
State Water Resources Control Board

MARCH 14, 2012

To: Enclosed Cachuma Project Hearing Service List

CACHUMA PROJECT HEARING – APPLICATIONS 11331 AND 11332

This letter rules on the motion filed by the Santa Ynez River Water Conservation District, Improvement District No. 1, the Cachuma Conservation Release Board, and the Santa Ynez River Water Conservation District (the Cachuma Water Agencies) to strike the outlines of rebuttal testimony that California Trout (CalTrout) and the National Marine Fisheries Service (NMFS) have submitted and preclude CalTrout and NMFS from presenting the proposed testimony at the upcoming hearing scheduled for March 29 and March 30, if necessary. As stated in the hearing notice, the purpose of the hearing is to consider whether to enter into the administrative record the Final Environmental Impact Report (FEIR) that the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) has prepared in connection with this proceeding. During the hearing, the parties will be permitted to cross-examine the consultants who assisted the Division with the preparation of the FEIR, and those parties who have complied with presubmittal requirements will be permitted to present rebuttal testimony within the limits described in this letter.

The State Water Board's regulations provide that, unlike direct testimony, rebuttal testimony generally will not be required to be submitted in writing prior to the start of a hearing. (Cal. Code Regs., tit. 23, § 648.4, subds. (b), (c) & (f).) In this case, however, the hearing notice directed the parties to identify any rebuttal witnesses and submit an outline of their proposed testimony by February 28, 2012. The purpose of this requirement was to facilitate preparation for the hearing so that the hearing can be conducted as expeditiously as possible. The hearing notice also specified that any rebuttal evidence must be responsive to the FEIR and does not include repetitive evidence or evidence that should have been presented during a party's case-in-chief.

CalTrout timely submitted outlines of proposed rebuttal testimony for two witnesses: Heather Cooley and William Trush. NMFS timely submitted outlines of proposed rebuttal testimony for four witnesses: Peter Alagona, Darren Brumback, Mark Capelli, and Penny Ruvelas. The Cachuma Water Agencies have moved to strike CalTrout's and NMFS's rebuttal testimony outlines in their entirety and to preclude all of the proposed testimony from being presented at the hearing.

In their motion to strike, the Cachuma Water Agencies contend that the rebuttal testimony outlines violate the State Water Board's regulations and the hearing notice, and that accepting the proposed testimony would deny the Cachuma Water Agencies due process of law because the outlines do not provide enough detail to allow the Cachuma Water Agencies to prepare to cross-examine the proposed witnesses and potentially present surrebuttal witnesses. The Cachuma Water Agencies also contend that certain parts of the proposed testimony do not

comply with the hearing notice for one or more of the following reasons: (1) the testimony is not responsive to the FEIR; (2) the testimony should have been presented during CalTrout's or NMFS's case-in-chief; or (3) the testimony is repetitive. CalTrout and NMFS have filed oppositions to the motion to strike, contending that their rebuttal testimony outlines comply with all applicable procedural requirements.

For the reasons set forth below, the motion to strike the rebuttal testimony outlines from the record is denied. The motion to preclude CalTrout and NMFS from presenting the proposed testimony is granted in part and denied in part.

As stated above, the State Water Board's regulations do not require rebuttal testimony to be submitted in advance of a hearing, and the hearing notice in this case did not specify how detailed the outlines of rebuttal testimony should be. Accordingly, the rebuttal testimony outlines should not be stricken, and the proposed testimony should not be precluded, on the grounds that the outlines were not sufficiently detailed. In order to ensure that the hearing is conducted expeditiously, however, CalTrout and NMFS will be required to submit more detailed outlines in advance of the hearing because parts of their outlines are not detailed enough to enable the other parties to fully prepare to respond to the proposed testimony. The parts of the outlines that must be revised are identified below.

A more fundamental problem with the majority of NMFS's proposed rebuttal testimony, and some of CalTrout's proposed rebuttal testimony, is that the testimony is not responsive to the FEIR. As stated earlier, the only issue in the upcoming hearing is whether to admit the FEIR into evidence. The purpose of the upcoming hearing is to afford the parties the opportunity to contest the validity of the factual contents of the FEIR, through cross-examination and rebuttal, before the State Water Board considers admitting the FEIR into evidence. Except to the extent necessary to address the validity of the factual contents of the FEIR, the parties will not be permitted to relitigate issues that were addressed during phase 2 of the hearing or to present new information that has become available since phase 2 of the hearing was completed.

In accordance with the limited scope of the upcoming hearing, NMFS will not be permitted to present testimony concerning the history of steelhead resources, standards of protection under section 7 of the Endangered Species Act, the status of the 2000 Biological Opinion, the steelhead recovery planning process, or the contents of the steelhead recovery plan, unless NMFS can demonstrate that the testimony bears directly on the validity of a specific factual statement, analysis, or determination contained in the FEIR. Similarly, CalTrout will not be permitted to present testimony concerning the need for fish passage around Bradbury Dam, and neither party will be permitted to present testimony concerning the impacts of water releases made pursuant to State Water Board Order WR 89-18, because those issues were not addressed in the FEIR. (FEIR (Dec. 2011) vol. I, p. 2.0-65 [explaining that the FEIR did not evaluate fish passage because the hearing record does not support the imposition of passage requirements at the present time]; FEIR (Dec. 2011) vol. II, pp. 3.0-13, 4.1-1, 4.1-2 [explaining that Order WR 89-18 releases were part of baseline conditions against which the environmental impacts of the various alternatives were measured].)

The following proposed rebuttal testimony does not appear to be responsive to the FEIR and will not be permitted at the hearing: all of Peter Alagona's proposed testimony; all of Darren Brumback's proposed testimony, except the testimony described in the first section of his outline; all of Mark Capelli's proposed testimony, except the testimony described in the second section of his outline; all of Penny Ruvelas's proposed testimony; and the proposed testimony described in the third and fourth sections of William Trush's outline. The remaining testimony appears to be responsive to the FEIR. Heather Cooley's proposed testimony overlaps to some

extent with testimony presented by CalTrout during phase 2 of the hearing, but the FEIR is a new exhibit, and it contains new information and analyses. Accordingly, Heather Cooley's proposed testimony will be permitted, provided that her testimony pertains to the factual contents of the FEIR, and does not merely duplicate testimony that already has been presented.

Although the rebuttal testimony outlines describe testimony that is not responsive to the FEIR, it is not necessary to formally strike all or part of the outlines from the administrative record because the outlines themselves are not testimony and will not be treated as evidence.

As discussed above, some of the testimony described in the outlines appears to be responsive to the FEIR, but the outlines do not contain enough detail to allow the other parties to fully prepare prior to the hearing to respond to the proposed rebuttal testimony. In particular, the first section of Darren Brumbach's outline does not describe the alleged problems with the quoted material from the FEIR, and the second section of Mark Capelli's outline does not clearly describe the alleged discrepancies in the FEIR's characterization of the steelhead recovery plan. In addition, section one of William Trush's outline does not identify the data that he reviewed, other than Appendix G of the FEIR, or describe the analysis he conducted in support of his conclusion that the FEIR contains erroneous conclusions with respect to steelhead population status and trends. Finally, section four of Heather Cooley's outline does not identify the 2009 Pacific Institute analysis on which she relied. **Revised rebuttal testimony outlines that correct these deficiencies must be received by the State Water Board and served on the other parties no later than noon on March 19, 2012.** CalTrout also should make the data upon which its witnesses relied available to the other parties upon request.

Some of the parties, including the Cachuma Water Agencies, have indicated that they may wish to present surrebuttal testimony. Surrebuttal testimony will be permitted, limited to the scope of rebuttal. As with rebuttal testimony, any party who wishes to present surrebuttal testimony must identify their witnesses and submit a detailed outline of their proposed testimony in advance of the hearing. **The following information must be received by the State Water Board and served on the other parties no later than noon on March 26, 2012: (1) the names of any proposed surrebuttal witnesses; (2) a detailed outline of their proposed testimony; (3) a statement of qualifications for each witness (unless it is already part of the record); and (4) a statement of service.**

If you have any questions about this letter, please contact Dana Heinrich, Staff Attorney IV, at (916) 341-5188 or dheinrich@waterboards.ca.gov.

Sincerely,



Tam M. Doduc
Hearing Officer

Enclosure

cc: Dana Heinrich, Staff Attorney IV
State Water Resources Control Board
Office of Chief Counsel

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Les Grober
Diane Riddle
Larry Lindsay
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Ernie Mona
Sonia Frazier

Cachuma Project Phase 2 Hearing
Final Service List
(updated 01/30/2012)

*(Based on 01/05/2004 list, updated 07/26/2007, updated 06/08/2010, updated 01/20/2011,
updated 05/13/2011, updated 07/29/2011, updated 01/05/2012, updated 01/30/2012)*

The parties whose email addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.

<p>Cachuma Conservation Release Board Mr. Kevin O'Brien Downey Brand LLP 621 Capitol Mall, Floor 18 Sacramento, CA 95814 kobrien@downeybrand.com bcougar@downeybrand.com</p> <p><i>updated 01/05/2012</i></p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 ccampbell@bakermanock.com</p> <p><i>updated 07/29/2011</i></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 Gregory.Wilkinson@Bbklaw.com</p> <p><i>Updated 01/30/2012</i></p>	<p>City of Lompoc Ms. Sandra K. Dunn Somach, Simmons & Dunn 500 Capitol Mall Suite 1000 Sacramento CA 95814 sdunn@somachlaw.com</p> <p><i>updated 06/08/2010</i></p>
<p>Santa Ynez River Water Conservation District Mr. Ernest A. Conant Law Offices of Young Wooldridge 1800 – 30th Street, Fourth Floor Barkersfield, 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>

The parties listed below did not agree to accept electronic service, pursuant to the rules specified by this hearing notice.

<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>Ms. Terri Maus-Nisich, Assistant CEO Santa Barbara County CEO's Office 105 E. Anapuma Street, 4th Floor Santa Barbara, CA 93101 tmaus@co.santa-barbara.ca.us</p> <p><i>updated 01/05/2012</i></p>
<p>Dan Hytrek NOAA Office of General Counsel Southwest Region 501 West Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 Dan.Hytrek@noaa.gov</p> <p><i>updated 05/13/2011</i></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>

Cachuma Project Phase 2 Hearing

Final Service List continued

(updated 01/30/2012)

*(Based on 01/05/2004 list, updated 07/26/2007, updated 06/08/2010, updated 01/20/2011,
updated 05/13/2011, updated 07/29/2011, updated 01/05/2012, updated 01/30/2012)*

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