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15 Conservation District Improvement District No. 1  
16 Cachuma Conservation Release Board and  
Santa Ynez River Water Conservation District

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18 **STATE OF CALIFORNIA**

19 **STATE WATER RESOURCES CONTROL BOARD**

20  
21 In the Matter of:

MOTION TO STRIKE

22 Hearing to Review the United States Bureau  
23 of Reclamation Water Right Permits 11308  
and 11310 (Applications 11331 and 11332) to  
24 Determine Whether Any Modifications are  
Necessary to Protect Public Trust Values and  
25 Downstream Water Rights on the Santa Ynez  
River below Bradbury Dam (Cachuma  
26 Reservoir)

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**I. INTRODUCTION**

The Santa Ynez River Water Conservation District, Improvement District No. 1 (“ID#1”), Cachuma Conservation Release Board (“CCRB”) and the Santa Ynez River Water Conservation District (“SYRWCD”) (collectively “Cachuma Water Agencies”) hereby move to strike the rebuttal testimony proposed to be presented to the State Water Resources Control Board (“State Board”) by the Environmental Defense Center acting on behalf of California Trout (“Cal Trout”) and NOAA’s National Marine Fisheries Service (“NMFS”). Both entities contest the proposal of the State Board to include the Final Environmental Impact Report (“FEIR”) developed by State Board staff and their consultants in the administrative record intended to support an eventual water right decision related to Permits 11308 and 11310 held by the U.S. Bureau of Reclamation for its Cachuma Project.

In its January 23, 2012 Notice of Public Hearing (“Notice”), the State Board provided for the presentation of rebuttal evidence by parties contesting inclusion of the FEIR in the hearing record but, in doing so, required that those parties intending to offer rebuttal witnesses prepare and serve an “outline of their testimony”. Hearing Notice, p.3. The purpose of the requirement was to avoid surprise and to provide interested parties—including presumably, the State Board staff and consultants—the opportunity to understand the proposed testimony and be able to adequately respond. The testimony “outlines” offered by NMFS and Cal Trout are a blatant attempt to avoid both the letter and the intent of the Board’s advance notice requirement.

In several instances, the outlines offered by NMFS fail to provide any indication *at all* of the testimony that will be offered by NMFS witnesses at the hearing on March 29

1 and 30. In other instances, it is evident from the bare bones outlines that *are* provided, that  
2 the testimony bears no relationship to the FEIR that is supposed to be the subject of the  
3 upcoming hearing and is, instead, an attempt to present as “rebuttal” testimony, evidence  
4 that could—and, should—have been provided when the State Board conducted multiple  
5 days of hearings eight years ago to develop a hearing record that is now closed.  
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7 The “outlines” offered by Cal Trout are no better. Neither outline describes the  
8 basis for the conclusions that are reached, thus making it impossible to determine whether  
9 the proposed testimony is supported by the facts. In one case, for example, the proffered  
10 witness will apparently testify about a “2009 Pacific Institute analysis” on agricultural  
11 water use that has not been provided by Cal Trout; is not cited in the proposed witness’  
12 qualifications; and cannot be located on the website of the Pacific Institute, thus making it  
13 impossible to determine the basis for the witness’ opinions. The other witness will, it is  
14 proposed, testify about steelhead “population status and trends” based upon technical  
15 analyses apparently performed by the witness; however, none of the analyses are described  
16 in sufficient detail—or, indeed, at all—to allow for any determination to be made about  
17 their reliability or consistency with accepted scientific practice.  
18

19 The result is that the purpose intended to be served by the State Board’s Notice of  
20 Public Hearing has been completely—and, we believe intentionally—frustrated. Rather  
21 than providing the other parties to the forthcoming hearing the opportunity to prepare to  
22 meet the testimony that will be presented, the “outlines” are manifestly intended to  
23 frustrate such preparation. Not only are these outlines incompatible with the requirements  
24 of the Board’s Notice but also they violate the State Board’s administrative regulations as  
25 well as Government Code Section 11513 and long-settled California case law. Accepting  
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1 the proposed testimony in such circumstances would be incompatible not only with the  
2 plain language and intent of the Notice, but would effectively deny the Cachuma Water  
3 Agencies due process of law. In the few instances where an outline does provide a  
4 reasonable description of the testimony to be offered, it is apparent the testimony is simply  
5 an attempt to re-open a hearing record by offering material that could and should have  
6 been presented during the hearings conducted in 2003—or is simply repetitive of  
7 testimony that was already presented during those hearings.  
8

9 We do not believe that either trial by surprise or a re-opening of the 2003 hearings  
10 was the purpose of the forthcoming proceeding relating to the FEIR. But that would  
11 nonetheless be the result if the outlines of testimony offered by NMFS and Cal Trout are  
12 accepted and the witnesses they offer are allowed to testify. For these reasons, and as  
13 elaborated below, the Cachuma Water Agencies request that the State Board strike the  
14 “outlines” that have been offered by NMFS and Cal Trout and preclude the presentation of  
15 testimony described therein.  
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19 **II. THE STATE BOARD SHOULD STRIKE AND EXCLUDE FROM THE**  
20 **RECORD THE OUTLINES OFFERED BY CAL TROUT AND NMFS**

21 **A. Background**

22 The administrative regulations adopted by the State Board provide in part that:

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24 It is the policy of the State and Regional Boards to discourage the  
25 introduction of surprise testimony and exhibits. (Cal. Code Regs.,  
26 Title 23, Section 648.4 subd. (a))

27 To this end, the regulations provide that when the State Board issues a  
28 hearing notice:

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Where any of the provisions of this section have not been complied with, the presiding officer may refuse to admit the proposed testimony or the proposed exhibit into evidence, and shall refuse to do so where there is a showing of prejudice to any party or the Board. (Cal. Code Regs., Title 23, Section 648.4 subd. (e))

Consistent with its regulations, the State Board issued its Notice of Public Hearing which advised all of the parties, including Cal Trout and NMFS as follows:

Hearing participation is limited to those parties that previously participated in the hearing for this matter. Because the administrative record was left open for the limited purpose of taking the Final EIR into evidence, the State Water Board will be the only party putting on witnesses for direct examination. The State Water Board intends to call Mr. Joe Gibson and Dr. Daryl Koutnick of Impact Sciences, Inc., as witnesses to authenticate the Final EIR and to be available for cross examination. Due to the limited purpose for which these witnesses will be called and the fact that the Final EIR is already publically available, the State Water Board will not prepare any direct testimony in advance for those witnesses. Other parties may cross-examine the State Water Board's witnesses on the Final EIR, the witnesses' oral testimony, and other relevant matters not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) Cross-examiners initially will be limited to one hour per panel of witnesses. The hearing officer has discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Redirect examination may be allowed at the discretion of the hearing officer. Any redirect examination and re-cross examination permitted will be limited to the scope of the cross-examination and the redirect examination, respectively. Rebuttal witnesses may be allowed but any rebuttal shall be limited to evidence that is responsive to evidence presented in connection with the State Water Board's witnesses, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

Hearing parties intending to present rebuttal evidence shall identify their rebuttal witnesses and prepare an outline of their testimony. . . . (emphasis added, Notice p. 2-3).

The Notice makes clear that the only issue for this limited hearing is "Should the

1 Final Environmental Impact Report. . .be entered into the administrative record . . .” That is,  
2 this is not an opportunity to “re-litigate” matters that have already been before the State  
3 Board, or should have been addressed earlier.  
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5 The outlines filed by NMFS and Cal Trout are not in compliance with the above  
6 directive, and should therefore be stricken and the testimony those outlines are intended to  
7 support should be precluded from the hearing now scheduled for March 29 and 30. By its  
8 Notice the State Board intended, consistent with general notions of due process, (a) that  
9 parties wishing to present rebuttal testimony must provide sufficient specificity about the  
10 testimony of their witnesses so that other parties would have the opportunity to prepare for  
11 cross examination of and potentially present surrebuttal witnesses, (b) that rebuttal  
12 testimony be relevant to the direct testimony (that is the content of the FEIR) and (c) that  
13 rebuttal testimony not be repetitive of information that was already presented in these  
14 proceedings, including five days of intensive testimony and subsequent briefing in 2003.  
15 The witness “outlines” filed by NMFS and Cal Trout consistently fail these straightforward  
16 requirements.  
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19 Finally, NMFS and Cal Trout appear to be offering several witnesses to address issues  
20 arising from either the Final Recovery Plan recently completed for steelhead or the  
21 reconsultation process underway between NMFS and the Bureau of Reclamation. The  
22 simple fact that the recovery plan has now been finalized does not change any of the  
23 findings or evidence in the existing FEIR, and therefore cannot serve as rebuttal evidence.  
24 The FEIR already addressed steelhead and effects on habitat, and even referenced the draft  
25 recovery plan (which is essentially unchanged in the final recover plan). As is the case here,  
26 California appeals courts have emphasized that intervening federal designations are not  
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1 “new information”—and thus do not warrant recirculation—when the FEIR in question has  
2 already addressed the underlying species and habitat. (*Fort Mojave Indian Tribe v.*  
3 *California Department of Health Services* (1995) 38 Cal.App.4th 1574.) In *Fort Mojave*,  
4 much like the circumstances here, petitioners had contended that the proposed designation of  
5 critical habitat (and the need for a new biological opinion) for the desert tortoise constituted  
6 “new circumstances” requiring either recirculation of the FEIR under section 21092.1 or a  
7 supplemental FEIR under section 21166. The appeals court rejected these arguments:  
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10       Petitioners' view is that the EIR should have been redone because of a change  
11 not in physical circumstances but in impending federal legal and scientific  
12 review. That is, given the critical habitat designation, before the federal  
13 government transfers the site the service will have to prepare *another*  
14 *biological opinion* under the federal act, focusing not simply on the survival  
15 of the species directly, but now indirectly, on effects on the habitat and on  
16 prospects for species 'recovery.' What the practical difference will be  
17 remains to be seen. But whatever the significance of that inquiry under  
18 federal law and for the federal decision about this project, its impendency  
19 does not amount to the type of new or changed circumstances requiring  
20 supplementation or recirculation of the present EIR, which already has served  
21 the practical and informational functions of CEQA with respect to this  
22 project's impact on the tortoise and its habitat.

23  
24 Likewise here, the mere finalizing of a recovery plan and an ongoing consultation process  
25 with NMFS does not suddenly give rise to rebuttal evidence and any justification for  
26 delaying further the acceptance of the FEIR into evidence. Thus, any witnesses or areas of  
27 testimony addressing these issues should be stricken.  
28

**B. Outlines and Proposed Testimony That Should be Stricken**

The witness outlines offered by NMFS and Cal Trout are non-compliant with the  
State Board's Notice in several respects. For purposes of organization, it is appropriate to

1 consider each outline in the context of the requirements found in the Notice itself. These  
2 requirements, quoting from the Notice, are the following:

- 3
- 4 i. First, evidence is not admissible at the forthcoming hearing if it is not “evidence that  
5 is responsive to evidence presented in connection with the State Water Board’s  
6 witnesses”. Notice, p. 3. Thus, if an outline fails to identify any particular part of  
7 the FEIR to which the proposed testimony is pertinent, it is not responsive to the  
8 State Board witnesses’ direct testimony (“**non responsive**”);
- 9
- 10 ii. Second, evidence is not admissible at the forthcoming hearing if it is evidence “that  
11 should have been presented during the case-in-chief of the party submitting  
12 rebuttal evidence” Notice, p. 3 (“**not new**”);
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- 14 iii. Third, an outline should be stricken and the testimony it purports to support should  
15 be precluded if the “outline” fails to provide sufficient detail to permit other  
16 parties to understand the testimony, including the basis for the testimony, thus  
17 precluding other parties from responding to the testimony at the hearing; that is,  
18 it is not an “outline of the testimony” from which one can determine what the  
19 witness will testify about. Notice, p. 3. (“**no information**”); and
- 20
- 21 iv. Fourth, a party offering rebuttal evidence should not be permitted to present  
22 “Repetitive evidence”, that is information that was already addressed in prior  
23 aspects of these hearings, including the extensive hearings in 2003. Notice, p. 3.  
24 (“**repetitive**”).

25 Below we identify, by proposed witness the manner in which the “outlines” offered by  
26 NMFS and Cal Trout fail to satisfy the above-described requirements of the State Board’s  
27 January 23 Notice.  
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2 **Alagona (NMFS)**

3 Dr. Alagona's entire outline is **non responsive, not new, provides no information, and**  
4 **is repetitive.** From front to back, Dr. Alagona's outline indicates he is being offered to  
5 present evidence of the history of steelhead on the Santa Ynez River, dating to pre-historic  
6 times. First, the evidence proposed to be introduced by Dr. Alagona is non responsive in  
7 that the outline provides no explanation as to whether or how the proposed evidence rebuts  
8 evidence presented in the FEIR. Indeed, the outline fails to identify any particular part of  
9 the FEIR which it purportedly rebuts. Second, the proposed evidence is not new. No  
10 explanation is provided why this historical information could not have been presented by  
11 NMFS during the five days of hearings that occurred in October and November of 2003. To  
12 the contrary, the hearing record shows that NMFS already *did*, in fact, present testimony  
13 related to the historic abundance of steelhead in the Santa Ynez River (see, e.g., Hearing Tr.  
14 p.643-47). The proposed testimony is thus not new; instead, it is cumulative and repetitive.  
15  
16 Third, the outline of Dr. Alagona's proposed testimony and evidence should be stricken in  
17 its entirety because it fails to permit other parties from understanding the basis for his  
18 testimony. While NMFS proposes to offer "rebuttal evidence" in support of Dr. Alagona's  
19 testimony in the form of a work entitled "Peter Alagona – Alagona, P.S., S.D. Cooper, M.  
20 Stoecker, and P. Beedle. 2011. Documenting the Historic Distribution of Steelhead and  
21 Rainbow Trout (*Oncorhynchus mykiss*) in the Santa Ynez River Watershed, Santa Barbara  
22 County, California," NMFS has not made that work available to the parties, nor is it  
23 available through conventional Internet search methods. The unavailability of the evidence  
24 that forms the basis of Dr. Alagona's testimony precludes other parties from determining  
25 what the witness will testify about, and precludes other parties from being able to  
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1 meaningfully respond to such testimony. Because the proposed testimony of Dr. Alagona is  
2 non responsive; because it could have and should have been presented as part of NMFS's  
3 case in chief in 2003; because it is impossible to determine from the proffered outline how  
4 the testimony relates, if at all, to the FEIR; because the basis of such testimony has not been  
5 made available, and is unavailable through conventional search methods; and because such  
6 testimony has already been presented by NMFS, and is already part of the hearing record,  
7 the entire outline should be stricken and Dr. Alagona's testimony precluded from the  
8 hearing.  
9

#### 11 **Brumback (NMFS)**

12 The outline of proposed testimony for Mr. Darren Brumback should also be stricken and  
13 his testimony precluded. Simply put, the outline never describes—at all—what Mr.  
14 Brumback intends to say. Instead, the outline for the most part consists of quotations from  
15 or citations to portions of the FEIR with which Mr. Brumback apparently disagrees, without  
16 ever describing what it is Mr. Brumback intends to say about any of the sections of the FEIR  
17 that are quoted or cited. Breaking it down by sections of the outline:  
18

19 1. "State Water Board's reliance on NMFS' 2000 biological opinion. . ."

20 --First four subparagraphs—**no information, not new**. That is these are merely  
21 quotes from the FEIR and there is no indication what "mischaracterization" the  
22 witness proposes to testify about or what he intends to say;  
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24 --Fifth subparagraph—**not new, no information and repetitive**. Some of this  
25 proposed testimony—such as Mainstem Rearing Target flows— could have been  
26 presented in NMFS's case in chief. Regarding the entire paragraph, there is no  
27 indication what "mischaracterization" the witness proposes to testify about; nor is  
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1 there any description, whatsoever, of what the witness intends to say. Moreover,  
2 information about rearing target flows and fish passage flows was already provided  
3 by NMFS as part of its case in chief during the 2003 hearing (see e.g., Hearing Tr.  
4 pp. 627, 628, 639, 657), and there was extensive testimony and cross examination  
5 concerning WR 89-18 water rights releases (see e.g. Hearing Tr. Pp 824, 1000-1008,  
6 1008-1013, and 1080-1083);

7  
8 --Sixth subparagraph—**no information.** Again, this is merely a quote from the FEIR  
9 and there is no indication what “mischaracterization” the witness proposes to testify  
10 about or what the witness proposes to say.  
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12 2. “The standards for protection of endangered steelhead applied under ESA. . .”

13 **Not responsive, no information and not new.** This section of Mr. Brumback’s  
14 outline is merely a recitation of the requirements of the ESA and is not evidence. It  
15 does not purport to relate to any particular part of the FEIR and it is impossible to  
16 determine what the witness proposes to testify about. Moreover, it is merely  
17 repetitive of information previously provided to the State Board by NMFS’ at the  
18 2003 hearing (Hearing Tr. pp.623-627) and thus is not new.  
19

20 3. “Status of the 2000 biological opinion. . .”

21 **Not responsive, no information and not new.** Similar to the above, this part of the  
22 outline does not purport to relate to any particular part of the FEIR and it is  
23 impossible to determine what the witness proposes to testify about or what he intends  
24 to say. To the extent the testimony is about the requirements of the 2000 biological  
25 opinion, the testimony is also repetitive of testimony offered by NMFS as part of its  
26 case in chief in 2003 (Hearing Tr.623, 626-28) and thus is not new.  
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1  
2 **Capelli (NMFS)**

3 The witness outline offered for Mark Capelli continues NMFS's effort to avoid  
4 compliance with the requirements of the Notice. Although the FEIR devoted four pages to a  
5 discussion of the only recovery planning document issued by NMFS for Southern California  
6 steelhead at the time the FEIR was promulgated (FEIR, pp. 2.0-41-44) Mr. Capelli proposes  
7 to testify about a Final Recovery Plan not in existence when the FEIR was issued.  
8 Importantly, for purposes of the present motion, however, it is impossible to determine what  
9 Mr. Capelli intends to say. Breaking his outline down by sections :

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11 2. "Timeline for Development of NMFS' . . . Recovery Plan. . ."

12 **Not responsive, no information and not new**—That is, this part of the outline does  
13 not purport to relate to any particular part of the FEIR and it is impossible to  
14 determine what the witness proposes to testify about as it relates to the FEIR; nor can  
15 it be determined what the witness intends to say. To the extent the witness intends to  
16 discuss the recovery planning process engaged in by NMFS with respect to the  
17 Southern California steelhead, the testimony is also not new. Instead testimony on  
18 the subject was previously presented as part of NMFS's case in chief in 2003. (See  
19 Hearing Tr. pp. 632-640).

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22 3. "Discrepancies in the FEIR Characterization of the Draft . . . Recovery Plan"

23 **No information.** Although this part of the outline purports to be about certain  
24 pages of the FEIR it is impossible to determine what the witness proposes to testify  
25 about as it relates to the FEIR or what he intends to say.

26  
27 4. Differences in Draft . . . and Final. . . Recovery Plan.

28 **No information.** Apparently Mr. Capelli intends to discuss certain differences that exist

1 between the draft steelhead recovery plan that existed when the FDEIR was issued and  
2 the Final Recovery Plan adopted by NMFS after the FEIR was issued. But, it cannot be  
3 discerned from the outline how Mr. Capelli's testimony amounts to "rebuttal" to the  
4 FEIR ; nor can it be determined what he intends to say.

5  
6 5. "Essential Role of the Santa Ynez River. . .", and

7 **No information.** Evidently it is Mr. Capelli's intention to also describe for the Board  
8 the elements of the Final Recovery Plan for Southern California steelhead adopted after  
9 the FEIR was issued. How his proposed description of the later-issued document  
10 amounts to "rebuttal testimony" is not explained; nor is it possible to determine from the  
11 outline what Mr. Capelli intends to say.

12  
13 6. "Summary"

14 **Similar to parts 4 and 5--Not responsive and no information**—Again, Mr.  
15 Capelli's purported "Summary" fails to indicate how his testimony amounts to  
16 "rebuttal" with respect to any part of the FEIR; nor does it provide any indication of  
17 what the witness proposes to say. As is true of the other elements of Mr. Capelli's  
18 testimony, his summary appears to be intended to somehow bring before the State  
19 Board a subject—recovery planning for the Southern California steelhead—that was  
20 comprehensively covered in the FEIR (pp. 2.0-41-44)) and to do so by means of a  
21 document that did not exist when the FEIR was issued. For purposes of the present  
22 motion, however, it is enough to note that the summary—as is true of the remainder  
23 of the outline for Mr. Capelli—completely fails to indicate how his testimony  
24 amounts to "rebuttal" of the FEIR and what the witness intends to say. That is, Mr.  
25 Capelli's outline does not purport to relate to any particular part of the FEIR and it is  
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1 impossible to determine what the witness proposes to testify about as it relates to the  
2 FEIR. Instead, his testimony appears to be simply a general outline of the Recovery  
3 Plan which speaks for itself.  
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5 **Ruvelas (NMFS)**

6 **Not responsive, no information**—The entire outline for Ms. Penny Revulas appears  
7 to involve a policy statement rather than the presentation of “rebuttal” evidence.  
8 Nowhere does the outline purport to relate to any particular part of the FEIR. It is  
9 impossible to determine from the outline what the witness proposes to testify about  
10 as it relates to the FEIR and what the witness intends to say.  
11

12 **Cooley (Cal Trout)**

13 Ms. Cooley’s outline is nothing more than an attempt to re-open the evidentiary hearing  
14 record purportedly to present new information (including an unavailable “2009 Pacific  
15 Institute analysis”) regarding water supply and demand within the service area of the  
16 Cachuma Project. The issue of water supply and demand within that service area was the  
17 subject of extensive direct and cross examination at the 2003 hearing. (Hearing Tr. Pp.  
18 1051-1078). While Cal Trout is entitled to cross-examine Messrs. Gibson and Koutnick  
19 regarding their analysis of impacts of the various project alternatives on water supplies  
20 within the Cachuma Project service area, Cal Trout is not entitled to submit new water  
21 supply or demand data. The evidentiary record is closed. The only issue now before the  
22 State Board is whether the FEIR should be entered into the administrative record for the  
23 Cachuma Project.  
24

25  
26 Regarding agricultural water use, Ms. Cooley also proposes to testify based on a “2009  
27 Pacific Institute analysis” that is neither attached to her outline, cited in her statement of  
28

1 qualifications nor available from the Pacific Institute’s website. She does not explain how  
2 her use of the analysis constitutes rebuttal testimony, nor does she describe what, if any,  
3 portion of the FEIR her testimony is intended to “rebut”. Her outline is thus, non-responsive  
4 to the Notice. In addition, Ms. Cooley fails to describe what she intends to *say* about the  
5 Pacific Institute analysis and its relationship to the FEIR, thus her outline provides no  
6 information. Finally, Ms. Cooley also apparently intends to testify about the use of recycled  
7 water but fails to provide any description of what she intends to say or how her testimony  
8 “rebut” the FEIR. Thus, her outline provides **no information** and is, again, **non-responsive**  
9 to the State Board’s Notice.  
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12 **Trush (Cal Trout)**

13 The “outline” of testimony of Dr. William Trush completes the cycle of avoidance of the  
14 requirements of the Notice and the State Board’s administrative regulations. Dr. Trush  
15 apparently intends to testify about a series of analyses he undertook of data provided in  
16 Appendix G of the FEIR. However, *none* of his analyses are provided as part of the outline;  
17 nor is a sufficient description of his analyses provided to enable any other party to the  
18 Cachuma hearings to understand what he did, how he did it or to allow for any  
19 determination of whether his analyses are reliable or consistent with accepted scientific  
20 practice. Instead, the outline attempts to hide the ball in order to prevent other parties to the  
21 hearing, including State Board staff, from being able to prepare to meet and respond to Dr.  
22 Trush’s testimony. Breaking Dr. Trush’s outline down by sections:  
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25 1.a and b—**No information**—That is, it is impossible to determine what analyses the  
26 witness undertook of data from Appendix G of the FEIR to enable him to testify  
27 about Santa Ynez River steelhead population status and trends. The data he used are  
28

1 not described; his methods are not described and his results are not described—at all.  
2 The consequence is that Cal Trout apparently intends to spring the results of Dr.  
3 Trush's technical analyses of complex scientific data on the other parties to the  
4 proceeding as a surprise—in contravention of the Notice of Public Hearing and the  
5 Administrative Code regulations intended to discourage surprise testimony (Cal.  
6 Code Regs., Title 23, § 648.4 subd. (a). Because his outline is neither compliant with  
7 the Notice of Hearing nor the Board's regulations, Dr. Trush's testimony should be  
8 excluded. Cal. Code Regs. Title 23, § 648.4 (e).

9  
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11 **1.c—No information, not new and repetitive—That is,** it is impossible to  
12 determine what analyses the witness undertook in order to testify about the condition  
13 of the steelhead. As is true of Dr. Trush's analyses of population status and trends,  
14 which also apparently rely on information from Appendix G of the FEIR, neither the  
15 data used, the methodology employed nor the results obtained are described. Instead,  
16 Cal Trout apparently intends to present Dr. Trush's analyses in the same kind of  
17 surprise fashion it intends for his analyses of population trends. To make matters  
18 worse, Cal Trout previously offered *extensive* testimony on the condition of  
19 steelhead in the Santa Ynez River at the 2003 hearing through Dr. Peter Moyle.  
20 Hearing Tr. pp. 798-805. Thus, the testimony now proposed to be presented by Dr.  
21 Trush is not new; instead, it is cumulative and repetitive of testimony previously  
22 presented by another academic witness eight years ago.

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25 **2. No information—**It cannot be determined from the outline how Dr. Trush  
26 analyzed the FEIR scoring system, or what the witness proposes to testify about  
27 relative to Alternative 5B and 5C (which were added as alternatives by the State  
28



1 Board following the 2003 hearings in response to criticisms of Cal Trout). Indeed, it  
2 cannot be determined from the outline whether Cal Trout supports alternatives 5B  
3 and 5C of the FEIR, or opposes them. Based upon the meager statements made in  
4 Section 2 of Dr. Trush's outline, it is impossible for other parties to the hearings to  
5 prepare to meet or respond to Dr. Trush's testimony about Alternatives 5B and 5C—  
6 whatever that testimony is going to be.  
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8 **3. No Information, Not new and repetitive**—While Dr. Trush's outline reports  
9 there is "new information" that addresses the need for steelhead passage around  
10 Bradbury Dam, his outline fails to describe what that information is. Thus, it is  
11 impossible to understand how the testimony amounts to "rebuttal" or to prepare to  
12 meet or respond to the testimony. Again, the patent objective is to surprise the other  
13 parties to the hearing in contravention of the Notice and the Board's regulations.  
14 Moreover, the testimony is cumulative. Extensive testimony was presented by Cal  
15 Trout on the subject of passage around Bradbury Dam during the 2003 hearings  
16 (Hearing Tr. pp. 837-849) that was rebutted in equally extensive fashion by the  
17 Cachuma Water Agencies (Hearing Tr. pp. 994-1000). Dr. Trush's proposed  
18 testimony is thus not "new", but instead is simply "cumulative" and "repetitive" in  
19 contravention of the Board' Notice and, again, threatens to re-open a hearing record  
20 that was duly closed more than eight years ago.  
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23 **4. No information, Not new and repetitive**—Finally, Dr. Trush's outline indicates  
24 that he will testify that the FEIR contains erroneous and misleading findings and  
25 conclusions about "the alternatives" adverse effects on the condition of Santa Ynez  
26 River steelhead. In particular, the outline then references the "adverse impacts" of  
27  
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1 Water Right Order 89-18. Ignoring for the moment the fact that WRO 89-18 is not  
2 one of the “alternatives” proposed by the FEIR, it is evident that this is one more  
3 attempt by Cal Trout to re-plow ground covered in the earlier hearings. Given that  
4 WRO 89-18 had already controlled Cachuma operations for the 15 years *prior* to the  
5 2003 hearings and that Dr. Moyle testified extensively on behalf of Cal Trout on the  
6 “condition” of steelhead downstream of Bradbury Dam (the area of the River  
7 affected by 89-18) during the 2003 hearings, it is evident that Dr. Trush’s testimony  
8 on the subject—whatever it is—will cover the same ground already covered by Dr.  
9 Moyle in his testimony. If the Board wants to understand Cal Trout’s position on the  
10 effects of WR 89-18, it can read Dr. Moyle’s extensive prior testimony on direct and  
11 cross examination. It doesn’t need Dr. Trush to provide additional testimony for the  
12 same party on the same subject.

13 Further, like the other parts of Dr. Trush’s outline, Section 4 fails to describe what  
14 Dr. Trush will say about the impact of 89-18 releases on steelhead; what, if any,  
15 analyses he undertook to reach his conclusions and what those analyses show.

16 Instead, his testimony on the subject is again intended to be a surprise and, for that  
17 additional reason, the outline is non-compliant with the Notice of Hearing and the  
18 State Board’s regulations and his testimony should be precluded.

### 19 20 21 22 23 24 **III. CONCLUSION**

25 The outlines offered by Cal Trout and NMFS on February 27, 2012 are not in  
26 compliance with the directives of the State Board’s Notice of Public Hearing or the State  
27 Board’s regulations. Instead they threaten a substantial denial of due process to those parties  
28

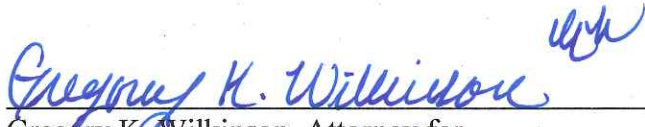
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to the hearing who desire to support the State Board staff's proposal to include the FEIR in the administrative record for the Cachuma hearings. The outlines should therefore be stricken and the testimony which NMFS and Cal Trout propose to present on March 29 and 30, 2012 should be precluded from being presented.

Respectfully submitted,


BEST BEST & KRIEGER LLP

DATED: 3/2/12

  
\_\_\_\_\_  
Gregory K. Wilkinson, Attorney for  
Santa Ynez River Water Conservation District  
Improvement District No. 1


DOWNEY BRAND LLP

DATED: 3/2/12

  
\_\_\_\_\_  
Kevin M. O'Brien, Attorney for  
Cachuma Conservation Release Board

LAW OFFICES OF YOUNG WOOLDRIDGE, LLP

DATED: 3/2/12

  
\_\_\_\_\_  
Ernest A. Conant, Attorneys for  
Santa Ynez River Water Conservation District

**PROOF OF SERVICE**

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I, PAMELA A. MCNEMAR, declare: I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is 1800 30th Street, Fourth Floor, Bakersfield, CA 93301.

On March 2, 2012, I caused to be served the below listed document(s) entitled as: **MOTION TO STRIKE** on the interested parties in this action, as listed below:

**BY MAIL** on March 2, 2012, at Bakersfield, California, by placing / / the original or / x / a true copy thereof enclosed in a sealed envelope with postage prepaid, in the United States mail at Bakersfield, California, as set forth below.

**BY FACSIMILE TRANSMISSION** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

**BY PERSONAL SERVICE** by causing personal delivery by \_\_\_\_\_ of the document(s) listed above to the person(s) at the address(es) set forth below.

**BY ELECTRONIC MAIL:** by transmitting the document(s) listed above via electronic mail to all parties listed to receive electronic service at the electronic mail address set forth on the Service List.

**See Attached Service List**

**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the address(s) on the next business day.

I am readily familiar with the firm's practice of collection and processing of documents for mailing. Under that practice it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business.

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

Executed on March 2, 2012, at Bakersfield, California.

  
PAMELA A. MCNEMAR

Cachuma Project Phase 2 Hearing  
Final Service List  
(updated 01/05/2012)

*(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)*

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

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<p>State Water Resources Control Board Division of Water Rights Attn: Jane Farwell 1001 I Street, 2nd Floor Sacramento, CA 95814 <a href="mailto:jfarwell@waterboards.ca.gov">jfarwell@waterboards.ca.gov</a></p>	<p>California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 <a href="mailto:kkraus@edcnet.org">kkraus@edcnet.org</a></p>

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

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