



# CALIFORNIA FARM BUREAU FEDERATION

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Public Comment  
Cachuma Project Draft Order  
Deadline: 12/9/16 12:00 noon



Sent via USPS and E-Mail

[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

December 9, 2016

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
PO Box 100  
Sacramento, CA 95812-0100

Re: Comment Letter - Cachuma Project Draft Order

Dear Ms. Townsend:

The California Farm Bureau Federation and the Santa Barbara County Farm Bureau (collectively “Farm Bureau”) appreciate the State Water Resources Control Board’s (Board) consideration of these comments on the Cachuma Project Draft Order (Draft Order).

The California Farm Bureau Federation (CFBF) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. CFBF is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 53,000 agricultural, associate and collegiate members in 56 counties. CFBF strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

The Santa Barbara County Farm Bureau, a constituent of California Farm Bureau Federation, is a grassroots agricultural organization based in County of Santa Barbara representing approximately 490 farmer and rancher members locally. The mission of Santa Barbara County Farm Bureau is to represent and promote agriculture in Santa Barbara County.

Farm Bureau is concerned that the Draft Order is inconsistent with good policy, CEQA, and several cited authorities. Although it is apparent that the Draft Order is primarily driven by a desire to recover the federally listed steelhead, this objective should not subsume the Board’s overriding obligation to make consistent, sound, and balanced decisions. In its zeal to recover the steelhead, the Draft Order proposes water rights

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conditions that exceed even the current requirements of the Endangered Species Act as interpreted by the responsible Federal regulatory agency. In so doing, the Draft Order greatly exceeds prior precedent and fails to appropriately balance the benefits and burdens of the options identified in the FEIR. This raises concerns not only within the Cachuma Project service area and watershed, but also is a troubling precedent for the rest of the state.

Farm Bureau members have substantial interests in this matter. First, there are a significant number of agricultural users within the Cachuma Project's service area and watershed who would be adversely impacted by the Draft Order.<sup>1</sup> These impacts may include reduced water availability and increased costs. In addition, Farm Bureau is very concerned about the precedent that could be set in this case. The Draft Order's alarming lack of regard for the settlement agreement that was the primary basis for the Reclamation's pending water rights petition could disrupt the current fragile balance and potentially tip the region back into conflict. Finally, the Draft Order's narrow focus on flows means that other, more effective and water efficient options are not explored, and that the relative value of the additional flows is not adequately considered.

**1) The Environmentally Superior Option of Alternative 3C Should Be Chosen Over the Significant Unavoidable Impacts Created by Alternative 5C.**

After considering the options identified in the FEIR, the Draft Order ultimately is based on Alternative 5C, an alternative requiring the Bureau of Reclamation to release more water from Bradbury Dam to protect fishery resources than what would be required per the Biological Opinion. Alternative 3C, originally identified in the FEIR as the environmentally superior alternative, represented the currently existing management and operation of the project. The Draft Order, however, deems Alternative 3C insufficient, despite acknowledgment that steelhead habitat conditions have improved from baseline conditions thanks to implementation of the 2000 Biological Opinion. Instead, the Draft Order rejects Alternative 3C on the ground that it is "consistent with" but does not exactly match the Board's "objectives" for the steelhead fishery.

Although the genesis of these "objectives" is not well defined, it appears to be based on the assertion that "Alternative 3C might not afford adequate protection to steelhead downstream of Bradbury Dam to achieve compliance with the Public Trust Doctrine."<sup>2</sup> In

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<sup>1</sup> The irrigated acreage with the Cachuma Project's service area has declined from approximately 38,000 acres in the early days of the Project to between approximately 10,000 and 12,000 acres a year today. (See *Cachuma Project*, Bureau of Reclamation (last updated Apr. 18, 2011), available to [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Cachuma+Project](http://www.usbr.gov/projects/Project.jsp?proj_Name=Cachuma+Project). In addition, the Project currently serves approximately 150,000 municipal and industrial uses in and around the City of Santa Barbara, Goleta, Summerland, Montecito, and Carpenteria.

<sup>2</sup> Draft Order: State Water Resources Control Board Order WR 2016 in the Matter of Permits 11308 and 11310 held by the U.S. Bureau of Reclamation for the Cachuma Project on the Santa Ynez River, SWRCB (Sep. 7, 2016), available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/cachuma/docs/cachumadraftorder\\_090716.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/cachuma/docs/cachumadraftorder_090716.pdf).

the end, even though Alternative 3C was identified by the Board's own EIR as the "environmentally superior" alternative and works for the ESA and works for water users, it seems it was subsequently rejected only because it was deemed *not* to work for an attenuated interpretation of the Public Trust Doctrine as posited in the Draft Order.

This approach, a departure from established precedent fraught with significant scientific uncertainty, should not be adopted by the Board. Instead, the Board should rely on the information in the FEIR. This is particularly true since there is not sufficient information available to demonstrate the additional impacts to water users will actually result in the desired benefits to fish. The Draft Order's flow-centric perspective turns a blind eye to all practical considerations, while erring liberally on the side of an *ipso facto* assumption that more water for fish must always be better than less. This approach, however, is not consistent with CEQA or the Board's constitutional and statutory obligations to consider and balance uses.

## **2) The Draft Order is not adequately supported by the cited authorities.**

The Board cites various authorities to support its action, including its public trust authorities, its water quality planning authorities, and its reasonable use and water rights authorities. In addition, the Board cites the federal and state Endangered Species Acts and section 5937 of the Fish and Game Code. As stated, however, none of the cited authorities justify the full scope and reach of the Board's proposed action—and indeed, several of the same authorities would appear to significantly limit or even directly conflict with the Board current approach.

### ***A. The Public Trust Doctrine Requires Balancing of Public Interest, Not a Preference for One Use.***

Per the California Supreme Court in *National Audubon Society v. Superior Ct.* (1983) 33 Cal.3d 419, the California the SWRCB can exercise authority to supervise and modify appropriations and uses of water for the purpose of preserving public use of navigable water bodies in the state.<sup>3</sup> In *Audubon*, however, the California Supreme Court also stated that the SWRCB is responsible for considering what is "feasible and consistent with the public interest" when making decisions in the name of "public trust."<sup>4</sup> In the opinion of the California Supreme Court, "both the public trust doctrine and the water rights system embody important precepts...to embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of public trust appropriations essential to the economic development of the state, or deny any duty to protect...the public trust."<sup>5</sup> In other words, the public trust doctrine requires *balancing* of the public interest. However, the

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<sup>3</sup> *National Audubon Society v. Superior Ct.* (1983) 33 Cal.3d 419, 434-435, 446-447.

<sup>4</sup> *National Audubon*, 33 Cal.3d at 446-447.

<sup>5</sup> *Id.* at p. 445.

Draft Order includes no reasonable balancing of potential adverse environmental consequences, significant economic considerations, or of the public interest in sufficient water supplies for domestic, municipal, and agricultural purposes generally.

Similarly, the Board's water quality planning and water authorities allow it to set, implement, and enforce water quality objectives and water rights conditions to protect designated beneficial uses and legal users of water, but also requires reasonable protection of *all* beneficial uses. Moreover, the Porter-Cologne Act requires consideration of economic impacts" and how to "reasonably achieve through "coordinated control of all factors" affecting water quality in an area.<sup>6</sup>

The Draft Order's citation to *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District (EDF v. EBMUD)*<sup>7</sup> illustrates the lack of proper balancing and weighing of competing interests under both public trust doctrine and the Porter-Cologne Act. In *EDF v. EBMUD*, the court reiterated that the Board must consider the relative benefit to be derived from all of the possible beneficial uses of the water, including domestic, irrigation, municipal, and industrial use *as well as* the preservation and enhancement of fish, wildlife, and recreation.<sup>8</sup> The Draft Order, however, unfairly weights the scales to fashion a novel standard in excess of the Endangered Species Act's "not likely to jeopardize" standard, to the clear detriment of the member units who rely on the Cachuma Project for municipal, industrial, or agricultural water.

The Draft Order's failure to take an appropriate balancing approach becomes especially apparent when considering the very different water supply impacts that Alternatives 3C and 5C propose. The Draft Order explicitly noted that Alternative 5C will have the potential to exacerbate water supply shortages during critically dry years or periods. But, the Draft Order spends very little time discussing these numbers, which should have constituted a major factor in any balancing analysis. Instead, in the face of testimony provided by those who are actually impacted by these potential shortages and who identified all of the ways they have already made significant changes and efforts to implement numerous conservation measures, the Draft Order brushes off this concern by concluding that water shortage impacts should "be avoided" by implementing more conservation measures. However, the Draft Order does not adequately address water supply impacts.

Furthermore, discussion in the Draft Order recognizes that implementation of Alternative 3C "results in a number of benefits to the steelhead population," but overrides consideration of Alternative 3C because option 3C's goals for preservation of the steelhead population are "consistent, but not the same" as the Board's goals for the steelhead. "Consistent, but not the same," however, is not the appropriate measure for determining

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<sup>6</sup> Water Code, § 13241.

<sup>7</sup> *Environmental Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 196.

<sup>8</sup> *Id.* at p. 196.

when to set aside consideration of the environmentally appropriate alternative in favor of another. Particularly when the chosen alternative has significant impacts of its own.

***B. The Reasonable Use and Other Doctrines Regarding Waste of Water Are Inconsistent with the Draft Order's Conclusions.***

The reasonable use doctrine, Article X, Section 2 of the California Constitution, and the Board's statutory authorities to prevent waste and unreasonable use seek to prevent waste and unreasonable uses of water. SWRCB cites article X section 2 of the state Constitution, and Water Code sections 100-101, for the premise that waste, unreasonable use, and unreasonable method of use or method of diversion are all impermissible actions.<sup>9</sup> Further, Water Code section 275 authorizes the SWRCB to take appropriate proceedings or actions to prevent such waste or unreasonable use of water. However, when the SWRCB determines the reasonableness of a particular water use, case law dictates that they *must consider* competing water demands and beneficial uses of the water; a use can be found unreasonable based on its impact on fish or instream uses, after the agency balances competing considerations.<sup>10</sup> Article X, Section 2 also requires "that the waters of the State be put to beneficial use to the fullest extent of which they are capable."<sup>11</sup> Contrary to these requirements, however, the proposed flows in the Draft Order would, to a large extent, alter operations of the Cachuma Project so as to prevent the efficient capture of waters to meet existing demands in Project's service area and watershed. Rather, the Draft Order would result in average loss of 14,511 and 32,381 acre-feet a year, in dry and critical dry years respectively,<sup>12</sup> for the alleged benefit of an estimated local population of some 16 native steelhead trout—in other words, an almost *per se* waste of water. Under any rational and defensible interpretation of "the public interest," however, it would seem self-evident that large volumes of useable water should *not* be redirected without strong evidence of a commensurate benefit to be gained. In this case, there is remarkable dearth of *any* such evidence.

***C. The California and Federal Endangered Species Acts Mandate a Lower Threshold for Fish Protection than the Draft Order Seeks to Impose.***

The federal Endangered Species Act requires consultation by federal agencies to prevent jeopardy or adverse modification of designated critical habitat of federally listed threatened and endangered species through the use of the "best available science" and through the adoption of "reasonable and prudent" and "economic and technological feasible" measures to avoid impacts.<sup>13</sup> In the case of the Cachuma Project, however, the

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citing *Environmental Defense Fund, Inc. v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183, 191, 200).

<sup>11</sup> See, e.g., Cal. Const., art. 10, sec. 2; Water Code, § 275.

<sup>12</sup> Final EIR, Volume II – Edited Version of 2011 2<sup>nd</sup> RDEIR (December 2011), available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/cachuma/feir/cachuma\\_feir\\_vol2.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/cachuma/feir/cachuma_feir_vol2.pdf), Tables 4-17 and 4-25 at pp. 4.3-18 and 4.3-25.

<sup>13</sup> 15 U.S.C. § 1536.

Bureau of Reclamation (Bureau) has in fact satisfied this requirement. In obtaining the 2000 Biological Opinion, the Bureau went through proper federal ESA proceedings, and received the requisite incidental take statement. If the Board is demanding a re-initiation of the consultation process because the amount of incidental take has been exceeded, or new information has been uncovered, then the proper and legally required procedure would be to reinitiate the consultation process in light of new information and issue a new biological opinion—not create a legally questionable and inapposite new legal standard wholly outside of the Board’s jurisdictional purview.

The California Endangered Species Act as well is even more unavailing as basis for the Draft Order’s proposed action to the extent it imposes requirements on state agencies, but does not apply to the Bureau of Reclamation or the Cachuma Project as a federal project, nor is the Southern California Steelhead DPS (*Oncorhynchus mykiss*) currently listed under the California Endangered Species Act.

***D. The Draft Order Seeks to Impermissibly and Over-Expansively Re-Interpret Fish and Game Code section 5937.***

The Draft Order also overextends Fish and Game Code section 5937, which requires passage of “sufficient” water “over, around or through” a “fishway” or “dam” “to keep in good condition any fish that may be planted or exist below the dam.” On their face, however, the terms “sufficient” and “good condition” and “any fish” “that may be planted or existing below the dam,” however, do not impose the equivalent of theoretical recovery standard that would not apply to operations of the Cachuma Project under either the federal or state Endangered Species Act in any case. Nor does this language support commandeering facility operations or foreclosing vested water rights, particularly when there is not adequate information to demonstrate that the additional restrictions have been sufficiently balanced “in the public interest” or will have any significant benefit to fish.

**3) The Draft Order inappropriately disrupts a valuable negotiated settlement**

It is apparent from the record that a significant amount of work went into developing a settlement among water users that incorporated key water rights and water quality provisions, as well as the requirements of the National Marine Fisheries Service’s Biological Opinion. The Board is typically supportive of agreements like this that incorporate water users and fishery needs and, in this case, the record in fact shows that, while additional nonflow measures in combination with existing flows could be undertaken and might well reap additional benefits, operations over the last several under the settlement agreement and existing biological opinion since have indeed benefited native steelhead in the watershed. Despite this, the Draft Order, in this case, casually brushes the settlement agreement. This important settlement agreement was also the basis of Alternative 3C, the “environmental superior alternative” found to best achieve all project objectives—including protection of public trust resources—in the Board’s FEIR. Given this background, it is again not at all clear why the Draft Order would impose requirements

Letter to State Water Resources Control Board  
Comment Letter - Cachuma Project Draft Order  
December 9, 2016  
Page 7

that are threaten to disrupt this settlement, particularly when the value of the additional flows to the species of concern is not well established.

**Conclusion**

While the Board's resolve to protect native steelhead is clear, the Draft Order fails to adequately balance this interest against other uses of water. For this reason, we request the Board to amend the Draft Order to implement Option 3C.

Thank you for consideration of these comments. If you have any questions, please contact me directly at [jfredrickson@cxfb.com](mailto:jfredrickson@cxfb.com) or (916) 561-5673.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Justin Fredrickson', with a long horizontal line extending to the right.

Justin Fredrickson  
Environmental Policy Analyst

cc: Service List of Parties to Exchange Information (see attached list)

Cachuma Project Evidentiary  
 Hearings Service List (updated  
 09/07/2016)

*(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, updated 03/28/2012, updated 12/12/2013, updated 01/06/2014(corrected), updated 01/23/14, updated 03/13/2014, updated 08/17/2016, update 09/07/16.)*

**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  <a href="mailto:kobrien@downeybrand.com">kobrien@downeybrand.com</a>  <a href="mailto:bcougar@downeybrand.com">bcougar@downeybrand.com</a></p> <p><i>updated 01/05/2012</i></p>	<p>City of Solvang          Mr. Christopher L. Campbell          Baker, Manock &amp; Jensen          5260 N. Palm Avenue, Suite 421          Fresno, CA 93704  <a href="mailto:ccampbell@bakermanock.com">ccampbell@bakermanock.com</a></p> <p><i>updated 07/29/2011</i></p>
<p>Santa Ynez River Water Conservation District, Improvement District No. 1 Mr. Paeter Garcia          Best Best &amp; Krieger LLP          3390 University Avenue, 5<sup>th</sup> Floor          Riverside, CA 92501  <a href="mailto:Paeter.Garcia@BBKlaw.com">Paeter.Garcia@BBKlaw.com</a></p> <p><i>updated 08/15/2014</i></p>	<p>City of Lompoc          Mr. Nicholas A. Jacobs          Somach, Simmons &amp; Dunn          500 Capitol Mall          Suite 1000          Sacramento CA 95814  <a href="mailto:njacobs@somachlaw.com">njacobs@somachlaw.com</a></p> <p><i>updated 01/06/2014</i></p>
<p>Santa Ynez River Water Conservation District Mr. Ernest A. Conant          Law Offices of Young Wooldridge          1800 – 30<sup>th</sup> Street, Fourth Floor          Bakersfield, CA 93301  <a href="mailto:econant@youngwooldridge.com">econant@youngwooldridge.com</a></p>	<p>California Trout, Inc.          Ms. Linda Krop          Ms. Maggie Hall Environmental Defense Center 906 Garden Street          Santa Barbara, CA 93101  <a href="mailto:lkrop@environmentaldefensecenter.org">lkrop@environmentaldefensecenter.org</a>  <a href="mailto:mhall@environmentaldefensecenter.org">mhall@environmentaldefensecenter.org</a></p> <p><i>updated 08/17/2016</i></p>

<p>County of Santa Barbara Mr. Michael C. Ghizzoni, County Counsel 105 E. Anapamu Street Santa Barbara, CA 93101 <a href="mailto:mghizzoni@co.santa-barbara.ca.us">mghizzoni@co.santa-barbara.ca.us</a>  <i>updated 08/12/2016</i></p>	<p>U.S Bureau of Reclamation Ms. Amy Aufdemberg 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 Fax (916) 978-5694 <a href="mailto:AMY.AUFDEMBERGE@sol.doi.gov">AMY.AUFDEMBERGE@sol.doi.gov</a>  <i>updated 08/12/16</i></p>
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Cachuma Project Evidentiary  
 Hearings Service List (updated  
 09/07/2016)

*(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, updated 03/28/2012, updated 12/12/2013, updated 01/06/2014(corrected), updated 01/23/14, updated 03/13/2014, updated 08/17/2016, update 09/07/16.)*

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

California Department of Fish and Wildlife Ms. Nancee Murray Senior Staff Counsel 1416 Ninth Street, 12 <sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:Nancee.Murray@wildlife.ca.gov">Nancee.Murray@wildlife.ca.gov</a>  <i>updated 08/15/2016</i>	Bureau of Reclamation, Mid-Pacific Region Mr. Michael Jackson Area Manager South-Central California Area Office 1243 N Street Fresno, CA 93721-1813 <a href="mailto:mjackson@usbr.gov">mjackson@usbr.gov</a>
Montecito Water District Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a>	Santa Barbara County CEO's Office Ms. Terri Maus-Nisich, Assistant CEO 105 E. Anapuma Street, 4 <sup>th</sup> Floor Santa Barbara, CA 93101 <a href="mailto:tmaus@co.santa-barbara.ca.us">tmaus@co.santa-barbara.ca.us</a>  <i>updated 09/07/2016</i>

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

NOAA Office of General Counsel Southwest Region Mr. Dan Hytrek 501 West Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 <a href="mailto:Dan.Hytrek@noaa.gov">Dan.Hytrek@noaa.gov</a>  <i>updated 05/13/2011</i>	
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