



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Office of The General Counsel
1416 Ninth Street, Room 1341
Sacramento, CA 95814
www.wildlife.ca.gov

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



December 9, 2016

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

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



VIA EMAIL

Re: California Department of Fish and Wildlife (CDFW) Comments on Draft Order Amending the Bureau of Reclamation's Water Rights for the Cachuma Project (Draft Order)

Dear Ms. Townsend:

Enclosed are the general and specific comments of CDFW regarding the Draft Order. CDFW appreciates this opportunity to comment on the Draft Order and urges the State Water Resources Control Board (SWRCB) to adopt an Order amending the Bureau of Reclamation's (Bureau) water rights permits for the Cachuma Project without further delay or additional evidentiary hearings at this time.

CDFW's specific comments to the Ordering Sections of the Draft Order are attached as Attachment 1 to this letter.

CDFW participated in the evidentiary hearings in the Phase 2 of the SWRCB proceedings. As stated in our Closing Statement at the end of the evidentiary hearings *twelve years ago*, this Draft Order is a critical step in the SWRCB's administration of the Bureau's water rights permits for the Cachuma Project on the Santa Ynez River. *And*, the Draft Order should only be considered a first step in an ongoing adaptive management strategy. The Draft Order only requires flow supplementation in wet and above normal water years. The slightly higher flows in only two water year types does not fulfill the SWRCB's obligation under the Public Trust Doctrine or Fish and Game Code section 5937 to keep fish in good condition. Instead, much of the success of the Draft Order will be determined by future studies, ongoing monitoring of the effectiveness of the terms and conditions in the Order and an ability to adapt to what that monitoring reveals about its effectiveness. The SWRCB must require studies of the terms and conditions of the Order, regular monitoring of the conditions in the river and the effectiveness of the Order in mitigating impacts to the steelhead fishery and other public trust resources, and must reopen these permits in the near term future if the studies or monitoring demonstrate a need for an alternative flow release schedule or other non-flow conditions necessary to fully discharge its duty under the Public Trust Doctrine.

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
December 9, 2016
Page 2

Additionally, it is absolutely vital that the SWRCB order the immediate commencement of a proper study of the feasibility of providing passage for steelhead around Bradbury Dam. The Draft Order did not clearly specify a time period in which a fish passage study must be commenced and when it must be completed. Similarly, the Draft Order allowed the Bureau to forego implementation of any tributary passage barrier and habitat restoration efforts in the revised project description. Additionally, the Draft Order allowed for *all other* studies, crucial to the success of determining what must be done to mitigate for the ruinous effect that the construction of Bradbury Dam has had on a formerly magnificent run of steelhead trout (*Oncorhynchus mykiss*), to be deferred pending the completion of the fish passage study, which could drag on for a decade or longer, without a specified end date. Deferring the start of *all other* studies is not biologically defensible or acceptable and tributary passage impediments must continue to be addressed while the feasibility of fish passage over or around Bradbury Dam is evaluated. The studies in the Draft Order must be done concurrently in order to better understand the effects of the terms and conditions of the Draft Order and to adaptively manage in the future. Again, the Draft Order is a step in the right direction of protecting public trust resources, but is not the final step. CDFW appreciates the SWRCB taking that step in better protecting public trust resources in the Santa Ynez River. Also, the studies required by the Draft Order will help inform the next step toward adequate protection of those public trust resources.

Because the Draft Order relies heavily on studies that will be done in the future by the Bureau in order to "improve the state of knowledge concerning the measures necessary to protect the steelhead fishery", many of CDFW's specific comments on Attachment 1 relate to the method and timing of "consultation" with CDFW. Improving the state of knowledge requires that studies be done in a scientifically justified way, with advance and ongoing input from CDFW and the National Marine Fisheries Service (NMFS). CDFW believes that its proposed edits to Section 11 of the Draft Order are necessary to producing the information that is critical to the success of further defining the next steps to be taken toward adequate protection of the steelhead fishery.

The Draft Order also excused the Bureau from implementing barrier fixes in tributaries below Bradbury Dam for steelhead passage, which would conflict with the requirements in the 2000 NMFS Biological Opinion. CDFW specific comments to Draft Order section 8(b) are designed to require improvements in downstream tributaries. It will take several years to complete the proposed fish passage study, as well as implement fish passage around Bradbury Dam, if found to be feasible. In the intervening years, steelhead still need access to the spawning, rearing and summer holding habitat in the principal tributaries of Salsipuedes, El Jaro, Quiota and Hilton Creeks. The SWRCB should require the Bureau to remove or modify several existing barriers in these tributaries, as these tributaries are currently maintaining the population within the Santa Ynez watershed.

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
December 9, 2016
Page 3

In its Specific Comments, CDFW also recommends the deletion of Section 9 (c). Section 9(b) addresses instances in which CDFW or NMFS determines flows would harm the fishery and provides that in such instances, the Executive Director may reduce or terminate such flows. Proposed Section 9 (c) is duplicative and conflicting with Section 9 (b) in that it unilaterally allows Member Units to make an unspecified demonstration of harm to the fishery, without the procedural steps outlined in 9 (b). Section 9 (c) should be deleted to avoid unnecessary confusion and conflict with Section 9(b).

CDFW also recommends deletion of an element of a study described in Section 11(b) regarding beavers. Beavers have been a part of the Santa Ynez River ecosystem for the past 76 years (prior to construction of Bradbury Dam). Beaver dams have been shown to create holding habitat and benefit growth of salmonids. Additionally, beavers attenuate stream flows and provide instream complexity that is often missing in urban or agricultural area. Studies regarding invasive species should be a priority, and beavers here are not an invasive species that require additional studies in the Draft Order.

CDFW also encourages the SWRCB to increase its emphasis on monitoring in the Draft Order. Rather than a subsection, CDFW, in Attachment 1, recommends that monitoring be given its own section and be acknowledged for the important role that monitoring will take in this step toward improving the state of knowledge concerning the measures necessary to protect the steelhead fishery in the Santa Ynez River. A steelhead monitoring plan needs to assess the population status and trend for the Santa Ynez steelhead population. The plan should follow the California Coastal Salmonid Monitoring Plan (Adams et al. 2011) and provide data that will determine the viability of the steelhead population. The California Coastal Salmonid Monitoring Plan was developed by the Department of Fish and Wildlife and the National Oceanic and Atmospheric Administration's Science Center and is being used by the Department and its partners to monitor coastal salmon and steelhead populations within the state. Toward that end, the Department has provided funding to various non-profit groups to provide training for entities conducting salmonid monitoring in the state. The California Coastal Salmonid Monitoring Plan provides standard protocols for assessing and monitoring populations of salmonids, and allows for consolidation of data from multiple sources for management purposes. The use of the California Coastal Salmonid Monitoring Plan in this Order will build on the existing COMB project as well as be able to combine their data, collected over the past 10 years, in trend analysis with new data. The use of the California Coastal Salmonid Monitoring Plan here will further cement the collaborative nature of the partnership that has been in effective of the past 12 years between CDFW, the Bureau, NMFS and the member units. It will also allow CDFW to more actively participate in survey design, on the ground data collection, and data analyses.

CDFW appreciates the opportunity to comment on the Draft Order, and acknowledges this important step the SWRCB is taking in adopting the long awaited changes to the Bureau's permits to operate the Cachuma Project. CDFW looks forward to working with

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
December 9, 2016
Page 4

the Bureau, NMFS, the Member Units, and the SWRCB as these parties go forward and implement the interim conditions in the Draft Order, plan and conduct crucial studies contained in the Draft Order, and ultimately determine more permanent conditions for operation of the Cachuma Project that will achieve full public trust protection pursuant to Fish and Game Code section 5937 and the Public Trust Doctrine.

Sincerely,



Nancee M. Murray
Attorney IV
Office of the General Counsel

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

Section of Draft Order	Revisions
11.8	The first sentence should be revised to read: ...set forth at pages 71-72, and the Terms and Conditions, set forth at pages 72-82...
11.8b	The language should be revised to read: Notwithstanding the foregoing, rightholder shall be required to implement tributary passage impediment and barrier fixes as described herein Quiota Creek (four road crossings) and Hilton Creek (Highway 154).
11.8c	The language should be revised to read: The State Water Board reserves authority to modify this term based on any <u>major</u> modification to the 2000 Biological Opinion. Any modification to this term shall be made in accordance with section 780 of title 23 of the California Code of Regulations.
11.9	New language should be added below Table 2: During Below Normal, Dry and Critical Years, rightholder shall release or bypass water in accordance with the 2000 Biological Opinion, or any revised Biological Opinion that may be issued by NMFS.
11.9c	<p>The following language should be deleted:</p> <p>The Executive Director may terminate the requirement to meet the Table 2 Flows, or may allow a reduction in the flows required, if CDFW, NMFS, rightholder, or Member Units demonstrate to the Executive Director's satisfaction that the flows will not benefit the fishery or are likely to harm the fishery.</p>
11.9e	The first sentence should be revised to read: If CDFW or NMFS <u>directs</u> a change to the schedule of Table 2 Flows pursuant Paragraph 9d, but...
11.9g	<p>A new subsection should be added as Section 9g and should read as follows: If after 6 years after implementation of Table 1 and 2 the steelhead population has not reached the minimum requirements outlined below, the Board will reopen Permits 11308 and 11310 to determine what alternative flow releases are necessary to comply with the Public Trust Doctrine and Fish and Game Code 5937.</p> <p>For the six year period:</p> <ol style="list-style-type: none"> 1) With less than three wet or above average water year types (and when the lagoon is open/passable), the average returning adult spawners must be nine and the average number of outmigrating smolts must be at least 12,000. 2) With three or greater wet or above average water year types (and when the lagoon is open/passable), the average returning adult spawners must be at least fifteen and the average number of outmigrating smolts must be at least 18,000.
11.11	<p>The first sentence should be revised to read: To determine the measures necessary to protect the public trust resources of the Santa Ynez River, the rightholder shall conduct the following studies <u>after</u> consultation with CDFW and NMFS.</p> <p>New language should be added after the first paragraph of Section 11 to read as follows:</p> <p>For all draft and final reports and studies required by this Paragraph and Order, the rightholder shall consult with CDFW and NMFS. For the purpose of this Order, consultation shall include, but is not limited to: within 30 business days of adoption of this order, the rightholder shall contact and schedule ongoing and regular consultation</p>

	<p>meetings with CDFW and NMFS. Upon completion of any study plan component (draft or final), the rightholder shall transmit the study plan to CDFW and NMFS. The rightholder shall provide CDFW and NMFS with at least a 30 business day comment period on the study plan prior to submittal to the Deputy Director. This 30 business day comment period shall apply to any draft, final or revised study plan and any draft, final or revised report or submission to the Deputy Director that may add to the record. Rightholder must include in any study plan submission to the Deputy Director, CDFW or NMFS comments and provide an explanation of how the document information was changed based on those comments or provide an explanation of the rightholder's reasons for not incorporating changes based on comments from CDFW and/or NMFS.</p> <p>At the first of these consultation meetings, the rightholder, CDFW and NMFS shall create a detailed study plan schedule. There are multiple components to the study plan schedule that will require individual studies resulting in data necessary to evaluate fish in good condition.</p> <p>After consultation with CDFW and NMFS, the rightholder must submit a study plan schedule to the Deputy Director within 120 business days from the date of this Order.</p> <p>In addition to the regular ongoing meetings, the rightholder shall hold an annual meeting with CDFW and NMFS during the period of time that studies described in this Order are being conducted. The annual meeting will be held in July, unless a different date is mutually agreed upon in writing. At the annual meeting, the rightholder must present data collected in the previous year, report progress on each study identified in the study plan schedule, and report projected work and schedule for the following year.</p> <p>All studies and reports described in this Order, unless specifically noted otherwise, must be completed within 3 years from the date of this Order.</p>
<p>11.11b(1)</p>	<p>The following language should be deleted:</p> <p>Based on the significant potential benefit of providing passage around Bradbury Dam, it may be possible to defer the remaining studies pending completion of the passage study. If passage is feasible and likely to achieve good condition of the steelhead fishery, the remaining study requirements may continue to be deferred pending implementation of measures that provide passage around Bradbury Dam and monitoring to determine whether good condition of the fishery is likely to be achieved.</p>
<p>11.11b(2)</p>	<p>The language should be revised to read: Rightholder shall develop and conduct an Instream Flow Incremental Methodology (IFIM) study. In addition to the IFIM study, rightholder shall 1) evaluate water quality, including but not limited to temperature, dissolved oxygen, nutrient loading and sediment; and 2) an evaluation of channel morphology and sediment transfer, including but not limited to stream bank stability, incision rates, and perched tributaries. The study shall evaluate channel incision (including effects on tributary access) due to the impoundment of sediment behind Bradbury Dam, as well as the direct and indirect effects on channel morphology, fish and wildlife, and appropriate beneficial uses. The evaluation shall include a</p>

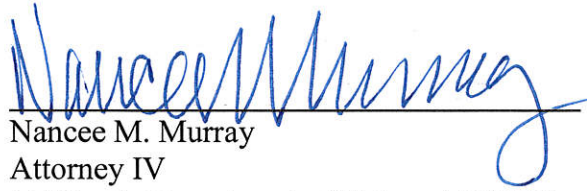
	<p>recommendation and timeline to remediate direct and indirect impacts from the impoundment of sediment behind Bradbury Dam, as well as potential operational changes to facilitate sediment movement through or around the dam, and improve or sustain water quality levels. The studies required in this subsection will help to determine flows and non-flow conditions necessary to keep the Santa Ynez River steelhead fishery in good condition at the individual, population and community level.</p>
11.11b(3)	<p>The second sentence should be deleted as follows:</p> <p>In addition, the study shall determine the effects of beaver dams on passage opportunities and distribution of steelhead and measures that could be implemented to reduce the impacts on steelhead in the river.</p>
11.11b(4)	<p>The language should be revised to read: ...Rightholder shall conduct a study that evaluates stream and streamside habitat restoration and habitat improvements that could be completed to improve steelhead conditions in the lower Santa Ynez River watershed in addition to the Table 2 Flows, including but not limited to fixing impediments and barriers to passage or providing passage upstream and downstream of Bradbury Dam.</p>
11.11c	<p>Add the following language to the first sentence: ...4) <u>timelines for submitting drafts to CDFW and NMFS for comment...</u> and 5) the proposed deadlines for submitting the completed reports to the Deputy Director that describe the studies and their results.</p> <p>The following language should be deleted:</p> <p>Rightholder shall consult with CDFW and NMFS regarding the development and scope of the study plan as well as each individual study. Within 180 days from the date of this order, rightholder shall submit a study plan to the Deputy Director for the Deputy Director's review and approval. The Deputy Director may direct the rightholder to make any changes to the study plan necessary to ensure a timely and meaningful evaluation of the measures necessary to protect public trust resources in the Santa Ynez River. In addition, The Deputy Director may require the rightholder to conduct the studies in phases, or to refine or augment the studies based on the results of an earlier phase. Rightholder shall make any changes to the study plan that the Deputy Director requires within the period that the Deputy Director specifies and shall conduct and report on the studies in accordance with the approved study plan. The Deputy Director may require updates and revisions to the study plan as studies are completed and new information is available.</p>
11.12	<p>The language should be revised to read: Right holder shall: Maintain a continuous record of the daily instream flows and flow depths in the Santa Ynez River at Highway 154 and at Alisal Road, Salsipuedes Creek, and other sites that the Deputy Director deems suitable, sufficient to document compliance with the terms of this permit. The continuous record of the daily stream flows and flow depths shall be made available <u>daily</u> on a publicly accessible website.</p> <p>The following language should be deleted:</p> <p>2) Implement the monitoring program described in the revised Biological Assessment</p>

	<p>(2000) to evaluate steelhead and their habitat within the lower Santa Ynez River. The monitoring program shall be implemented regardless of which flow requirements are in effect. The Deputy Director may amend the monitoring requirements to require additional monitoring or refine existing requirements.</p>
<p>11.13</p>	<p>A new section 13 should be added to the Order that specifically addresses the monitoring program:</p> <p>The new section 13 should read as follows: Implement the monitoring program described in the revised Biological Assessment (2000) with the inclusion of components from the CDFW Coastal Monitoring Program (Adams et. al. 2011) necessary to develop at least one life cycle monitoring station to evaluate steelhead and their habitat within the lower Santa Ynez River. This includes biweekly red surveys for steelhead during the winter spawning season as well as the development of a steelhead movement study during summer and fall. A PIT tag study must also be done to assess freshwater productivity. Smolt production must be evaluated by mark – recapture at the weir traps. The rightholder will establish a Biological Advisory Committee (BAC) composed of the rightholder, CDFW, NMFS and USFWS. The function of the BAC will be to advise the rightholder on implementation of the monitoring program. The monitoring program shall be implemented regardless of which flow requirements are in effect. The BAC will meet annually in July to review all steelhead and habitat monitoring data collected in the previous twelve month period, the summary analysis and trend for all previous year data collections as well as discuss the upcoming year's monitoring studies. Additional meetings will be scheduled based upon the need to evaluate new information. The Deputy Director may amend the monitoring requirements to require additional monitoring or refine existing requirements.</p>

CERTIFICATE OF SERVICE

I hereby certify that I have on this day electronically filed the foregoing California Department of Fish and Wildlife's Comments on the Draft Order Amending the Bureau of Reclamations Water Rights for the Cachuma Project with the State Water Resources Control Board (CDFW Comments). I have also electronically filed the same CDFW Comments to the Cachuma Project Evidentiary Hearings Service List, last updated on 09/07/2016.

Dated this 9th day of December, 2016



Nancee M. Murray

Attorney IV

California Department of Fish and Wildlife

