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**Cachuma Conservation Release Board
and
Santa Ynez River Water Conservation District, Improvement District No. 1**

September 28, 2010

STATE WATER RESOURCES
CONTROL BOARD
19 OCT -1 PM 12:21
DIV. OF WATER RIGHTS
SACRAMENTO

Charles L. Lindsay
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, Ca 95812-2000

Re: Completion of Final Environmental Impact Report and Water Rights Decision for the Cachuma Project—United States Bureau of Reclamation Water Rights Permits 11308 and 11310

Dear Mr. Lindsay:

The undersigned are the General Managers of the Cachuma Conservation Release Board (“CCRB”) and the Santa Ynez River Water Conservation District, Improvement District No. 1 (“ID No. 1”) (collectively the “Cachuma Member Units”). We are writing in response to the September 21, 2010 letter of Rodney McInnis of the National Marine Fisheries Service (“NMFS”) proposing a delay in the release of the Final Environmental Impact Report associated with adoption of the State Water Resources Control Board’s (“State Board’s”) anticipated Water Right Decision in the matter of Bureau of Reclamation Water Rights permits 11308 and 11310. In our view, Mr. McInnis’ proposal should be rejected. It is utterly inconsistent with the position previously taken by NMFS in this proceeding; it is inconsistent with California law relating to the issuance of EIRs, and; if granted, it would cast doubt on the timeliness of the California Environmental Quality Act’s (“CEQA”) documentation the State Board *does* eventually adopt. We believe it is nothing less than an attempt to belatedly re-open a State Board hearing that was concluded seven years ago and, for the reasons that follow, should be rejected.

In a letter dated May 27, 2010, regarding the Schedule to Complete the Hearing to Review U.S. Bureau of Reclamation Water Rights Permits 11308 and 11310, you included two potential schedules—Plan A and Plan B. (A copy of the State Board’s Schedule is enclosed). Under both of the Plans proposed by the State Board, release of the Final EIR was planned for September 1, 2010 with the parties then being given 30 days to raise objections to entering the document into the hearing record. We are unaware of any objections being voiced regarding the proposed schedule from any party to the hearings, including the National Marine Fisheries Service. Now, approximately four months later—well after the proposed release date of the Final EIR—NMFS seeks a delay of indeterminate length in the release of the Final EIR in order to accommodate two processes it proposes to complete at some undisclosed time in the future: the

adoption of a final recovery plan for the Southern California Steelhead and the issuance of a new Cachuma Project biological opinion following re-initiation of consultation on the existing Biological Opinion: a process that has barely begun. CEQA does not authorize the kind of delay NFMS proposes.

To the contrary, CEQA, itself, confirms the Legislature's intent that the environmental review processes of other agencies not be used to delay CEQA compliance. Instead, it directs that the CEQA review process be completed in the most efficient manner possible, that other planning and review requirements run "concurrently," rather than consecutively, with CEQA review, and that environmental review proceed in the most efficient, expeditious manner" possible. (Cal. Pub. Res. Code § 21003). As recognized in the CEQA Guidelines, the statute is not to be subverted into an instrument of delay. (14 Cal. Code Regs. § 15003(j).) Moreover, as the cases interpreting CEQA have confirmed, CEQA review is not to be deferred because of the pendency of future studies. Instead, prior CEQA precedent squarely rejects arguments that an EIR should be delayed in order to account for the unknown conclusions of potential future studies or unknown impacts of potential future projects.¹

According to Mr. McInnis, further delay in the issuance of a Final EIR is warranted because of the development of "new information" in the form of a steelhead "recovery plan" and a "new biological opinion" regarding operation and maintenance of the Cachuma Project. But, this attempt to now craft a connection between the completion of NMFS' on-going ESA activities and the responsibilities of the State Board under California law, including the public trust doctrine, is flatly inconsistent with the position NMFS took at the conclusion of the Cachuma water rights hearings seven years ago. There, NMFS asserted the following:

While certainly informative to the various agencies of the State of California, including the Board and the Department of Fish and Game, the Board's duty to protect public trust resources is in no way dependent on the listing of the Southern California steelhead ESU by the Secretary of the Interior. If Southern California steelhead were removed from the federal endangered species list tomorrow—or if they had never been placed on the list in the first place—the Board would still be obliged to consider what level of protection all of the public trust resources in the Santa Ynez River watershed is in the public interest, and to require appropriate measures on the part of the permittees to ensure that level of protection is met.

(Phase II Closing Brief of NOAA Fisheries, pp. 9-10, enclosed.)

¹ NMFS also suggests that the as-yet-unavailable recovery plan and results of the biological opinion re-consultation process may constitute "substantial evidence" meriting further analysis under CEQA. However, substantial evidence does not include "argument, speculation, [or] unsubstantiated opinion or narrative" but instead includes only "facts, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Cal. Pub. Res. Code § 21080(e).) Because NMFS provides no factual evidence regarding what the eventual recovery plan or re-consultation process may show, if anything, they do not and cannot constitute "substantial evidence" at this time.

Speaking directly to the importance of a recovery plan to the State Board's water rights process, NMFS stated, "[T]he recovery planning process is tentative and contingent, and the permittee is legally free to disregard any aspect of a recovery plan that it finds inconvenient." (*Id.* p. 10.) Accordingly, NMFS concluded:

In sum, while it may be advantageous for the Board to have the benefit of a final recovery plan for the Southern California steelhead prepared by NOAA, the Board cannot stay its hand in reliance on such a plan because of uncertainties regarding its timely completion and effective implementation.

(*Id.* p. 11.)

Then turning to the jeopardy analysis involved in a Section 7 consultation under the ESA, NMFS told the Board then that it was "based on scientific conclusions regarding the ESU as a whole." (*Id.*) Thus, according to NMFS:

This means that in administering the ESA with respect to Southern California steelhead, NOAA must consider in the aggregate steelhead populations in the Ventura River, the Santa Clara River, and elsewhere in the ESU that are *not* part of the Board's considerations in this matter.

(*Id.* (emphasis in original).)

In short, NMFS' current position that the State Board should delay its issuance of a Final EIR because of NMFS' on-going activities under the ESA is a complete reversal of the Agency's prior position that NMFS' ESA activities are *uncertain, untimely* and, ultimately, *irrelevant* to the State Board public trust obligations that are at the heart of the still pending water rights proceeding.

Finally, it is noteworthy that Mr. McInnis never informs the State Board how long it should defer the release of its Final EIR. He never discloses, for example, that the NMFS "draft" Recovery Plan has already been on the street for more than 14 months (since July, 2009) and never suggests when it will be completed. He never estimates how much time will be required to complete NMFS' re-consultation on Cachuma Project operations and does not disclose that it is a process that has barely begun and that it requires the development of a new biological assessment by the Bureau of Reclamation before the formal consultation itself can begin. Under CEQA, this matters. (See, e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1217 (striking down EIR where it relied upon "outdated" information); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1367.)

In sum, given the fact that the State Board's Final EIR is nearly complete; that CEQA itself precludes its use for purposes of delay; that the same federal agency that is now attempting to tie the State Board's water rights process to its actions under the ESA previously took the

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position that its ESA activities and the State Board's water rights responsibilities are unrelated and; considering that the request for delay is completely open-ended and is likely to involve a delay of years, not months, the request for delay in the issuance of the State Board's imminent Final EIR should be firmly rejected.

Sincerely,



Kate Rees
General Manager
Cachuma Conservation Release Board



Chris Dahlstrom
General Manager
Santa Ynez River Water Conservation District,
Improvement District, No. 1

cc: All Parties to the Cachuma Project hearing

Enclosures: (1) State Board's May 27, 2010 Schedule to Complete the hearing to Review U.S. Bureau of Reclamation Water Rights Permits 11308 and 11310;
(2) Excerpts from Phase II Closing Brief of NOAA Fisheries



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



Arnold Schwarzenegger
Governor

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterboards.ca.gov/waterrights

ELECTRONIC MAIL

MAY 27 2010

Kate Rees
Cachuma Conservation Release Board
3301 Laurel Canyon Road
Santa Barbara, CA 93105
krees@cachuma-board.org

SCHEDULE TO COMPLETE THE HEARING TO REVIEW U.S. BUREAU OF RECLAMATION WATER RIGHT PERMITS 11308 AND 11310 (APPLICATIONS 11331 AND 11332) FOR MODIFICATIONS TO PROTECT PUBLIC TRUST VALUES AND DOWNSTREAM WATER RIGHTS, AND TO CONSIDER CHANGE PETITIONS – SANTA YNEZ RIVER IN SANTA BARBARA COUNTY

Dear Ms. Rees:

I would like to thank you for your work to obtain funding from the Cachuma Conservation Release Board (CCRB) to assist the State Water Resources Control Board (State Water Board) in completing the final Environmental Impact Report (EIR) for the Cachuma Project hearing referenced above. With CCRB's help, the State Water Board's environmental consultant, Impact Sciences, will continue to work on preparing a final EIR without delay.

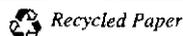
Per your request, I am providing an estimate for the time required to complete the work needed to obtain a decision on the issues. The end product will be a State Water Board decision regarding the change petitions and potential modifications to the water right permits for the Cachuma Project. Once the EIR becomes final, it needs to be entered into the hearing record. Once it is in the record, we will prepare a decision for consideration by the State Water Board.

When the State Water Board releases the final EIR to the public, we will give the parties to the hearing 30-days to raise any objections they may have to entering the EIR in the record. The 30-day objection period is not required by law, but seems reasonable. Admitting the EIR into the record will then take one of two paths. First, if there are no objections, or the objections can be addressed without a hearing, the hearing officer would close the record and direct staff to prepare a decision. Second, if there are objections, the State Water Board would require an additional day of hearing to address them. One day of hearing would likely be sufficient. The State Water Board would provide a 60-day notice for the hearing. After the hearing, the record would be closed and a decision prepared. Since there are two possible outcomes regarding the need for a hearing, there are two possible schedules. The two potential schedules are listed below:

Plan A (No Hearing)

June 1 - Impact Sciences receives direction to continue working to final the EIR.
September 1 - EIR is released to the public and parties are given 30-days to raise any objections to entering it into the hearing record.

California Environmental Protection Agency



MAY 27 2010

October 1 – Objections to entering final EIR into record are due.
October & November - If there are no objections, staff would prepare a decision at the direction of the hearing officer, brief the Board Members in closed session, and release a draft decision for public review and comment.
Mid November or Early December - State Water Board considers the decision.

Plan B (Hearing Required)

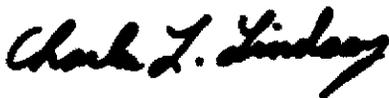
June 1 - Impact Sciences receives direction to continue working to final the EIR.
September 1 - EIR is released to the public and parties are given 30-days to raise any objections to entering it into the hearing record.
October 1 – Objections to entering final EIR into record due.
Early October - If necessary, the State Water Board would notice a public hearing to occur in 60 days (early December).
Early December - Conduct the hearing and close the record.
January & February - Staff would prepare a decision at the direction of the hearing officer, brief the Board Members in closed session, and release a draft decision for public review and comment.
March - State Water Board considers the decision.

In summary, if a hearing is necessary, the Board's decision on the issues will not be made before the end of this calendar year. If there is not a hearing, State Water Board may reach a decision by the end of the year, hopefully in November.

As you may realize, the execution of all the actions to reach a decision are dependent on many people, and could be affected by unforeseen circumstances. But with that caveat, I will carefully monitor this project, take all reasonable actions within my authority to keep it on schedule, and keep you and the State Water Board Executive staff informed of progress and key events. Moreover, if and when I need it, I will request assistance from the appropriate persons.

Thank you again for the assistance you and the CCRB are providing. Please contact me at (916) 341-5358 if you have any questions.

Sincerely,



Charles L. Lindsay, Chief
Hearings Unit

cc: Joe Gibson
Impact Sciences
803 Camarillo Springs Road, Suite A
Camarillo, CA 93012
joegibson@impactsciences.com

Cachuma Project Hearing Service List

**Cachuma Project Hearing
Phase-2 Hearing
Final Service List**

(Last Updated 07/26/2007)

<p>Cachuma Conservation Release Board Mr. Gregory K. Wilkinson Best, Best & Krieger, LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 gkwilkinson@bbklaw.com</p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 clc@bmj-law.com</p>
<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>City of Lompoc Ms. Sandra K. Dunn Somach, Simmons & Dunn 813 Sixth Street, Third Floor Sacramento, CA 95814-2403 sdunn@lawssd.com</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 gkwilkinson@bbklaw.com</p>	<p>Santa Barbara County Parks Ms. Terri Maus-Nisich Director of Parks 610 Mission Canyon Road Santa Barbara, CA 93105 tmaus@co.santa-barbara.ca.us</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>
<p>Christopher Keifer NOAA Office of General Counsel Southwest Region 501 West Ocean Blvd., Ste 4470 Long Beach, CA 90802-4213 Christopher.Keifer@noaa.gov</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>

1 CHRISTOPHER A. KEIFER
2 United States Department of Commerce
3 National Oceanic & Atmospheric Admin.
4 Office of General Counsel, Southwest Region
5 501 W. Ocean Blvd., Ste. 4470
6 Long Beach, CA. 90802
7 Tel.: (562) 980-4076
8 Fax: (562) 980-4084

9 Attorney for NOAA Fisheries

10 STATE OF CALIFORNIA

11 STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of:

13 Hearing to Review the United States Bureau
14 of Reclamation Water Rights Permits 11308
15 and 11310 (Applications 11331 and 11332)
16 to Determine Whether Any Modifications in
17 Permit Terms and Conditions Are Necessary
18 to Protect Public Trust Values and Downstream
19 Water Rights on the Santa Ynez River below
20 Bradbury Dam (Cachuma Reservoir)

PHASE II

CLOSING BRIEF OF
NOAA FISHERIES

21 INTRODUCTION

22 The National Marine Fisheries Service (NOAA Fisheries or NOAA)¹ is the agency of the
23 federal government that has been directed by Congress to protect marine species² listed under the
24 federal Endangered Species Act (ESA). NOAA Fisheries has joined this proceeding before the State
25 Water Resources Control Board (SWRCB or Board) regarding public trust resources in the Santa

26 ¹The National Marine Fisheries Service is part of the National Oceanic and Atmospheric
27 Administration (NOAA), which in turn is part of the United States Department of Commerce.
28 NOAA also comprises the National Ocean Service, which has jurisdiction over the National Marine
Sanctuary system, among other responsibilities; the National Environmental Satellite, Data and
Information Service, which operates a fleet of satellites; and the National Weather Service, the best
known NOAA sub-agency. See Reorganization Plan No. 4 of 1970, 80 Stat. 2090, codified at 5
U.S.C. 903 App.

²Through agreement with the United States Fish and Wildlife Service, the "marine species"
over which NOAA has jurisdiction under the ESA include anadromous salmonid species such as
Oncorhynchus mykiss which spend a majority of their life cycle in a marine environment.

1 Co., 166 Cal. 576 (1913).

2 What is important for the Board to recognize is that the public trust doctrine is founded on
3 ownership in common of water and wildlife, while the federal power to regulate interstate commerce
4 was delegated to Congress by the several states and the people as a means to unify a young and
5 growing nation and eliminate the problems caused by inconsistent and antagonistic policies of the
6 various states under the Articles of Confederation. The commerce clause is not based on a theory
7 of common ownership, and does not require that Congress perform any balancing of competing
8 interests; the only requirement is that the regulated activity have a substantial relationship to
9 interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

10
11 **II. THE BOARD CANNOT RELY ON PROCESSES ADMINISTERED BY NOAA**
12 **FISHERIES UNDER FEDERAL LAW TO MEET THE BOARD'S OBLIGATIONS UNDER**
13 **CALIFORNIA LAW**

14 Despite the overlap that exists between the obligations and duties of the Board under the law
15 of the State of California and the obligations and duties of NOAA Fisheries under the Endangered
16 Species Act, there are significant differences in how the two sources of law work and the standards
17 imposed. These differences are of such a degree as to render wholly inappropriate any reliance by
18 the Board on any ESA-based actions NOAA may take to fulfill its duty to under California law for
19 public trust resources adversely affected by the operations of the Cachuma Project and to ensure that
20 the permittees implement measures to provide the appropriate levels of protection for public trust
21 values.

22 While certainly informative to the various agencies of the State of California, including the
23 Board and the Department of Fish and Game, the Board's duty to protect public trust resources is
24 in no way dependent on the listing of the Southern California steelhead ESU by the Secretary of the
25 Interior.¹⁵ If Southern California steelhead were removed from the federal endangered species list

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¹⁵The Secretary of the Interior maintains the list of threatened and endangered species and must concur with the recommendations of the Secretary of Commerce that a species under NOAA's

1 tomorrow—or if they had never been placed on the list in the first place—the Board would still be
2 obliged to consider what level of protection all the public trust resources in the Santa Ynez River
3 watershed is in the public interest, and to require appropriate measures on the part of the permittees
4 to ensure that level of protection is met. In *National Audubon*, none of the species adversely affected
5 by permitted water diversions were listed under the federal Endangered Species Act, yet the courts
6 found that state law was sufficient to protect the public trust values at issue and to impose a duty on
7 the Board to protect those values.

8 The permittee has suggested that the ESA recovery planning process is all that is necessary
9 to protect public trust values in the Santa Ynez. This proposition is totally without merit. As
10 explained *supra*, the recovery planning process is tentative and contingent, and the permittee is
11 legally free to disregard any aspect of a recovery plan that it finds inconvenient. In sharp contrast,
12 the permittee is *not* free to disregard any measures the Board finds necessary to protect the public
13 trust resources in the Santa Ynez River.

14 In addition, there are numerous other species of fish and wildlife in the Santa Ynez River that
15 are not listed under the ESA, that will not be the focus of any recovery plan NOAA may issue, and
16 yet are still the part of the public trust values protected under California law. The ESA focuses on
17 single species and grants NOAA no management authority with regard to any species that is not
18 listed or a candidate for listing.

19 As a further complicating factor, while recovery plans may explore measure specific to
20 certain populations within an ESU, the processes of listing, delisting, and the jeopardy analysis
21 conducted in a Section 7 consultation are all based on scientific conclusions regarding the ESU as
22 a whole. This means that in administering the ESA with respect to Southern California steelhead,
23 NOAA must consider in the aggregate steelhead populations in the Ventura River, the Santa Clara
24 River, and elsewhere in the ESU that are *not* part of the Board's considerations in this matter.

25 _____
26 jurisdiction be listed before the species is actually placed on the list. 16 U.S.C. 1533(a)(2). The
27 Secretary of the Interior can neither add to nor remove from the list any species under the jurisdiction
28 of the Secretary of Commerce without a prior favorable recommendation from the Secretary of
Commerce. *Ibid.*

1 In sum, while it may be advantageous for the Board to have the benefit of a final recovery
2 plan for the Southern California steelhead ESU prepared by NOAA, the Board cannot stay its hand
3 in reliance on such a plan because of uncertainties regarding its timely completion and effective
4 implementation. Further, the Board can and should exercise its own independent authority to require
5 the permittee to undertake the studies necessary to identify the means of adequately protecting the
6 public trust interests in the steelhead resources of the Santa Ynez River. Reliance on the
7 uncertainties of the ESA recovery planning process or on the limited scope of the ESA consultation
8 process is simply not a viable method of protecting public trust values.

9
10 **III. CURRENT SCIENTIFIC KNOWLEDGE OF THE ISSUES INVOLVED IN**
11 **PROTECTING PUBLIC TRUST RESOURCES IN THE SANTA YNEZ RIVER**
12 **WATERSHED IS INCOMPLETE**

13
14 NOAA presented substantial, uncontroverted evidence that current scientific understanding
15 of specific aspects of the Santa Ynez River watershed and the needs of steelhead within the
16 watershed is incomplete. NOAA Exs. 1 - 6. No evidence to the contrary was offered by any party.
17 In fact, quite the opposite occurred: the Bureau, the Member Units, the Department of Fish and
18 Game, and CalTrout all offered evidence supporting NOAA's position that the current body of
19 scientific knowledge of the Santa Ynez River and of the biological needs of steelhead in the Santa
20 Ynez is inadequate for the Board to draw any definitive conclusions on how best to protect public
21 trust values inherent in the steelhead resources of the Santa Ynez River.

22 For example, Dr. Hanson testified on behalf of the Member Units that despite his long years
23 of experience as a fisheries biologist, his extensive knowledge of the Santa Ynez, and in spite of
24 ongoing work to monitor water temperatures in the Santa Ynez, the thermal tolerance criteria
25 specific to the steelhead which inhabit the Santa Ynez remain a mystery to him. R.T., at 274-275,
26 376-379. Mr. Payne testified for the Member Units that previous instream flow studies were
27 inadequate, and that there are still no suitable criteria for study of Southern California steelhead
28 flow/habitat needs. R.T., at 1024. Ms. Baldrige testified there is inadequate information about fish