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15 **STATE OF CALIFORNIA**
16 **STATE WATER RESOURCES CONTROL BOARD**
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19 In the Matter of:)
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21 Hearing to Review the U.S. Bureau of)
22 Reclamation Water Rights Permits)
23 (Applications 11331 and 11332) – Cachuma)
24 Project Phase 2)
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28)

**CALIFORNIA TROUT’S RESPONSE TO
WATER AGENCIES’ MOTION TO
STRIKE**

1 **1. INTRODUCTION**

2 The rebuttal testimony outlines and other rebuttal information submitted by California
3 Trout (“CalTrout”) complies with both California law and the explicit requirements of the State
4 Water Resources Control Board (“SWB”) January 23, 2012 Hearing Notice. The Santa Ynez
5 River Water Conservation District, Improvement District No. 1, Cachuma Conservation
6 Release Board, and the Santa Ynez River Water Conservation District (collectively “Water
7 Agencies”) Motion to Strike fails to identify any basis to strike, limit, or otherwise preclude,
8 the testimony of Ms. Heather Cooley or Dr. William Trush.

9 **2. CALTROUT COMPLIED WITH ALL REBUTTAL PRE-SUBMISSION**
10 **REQUIREMENTS**

11 In considering the pre-submission of rebuttal evidence, the SWB is governed by the
12 California Code of Regulations, Title 23, Section 648.4, which provides for the identification of
13 witnesses and the pre-submission and presentation of testimony and exhibits in adjudicatory
14 proceedings, including SWB proceedings. “Surprise testimony and exhibits” are discouraged as
15 a matter of “policy.” (Cal. Code Regs. Title 23, § 648.4(a).) The SWB “may,” in a hearing
16 notice, establish procedures and requirements for the identification of 1) witnesses, 2) the
17 subject of testimony, 3) estimated time frames for testimony, and 3) witness qualifications prior
18 to the start of a hearing. (Cal. Code Regs. Title 23, § 648.4(b).) The Water Agencies reference
19 these and other regulatory provisions in their Motion to Strike, but fail to mention the only
20 requirement that explicitly pertains to rebuttal evidence – California Code of Regulations, Title
21 23, Section 648.4(f), which plainly states:

22 Rebuttal testimony generally will not be required to be submitted in
23 writing, nor will rebuttal testimony and exhibits be required to be
24 submitted prior to the start of the hearing. (Cal. Code of Regulations, Title
25 23, § 648.4(f).)

26 There is no requirement that rebuttal testimony or exhibits be submitted prior to the start of a
27 hearing (or ever, for rebuttal testimony). Nor is an outline of rebuttal testimony required to be
28 submitted. Instead, the SWB generally retains discretion to identify procedures and

1 requirements, through a hearing notice, for any pre-hearing submission. (Cal. Code of
2 Regulations, Title 23, § 648.4.) With respect to rebuttal evidence, the SWB may decide that
3 pre-submission of rebuttal information is not required, as occurred in these proceedings in
4 2003.

5 Thus, no administrative or statutory provision supports the Water Agencies' Motion to
6 Strike CalTrout's pre-submission of rebuttal information. The only requirements pertaining to
7 the pre-submission of rebuttal information for the March 29-30 hearing are identified in the
8 SWB's January 23, 2012 Hearing Notice.

9 a. CalTrout Properly Submitted Outlines of Testimony and Statement of
10 Qualifications for Each Witness

11 For the March 29-30, 2012 hearing, the SWB, in its allowable discretion, identified the
12 following requirements in its Hearing Notice for any parties intending to submit rebuttal
13 evidence: 1) identify their rebuttal witnesses; 2) prepare an outline of testimony; and 3) include
14 a statement of qualifications for each witness. (Hearing Notice at 3.) CalTrout has complied
15 with each of the Hearing Notice requirements by submitting an outline of testimony and
16 statement of qualifications for Ms. Heather Cooley and Dr. William Trush – the only two
17 rebuttal witnesses CalTrout intends to present at the March 29-30 hearing. CalTrout has thus
18 complied with all requirements for the pre-submission of rebuttal information to the SWB.

19 The Hearing Notice does not specify the contents of the "outline of testimony."
20 However, CalTrout's outlines are consistent with the SWB administrative regulations as they
21 identify the "subject of each witness' proposed testimony." (Cal. Code Regs. Title 23, §
22 648.4(b).) CalTrout's outlines also describe how the testimony is responsive to the Final EIR,
23 and itemize what will be discussed under each subject area. These outlines thus comply with
24 the Hearing Notice's only stated requirement that parties intending to present rebuttal evidence
25 "shall . . . prepare an outline of their testimony." (Hearing Notice at 3.) Ms. Cooley's and Dr.
26 Trush's outlines provide sufficient detail of the subject and scope of their testimony for the
27 participating parties to prepare for any cross-examination of these witnesses.
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1 The Water Agencies, however, protest that the outlines must provide even more
2 detailed material – including, for example, the basis for any conclusions that are reached,
3 technical analyses, and attachments of any references – to improve their ability to prepare for
4 the March 29-30 Hearing. (See, e.g., Motion to Strike at 3 and 14-15.) It seems that the
5 material identified by the Water Agencies is essentially the written testimony and exhibits of
6 CalTrout’s witnesses, and neither is required to be submitted prior to the Hearing. (Cal. Code
7 of Regulations, Title 23, § 648.4(f); Hearing Notice.)

8 Moreover, the Water Agencies have identified no legal requirement, and simply
9 speculate about SWB intent, to support their assertion that the outline of testimony requires any
10 further detail than has already been provided. As explained above, the law does not require the
11 pre-submission of rebuttal information. The SWB may, in its discretion, require it. Here, the
12 SWB has stated only that parties “shall . . . prepare an outline of their testimony.” CalTrout’s
13 submission complies with the SWB Hearing Notice, and is otherwise in accordance with SWB
14 administrative regulations. Each outline is sufficiently detailed to identify the subject and scope
15 of testimony and is consistent with the policy of discouraging surprises.

16 The Water Agencies also indicate a desire to have sufficient information to prepare for
17 their presentation of potential “surrebuttal” witnesses. Motion to Strike at 6. However, the
18 Hearing Notice does not address whether parties may present “surrebuttal” evidence. It states
19 only that parties will have an opportunity to cross-examine State Water Board witnesses and
20 rebuttal witnesses. Notably, the Water Agencies have not indicated they will be providing an
21 outline of testimony or other information regarding any of their potential “surrebuttal”
22 witnesses, and apparently they find no due process problems with the failure to do so.

23 b. Witness Rebuttal Testimony Meets Definition of “Rebuttal” Evidence

24 The Water Agencies also assert that Ms. Cooley’s and Dr. Trush’s testimony should be
25 precluded because the rebuttal outlines fail to demonstrate that this testimony meets the SWB’s
26 definition of “rebuttal” evidence. Preliminarily, we note that nothing in the Hearing Notice
27 requires the rebuttal outline to establish that witness testimony satisfies this definition.
28 However, this argument also fails.

1 The Hearing Notice defines “rebuttal” evidence as:
2 . . . responsive to evidence presented in connection with the State Water
3 Board’s witnesses, and it does not include evidence that should have been
4 presented during the case-in-chief of the party submitting rebuttal
5 evidence. It also does not include repetitive evidence. (Hearing Notice at
6 3.)

7 Ms. Cooley’s rebuttal outline demonstrates how her testimony meets each element of
8 this definition. First, it identifies how her testimony is presented in connection with the Final
9 EIR by specifically characterizing the subject of her testimony in relation to problems
10 identified with the Final EIR (identified as “FEIR” in the outline). For example, the outline
11 identifies the main subjects of Ms. Cooley’s testimony as follows: “The FEIR overestimates
12 future demand and potential shortages under the proposed alternatives”; “The FEIR does not
13 include cost-effective urban conservation potential available to water contractors”; “The FEIR
14 does not consider the availability of water through alternative supplies”; and “The FEIR does
15 not consider the potential for reducing agricultural water use”.

16 Second, Ms. Cooley’s rebuttal outline also demonstrates that she will not be presenting
17 evidence that should have been presented with CalTrout’s case-in-chief in 2003. For example,
18 Item 1 identifies that Ms. Cooley will be discussing “recent” water demand projections,
19 including 2010 Urban Water Management Plans, as well as mandated water conservation
20 requirements in the recently enacted SBx7-7.¹ This information was unavailable in 2003 and
21 could not have been presented at that time. Item 2 (“technological improvements since 2003”) and
22 Item 4 (“2009 Pacific Institute Analysis”) similarly identify new information since 2003.
23 The remaining items, as indicated in the outline, are addressing specific findings and
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25 ¹ The Water Agencies assert that “CalTrout is not entitled to submit new water supply or
26 demand data. The evidentiary record is closed.” This is nonsensical. The Hearing Notice states
27 “On November 13, 2003, the hearing officer, Peter Silva, determined *the hearing record for the*
28 *Cachuma Project would be left open* for the State Water Board staff to offer the Final EIR into
evidence.” (Hearing Notice at 2, emphasis added.) The purpose of the March 29-30 hearing
includes both cross-examination of State Water Board witnesses and the opportunity to submit
rebuttal evidence. (Hearing Notice at 2-3.) It is thus clear that the hearing record remains open
for the submission of new evidence at these proceedings.

1 conclusions in the Final EIR (e.g., “the FEIR wrongly concludes that each of the water
2 contractor’s water rates provides a strong incentive to conserve”), including the responses to
3 comments. They could not have been raised during CalTrout’s 2003 case-in-chief.

4 Lastly, Ms. Cooley’s rebuttal outline demonstrates that she will not be presenting
5 repetitive evidence. Ms. Cooley’s testimony is not duplicative of any other Caltrout rebuttal
6 witness’s testimony.

7 The Water Agencies’ objections to Ms. Cooley’s outline boil down to an assertion that
8 they should receive written testimony and exhibits, or at least, a more detailed outline prior to
9 the March 29-30 hearing. As discussed above, this argument fails.

10 Dr. Trush’s rebuttal outline also demonstrates how his testimony meets each element of
11 the definition of “rebuttal” evidence. First, it identifies how his testimony is presented in
12 connection with the Final EIR by specifically characterizing the subject of his testimony in
13 relation to problems identified with the Final EIR (identified as “FEIR” in the outline). For
14 example, the outline identifies the main subjects of Dr. Trush’s testimony as follows: “The
15 FEIR contains erroneous and inconsistent findings with respect to Santa Ynez River steelhead
16 population status and trends”; The FEIR does not adequately evaluate the effects of
17 Alternatives 5B and 5C for steelhead”; “None of the FEIR alternatives, including the
18 alternatives based on the 2000 BO, include provisions for steelhead passage around Bradbury
19 Dam”; and “The FEIR contains erroneous and misleading findings and conclusions regarding
20 the alternatives’ adverse effects on the condition of Santa Ynez River steelhead”.

21 Second, Dr. Trush’s rebuttal outline also demonstrates that he will not be presenting
22 evidence that should have been presented with CalTrout’s case-in-chief in 2003. For example,
23 some portions of his testimony are based on information that was unavailable in 2003 and
24 could not have been presented at that time (e.g., “FEIR Appendix G” referenced throughout
25 Item 1; Alternatives 5B and 5C which were not included in the 2003 EIR; “new information”
26 addressing need for steelhead passage around Bradbury Dam²). Much of this testimony, along

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28 ² Dr. Trush’s rebuttal outline inadvertently omitted the following, highlighted parenthetical in
Item 3.a. “New information (*e.g., Final Recovery Plan, 5-Year Status Review*) addresses need
for steelhead passage around Bradbury Dam.” The Water Agencies’ assertion that testimony

1 with the remaining items, as indicated in the outline, address specific findings and conclusions
2 in the Final EIR (e.g., “Steelhead population status and trends in the Santa Ynez River are
3 inconsistent with the FEIR’s conclusion that flows implemented under the 2000 [Biological
4 Opinion] have resulted in increased abundance of *O. mykiss*.”), including the responses to
5 comments. They could not have been raised during CalTrout’s 2003 case-in-chief.

6 Finally, Dr. Trush’s rebuttal outline demonstrates that he will not be presenting
7 repetitive evidence. Dr. Trush’s testimony is not duplicative of any other Caltrout rebuttal
8 witness’s testimony.

9 The Water Agencies’ objections to Dr. Trush’s rebuttal outline consist, in large part, of
10 their same assertion that they are entitled to receive written testimony and exhibits, or at least, a
11 more detailed outline. As demonstrated above, this argument fails. The Water Agencies also
12 assert that Dr. Trush’s proposed testimony is a replay of prior testimony on behalf of CalTrout
13 in 2003. However, as is made clear from Dr. Trush’s outline, his discussion of steelhead status
14 and trends (Item 1) includes analysis of Appendix G (dated July 2010) in the Final EIR, which
15 identifies new information that was not available in 2003, and his testimony is responsive to
16 findings and conclusions in the Final EIR, which also could not have been addressed in 2003.
17 The same is true for Dr. Trush’s testimony regarding steelhead passage (Item 3) and the
18 adverse effects of 89-18 releases (Item 4). CalTrout understands the restrictions of “rebuttal”
19 evidence. These are not attempts to re-do testimony that was submitted in 2003. As identified
20 in Dr. Trush’s outline, this testimony addresses new information and/or findings and
21 conclusions in the Final EIR that were not available in 2003. The Water Agencies’ assertion
22 that Dr. Trush’s testimony improperly threatens to reopen the hearing record is nonsense, as the
23 hearing record remains open and the SWB has explicitly invited the parties to identify rebuttal
24 witnesses, who will testify on the that record. (Hearing Notice at 2-3.)

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28 regarding the Final Recovery Plan is not rebuttal is incorrect. Rather than the mere finalization
of the Plan, it is the specific information in the Plan and how it pertains to the Final EIR that is
at issue.

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3. CONCLUSION

CalTrout's rebuttal testimony outlines and other rebuttal information fully comply with all rebuttal pre-submission requirements. Although the Water Agencies would clearly prefer to have as much information as possible prior to the March 29-30 hearing, the information identified in the Hearing Notice and submitted by CalTrout is sufficient to support their preparation and discourage the potential for surprises during the proceedings. The Water Agencies' Motion to Strike, therefore, fails to identify any basis to strike, limit, or otherwise preclude, the testimony of Ms. Heather Cooley or Dr. William Trush.

Respectfully submitted this 7th day of March, 2012



ENVIRONMENTAL DEFENSE CENTER
Karen M. Kraus
Attorneys for CALIFORNIA TROUT

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2 STATE OF CALIFORNIA
3 STATE WATER RESOURCES CONTROL BOARD

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6 In the Matter of:) CERTIFICATE OF SERVICE

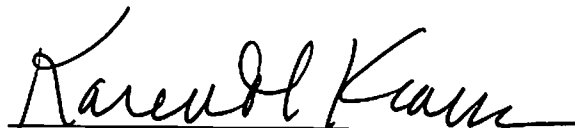
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9 Bureau of Reclamation Water)
10 Rights Permits)
11 (Applications 11331 AND)
12 11332) - Cachuma Project)
13 Phase 2)
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17 I am employed in the County of Santa Barbara, California.
18 I am over the age of 18 and not a party to the within action.
19 My business address is 906 Garden Street, Santa Barbara, CA
20 93101. On March 7, 2012, I served the:

21 CALIFORNIA TROUT'S RESPONSE TO WATER AGENCIES' MOTION TO
22 STRIKE

23 on the following parties: U.S. Bureau of Reclamation; National
24 Marine Fisheries Service NOAA Office of General Counsel; Santa
Barbara County CEO's Office; Department of Fish and Game;
County of Santa Barbara, County Counsel, by placing a true and
correct copy thereof in a sealed envelope with first class
postage thereon fully prepaid in the United States mail at
Ventura, California and addressed according to the attached
Service List; and on the remaining parties by sending a true
and correct copy electronically, addressed according to the
attached service list.

I declare under penalty of perjury that the foregoing is
true and correct and executed on March 7, 2012 at Ventura,
California.

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Karen M. Kraus

**Cachuma Project Phase 2 Hearing
Final Service List
(updated 01/30/2012)**

*(Based on 01/05/2004 list, updated 07/26/2007, updated 06/08/2010, updated 01/20/2011,
updated 05/13/2011, updated 07/29/2011, updated 01/05/2012, updated 01/30/2012)*

The parties whose email addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.

<p>Cachuma Conservation Release Board Mr. Kevin O'Brien Downey Brand LLP 621 Capitol Mall, Floor 18 Sacramento, CA 95814 kobrien@downeybrand.com bcougar@downeybrand.com</p> <p><i>updated 01/05/2012</i></p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 ccampbell@bakermanock.com</p> <p><i>updated 07/29/2011</i></p>
<p>Santa Ynez River Water Conservation District, Improvement District No. 1 Mr. Gregory K. Wilkinson Best, Best & Krieger, LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 Gregory.Wilkinson@Bbklaw.com</p> <p><i>Updated 01/30/2012</i></p>	<p>City of Lompoc Ms. Sandra K. Dunn Somach, Simmons & Dunn 500 Capitol Mall Suite 1000 Sacramento CA 95814 sdunn@somachlaw.com</p> <p><i>updated 06/08/2010</i></p>
<p>Santa Ynez River Water Conservation District Mr. Ernest A. Conant Law Offices of Young Wooldridge 1800 – 30th Street, Fourth Floor Bakersfield, CA 93301 econant@youngwooldridge.com</p>	<p>California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 kkraus@edcnet.org</p>

The parties listed below did not agree to accept electronic service, pursuant to the rules specified by this hearing notice.

<p>U.S Bureau of Reclamation Ms. Amy Aufdemberg 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 Fax (916) 978-5694 AMY.AUFDEMBERGE@sol.doi.gov</p>	<p>Ms. Terri Maus-Nisich, Assistant CEO Santa Barbara County CEO's Office 105 E. Anapuma Street, 4th Floor Santa Barbara, CA 93101 tmaus@co.santa-barbara.ca.us</p> <p><i>updated 01/05/2012</i></p>
<p>Dan Hytrek NOAA Office of General Counsel Southwest Region 501 West Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 Dan.Hytrek@noaa.gov</p> <p><i>updated 05/13/2011</i></p>	<p>Department of Fish and Game Office of General Counsel Nancee Murray 1416 Ninth Street, 12th Floor Sacramento, CA 95814 Nmurray@dfg.ca.gov</p>

Cachuma Project Phase 2 Hearing

Final Service List *continued*

(updated 01/30/2012)

*(Based on 01/05/2004 list, updated 07/26/2007, updated 06/08/2010, updated 01/20/2011,
updated 05/13/2011, updated 07/29/2011, updated 01/05/2012, updated 01/30/2012)*

The parties listed below did not agree to accept electronic service, pursuant to the rules specified by this hearing notice.

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