. SPECIFIC ACTION OF THE STATE BOARD REQUESTED BY THE PETITIONERS.

PG&E requests that the final Certification be modified in the manner described in Section V above.

VII. LIST OF INTERESTED PARTIES.

Please see attached Certificate of Service representing designated parties to the State Water Board proceedings.

VIII. STATEMENT THAT COPIES OF THIS PETITION HAVE BEEN SENT TO THE REGIONAL WATER BOARD.

A true and correct copy of this petition for reconsideration was sent, *via U.P.S. Next Day Air*, on October 13, 2008 to the Central Valley Regional Water Quality Control Board at the following address:

William Marshall
Supervising Water Resources Control Engineer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Also, please see the attached Certificate of Service.

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

PG&E has submitted a request, dated October 13, 2008, to the Executive Director of the SWRCB for the preparation of the Staff Record related to the Certificate, if available, in connection with this Petition. A copy of this Request for Preparation of a State Board Staff Record, as required by 23 CCR § 3867(d)(9), is Attachment L hereto.

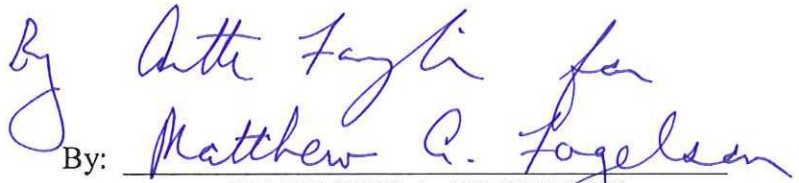
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X. SUMMARY OF THE MANNER IN WHICH THE PETITIONER PARTICIPATED IN ANY PROCESS LEADING TO THE ACTION IN QUESTION.

PG&E explained its participation in the process leading to issuance of the final Certification in Section IV above.

Respectfully submitted,

By: 
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Dated: October 13, 2008

CERTIFICATE OF SERVICE

On October 13, 2008, I served a true and correct copy of the following document:

***Pacific Gas and Electric Company's
Petition for Reconsideration
and Request for a Stay of the Water Quality Certification
for the Spring Gap-Stanislaus Hydroelectric Project***

on the State Water Resources Control Board, *via UPS Next Day Air Service*, located at 1001 "T" Street, Sacramento, CA 95814-2828. Service was also completed by serving said document to all parties listed on the Service List on file with the FERC Docket Office for FERC Docket No. P-2130.

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

Executed in San Francisco, California on October 13, 2008.


ELIZABETH J. DIAMOND