



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

NOAA General Counsel Office,
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March 19, 2012

Attention: Ms. Jane Farwell
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Cachuma Project Hearing – Applications 11331 and 11332

Dear Ms. Farwell:

NOAA's National Marine Fisheries Service (NMFS) is responding to the State Water Resources Control Board's (Board) letter, dated March 14, 2012, ruling on the motion filed by the Cachuma Water Agencies to strike the outlines of rebuttal testimony for NMFS.

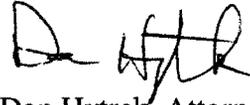
NMFS respectfully disagrees with the Board's ruling and the basis for its ruling described in the Board's letter. As described in NMFS' Opposition to Motion to Strike, dated March 7, 2012, NMFS' outlines for rebuttal testimony met all of the requirements of the Board's regulations and hearing notice.

Nevertheless, NMFS is submitting a revised rebuttal outline for Darren Brumback as instructed in the Board's letter. Mark Capelli is no longer able to attend the hearing on this matter. Therefore, NMFS is not submitting a revised rebuttal outline for his previously proposed testimony.



If you have any questions regarding this letter, please contact me at (562) 980-4075.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hytrek".

Dan Hytrek, Attorney-Advisor
NOAA General Counsel Office
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501 W. Ocean Blvd., Suite 4470
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(562) 980-4075
Representing the National Marine Fisheries
Service

Attch:

NMFS Rebuttal Witness, Brumback, Revised Outline
Statement of Service

cc:

Service List

State Water Resources Control Board (Board), Cachuma Project Hearing

National Marine Fisheries Service (NMFS) Rebuttal Witness, Darren Brumback, Revised Outline of Testimony

Qualifications

- Fisheries biologist for the NMFS Southern California Office Regulatory Steelhead Team.
 - o NMFS project manager for the Cachuma Project biological opinion of 2000 and reinitiated Section 7 consultation under the Federal Endangered Species Act (ESA).
- Statement of qualifications was previously submitted

State Water Board's reliance on NMFS' 2000 biological opinion for Reclamation's Cachuma Project as a basis for the FEIR alternatives, presumption of compliance with terms and conditions to protect the public trust resource of endangered steelhead, and general mischaracterization

“The alternatives considered in the 2011 2nd RDEIR [FEIR] all incorporate the requirements of the September 2000 Biological Opinion, which is designed to protect endangered Southern California steelhead. Consequently, the SWRCB is of the opinion that the public trust resource would be protected under the implementation of the proposed project.” (FEIR 2.0-66) ... “The SWRCB does not need to obtain that additional information [reinitiated consultation] to complete the current CEQA process because the 2000 Biological Opinion is the guiding principle from which the [FEIR] project [objectives] and alternatives are derived.” (FEIR 2.0-69)

- The Board's FEIR should not rely on the analysis and conclusions in NMFS' 2000 biological opinion to determine whether the endangered steelhead public trust resource is adequately protected for the following reasons.
- Reinitiation of consultation under the ESA is required for the Cachuma Project because a) the amount of take specified in the 2000 biological opinion has been exceeded, and b) the effects of the Project may affect endangered steelhead in a manner or to an extent not considered in the 2000 biological opinion.
 - o The 2000 biological opinion specified that reinitiation would be triggered if certain restoration actions were not completed by 2005, and not all of the actions were completed by that time
 - o The amount of take specified in the 2000 biological opinion for the annual monitoring program (i.e. trapping) has been exceeded
 - o The basis for not prescribing ramping rates at the initiation of water rights releases is no longer valid
 - o Unauthorized take resulted from failure to meet flow targets at Alisal Bridge in 2007

- A new biological opinion will result from the reinitiated consultation to determine whether or not Reclamation has ensured that the Cachuma Project is not likely to jeopardize the continued existence of endangered steelhead or destroy or adversely modify critical habitat for this species.
 - The new biological opinion will analyze new information gathered since the 2000 biological opinion was completed, including monitoring results, NMFS' Final Recovery Plan, and technical memoranda that were prepared in association with the Final Recovery Plan; some of which the FEIR does not consider
 - New information from Reclamation's January 2011 Compliance Report referenced in the FEIR indicates that the capacity of the "fish passage account" to facilitate migration opportunities does not function as characterized in Reclamation's biological assessment
- NMFS' determinations in the 2000 biological opinion are limited to Reclamation's proposed action (with no alternatives) and limited by the Endangered Species Act's jeopardy standard
 - The 2000 biological opinion documents NMFS' determination that Reclamation's Cachuma Project, as proposed in the 1999 biological assessment and amended in 2000 (FEIR, Appendix C), was not likely to *jeopardize the continued existence* of endangered steelhead or destroy or adversely modify designated critical habitat for this species.
 - *Jeopardize the continued existence of* means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild ... (50 CFR § 402.02).

“As required by NMFS, the Cachuma Project will fully comply with the provisions of a revised Biological Opinion **just as the Project has operated in compliance with the September 2000 Biological Opinion.**” (FEIR 2.0-62/63/64)

- FEIR Table 2-4A: Summary of Reasonable and Prudent Measures/Terms and Conditions Described in the Cachuma Project Biological Opinion and Status of Compliance
- The administrative record for the Cachuma Project, including Reclamation's January 2011 Compliance Report referenced in the FEIR, demonstrates that the Project has not operated in full compliance with the 2000 biological opinion, and the FEIR recognizes some but not all of these issues.
 - The 2000 biological opinion specified that reinitiation would be triggered if certain restoration actions were not completed by 2005, and not all of the actions were completed by that time
 - The amount of take specified in the 2000 biological opinion for the annual monitoring program (i.e. trapping) has been exceeded
 - The basis for not prescribing ramping rates at the initiation of water rights releases is no longer valid

- Unauthorized take resulted from failure to meet flow targets at Alisal Bridge in 2007
- Reclamation and NMFS have still not agreed on a water rights releases monitoring plan as required under the 2000 biological opinion

“Reclamation’s responsibilities with regard to the terms contained in any Biological Opinion are not dependent upon those terms being incorporated into Reclamation’s permits.” (FEIR 2.0-62/63/64/70)

- FEIR subsection 2.4 (2.0-18) summary of 2000 BO, as referenced in FEIR section 3.0 (3.0-2), including:
 - Allocation of surcharged water (Table 2-5 (2.0-27))
 - Mainstem Rearing Target Flows (2.0-28/29; Table 2-7 (2.0-30))
 - Fish Passage Flows (2.0-30/31)
 - Water Rights Releases
- Reclamation states that they do not have the ability to deny or alter the water rights releases because the water rights releases are non-discretionary actions mandated by the terms of Reclamation’s water rights permits and by the State Water Resources Control Board Order 89-18 (Reclamation’s January 2011 Compliance Report referenced in the FEIR).
- Reclamation’s interpretation suggests that the Board’s adoption of the FEIR, and subsequent issuance of the subject water rights, may limit Reclamation’s discretion to revise the proposed action for reinitiated ESA consultation to ensure its actions do not jeopardize the continued existence of endangered steelhead or destroy or adversely modify designated critical habitat for this species and to minimize the effects of incidental take that may result from its proposed action.

“The SWRCB acknowledges that the results of this implementation [2000 biological opinion] have not been appreciable improvement the steelhead population as anticipated. However, the populations have not shown a dramatic decline in numbers. **As a consequence of not reaching the desired goals, NMFS and the Reclamation have initiated re-consultation on this public trust resource.**” (FEIR 2.0-113, Response to Comments)

- In this context, the Board’s statement in the FEIR that NMFS and Reclamation have reinitiated consultation under the ESA as a result of not reaching the desired goals for steelhead populations is not accurate.
- Reinitiation of consultation under the ESA is required for the Cachuma Project because a) the amount of take specified in the 2000 biological opinion has been exceeded, and b) the effects of the Project may affect endangered steelhead in a manner or to an extent not considered in the 2000 biological opinion.
 - The 2000 biological opinion specified that reinitiation would be triggered if certain restoration actions were not completed by 2005, and not all of the actions were completed by that time
 - The amount of take specified in the 2000 biological opinion for the annual monitoring program (i.e. trapping) has been exceeded

- The basis for not prescribing ramping rates at the initiation of water rights releases is no longer valid
- Unauthorized take resulted from failure to meet flow targets at Alisal Bridge in 2007