

Jane Farwell - Cachuma Project hearing - OBJECTION CACHUMA FEIR

From: Karen Kraus <kkraus@edcnet.org>
To: 'Jane Farwell' <jfarwell@waterboards.ca.gov>
Date: 1/9/2012 11:21 AM
Subject: Cachuma Project hearing - OBJECTION CACHUMA FEIR
CC: <kobrien@downeybrand.com>, <ccampbell@bakermanock.com>, <gkwilkinson@bbk...>
Attachments: 2012-01-09 EDC to Farwell re 2011 SWB FEIR.pdf

Ms. Farwell,

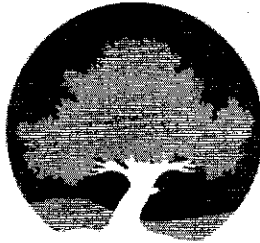
Attached is a letter submitted on behalf of CalTrout in objection to the inclusion of the SWB's 2011 Final Environmental Impact Report in the administrative record for the Cachuma Project. As requested, we are separately submitting, via U.S. mail, a hard copy of this letter with an original signature.

We would appreciate it if you could confirm receipt of this email and attachment.

Thank you.

Karen M. Kraus
Staff Attorney
Environmental Defense Center
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Ventura, CA 93003
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environmental
DEFENSE CENTER

January 9, 2012

Jane Farwell, Environmental Scientist
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
jfarwell@waterboards.ca.gov

VIA EMAIL

**Re: Cachuma Project – Final Environmental Impact Report on the
Consideration of Modifications to the U.S. Bureau of Reclamation’s
Water Permits 11308 and 11310 (Applications 11331 and 11332)**

Dear Ms. Farwell:

The Environmental Defense Center (“EDC”) submits this letter to object to the inclusion of the December 2011 Final Environmental Impact Report (“FEIR”) – evaluating potential modifications to the U.S. Bureau of Reclamation’s (“BOR”) water rights permits to protect the public trust and downstream water rights on the Santa Ynez River – in the administrative record for the Cachuma Project hearing. This letter is submitted to the State Water Resources Control Board (“SWRCB” or “Board”) on behalf of our client, California Trout (“CalTrout”), a non-profit river conservation organization with a substantial interest in the public trust resources of the Santa Ynez River, including the endangered southern California steelhead.

The Cachuma Project hearing, in accordance with California Code of Regulations, Title 23, Section 648, is an adjudicatory proceeding, i.e.:

[A]n evidentiary hearing for determination of facts pursuant to which the State Board . . . formulates and issues a decision.

Thus, once admitted into the hearing record, presumably as a SWRCB staff exhibit, the FEIR would be available as evidence to support the Board’s final public trust decision. Adjudicative proceedings must be conducted in accordance with the provisions and rules of evidence identified in Government Code Section 11513. Simply entering the FEIR into the record does not comply with Government Code Section 11513 as the parties to the

hearing have not, at a minimum, had an opportunity to cross-examine SWRCB staff, or the consultants that prepared the EIR, on relevant issues.¹

The SWRCB also never provided hearing participants with an opportunity to cross-examine the preparers of the 2003 Draft EIR during the Cachuma Project hearing proceedings. Although some of the individuals involved in the preparation of the Draft EIR did present testimony in October and November of 2003, they did so as part of the Member Units' and Bureau of Reclamation's case-in-chief, and their testimony did not address the Draft EIR. Moreover, it has now been eight years since those evidentiary proceedings, and during that time the SWRCB's EIR has undergone significant revisions. Prior to releasing the December 2011 FEIR, the SWRCB circulated a 2007 Revised Draft EIR ("2007 DEIR") that supplemented and revised the 2003 Draft EIR to analyze two new alternatives. And, in 2011, the SWRCB circulated a 2nd Revised Draft EIR ("RDEIR") that:

[I]n response to comments on the 2007 RDEIR . . . updated information on water supply, biological resources, oak trees, and recreation. In addition, the 2nd RDEIR has been updated to reflect a number of changes that have occurred since the 2007 RDEIR was prepared. Finally, the 2nd RDEIR makes some changes and corrections in response to comments on the 2007 RDEIR.²

Even if the parties had the opportunity to address the 2003 Draft EIR during the 2003 proceedings, the significant updates to the FEIR have created a compelling need to subject the findings and conclusions in the FEIR to the same scrutiny required for every other item of submitted evidence in the Cachuma Project hearing.

We note the following concerns as examples to illustrate our objection to the Board relying on the FEIR:

- The FEIR contains erroneous and inconsistent findings and conclusions that the provisions of the National Marine Fisheries Service 2000 Biological Opinion protect the public trust resources of the Santa Ynez River and maintain steelhead in good condition.
- The FEIR contains misleading findings and conclusions regarding the evaluated alternatives' effects on the condition of Santa Ynez River steelhead.

¹ Cal. Gov. Code 11513(b). This provision also provides an opportunity for parties to rebut evidence.

² SWRCB Notice To: Enclosed Cachuma Hearing Service and General Mailing Lists RE Release of Second Revised Draft Environmental Report Prepared in Connection with Consideration of Modifications to the U.S. Bureau of Reclamation's Water Right Permits 11308 and 11310 (Applications 11331 and 11332) To Protect Public Trust Values and Downstream Water Rights on the Santa Ynez River Below Bradbury Dam (Cachuma Reservoir). 2011. Apr 1.

- The FEIR contains erroneous findings and conclusions regarding the Santa Ynez River steelhead population status and trends
- The FEIR contains erroneous and inconsistent findings and conclusions regarding the scope of public trust resources on the Santa Ynez River and the scope of the SWRCB's public trust decision.
- The FEIR contains erroneous and inconsistent findings and conclusions regarding the National Marine Fisheries Service Recovery Plan for the Southern California steelhead, including information in that Plan regarding the Santa Ynez River population.
- The FEIR contains erroneous and inconsistent findings and conclusions regarding water supply impacts and the minimization of such impacts through alternative water supply and conservation measures.
- The FEIR contains erroneous findings and conclusions regarding the Cachuma Project Settlement Agreement between the Cachuma Conservation Release Board, the Santa Ynez River Water Conservation District, Santa Ynez River Water Conservation District Improvement District No. 1, and the City of Lompoc.
- The FEIR relies on substantial data and information added since circulation of the 2003 Draft EIR and the 2003 hearing proceedings, none of which has been subjected to the required evidentiary process. The new data includes operation data for Bradbury Dam, data for water supply and demand, water quality data, and fishery monitoring data, as well as other data that is "available and pertinent to all issues." (FEIR at 2.0-482.)

With the opportunity to respond to the FEIR through an evidentiary process, we would be able to query the preparers of the document about these and other issues, and identify any problems with the findings, conclusions, and underlying data in the FEIR for the SWRCB's consideration.

The opportunity the parties have already had to submit comments on the 2007 RDEIR and the 2011 2nd RDEIR, pursuant to the California Environmental Quality Act ("CEQA"), does not suffice for this purpose, nor is it a basis to admit the FEIR into the hearing record. The CEQA process is related to, but distinct from, the adjudicative process. CEQA comments pertain to the adequacy of the EIR in support of the Board's CEQA responsibilities to 1) identify the environmental effects of the Project; and 2) to mitigate adverse effects of the Project through the imposition of feasible mitigation measures or alternatives. If, in addition, the Board will rely on the EIR to support its adjudicative public trust decision, then the EIR should be subjected to the same evidentiary requirements as all other evidence submitted in the Cachuma Project hearing record.

For these reasons, we object to the admission of the FEIR into the Cachuma Project hearing record, unless the parties are provided the opportunity to address the FEIR through the evidentiary process, in accordance with Government Code Section 11513.

We also request that all parties be allowed to submit a supplemental closing brief. The August 13, 2003 Hearing Notice provides that the hearing officer will set a schedule for filing briefs or closing statements "[a]t the close of the hearing or at other times if appropriate."³ It is appropriate to provide an additional opportunity to submit supplemental closing briefs to address how information in the FEIR relates to our case-in-chief. As described above, the SWRCB's EIR has undergone significant revisions since early 2004, when closing briefs were submitted in this matter.

Thank you for considering our concerns on these issues.

Sincerely,



Karen M. Kraus
Staff Attorney

cc: Cachuma Project Phase 2 Hearing List

³ August 13, 2003 Notice of Field Orientation Tour and Supplemental Notice of Phase 2 of Public Hearing, Enclosure 1 at 6. See also, CCR Title 23 § 648.5(d) ("After conclusion of the presentation of evidence, all parties appearing at the hearing may be allowed to present a closing statement.")

Cachuma Project Phase 2 Hearing
Final Service List
(updated 07/29/2011)

*(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)*

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 tkuntz@downeybrand.com</p> <p><i>updated 01/20/2011</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 gkwilkinson@bbklaw.com</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 Bakersfield, 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>Santa Barbara County Parks Ms. Terri Maus-Nisich Director of Parks 601 Mission Canyon Road Santa Barbara, CA 93105 tmaus@co.santa-barbara.ca.us</p>
<p>Dan Hytek NOAA Office of General Counsel Southwest Region 501 West Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 Dan.Hytek@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>