Magalie Roman Salas  
Office of the Secretary  
Docket Room  
Federal Energy Regulatory Commission  
888 First Street, N.E., Room 1A, East  
Washington, D.C. 20002

Re: Turlock Irrigation  
Project Nos.: 2299

Dear Ms. Salas:

Enclosed for filing in the above referenced matter, please find enclosed an electronic filing of a document entitled “PETITION OF THE NATIONAL MARINE FISHERIES SERVICE FOR MODIFYING PROJECT STRUCTURES AND OPERATIONS.”

Please feel free to contact me if you have any questions.

Sincerely,

Miles M. Croom  
Northern California Supervisor  
Habitat Conservation Division
UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of Articles 10, 37, and 58 of The New Don Pedro Project Project No. 2299

PETITION OF THE NATIONAL MARINE FISHERIES SERVICE FOR MODIFYING PROJECT STRUCTURES AND OPERATIONS

Pursuant to the reserved discretionary authority contained in Articles 10, 37, and 58 of the License for the New Don Pedro Project (FERC No. 2299), the National Marine Fisheries Service (NOAA Fisheries) hereby petitions the Federal Energy Regulatory Commission (FERC) to modify the minimum flow provisions of Article 37 as necessary to protect both steelhead and chinook salmon in the Tuolumne River. NOAA Fisheries believes that current project operations are adversely affecting Central Valley steelhead, listed as threatened under the Endangered Species Act (ESA), 16 U.S.C. 1531 et seq., and that modifications to project operations are necessary to reduce these impacts and to comply with the terms of the license, the Federal Power Act, and the ESA. In order to comply with the ESA, we request that FERC initiate consultation with NOAA Fisheries pursuant to Section 7(a)(2) of the ESA regarding the impacts of federally licensed New Don Pedro project facilities and operations on Central Valley steelhead.
The person to whom correspondence, pleadings and other papers regarding this proceeding should be addressed and the person whose name is to be placed on the Commission’s official service list is designated as follows pursuant to Rule 203:

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I. BACKGROUND

A. NOAA FISHERIES’ INTEREST IN THIS PROCEEDING

NOAA Fisheries is responsible under federal law for protecting and managing a variety of marine resources, including anadromous salmonid species listed under the Endangered Species Act (ESA) and their designated critical habitat. The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. 1531(b). In order to protect species listed as threatened or endangered, the ESA generally prohibits the “take” of such species and requires all federal agencies to ensure, in consultation with NOAA Fisheries (or the United States Fish and Wildlife Service (FWS)), that their actions will not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat.

B. STATUS OF LISTING ACTIONS AND CRITICAL HABITAT DESIGNATION

The ESA requires NOAA Fisheries to take certain actions if a marine or anadromous species may face extinction. If a species is in danger of extinction throughout all or a significant portion of its

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range, NOAA Fisheries is required under Section 4 of the ESA to list that species as endangered. If a species is likely to become endangered in the foreseeable future, then NOAA Fisheries must list that species as threatened. Upon listing of a species as endangered, the Section 9 prohibition on take becomes effective immediately. The ESA defines take to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.” 16 U.S.C. 1532(19). The meaning of “harm” is further explained in the protective regulations to include any act resulting in “significant habitat modification which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. 222.102. If a species is listed as threatened, NOAA Fisheries may, by regulation, apply the prohibitions contained in Section 9 to that species. NOAA Fisheries is also required under Section 4, subject to certain exceptions, to designate critical habitat essential to the conservation of the species. Effective March 19, 1998, NOAA Fisheries listed Central Valley (CV) steelhead as threatened under the ESA. 63 Fed. Reg. 13,347. The Section 9 take prohibition was extended to CV steelhead by protective rule which became effective on December 30, 1999. 64 Fed. Reg. 73,479. These protective regulations apply to all federal agencies, including the Federal Energy Regulatory Commission. In proposing the protective regulations for CV steelhead, NOAA Fisheries described certain activities that are very likely to injure or kill salmonids, or that may injure or kill salmonids, resulting in a violation of the ESA (64 Fed. Reg. at 73,481). These activities include, in part:

Physical disturbance or blockage of the streambed where spawners or redds are present concurrent with the disturbance . . . Blocking fish passage through fills, dams, or impassable culverts . . . Water withdrawals that impact spawning or rearing habitat . . .
If the actions of a federal agency activity result in take—including harm or harassment—of steelhead, that activity may be in violation of Section 9 of the ESA unless NOAA Fisheries has issued an incidental take permit for that activity or the take has been exempted through a Section 7 consultation.

C. FACTORS AFFECTING CV STEELHEAD

Primary stressors affecting CV steelhead in the Tuolumne River are mostly related to water development and water management. Because juvenile steelhead rear in fresh water for one year or longer, water temperatures in their river habitat must remain suitable year-round. For the most part, suitable water temperatures occur naturally only in the mid- to high- elevation reaches and tributaries of the Tuolumne, which historically resulted in adult steelhead migrating higher into the drainage to spawn than most salmonid species. Because 82% to 95% of their historical spawning and rearing habitat has been lost, mostly due to dam construction, juvenile steelhead rearing is generally restricted to lower elevation reaches where high water temperatures during late summer and fall increasing their mortality.¹


CMARP Steering Committee. 1999. Recommendations for the implementation and continued refinement of a comprehensive monitoring, assessment, and research program. 142 pp.
Central Valley anadromous fish management and research has been primarily focused on chinook salmon, resulting in inadequate efforts to monitor and restore steelhead. Conservation actions identified in many anadromous fish restoration plans are largely directed at chinook salmon recovery with little emphasis on specific actions needed to recover steelhead. Activities to protect steelhead in the Tuolumne River need to address the substantial loss of spawning and rearing habitat due to blockages by dams and appropriate measures to mitigate those losses, such as providing suitable water temperatures year-round in reaches comprising remaining steelhead rearing habitat.

D. LICENSE FLOW REQUIREMENTS

The New Don Pedro Project was licensed in 1964. Article 37 of the Project license established minimum flow releases for the first 20 years of project operations and provided that during that time the Licensees would study the Tuolumne River fishery and determine what change in flows is necessary to protect aquatic resources. In December 1992, FERC initiated a proceeding pursuant to Article 37 to reopen the license and determine flows necessary to protect aquatic resources. The involved stakeholders entered into negotiations and by April 1995, reached agreement on a minimum flow regime. This flow regime, although resulting in an overall increase in flows, was based upon the life history requirements of chinook salmon and failed to address the different life history requirements of CV steelhead which, unlike chinook salmon, must reside in the Tuolumne River year round. FERC

2 Ibid.

then forwarded this settlement to FWS, initiating a Section 7 consultation on its proposal to amend Articles 37 and 58 to increase minimum flows. On October 4, 1995, FWS issued a Biological Opinion finding that the proposed minimum flows would neither jeopardize the continued existence of the delta smelt or the Sacramento splittail, or adversely modify the designated critical habitat of the Sacramento splittail. FERC incorporated the settlement into an amended license on July 31, 1996. Turlock Irr. Dist. & Modesto Irr. Dist., 76 F.E.R.C. ¶ 61,117.

II. ARGUMENT

A. CURRENT PROJECT OPERATIONS ADVERSELY AFFECT CV STEELHEAD

In the Tuolumne River, minimum releases from the New Don Pedro Project, as stipulated in license Article 37, allow summer water temperatures in steelhead habitat to rise above thresholds lethal to steelhead. In fact, after the license was amended, kills of CV steelhead were reported on the Tuolumne River, including the most recently observed fish kill in 2001. The 2001 fish kill was observed shortly after stream flows were reduced in accordance with the flow regime

3 Juvenile Central Valley steelhead prefer a water temperature of 19 degrees Celsius (66.2 degrees Fahrenheit) and have critical thermal maxima of 28.4 to 31.0 degrees Celsius (83.1 to 87.8 degrees Fahrenheit).


established under the Settlement Agreement and incorporated in the Amended License. Reducing flows at a time of elevated air temperatures in late spring and early summer exacerbates unsuitable habitat conditions for CV steelhead by increasing the water temperatures to physiologically stressful levels, thereby increasing CV steelhead mortality. In addition, reports indicated that during the flow reduction, the designated stream gage for determining compliance with the Project License was either malfunctioning or not functioning at all and that the true river flow was below recorded values, thus indicating a violation of the Settlement Agreement and noncompliance with License Article 37.

B. NOAA FISHERIES’ ATTEMPTS TO MINIMIZE IMPACTS TO CV STEELHEAD THROUGH THE EXISTING LICENSE PROVISIONS HAVE BEEN UNSUCCESSFUL

NOAA Fisheries has sought to renew discussions regarding stream flow suitable for steelhead by voluntary agreement as provided in amended Article 37. NOAA Fisheries participated in meetings of the Tuolumne River Technical Advisory Committee (TRTAC). The TRTAC was created to fulfill the Licensees’ consultive requirements under License Article 37, relative to the ongoing chinook salmon stream flow program for the Tuolumne River, and is composed of the signatories to the Settlement Agreement. For almost two years, NOAA Fisheries has advised the TRTAC to reconsider and reevaluate FERC’s present flow regime in order to minimize impacts to CV steelhead. During the August 28, 2002 TRTAC flow workshop, NOAA Fisheries learned that the same data set used by the

4 Scientific evidence indicates that steelhead are attracted up the Tuolumne River by the heightened spring flows established under the Settlement Agreement and but then become stranded when those flows are reduced in late spring and summer. Temperatures in the lower Tuolumne, with its wide and poorly shaded river channel, can exceed critical steelhead maxima under late spring and summer flow conditions.

5 The relevant portion of Article 37 reads: “The volume of annual flow shall be periodically readjusted upon agreement among the Licensees, Cal Fish & Game, and FWS after April 1 of each year as more current unimpaired flow information becomes available.”
TRTAC to establish the flow regime under amended Article 37 was also used to develop a model to set flow regimes suitable for restoration efforts for Central Valley fall/late fall run chinook salmon in the Tuolumne River. This data set and model are still available and can be used to evaluate the suitability of the present flow regime for CV steelhead and to determine flows necessary to balance the needs of Central Valley Fall/Late Fall Run chinook salmon and CV steelhead. Despite repeated efforts, NOAA Fisheries has been unsuccessful in procuring an agreement with the TRTAC to reevaluate the suitability of the current flow regime for CV steelhead.

C. FERC HAS DISCRETIONARY AUTHORITY TO MODIFY THE LICENSED FLOW REGIME TO PROTECT C.V. STEELHEAD

Under Articles 37, 58, and standard Article 10, FERC reserved its authority to modify minimum flow requirements to protect aquatic resources. Article 37 further specifies that, "The volume of annual flow shall be periodically readjusted upon agreement among the Licensees, California Department of Fish and Game, and FWS after April 1 of each year as more current unimpaired flow information becomes available."

FERC succinctly addressed the issue of its reserved authority and discretion under reopener articles (10, 37, and 58, in this instance) in a 1990 decision (Pacific Gas and Elec. Co., 52 F.E.R.C. ¶ 61,019). In that Order, FERC denied Pacific Gas and Electric Company’s (PG&E) appeal of an Order amending PG&E’s license by adding minimum flow provisions pursuant to reopener Articles contained in the original license. In so doing, FERC provided the following explanation of its authority:

Section 6 provides that licenses may be altered only upon mutual agreement between the licensee and the Commission and that the licenses shall be issued for a period not exceeding fifty years. The law is clear, however, that “reopeners” (license articles reserving to the Commission the authority to take certain actions in the future) are an appropriate means for the Commission to pursue the broad public policy objectives of Section 10(a)(1) of the FPA while still according Section 6 the scope its terms indicate. Pacific Gas & Electric Co. v. F.E.R.C., 720 F.2d 78, 83-84 (D.C. Cir. 1983). See also State of California v. Federal
Power Commission, 345 F.2d 917, 931-25 (9th Cir. 1965) (Commission may include in license a reopener that would allow the Commission to prescribe in the future higher minimum flows to protect fish and wildlife, even if such flows impaired the licensee’s irrigation rights)

D. THE ENDANGERED SPECIES ACT REQUIRES FERC TO REINITIATE CONSULTATION WITH NOAA FISHERIES IN THIS INSTANCE

The established flow regime was developed to accommodate chinook salmon biology, and fails to mitigate for impacts to steelhead. Central Valley steelhead were not listed as threatened under the ESA until March 19, 1998, approximately three years after the Settlement Agreement and two years after FERC amended the License at issue. Consequently, neither the Settlement Agreement; the Biological Opinion issued by FWS (which does not have jurisdiction over CV steelhead); nor the Amended License contain any analysis or discussion of the impacts of the proposed flow regime on CV steelhead or its habitat.

As discussed supra, the ESA prohibits the take of endangered or threatened species. 16 USC 1538(a)(1)(B). The term “take” as defined by the statute not only includes the killing of Tuolumne River steelhead—an event that is already reported to have occurred—but also includes harassment, harming, pursuit, hunting, shooting, wounding, trapping, capture, or collection of such fish. 16 U.S.C. 1532(19). The penalty for violation is serious: criminal fines of $25,000.00 per violation and imprisonment may be imposed. 16 U.S.C. 1540. The take prohibition applies both to individual persons and associated entities alike, including “any officer, employee, agent, department or instrumentality of the Federal Government.” 16 U.S.C. 1532(13).

In order to prevent take of protected species, the ESA’s plain language commands that all Federal agencies consult with NOAA Fisheries (or FWS) to “insure that any action authorized, funded, or carried out by such [Federal] agency * * * is not likely to jeopardize the continued
existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. 1536(a)(2). Further, the Federal agency is required to re-initiate consultation where, as in this case, discretionary federal involvement or control over the action has been retained or is authorized and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;
(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion;
(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. 402.16. Condition (d) above is clearly met in this instance.

The ESA does not give NOAA Fisheries the power to order other agencies to consult under Section 7. Rather, Section 7 imposes an obligation on all federal agencies to independently scrutinize their activities\(^6\) and initiate consultation with NOAA Fisheries when any action they propose to undertake, fund, permit, license or otherwise authorize may affect listed species under the jurisdiction of NOAA Fisheries. 16 U.S.C. 1536(a)(2). FERC, the federal entity responsible for licensing and regulating private hydropower projects in the United States,\(^7\)

\(^6\)In 1985 the Oak Ridge National Laboratory analyzed the direct and indirect adverse impacts to sensitive fish populations from hydroelectric project operations in the Central Valley. The results of this analysis are contained in a FERC report concluding that 27 FERC licensed hydroelectric projects adversely alter stream flows in areas where threatened or endangered fish species are located and contain adequate reopener authority to remedy the problem. In its report, FERC further concludes that the continuing operations of 9 FERC licensed hydro projects (involving 22 storage reservoirs), including the New Don Pedro Project, appear to have significant direct and cumulative impacts on threatened and endangered fish species.

\(^7\)FERC is an independent agency which has jurisdiction over non-federal hydropower development under the Federal Power Act (FPA), 16 U.S.C. 791a \textit{et seq.}
has not yet consulted with NOAA Fisheries on the ongoing impacts of the New Don Pedro Project on CV steelhead. Consequently, FERC has not insured that an action it has taken, the licensing of—and continuing discretionary control over—ongoing operations of the New Don Pedro Project is not likely to jeopardize the continued existence of threatened CV steelhead as required by law, nor has any incidental take of CV steelhead resulting from FERC’s licensure of the New Don Pedro Project been authorized by NOAA Fisheries as required by law.

For the following reasons, the legal conditions requiring consultation have been met and re-initiation of consultation is warranted.

A. The monitoring system is an ongoing agency action or program over which FERC continues to retain discretion

The continuing monitoring and study plan for chinook salmon at the New Don Pedro Project evince an ongoing management program controlled by FERC. As such a continuing program over which FERC has retained discretionary control, this program constitutes an agency action subject to Section 7 consultation.

The term “agency action” as used in the ESA is defined in the implementing regulations to embrace: “all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies * * * Examples include, but are not limited to: * * * actions intended to conserve listed species or their habitats * * * the granting of licenses * * * or actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. 402.02 (emphasis added). Courts have recognized that there was “little doubt that Congress intended to enact a broad definition of agency action in the ESA.” Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir.1994). Courts have further found agency actions subject to the Section 7
consultation requirement to include the renewal of water service contracts, see National Resources Defense Council v. Houston, 146 F.3d 1118 (9th Cir.1998), and issuance of dredging permits, see WaterWatch of Oregon v. U.S. Army Corps of Eng’rs, 2000 WL 1100059 (D. Or. 2000). Importantly, federal action can be found even after federal approval and implementation of the plan or program. See, e.g., Pacific Rivers Council, (U.S. Forest Service forestry management plan a continuing “action” because it had ongoing effects beyond its mere approval); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978)(operation of virtually complete dam project enjoined for failure to meet Section 7 requirements even though the planning and approval process for construction and operation had concluded years before).

The present New Don Pedro Project flow regime is part of an ongoing, not-yet-complete, adaptable streamflow program. Accordingly, the issue here is not whether FERC has retained sufficient discretion in a previously completed fixed action. Cf. Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995)(private timber company’s decision to build a road pursuant to previously agreed to right of way with the Bureau of Land Management did not constitute an agency action); Environmental Protection Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001)(logging company’s previously issued ESA Section 10 permit involved authorization of a private action and a limited role for the involved federal agency). Here, FERC is clearly involved in ongoing decision making. At the onset, FERC expressly stated in its Order Amending License that its knowledge of present management influences on the Tuolumne River was an incomplete “picture” and that FERC will need to continually evaluate whether future changes in project flow releases and ramping rates may be necessary. 76 F.E.R.C. ¶ 61,117, at 11. FERC ordered additional analysis on the effect of fluctuations during project flow releases to help it “determine [appropriate] ramping restrictions,” and required the establishment of a
monitoring program to help the agency “determine whether to require future monitoring studies and changes in the project structures and operations to protect fishery resources in the Tuolumne River.” *Id.*, at 11, 15. As part of the program, the Order required annual monitoring reports to be filed with FERC. This was not simply a passive procedure on the part of FERC; the Order delineated *active participation* by the Commission in the monitoring program: “Any disagreements regarding the conduct of [salmonid population and habitat monitoring] studies, not resolved among the licensees, *shall be filed with the Commission for determination.*” *Id.*, at 15 (emphasis added). Most telling, FERC indicated that the monitoring studies and reporting requirement were for the sole purpose of guiding the Commission in its exercise of its reserved authority and continuing discretion: “Based on the information provided * * * the Commission will determine whether to require * * * changes in project structures and operations to protect fishery resources in the Tuolumne River.” *Ibid.* FERC could not have expressed itself more plainly: the issue of sufficiency of streamflows—the very issue affecting steelhead—is unsettled, the object of a continuing management program by FERC, and subject to modification at FERC’s discretion.

FERC’s ongoing discretionary involvement over streamflows—which it has expressly acknowledged—gives the agency the ability to implement protective measures for steelhead. Contrary to the circumstances in the line of cases where consultation would prove to be a “meaningless exercise” because the action agency had no discretion or authority to alter the private action at issue, the present ongoing New Don Pedro streamflow program, which currently adversely affects steelhead, is subject to ongoing approval from FERC. *Cf. Sierra Club* (federal agency’s lack of discretion to influence private entity’s road building would render consultation a meaningless exercise); *Environmental Protection Info. Ctr.*, (FWS’ Incidental
Take Permit did not retain within the agency sufficient power to implement measures that inure to the benefit of subsequently listed species).

FERC has recently denied petitions requesting initiation of Section 7 consultation where petitioners argued that reservation of authority to amend a license constitutes discretionary involvement or control. *See, e.g.*, Puget Sound Energy, Inc., 95 F.E.R.C. ¶ 61,139 (2001); Puget Sound Energy, Inc., 95 F.E.R.C. ¶ 61,105 (2001); Phelps-Dodge Morenci, Inc., 94 F.E.R.C. ¶ 61,202 (2001). However, the rationales relied upon by the Commission in those cases do not apply in the instant case. In Phelps-Dodge, FERC acknowledged its obligation to investigate, in consultation with NOAA Fisheries (or FWS), the effects of ongoing operations of a licensed project on listed species when information indicating possible adverse effects is made available to the Commission and to reopen license proceedings if the investigation indicates operational changes are necessary. Phelps-Dodge, 94 F.E.R.C. ¶ 61,202 at 11. The Commission then rejected the petition not on the grounds that it had insufficient involvement in project operations but rather that the petitioners presented no new information relevant to the effects of the project on listed species that had not already been considered by FERC and FWS and that therefore taking even a preliminary investigative step toward a reopener was unnecessary. *Id.*, at 15. That is not the situation in the instant case; flow needs specific to threatened CV steelhead have never been considered by the Commission in any licensing proceeding for the New Don Pedro Project.

The Puget Sound Energy case is even more instructive. The Commission again acknowledged its obligation to consider the effects of ongoing project operations on listed species (95 F.E.R.C. ¶ 61,015, at 8) and its obligation to reopen the license if changes to project operations were necessary to reduce adverse effects to listed species, but characterized the petition as “premature,” based on the Commission’s judgment that available information on the
effects of project operations on listed species was “in dispute.” *Ibid.* Despite finding that the information was in dispute, the Commission appointed the licensee as FERC’s non-federal representative to consult with NOAA Fisheries and prepare a biological assessment, upon which NOAA Fisheries would issue a biological opinion pursuant to Section 7 of the ESA. *Ibid.* Thus, while the Commission declined to characterize its actions as formal consultation pursuant to a reopener proceeding, it is clear the Commission recognized its discretionary involvement in ongoing project operations and resulting obligation to consult with NOAA Fisheries.

The same logic applies to the instant case *a fortiori.* Here, the information regarding adverse effects to a listed species is *not* in dispute. Indeed, the Commission stated in its Final Environmental Impact Statement evaluating the effects on anadromous steelhead of the project operations as proposed in the Settlement and subsequently incorporated into the License:

“[C]onditions in the lower river are not currently suitable for the species (primarily because of high water temperatures in the summer).” Final Environmental Impact Statement: *Reservoir Release Requirements at the New Don Pedro Project, California,* at 3-65. (FERC, Jul. 1996). It is beyond peradventure that water temperature parameters downstream of the project are directly affected, if not largely determined, by releases from the project reservoir.

**B. A new species has been listed which was not considered in the initial Section 7 consultation**

As explained *supra,* the initial ESA consultation with FWS on the amendments to Articles 37 and 58 of the license considered the effects of FERC’s action only on delta smelt and Sacramento splittail. FWS issued its biological opinion addressing those effects on October 4, 1995. CV steelhead were listed pursuant to the ESA in 1998. Regulations implementing the consultation duties of federal action agencies clearly require the action agency, in this case
FERC, to reinitiate consultation on the effects of its action when “a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. 402.16(d). While the reinitiation requirement depends, just as the original initiation requirement does, on sufficient discretionary involvement of the federal action agency, the Commission, for the reasons explained supra, retains such discretion.

III. CONCLUSION

The License for the New Don Pedro Project was amended to modify the instream flow requirements of Article 37 prior to the ESA listing for CV steelhead. The amended flow regime adversely affects CV steelhead. With the listing of steelhead, environmental conditions, legal requirements, and resource management priorities have changed substantially since the License amendment was issued. Because FERC has legal obligations to protect fishery resources under both the Federal Power Act and the Endangered Species Act, Article 37 should be amended to address project impacts and habitat requirements of CV steelhead.

Accordingly, we request FERC to consult with NOAA Fisheries, pursuant to FERC’s reserved discretion under Articles 37, 58, and standard Article 10, to modify the minimum flow provisions of Article 37 as necessary to protect both steelhead and chinook salmon in the Tuolumne River. Further, in order to comply with the ESA, we request that FERC initiate an ESA Section 7(a)(2) consultation on the impacts of federally licensed project facilities and operations on CV steelhead. For the reasons stated above, NOAA Fisheries respectfully requests that FERC grant this Petition.

Dated: May 12, 2003 Respectfully submitted,
/s Christopher Keifer

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