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11 **STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**
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14)
15 In the Matter of:)
16)

17 Hearing to Review the U.S. Bureau of)
Reclamation Water Rights Permits)
18 (Applications 11331 and 11332) – Cachuma)
19 Project Phase 2)
20)
21)
22)

CALIFORNIA TROUT, INC.'S
OPPOSITION TO MEMBER UNITS'
MOTION TO STRIKE AND MOTION FOR
DISMISSAL OF PARTY

1 **I. INTRODUCTION**

2 The Member Units have requested the State Water Resources Control Board (“Board”) to strike the
3 appendices accompanying CalTrout’s Closing Brief, as well as an appendix submitted by both the
4 Department of Fish and Game (“DFG”) and NOAA Fisheries. Member Units’ Motion to Strike; Motion
5 for Dismissal of Party (“Motion”) at 2-5. The Member Units have also moved for dismissal of NOAA
6 Fisheries as a party to the Phase 2 proceedings. Motion at 5-8. As discussed below, submission of the
7 appendices challenged by the Member Units is consistent with the procedural rules identified for this
8 hearing. The Member Units’ Motion to Strike and Motion for Dismissal of Party should therefore be
9 denied.

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11 **II. CALTROUT’S CLOSING BRIEF APPENDICES SHOULD NOT BE STRICKEN**

12 The procedural rules for the Phase 2 proceedings are identified in Title 23 of the California Code of
13 Regulations (sections 648-649.6 and 760) and the Board’s August 13, 2003 Notice of Field Orientation
14 Tour and Supplemental Notice of Phase 2 of Public Hearing (“Supplemental Hearing Notice”). In
15 addition, Hearing Officer Silva identified, clarified, and modified procedural requirements during the
16 Phase 2 Hearing itself. For example, on the final day of the hearing, Hearing Officer Silva explicitly
17 authorized the submission of appendices with closing briefs.¹ Nonetheless, the Member Units contend
18 that CalTrout’s appendices violate the procedural rules for this hearing. CalTrout’s Closing Brief
19 appendices, however, fully comport with all relevant procedural requirements.

20 **a. CalTrout’s Appendices 1, 3, and 4 Were Properly Submitted With CalTrout’s**
21 **Closing Brief.**

22 The Member Units contend that CalTrout has violated the procedural requirements for this
23 hearing by submitting Appendices 1, 3 and 4 as “new exhibits” with its closing brief.² Motion at 5. In
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25 ¹ “H.O. SILVA: * * * Normally we’d like to limit – we agree to a number of pages, which I think
26 helps everybody because you don’t have one party submitting two pages and somebody
27 submitting a thousand. And you can add appendices as you like, but we do want the closing
28 briefs to be concise, to the point.” T:1119 (emphasis added).

² The Member Units similarly contend that NOAA Fisheries Appendix B and DFG’s Appendix 1 were
improperly submitted. These appendices are identical to CalTrout’s Appendix 1 (“Santa Ynez River Fish
Passage Feasibility Analysis”).

1 support of this contention, the Member Units cite to provisions that limit the timing of submission of
2 “testimony” and other “evidence.” Motion at 2-3. CalTrout’s Appendix 1 (“Santa Ynez River Fish
3 Passage Feasibility Analysis”), Appendix 3 (“Water Conservation Study”), and Appendix 4 (Study Plan
4 for “Modifications to Downriver Water Rights Release Schedule”), however, are not evidentiary, and for
5 this reason have been properly submitted to the Board as appendices to CalTrout’s Closing Brief.

6 The California Evidence Code defines the term “evidence” to mean, “Testimony, writings,
7 material objects, or other things presented to the senses that are offered to prove the existence or
8 nonexistence of a fact” (emphasis added). Cal. Evid. Code § 140. See also, Board of Education of City
9 and County of San Francisco v. Alliance Assur. Co. (1908) 159 F. 994, 998 (“Evidence is the means by
10 which a fact is proved.”).

11 Appendices 1, 3, and 4 were not provided to the Board to “prove the existence or nonexistence of
12 a fact.” These appendices, each describing a particular study plan, were not submitted to prove that the
13 studies identified therein should be conducted. For such proof, CalTrout properly relies on evidence
14 already in the hearing record. See, CalTrout Closing Brief (“CT Closing”) at 12-14 (discussing need for
15 fish passage study); CT Closing at 21-25 (discussing need for water conservation study); CT Closing at
16 25-28 (discussing need for study of potential modifications to downstream water rights release
17 schedule). Instead, the appendices were provided only to facilitate the Board’s ability to fashion an
18 appropriate order if, based on the evidence in the record, the Board should determine that any one or all
19 of these studies should be carried out. Thus, CalTrout’s Closing Brief only directs the Board to
20 Appendices 1, 3, or 4 if the Board determines, based on the evidence already in the hearing record, that
21 such studies should be conducted. See, CT Closing at 14, lines 19-23; CT Closing at 25, lines 12-21; CT
22 Closing at 28, lines 15-19. If, on the other hand, the Board should determine, based on the evidence in
23 the record, that these studies are not warranted, then the Board would not review the material in the
24 appendices.

25 In this regard, the appendices are analogous to a proposed court order,³ and CalTrout did not
26 intend for them to be taken in any other way. As it is the Board’s practice to release a “draft” Order for
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28 ³ See, e.g., California Rules of Court Rule 313(j), authorizing parties to submit a proposed order or judgment.

1 comment, all parties will have an opportunity to address the Board regarding the acceptability of the
2 specific provisions the Board proposes to incorporate into the Cachuma Project permits. See, e.g., May
3 12, 2003 Cover Letter enclosing Draft Order Denying Petition to Revise Declaration of Fully
4 Appropriated Streams to Allow Processing of Applications to Appropriate Treated Groundwater
5 Discharged into the Lower American River [Attachment 1]. Thus, CalTrout’s appendices are not
6 “exhibits” or “testimony,” and were therefore properly submitted to the Board as appendices to
7 CalTrout’s Closing Brief.

8 Additionally, all of the parties to these proceedings have been apprised of, and had an
9 opportunity to controvert, the evidence upon which these study plans are based, as the material in each
10 appendix is based on testimony and other evidence presented during the hearing. For example, multiple
11 experts testified regarding the scope, method, and timing of a study of the feasibility of steelhead
12 passage around Bradbury Dam. See, e.g., Ex. CT 10 and T:835-849 (testimony of Ed Zapel); Ex. DFG 7
13 and T:520-527 (testimony of Marcin Whitman); Ex. NOAA 5; T:665-668 (testimony of Jonathon
14 Mann). Similarly, testimony during the hearing also addressed the elements of a study of downstream
15 water rights release modifications. See, e.g., Ex. CT 30 at 12 and T:821 (testimony of Tom Keegan); Ex.
16 CT 90, App. 1 and T:794-795 (testimony of Jim Edmondson); Ex. Lompoc 3 and Lompoc 5 (testimony
17 of Timothy Durbin); Ex. MU 264, Section 3 (testimony of Ali Shahroody). A water conservation study
18 was also discussed. See, e.g., Ex. CT 50, CT 56 and T:828-829 (testimony of Dana Haasz and Peter
19 Gleick). Thus, the Member Units are incorrect when they assert that none of the material in the
20 appendices has been subjected to cross-examination or rebuttal.

21 For these reasons, CalTrout’s Appendices 1, 3, and 4 have been properly submitted to the Board.
22 These items were not submitted as evidence to prove the existence or nonexistence of a fact, or even that
23 the studies identified therein should be conducted. Because they are non-evidentiary, they are therefore
24 not subject to the deadlines for submitting testimony and other exhibits. Hearing Officer Silva explicitly
25 authorized the submission of appendices with closing briefs. Thus, the submission of Appendices 1, 3,
26 and 4 is fully consistent with the procedural requirements for this hearing.

1 **b. CalTrout’s Appendix 2 Was Properly Submitted With CalTrout’s Closing Brief.**

2 CalTrout’s Appendix 2, which contains a detailed response to the rebuttal testimony of Ms.
3 Misty Gonzales, is limited to evidence already in the hearing record and has been properly submitted as
4 an appendix to CalTrout’s closing brief. Ms. Gonzales’ ten page written testimony, provided to the
5 Board and the hearing participants for the first time on November 13, 2003 at the same time Ms.
6 Gonzales provided her oral testimony, consists entirely of a critique of Ms. Dana Haasz’s and Dr. Peter
7 Gleick’s written testimony on behalf of CalTrout regarding the potential water savings that could be
8 achieved through water conservation. See, Ex. MU 280 and T:1062-1068. Pursuant to the schedule for
9 rebuttal and cross-examination established by the Hearing Officer, CalTrout was provided only ten
10 minutes to consult with Ms. Haasz and Dr. Gleick to prepare to cross-examine Ms. Gonzales. T:1067.
11 CalTrout attempted to carry out an effective cross-examination in accordance with this schedule, but
12 stated its concern that the minimal time provided was an inadequate amount of time for counsel to
13 consult with Ms. Haasz and Dr. Gleick and prepare to cross-examine Ms. Gonzales. T:1067. CalTrout
14 stated its intent to fully respond to Ms. Gonzales’ testimony in future written submittals to the Board,
15 and understood the Hearing Officer to assent to this request. Id. and T:1077. As discussed above, the
16 Hearing Officer explicitly stated that appendices could be submitted with closing briefs (and were not
17 subject to any page restrictions). Thus, CalTrout understood and intended its submission of Appendix 2
18 along with its closing brief to be consistent with the procedures established by the Supplemental Hearing
19 Notice and the Hearing Officer.⁴ Moreover, CalTrout’s Appendix 2 is entirely limited to references to
20 the evidence already in the hearing record, and does not consist of any new evidence.⁵ Supplemental
21 Hearing Notice at 6. For these reasons, CalTrout’s Appendix 2 should not be stricken.

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25 ⁴ CalTrout’s submission of Appendix 2 is premised on this understanding of the exchange between
26 Hearing Officer Silva and Ms. Linda Krop. See, T: 1067 and 1077. However, if this type of submission
27 was not intended by Mr. Silva, then CalTrout would not object to Appendix 2 being stricken. It is not
28 CalTrout’s intent to subvert the rules of procedure for this hearing.

⁵ The Member Units suggest that Appendix 2 should have been submitted as rebuttal evidence during
the hearing. Motion at 4. However, rebuttal evidence is “new evidence” that is “responsive to evidence
presented in a case-in-chief.” Supplemental Hearing Notice at 6. Ms. Gonzales’ testimony was provided
as rebuttal, and the hearing procedures do not provide an opportunity to rebut rebuttal evidence.

1 **III. NOAA FISHERIES SHOULD NOT BE DISMISSED AS A PARTY**

2 The Member Units argue that NOAA Fisheries’ submission of Appendix B (“Santa Ynez River Fish
3 Passage Feasibility Analysis”) has violated the Board’s procedural requirements, and that the Board
4 should thus take the rather draconian measure of dismissing NOAA Fisheries as a party from these
5 proceedings. Motion at 5-8. As discussed above, however, submission of this document as an appendix
6 fully comports with the procedural requirements governing these proceedings. Therefore, the Member
7 Units’ Motion to Dismiss NOAA Fisheries is without merit. Moreover, even should the Board determine
8 that the submission of Appendix B is not consistent with the hearing procedures, the drastic measure of
9 dismissing NOAA Fisheries as a party is not warranted to remedy a minor and unintentional violation of
10 hearing procedure.⁶ Any threat of prejudice to any party can be addressed simply by striking the
11 Appendix.

12 NOAA Fisheries’ Biological Opinion and recovery planning process are central issues at dispute in
13 these proceedings, and NOAA Fisheries’ participation has been invaluable in clarifying the purpose and
14 limits of both. NOAA Fisheries’ participation, thus, continues to be of the utmost importance in these
15 proceedings.

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17 **IV. CONCLUSION:**

18 For the reasons discussed above, the Member Units’ Motion to Strike and Motion for Dismissal of
19 Party should be denied.

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22 Dated: _____

Respectfully submitted,
ENVIRONMENTAL DEFENSE CENTER

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25 By: _____

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28 ⁶ There is no indication that NOAA Fisheries’ intended to circumvent the procedural requirements or in any way understood the procedural requirements to prohibit the submission of Appendix B.