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MAY 29 2003

To: Enclosed Cachuma Hearing Service List

CACHUMA PROJECT HEARING – APPLICATIONS 11331 AND 11332

At the pre-hearing conference on May 13, 2003, I directed the National Marine Fisheries Service (NOAA Fisheries) to submit a formal, written request to participate as a party in Phase II of the Cachuma Project Hearing by May 20, 2003. I said that I would rule on NOAA Fisheries' request, as well as an issue concerning the scope of the hearing, by May 30. Other procedural issues raised during the prehearing conference will be addressed in a supplemental hearing notice, which the State Water Resources Control Board (SWRCB) will issue around July 1.

On May 19, 2003, NOAA Fisheries submitted a request to participate as a party. NOAA Fisheries seeks to call five expert witnesses, and to present evidence concerning: (1) the Biological Opinion that NOAA Fisheries issued to the U.S. Bureau of Reclamation (Reclamation) in 2000, which addresses the effects of the ongoing operation of the Cachuma Project on the endangered Southern California steelhead Evolutionarily Significant Unit (ESU); (2) how the Biological Opinion relates to the steelhead recovery planning process; (3) the status of the steelhead; and (4) conservation measures in addition to those identified in the Biological Opinion.

The deadline to submit a Notice of Intent to Appear and participate as a party was October 11, 2000. In response to a letter from NOAA Fisheries, I instructed NOAA Fisheries in a letter dated December 11, 2001, to submit a Notice of Intent to Appear as soon as possible if NOAA Fisheries wished to participate in this hearing. In March 2002, NOAA Fisheries submitted a Notice of Intent to Appear, indicating that NOAA Fisheries intended to present a non-evidentiary policy statement only.

NOAA Fisheries has not offered any excuse for its tardy decision to participate as a party. I am troubled by NOAA Fisheries' failure to follow the procedural requirements set forth in the hearing notice. No party will be prejudiced if NOAA Fisheries is allowed to participate, however, because the deadline to exchange testimony for Phase II has not passed. In addition, NOAA Fisheries' participation will be valuable in light of its unique role as the agency that listed the Southern California steelhead ESU as endangered, authored the Biological Opinion, and is responsible for preparing a recovery plan for the species. Excluding NOAA Fisheries from this proceeding would make it more difficult for the SWRCB to ensure that the record includes the evidence necessary for the SWRCB to properly evaluate impacts on fisheries consistent with the SWRCB's public trust responsibilities. Accordingly, I will allow NOAA Fisheries to participate.

California Environmental Protection Agency

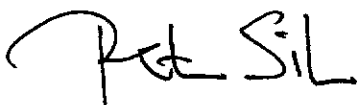
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NOAA Fisheries is advised, however, that failure to comply in the future with the procedural requirements for participation as a party in a hearing is grounds for dismissal as a party. (Cal. Code Regs., tit. 23, § 648.1, subd. (c).)

At the prehearing conference, some of the parties questioned whether the scope of the hearing includes the issue whether Reclamation's water right permits should be modified to protect public trust resources upstream of Bradbury Dam. The hearing notice defines the hearing issues broadly. Although key hearing issue 4a asks what flow requirements are required to protect public trust resources downstream of Bradbury Dam, key issue 4a also asks what terms, conditions, or recommendations contained in the Biological Opinion, if any, should be incorporated into Reclamation's permits. The Biological Opinion recommends that Reclamation study effective passage for steelhead to spawning and rearing habitat upstream of Bradbury Dam. In addition, key hearing issue 4b asks what other measures, if any, are necessary to protect public trust resources. By its terms, key hearing issue 4b is not limited to public trust resources below Bradbury Dam, or to requirements that apply below Bradbury Dam. Consistent with the hearing notice, I intend to allow parties to present evidence concerning whether Reclamation's permits should be modified to address any impacts of Cachuma Project operations to public trust resources above Bradbury Dam, including evidence concerning requirements that would apply above the dam.

If you have any questions about this ruling, please contact Ms. Katherine Mrowka at (916) 341-5363 or Dana Differding, Staff Counsel, at (916) 341-5188.

Sincerely,



Peter S. Silva
Hearing Officer

cc: Ms. Dana C. Differding
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Cachuma Hearing
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Updated 5/28/03

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**Additions to Mailing List (Service
of Exhibits and Testimony to
Persons Denoted with a "*" is Not
Yet Required)**