

**State Water Resources Control Board (Board), Cachuma Project Hearing Phase 2,  
U.S. Bureau of Reclamation Water Rights Permits 11308 and 11310**

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

**ESA Section 7 Interagency Consultation**

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).
- Bachelor of Science in Fisheries with over 20 years professional experience.
- Certified Fisheries Professional – American Fisheries Society.
- Statement of qualifications attached

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 (including, but not limited to the following)

- “The alternatives considered in the 2011 2<sup>nd</sup> 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 and final recovery plan] 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)
- “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)
  - o FEIR Table 2-4A: Summary of Reasonable and Prudent Measures/Terms and Conditions Described in the Cachuma Project Biological Opinion and Status of Compliance
- “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:
  - o 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
- “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)

The standards for protection of endangered steelhead applied under ESA Section 7 in a biological opinion are limited based on the terms of the statute and regulations

- Section 7(a)(2): *Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered 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).
- ESA Section 7 Consultation Process
  - Federal agency (e.g., Reclamation) submits a written request to initiate formal consultation (to NMFS and/or USFWS) that shall include a description of:
    - A description of the action to be considered;
    - A description of the specific area that may be affected by the action;
    - A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
    - Any relevant reports and available information on the action, the affected listed species, or critical habitat.
    - The best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects the action may have on listed species or critical habitat.
  - NMFS responsibilities during formal consultation:
    - Review all relevant information provided by the Federal agency or otherwise available;
    - Evaluate the current status of the listed species or critical habitat;
    - Evaluate the effects of the action on listed species or critical habitat;
    - Formulate its biological opinion whether or not the Federal action agency has insured its action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat;

- A jeopardy biological opinion shall include reasonable and prudent alternatives, if any, utilizing the expertise of the Federal agency in identifying such alternatives.
- Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat;
- Formulate a statement concerning incidental take, if such take may occur; that:
  - Specifies the amount or extent of take,
  - Specifies reasonable and prudent measures considered necessary or appropriate to minimize take, and
  - Sets forth terms and conditions (including reporting requirements) that must be complied with by the Federal agency.

Status of the 2000 biological opinion (Southern California steelhead) for the U.S. Bureau of Reclamation operation and maintenance of the Cachuma Project on the Santa Ynez River in Santa Barbara County, California

- Flow releases under the 2000 biological opinion
  - Mainstem rearing targets
  - Fish passage supplementation
  - Water Rights Releases – Order WR 89-18
- Species status, abundance, and population trend
- Reclamation’s compliance with the 2000 biological opinion
- Reinitiation of formal consultation under ESA Section 7 is required.
  - Reinitiation of formal Section 7 consultation is required if (50 CFR § 402.16):
    - The amount or extent of taking specified in the incidental take statement is exceeded;
    - New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
    - The identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
    - A new species is listed or critical habitat designated that may be affected by the identified action.
  - Based on information gathered in implementation of the 2000 biological opinion and after the Board’s Phase 2 Hearing (2003), releases prescribed under the State Board’s Order WR 89-18 and incorporated into all alternatives presented in the FEIR are likely to adversely affect endangered steelhead of the lower Santa Ynez River in a manner or to an extent not considered in NMFS’ Biological Opinion of 2000

- A new biological opinion, including updated proposed action, effects analysis and jeopardy determination will result from the reinitiated consultation.