INTRODUCTION

NOAA Fisheries hereby opposes the Motion to Strike and the Motion for Dismissal filed by the Member Units on February 18, 2004. The Member Units make two motions, and each one will be addressed in turn.

ARGUMENT

First, the Member Units contend that consideration by the Board of Appendix B to NOAA Fisheries' Closing Brief would be a violation of the Constitution of the United States, as well as the California Government Code, and the regulations of the Board. This argument presumes that Appendix B, an outline for the conduct of a fish passage project feasibility analysis, is "evidence." Member Units are mistaken in that presumption. The California Evidence Code defines evidence as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Cal. Evidence Code §140 (emphasis added). As
explained *infra*, Appendix B to NOAA Fisheries’ Closing Brief does not meet that definition.

In the Conclusion section of its closing brief, NOAA Fisheries requested that the Board order the permittee to conduct studies regarding fish passage projects. As part of that request, NOAA stated conditions under which such a study should be conducted if it were to be thorough and meaningful, including requesting the Board to address through appropriate terms in the permit the potential misuse of the concept of “feasibility.” Closing Brief of NOAA Fisheries, at 17. Appendix B is of the same character as the other suggested permit terms that were included in the Conclusion section setting forth the conduct of any steelhead investigation the Board may order: suggested permit terms for the Board on how the requested fish passage study should be ordered to be conducted to avoid delay and controversy. Had NOAA offered Appendix B to prove any fact supporting NOAA’s arguments, it would have been referenced in Section III of NOAA’s closing brief. Instead, the sole reference to Appendix B occurs squarely in the middle of the other requested permit conditions contained in the Conclusion section. Appendix B was not offered to prove the existence *vel non* of any fact, and cannot reasonably be read to do so.

Rather than including the requested permit terms comprised by Appendix B in the body of the closing brief, NOAA put them in an appendix for greater clarity and succinctness. Furthermore, NOAA organized its closing brief in this manner based on the ruling by Hearing Officer Silva on the final day of the Phase II hearing:

H.O. SILVA: * * * Normally we’d like to limit—we agree to a number of pages, which I think helps everybody because you don’t have one party submitting two pages and somebody submitting a thousand. *And you can add appendices as you like*, but we do want the closing briefs to be concise, to the point.

R.T., at 1119 (emphasis added).

Counsel for Member Units was not only in the hearing room at the time of that ruling from the chair, he was an active participant in the discussion of the rules for closing briefs. R.T., at 1120. If the Member Units truly believed Mr. Silva’s ruling to be such an egregious violation of the United States Constitution, of state law, and of the Board’s own regulations, the proper course of action would have been to object to the ruling or, at the very least, seek clarification at the time it was
made. Instead, the Member Units now claim that a submission made in conformance with a ruling of the Board is somehow prejudicial and seek not only to prevent the Board from considering suggested terms and conditions to be incorporated into Permits 11308 and 11310—the very heart of the matter now before the Board—but also to have one party dismissed from the hearing.

Because Appendix B consists of suggested terms for incorporation into any order the Board may issue in this proceeding, it is not an evidentiary submission and is quite properly submitted with a closing brief. The Member Units’ characterization of Appendix B as evidence, the basis for the motion to strike, is completely without merit. Therefore, the motion to strike should be denied.

Next, the Member Units move to dismiss NOAA Fisheries as a party to this proceeding based on their claim that filing requested permit conditions specifying how any fish passage studies the Board might order should be structured somehow constitutes a “crude attempt to ignore” the Board’s rulings on the conduct of this hearing. The Member Units offer three purported “facts” and conclude from these “facts” that NOAA must be dismissed as party, a sanction wildly disproportionate\(^1\) to the alleged infraction.

The Member Units’ first purported “fact,” that “the Member Units are prejudiced by NOAA Fisheries’ attempt to offer” Appendix B, is not a fact at all. It is a conclusory assertion premised on an erroneous characterization of Appendix B as “evidence” and a repetition of the faulty basis for the motion to strike. As such, it should be rejected by the Board. Given the Board’s practice of circulating and receiving comments on draft Orders, the Member Units are not prejudiced by the inclusion of requested permit terms in NOAA’s closing brief. The Board’s practice affords the

\[^1\text{Both the 2000 Hearing Notice and the 2003 Supplemental Hearing Notice for Phase 2 allow for the submission of evidentiary materials with closing briefs. See Notice of Hearing, Information Concerning Appearance at Water Right Hearings, 5.d., at 5 (Sep. 25, 2000) and Notice of Field Orientation Tour and Supplemental Notice of Phase 2 of Public Hearing, Information Concerning Appearance at Water Right Hearings, 6.d, at 6 (Aug. 15, 2003) (evidentiary submissions with closing briefs proper when “the subject of an offer of the document in evidence”). Were the Member Units’ erroneous assertion that Appendix B is an evidentiary submission accurate—which NOAA maintains is not—the proper response for consideration by the Board would be an objection to the offer or a motion to strike, not a motion for dismissal of a party.}\]
Member Units ample opportunity for response to proposed permit terms before any final Order is issued.

The next two purported “facts” offered by the Member Units, that “NOAA Fisheries did participate in the hearing” and that the record before the Board “already includes ... all the evidence the Board may properly receive to evaluate impacts on fisheries,” are premises in an attempted syllogistic argument that can be restated succinctly: NOAA has participated in this proceeding; the Board has received and cannot receive further evidence from NOAA during this proceeding; therefore, NOAA should be dismissed from this proceeding. Were this argument valid, it would apply to any party in any proceeding before the Board. In fact, it is not a valid argument; it is an absurd non sequitur that should be rejected by the Board.

In attempting to portray NOAA Fisheries’ submission in as poor a light as possible, the Member Units also resort to inflammatory rhetoric\(^2\) and add yet another logical fallacy, argument by guilt-by-association. For the second time in this proceeding\(^3\) counsel for the Member Units has improperly attempted to impute to NOAA Fisheries the actions of another agency, this time past litigation tactics of the Bureau of Reclamation. While both the allegations of misconduct by the Bureau of Reclamation in a different proceeding before this Board more than twenty years ago and the personal reminiscences of counsel for the Member Units are fascinating, they are equally irrelevant. No provision of California law incorporates the personal experiences and subjective opinions of counsel to the Member Units as standards by which submissions to the Board are to be evaluated.

CONCLUSION

Appendix B can be evaluated only under the standards set forth in the California Evidence

\(^2\)Apparently, when the Member Units communicate with other parties in order to coordinate arguments the result is “joint panels” and “incorporation by reference,” ostensibly for the convenience of the Board. When communication occurs among parties with whom the Member Units disagree, the result is, according to counsel for the Member Units, “complicity.” See Motion for Dismissal, at 7 n.3.

\(^3\)See Closing Brief of NOAA Fisheries, at 15.
Code, the California Government Code, the Board’s regulations, the Hearing Notices setting forth
the rules for this proceeding, and the ruling communicated to all parties by Hearing Officer Silva that
parties "can add appendices as [they] like" to their closing briefs. R.T., at 1119 (emphasis added).
Under those standards, Appendix B to NOAA Fisheries’ Closing Brief is not an evidentiary
submission and comports in all respects with the Board’s procedural regulations and rulings on the
conduct of this hearing. Therefore, the Member Units’ motion to strike and motion for dismissal of
NOAA Fisheries as a party should be denied.

Respectfully submitted,

[Signature]

Christopher Keifer
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Office of General Counsel, Southwest Region

Dated: February 27, 2004

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PROOF OF SERVICE

I hereby certify that on February 27, 2004, I deposited in with the United States Postal Service copies of the Opposition to Motion to Strike and Motion to Dismiss with appropriate postage to each of the parties on the attached Service List.

Christopher Keifer
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.)

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