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10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
11

12	Hearing to Review the U.S. Bureau of	)	<b>REPLY TO OPPOSITIONS TO CITY OF LOMPOC'S MOTION STRIKE</b>
	Reclamation Water Right Permits 11308	)	
13	and 11310 (Applications 11331 and 11332)	)	
	To Determine Whether Any Modifications	)	
14	in Permit Terms and Conditions are Necessary	)	
	to Protect Public Trust Values and Downstream	)	
15	Water Rights on the Santa Ynez River Below	)	
16	<u>Bradbury Dam (Cachuma Reservoir)</u>	)	

17 As discussed in Lompoc's Motion to Strike, Appendix 4 to Cal Trout's Closing Brief proposes  
18 a comprehensive study plan for modifying the downstream water rights release schedule. During the  
19 four days of hearing, Cal Trout offered no testimony, let alone any expert testimony, regarding  
20 hydrology or the project's impacts to downstream water rights. (See Lompoc's Motion to Strike.)  
21 CalTrout's Opposition to Lompoc's Motion to Strike argues that the topic of modifying downstream  
22 water rights release schedule was introduced during the hearing. Moreover, CalTrout implies that the  
23 evidentiary record supports the comprehensive study plan described in Appendix 4. To this end,  
24 CalTrout provides several references to the record to support its assertion. None of the citations in  
25 CalTrout's Opposition provide an evidentiary basis to argue that Appendix 4 is not new evidence, but  
26 merely a summary of the existing evidence in the record.  
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1 A review of these citations illustrates the flaw in CalTrout's efforts to introduce the proposed  
2 study plan for revising downstream water rights releases. Mr. Keegan testified that water rights  
3 releases under Order No. WR 89-18 should occur over a more continuous nature. (Cal Trout Exh.  
4 30 at p. 12.) This citation to the record, however, does not state additional studies should be  
5 conducted. Mr. Keegan's written testimony simply states that water rights releases under WR 89-18  
6 should be modified. Mr. Keegan's oral testimony simply states that he recommends focused studies  
7 be conducted to consider modification of the 89-18 flows. (RT 821-822.) Mr. Keegan's testimony  
8 provides no detail as to the type of study or how the study should be conducted. Moreover, Mr.  
9 Keegan is not an expert qualified in hydrology to even provide testimony regarding the hydrology.

10 CalTrout also relies upon Department of Fish & Game witness Mr. McEwan's written  
11 testimony. Mr. McEwan's testimony simply states that the State Water Resources Control Board  
12 should investigate the feasibility of modifying the release schedule of water rights releases from  
13 Bradbury Dam to downstream users. (DFG Exh. 1 at p. 6.) Similar to Mr. Keegan's testimony, Mr.  
14 McEwan's testimony does not provide any specifics or details as to how the water rights release  
15 schedule should be conducted or what type of study should be conducted. As with Mr. Keegan,  
16 McEwan is not a qualified expert in hydrology.

17 CalTrout next relies upon Ms. Kraus' cross-examination of Mr. Shahroody to support the  
18 argument that the hearing record contains testimony regarding the need future studies of the  
19 downstream water rights releases. The cited cross-examination of Mr. Shahroody consists of Mr.  
20 Shahroody stating that there has not been a study for modeling to evaluate the impacts of releases at  
21 lower rates for a longer duration under the Biological Opinion. (RT 416-417; 1047-1048.) Mr.  
22 Shahroody did not testify that any such study should be conducted or how such a study would be  
23 conducted.

24 In contrast to CalTrout's references to the evidentiary record, Appendix 4 to CalTrout's  
25 Closing Brief outlines a detailed hydrology study regarding downstream water rights. When  
26 provided the opportunity to demonstrate that such a proposed study was addressed in hearing,  
27 CalTrout provides absolutely no reference to the record to support a detailed study. As stated in  
28 CITY OF LOMPOC'S REPLY TO OPPOSITIONS TO MOTION TO STRIKE

1 Lompoc’s Motion to Strike, nothing within the proposed study plan indicates that it was prepared  
2 and/or reviewed by a qualified expert in hydrology. Moreover, by proposing this study plan in a  
3 closing brief, as opposed to during the evidentiary hearing, the anonymous preparers of the proposed  
4 study plan escapes the scrutiny of cross-examination. (See Title 23, Cal. Code Regs., § 648.5.1;  
5 Gov’t Code, § 11513 (parties have the right to cross-examine opposing witnesses).)

6 CalTrout also argues that Lompoc seeks to disparage the evidentiary basis for a study of  
7 modifications to the downstream water rights release schedule and that such statements belong in  
8 Lompoc’s closing brief, not in a motion to strike. First, Lompoc could not have used its Closing  
9 Brief to “disparage” the evidentiary basis for a such a detailed study plan as set forth in Appendix 4,  
10 as nothing in record from CalTrout or any other party proposed such a study plan. Second, to the  
11 extent that Lompoc “disparages” the evidentiary basis for modifying the operation of the Cachuma  
12 Project, whether it be CalTrout’s proposed Alternative 3A2, or any proposed hydrology study,  
13 Lompoc’s Closing Brief clearly pointed out that CalTrout failed to provide any expert testimony  
14 regarding hydrology. (Lompoc’s Closing Brief at p. 15.) CalTrout’s Opposition, however, fails to  
15 identify a single expert in hydrology that proposed or discussed the need for such a study or how the  
16 study would be performed. Instead of addressing the lack of evidentiary basis for such a study,  
17 CalTrout argues that Lompoc should have raised this issue in its closing brief. To the extent possible,  
18 Lompoc did just that. (*Id.*) CalTrout’s Appendix 4 constitutes an effort to resurrect its failure to  
19 present evidence regarding impacts to hydrology and downstream water rights. The time for such  
20 evidence was during the hearing, not as an attachment to its Closing Brief.

21 NOAA Fisheries’ Opposition to Lompoc’s Motion to Strike argues that Lompoc should be  
22 precluded from objecting to NOAA Fisheries’ Appendix B because Lompoc’s testimony did not  
23 address fish passage issues. NOAA Fisheries provides no authority to support its contention.  
24 Moreover, NOAA Fisheries misses the point. Lompoc’s Motion to Strike is about the integrity of  
25 the process. A process that requires evidence be submitted prior to and during the hearing process,  
26 not as appendix to the closing brief.

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DATED: March 15, 2004

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LAW OFFICES OF  
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**PROOF OF SERVICE**

I am employed in the County of Yolo; my business address is 129 C Street, Suite 2, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On March 15, 2004, I served a true and correct copy of

**LOMPOC’S REPLY TO OPPOSITIONS TO MOTION TO STRIKE**

  X   (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the City of Davis, California.

       (by overnight delivery service) via Federal Express to the person at the address set forth below:

       (by personal delivery) by personally delivering a true copy thereof to the person and at the address set forth below:

       (by facsimile transmission) to the person at the address and phone number set forth below:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 15, 2004, at Davis, California.

\_\_\_\_\_  
Donald B. Mooney

**Cachuma Project Hearing**

Phase-2 Hearing  
Final Service List

Updated 01/05/2004

**(Note: The parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)**

<p>Cachuma Conservation Release Board Mr. Gregory K. Wilkinson Best, Best &amp; Krieger, LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 <a href="mailto:gkwilkinson@bbklaw.com">gkwilkinson@bbklaw.com</a> SERVED VIA E-MAIL</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:clc@bmj-law.com">clc@bmj-law.com</a> SERVED VIA E-MAIL</p>
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