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7 **STATE OF CALIFORNIA**

8 **STATE WATER RESOURCES CONTROL BOARD**

9 In the Matter of:

10 Hearing to Review the United States Bureau
11 of Reclamation Water Rights Permits 11308
12 and 11310 (Applications 11331 and 11332)
13 to Determine Whether Any Modifications in
14 Permit Terms and Conditions Are Necessary
15 to Protect Public Trust Values and Downstream
16 Water Rights on the Santa Ynez River below
17 Bradbury Dam (Cachuma Reservoir)

OPPOSITION TO MOTION TO
STRIKE AND MOTION TO
DISMISS

16 **INTRODUCTION**

17 NOAA Fisheries hereby opposes the Motion to Strike and the Motion for Dismissal filed by
18 the Member Units on February 18, 2004. The Member Units make two motions, and each one will
19 be addressed in turn.

21 **ARGUMENT**

22 First, the Member Units contend that consideration by the Board of Appendix B to NOAA
23 Fisheries' Closing Brief would be a violation of the Constitution of the United States, as well as the
24 California Government Code, and the regulations of the Board. This argument presumes that
25 Appendix B, an outline for the conduct of a fish passage project feasibility analysis, is "evidence."
26 Member Units are mistaken in that presumption. The California Evidence Code defines evidence
27 as "testimony, writings, material objects, or other things presented to the senses that are *offered to*
28 *prove the existence or nonexistence of a fact.*" Cal. Evidence Code §140 (emphasis added). As

1 explained *infra*, Appendix B to NOAA Fisheries' Closing Brief does not meet that definition.

2 In the Conclusion section of its closing brief, NOAA Fisheries requested that the Board order
3 the permittee to conduct studies regarding fish passage projects. As part of that request, NOAA
4 stated conditions under which such a study should be conducted if it were to be thorough and
5 meaningful, including requesting the Board to address through appropriate terms in the permit the
6 potential misuse of the concept of "feasibility." Closing Brief of NOAA Fisheries, at 17. Appendix
7 B is of the same character as the other suggested permit terms that were included in the Conclusion
8 section setting forth the conduct of any steelhead investigation the Board may order: suggested
9 permit terms for the Board on how the requested fish passage study should be ordered to be
10 conducted to avoid delay and controversy. Had NOAA offered Appendix B to prove any fact
11 supporting NOAA's arguments, it would have been referenced in Section III of NOAA's closing
12 brief. Instead, the sole reference to Appendix B occurs squarely in the middle of the other requested
13 permit conditions contained in the Conclusion section. Appendix B was not offered to prove the
14 existence *vel non* of any fact, and cannot reasonably be read to do so.

15 Rather than including the requested permit terms comprised by Appendix B in the body of
16 the closing brief, NOAA put them in an appendix for greater clarity and succinctness. Furthermore,
17 NOAA organized its closing brief in this manner based on the ruling by Hearing Officer Silva on the
18 final day of the Phase II hearing:

19 H.O. SILVA: * * * Normally we'd like to limit – we agree to a number of
20 pages, which I think helps everybody because you don't have one party submitting
21 two pages and somebody submitting a thousand. *And you can add appendices as*
22 *you like*, but we do want the closing briefs to be concise, to the point.

23 R.T., at 1119 (emphasis added).

24 Counsel for Member Units was not only in the hearing room at the time of that ruling from
25 the chair, he was an active participant in the discussion of the rules for closing briefs. R.T., at 1120.
26 If the Member Units truly believed Mr. Silva's ruling to be such an egregious violation of the United
27 States Constitution, of state law, and of the Board's own regulations, the proper course of action
28 would have been to object to the ruling or, at the very least, seek clarification at the time it was

1 made. Instead, the Member Units now claim that a submission made in conformance with a ruling
2 of the Board is somehow prejudicial and seek not only to prevent the Board from considering
3 suggested terms and conditions to be incorporated into Permits 11308 and 11310—the very heart
4 of the matter now before the Board—but also to have one party dismissed from the hearing.

5 Because Appendix B consists of suggested terms for incorporation into any order the Board
6 may issue in this proceeding, it is not an evidentiary submission and is quite properly submitted with
7 a closing brief. The Member Units' characterization of Appendix B as evidence, the basis for the
8 motion to strike, is completely without merit. Therefore, the motion to strike should be denied.

9
10 Next, the Member Units move to dismiss NOAA Fisheries as a party to this proceeding based
11 on their claim that filing requested permit conditions specifying how any fish passage studies the
12 Board might order should be structured somehow constitutes a "crude attempt to ignore" the Board's
13 rulings on the conduct of this hearing. The Member Units offer three purported "facts" and conclude
14 from these "facts" that NOAA must be dismissed as party, a sanction wildly disproportionate¹ to the
15 alleged infraction.

16 The Member Units' first purported "fact," that "the Member Units *are* prejudiced by NOAA
17 Fisheries' attempt to offer" Appendix B, is not a fact at all. It is a conclusory assertion premised on
18 an erroneous characterization of Appendix B as "evidence" and a repetition of the faulty basis for
19 the motion to strike. As such, it should be rejected by the Board. Given the Board's practice of
20 circulating and receiving comments on draft Orders, the Member Units are not prejudiced by the
21 inclusion of requested permit terms in NOAA's closing brief. The Board's practice affords the

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23 ¹Both the 2000 Hearing Notice and the 2003 Supplemental Hearing Notice for Phase 2 allow
24 for the submission of evidentiary materials with closing briefs. See Notice of Hearing, *Information*
25 *Concerning Appearance at Water Right Hearings*, 5.d., at 5 (Sep. 25, 2000) and Notice of Field
26 Orientation Tour and Supplemental Notice of Phase 2 of Public Hearing, *Information Concerning*
27 *Appearance at Water Right Hearings*, 6.d, at 6 (Aug. 15, 2003)(evidentiary submissions with closing
28 briefs proper when "the subject of an offer of the document in evidence"). Were the Member Units'
erroneous assertion that Appendix B is an evidentiary submission accurate—which NOAA maintains
is not—the proper response for consideration by the Board would be an objection to the offer or a
motion to strike, not a motion for dismissal of a party.

1 Member Units ample opportunity for response to proposed permit terms before any final Order is
2 issued.

3 The next two purported “facts” offered by the Member Units, that “NOAA Fisheries *did*
4 participate in the hearing” and that the record before the Board “*already* includes . . . all the evidence
5 the Board may properly receive to evaluate impacts on fisheries,” are premises in an attempted
6 syllogistic argument that can be restated succinctly: NOAA has participated in this proceeding; the
7 Board has received and cannot receive further evidence from NOAA during this proceeding;
8 therefore, NOAA should be dismissed from this proceeding. Were this argument valid, it would
9 apply to any party in any proceeding before the Board. In fact, it is not a valid argument; it is an
10 absurd *non sequitur* that should be rejected by the Board.

11 In attempting to portray NOAA Fisheries’ submission in as poor a light as possible, the
12 Member Units also resort to inflammatory rhetoric² and add yet another logical fallacy, argument by
13 guilt-by-association. For the second time in this proceeding³ counsel for the Member Units has
14 improperly attempted to impute to NOAA Fisheries the actions of another agency, this time past
15 litigation tactics of the Bureau of Reclamation. While both the allegations of misconduct by the
16 Bureau of Reclamation in a different proceeding before this Board more than twenty years ago and
17 the personal reminiscences of counsel for the Member Units are fascinating, they are equally
18 irrelevant. No provision of California law incorporates the personal experiences and subjective
19 opinions of counsel to the Member Units as standards by which submissions to the Board are to be
20 evaluated.

21 CONCLUSION

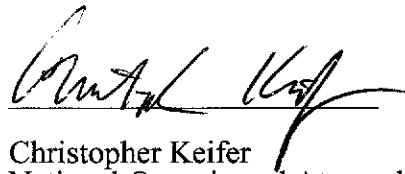
22 Appendix B can be evaluated only under the standards set forth in the California Evidence
23

24 ²Apparently, when the Member Units communicate with other parties in order to coordinate
25 arguments the result is “joint panels” and “incorporation by reference,” ostensibly for the
26 convenience of the Board. When communication occurs among parties with whom the Member
27 Units disagree, the result is, according to counsel for the Member Units, “complicity.” *See* Motion
for Dismissal, at 7 n.3.

28 ³*See* Closing Brief of NOAA Fisheries, at 15.

1 Code, the California Government Code, the Board's regulations, the Hearing Notices setting forth
2 the rules for this proceeding, and the ruling communicated to all parties by Hearing Officer Silva that
3 parties "*can add appendices as [they] like*" to their closing briefs. R.T., at 1119 (emphasis added).
4 Under those standards, Appendix B to NOAA Fisheries' Closing Brief is not an evidentiary
5 submission and comports in all respects with the Board's procedural regulations and rulings on the
6 conduct of this hearing. Therefore, the Member Units' motion to strike and motion for dismissal of
7 NOAA Fisheries as a party should be denied.

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9 Respectfully submitted,

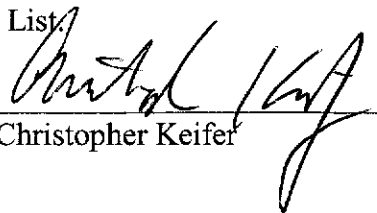
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12 Christopher Keifer
13 National Oceanic and Atmospheric Administration
Office of General Counsel, Southwest Region

14 Dated: February 27, 2004
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PROOF OF SERVICE

I hereby certify that on February 27, 2004, I deposited in with the United States Postal Service copies of the Opposition to Motion to Strike and Motion to Dismiss with appropriate postage to each of the parties on the attached Service List.


Christopher Keifer

Cachuma Project Hearing
Phase-2 Hearing
Final Service List

Updated 01/05/2004

(Note: The parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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