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8 **STATE OF CALIFORNIA**
9 **STATE WATER RESOURCES CONTROL BOARD**
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11 In the Matter of:)
12)
13) **CALIFORNIA DEPARTMENT OF**
CACHUMA PROJECT HEARING, PHASE 2) **FISH AND GAME OPPOSITION TO**
14 UNITED STATES BUREAU OF) **MEMBER UNITS' MOTION TO**
RECLAMATION APPLICATIONS 11331) **STRIKE AND MOTION TO DISMISS**
AND 11332) **PARTY**
15)

16 **I.**

17 **INTRODUCTION**

18 The City of Santa Barbara, Goleta Water District, Montecito Water District, Carpinteria
19 Valley Water District and Santa Ynez River Water Conservation District No. 1 (hereinafter the
20 "Member Units") have filed a motion to strike "Appendix 1" to the closing statement of the
21 Department of Fish and Game ("DFG")¹ as well as a motion to dismiss NOAA Fisheries as a
22 party to the Cachuma Project hearing. DFG respectfully requests that the State Water Resources
23 Control Board ("SWRCB") deny both motions for the reasons stated herein.
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¹ This identical document was also submitted by NOAA Fisheries and California Trout as appendices to their closing statements.

1 DFG requests denial of the motion to strike because it is based on the erroneous premise
2 that Appendix 1 is evidence. Appendix 1 is not evidence. It is intended as a component of a
3 proposed SWRCB order based on the findings of fact advocated in our agency's closing
4 statement. It was attached to assist the SWRCB in crafting an approach to studying the feasibility
5 of passing steelhead trout around Bradbury Dam *if* it decides that such a study is necessary to
6 protect public trust resources. Since the evidentiary basis of Appendix 1 was already submitted
7 in the hearing, it has already been made available for cross-examination and rebuttal by all the
8 parties.

9 DFG also requests denial of the Member Units' motion to dismiss NOAA Fisheries from
10 the proceeding since it is also based on the flawed premise that the appendix is evidence.
11 Dismissal of NOAA Fisheries is far too severe an action. NOAA Fisheries has provided
12 important insight into the application of the Endangered Species Act to the Cachuma Project as
13 well as significant testimony in regards to the protection of public trust resources. The negative
14 repercussions to the SWRCB's decisionmaking process that would arise from the removal of
15 NOAA Fisheries' evidence from the record would be grossly disproportionate to the gravity of
16 the alleged infraction, if any, created by the submittal of the appendix.

17 II.

18 **THE MEMBER UNITS' MOTION TO STRIKE SHOULD BE DENIED BECAUSE** 19 **APPENDIX 1 IS NOT EVIDENCE AND THEREFORE ITS SUBMISSION IS NOT IN** 20 **CONFLICT WITH PROCEDURAL RULES**

21 The Member Units cite to both the Phase 2 hearing notice and the Title 23 regulations for
22 the proposition that Appendix 1 should be stricken from consideration because it was offered
23 after the SWRCB's deadline for submission of evidence. This argument is patently fallacious.
24 DFG did not submit Appendix 1 as evidence. Appendix 1 does not prove the existence or non-
25 existence of any facts in this proceeding. It was not submitted to prove any of our agency's
positions regarding the key hearing issues. The motion to strike should therefore be denied

1 because the submission of the appendix cannot be in violation of the procedural rules controlling
2 the presentation of evidence.

3 On page 2 of Enclosure 1 to the hearing notice, the SWRCB states that, "Exhibits include
4 written testimony, statements of qualifications of expert witnesses, and *other documents to be*
5 *used as evidence.*" This provision makes clear that the October 15, 2003 deadline for the
6 presentation of "exhibits"² only applies to documents that are used by the parties as "evidence."
7 Although this term is not defined either in the hearing notice or in the Title 23 regulations,
8 California Evidence Code Section 140 offers some persuasive guidance. That section defines
9 "evidence" as "testimony, writings, material objects, or other things presented to the senses that
10 are *offered to prove the existence or nonexistence of a fact.*" Appendix 1 does not prove the
11 existence or nonexistence of any facts. In fact, the facts that form the basis for the recommended
12 actions in Appendix 1 have been addressed by testimony and exhibits submitted during the
13 hearing consistently with all applicable procedural rules.
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15 Appendix 1 is designed to be used by the SWRCB to frame the process and contents of a
16 mandated steelhead passage feasibility study *if* the SWRCB finds that the parties have proven
17 through evidence that such a study is necessary to protect public trust resources. It simply
18 suggests a course of action to be taken based on the ultimate facts proven by that evidence.
19 Appendix 1 was included as an attachment because it was drafted as a universal recommendation
20 from all of the fisheries agencies and organizations involved in the hearing. In fact, DFG's
21 decision to attach this document to its closing statement was based, in part, on assurances by
22 Vice Chair Silva that appendices would be permitted.³
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25 ² See SWRCB, "NOTICE OF FIELD ORIENTATION TOUR AND SUPPLEMENTAL NOTICE OF PHASE 2 OF
PUBLIC HEARING," August 13, 2003 at 5.

³ Recorder's Transcript p. 1119.

1 The Member Units also allege that they have been denied the right to cross-examine and
2 rebut Appendix 1. This argument is also flawed. As previously discussed, the foundation for
3 Appendix 1 consists of evidence submitted during the hearing. DFG presented testimony and
4 exhibits to prove that a steelhead passage feasibility study was a necessary measure to protect
5 public trust resources.⁴ In addition, DFG testified that prior investigations into passage feasibility
6 have been unsatisfactory.⁵ Finally, Marcin Whitman, one of DFG's hydraulic engineers with
7 extensive experience studying and designing fish passage projects, offered testimony and
8 exhibits to outline the proper contents and process of a fish passage feasibility study.⁶ Testimony
9 and exhibits submitted by NOAA Fisheries and California Trout stand as additional evidentiary
10 sources for the recommendations in the appendix.⁷ Thus, since the evidentiary foundation for
11 Appendix 1 has already been presented to the SWRCB in the hearing, the parties have already
12 been granted a full opportunity for rebuttal and cross-examination. Any claim implying a denial
13 of due process is therefore inappropriate.
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15 III.

16 CONCLUSION

17 For the foregoing reasons, DFG respectfully requests that the SWRCB deny the Member
18 Units' Motion to Strike and consider Appendix 1 to DFG's closing statement not as evidence,
19 but as part of a proposed order if your agency finds that a steelhead passage feasibility study is
20 necessary to protect public trust resources pursuant to Key Issue 3.b. DFG also requests denial of
21 the Motion to Dismiss NOAA Fisheries from the proceeding, since it is based entirely on the
22 erroneous premise that the appendix is evidence. Removing the testimony and exhibits presented
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25 ⁴ DFG Exhibits 1, 2, and 4.


⁵ DFG Exhibit 7.

⁶ DFG Exhibits 7, 8.

⁷ See eg. NOAA Fisheries Exhibits 5, 17; California Trout Exhibits 10, 29.

1 by NOAA Fisheries from consideration in this proceeding would harm the SWRCB's
2 decisionmaking process in a manner that far exceeds the gravity of the alleged infraction, if any,
3 created by submittal of the appendix.

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5 Dated March 1, 2004

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Harlee Branch, Staff Counsel