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1 CHRISTOPHER A. KEIFER  
2 United States Department of Commerce  
3 National Oceanic & Atmospheric Admin.  
4 Office of General Counsel, Southwest Region  
5 501 W. Ocean Blvd., Ste. 4470  
6 Long Beach, CA. 90802  
7 Tel.: (562) 980-4076  
8 Fax: (562) 980-4084  
9 Attorney for NOAA Fisheries

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)

NOAA FISHERIES'  
OPPOSITION TO  
CITY OF LOMPOC'S  
MOTION TO STRIKE

16 **INTRODUCTION**

17 On February 27, 2004, the City of Lompoc (City) filed a Motion to Strike with the Board.  
18 NOAA Fisheries hereby opposes the Motion to Strike Appendix B and lines 23 - 28, page 17 from  
19 NOAA Fisheries' Closing Brief (Motion).

21 **ARGUMENT**

22 As an initial matter, NOAA questions the propriety of such a motion by the City of Lompoc  
23 (City) at this juncture. In the City's opening statement, counsel for the City stated the City's interest  
24 in this matter quite clearly: "Lompoc's sole objective is to ensure that the Cachuma Project not  
25 adversely impact Lompoc's water rights, neither the quality nor quantity." R.T., at 468. Testifying  
26 under oath, Mr. Keefe, the City Administrator for the City of Lompoc, confirmed the City's single,  
27 narrow interest in this matter: "our sole objective is to ensure the Cachuma Project not adversely  
28 impact Lompoc's groundwater rights." R.T., at 482. The City does not attempt to, and indeed

1 cannot, reconcile the fact that their "sole objective" clearly excludes the manner in which a fish  
2 passage study might be conducted with their assertion that submission of requested permit terms  
3 addressing the conduct of fish passage studies in Appendix B now prejudices them.

4 Despite ample opportunity to do, the City presented no evidence whatsoever regarding Key  
5 Hearing Issue 3 in either its case in chief, R.T., at 470-490, or on rebuttal, R.T., at 1080-1083. The  
6 City declined to cross-examine Department of Fish and Game (DFG) witnesses on both DFG's case-  
7 in-chief, R.T. at 586, and rebuttal evidence, R.T. at 1108. The City declined to cross-examine  
8 CalTrout witnesses on both CalTrout's case-in-chief, R.T. at 919, and rebuttal, R.T. at 1117. The  
9 City cross-examined only one NOAA witness, and the very few questions the City did ask were  
10 clearly aimed at proving NOAA's position that existing scientific knowledge of the Santa Ynez  
11 River watershed is currently insufficient for the Board to make any final decisions regarding public  
12 trust values in this matter:

13  
14 MS. DUNN: Just generally, would you expect an IFIM study that was done in 1988  
15 to necessarily be representative of the channel conditions that exist today?

16 DR. LI: That is why I asked for a new one.  
17

18 R.T., at 960. The City's cross-examination of NOAA had absolutely nothing to do with fish passage  
19 studies, R.T. at 957-960, despite voluminous testimony by multiple parties on that very subject.  
20 Indeed, neither Mr. Mooney, Ms. Dunn, Mr. Durbin, nor Mr. Keefe so much as uttered the word  
21 "fish" at any point in the hearing.

22 Despite being given almost three months to develop closing arguments on the matters before  
23 the Board affecting the City's interests, the City declined to acknowledge the existence of, let alone  
24 address, Key Hearing Issue 3 in its Closing Brief. The word "steelhead" does not even appear in the  
25 City's closing brief. Were CalTrout not so aptly named, one would be hard pressed to discern from  
26 the City's closing brief that fisheries were an issue before the Board at all.

27  
28 Despite this complete failure to address fish passage issues or virtually any other aspect of

1 Key Hearing Issue 3 at any stage in this proceeding, the City now joins<sup>1</sup> in the Member Units'  
2 conclusory assertions that Appendix B somehow "prejudices" them, and sees fit to burden the  
3 Board's limited resources by filing its own additional motion to strike, through which the City seeks  
4 to further restrict the Board's consideration of requested permit terms submitted in response to Key  
5 Issue 3.

6  
7 The City bases its motion on the same erroneous premise relied on by the Member Units, that  
8 Appendix B constitutes an evidentiary submission.<sup>2</sup> In the very brief discussion following that  
9 erroneous assertion the City fails to offer any argument or analysis establishing the validity of the  
10 fundamental premise on which the motion rests. The City makes several objective observations of  
11 the contents of Appendix B but those observations<sup>3</sup> are irrelevant to the fundamental issue of  
12 whether or not Appendix B constitutes an evidentiary submission. Nowhere in its motion does the  
13 City acknowledge California Evidence Code §140. The City does not point to any fact the existence  
14 or nonexistence of which Appendix B was purportedly offered to prove, and indeed cannot.<sup>4</sup> Like  
15 the Member Units, the City merely makes a naked, conclusory assertion and rests its motion squarely  
16 on that faulty premise. NOAA hereby incorporates by reference its Opposition to Motion to Strike  
17 and Motion to Dismiss filed in response to the motions of the Member Units, and requests that the  
18 Board deny the City's Motion to Strike Appendix B.

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20  
21 <sup>1</sup>Motion, at 2.

22 <sup>2</sup>"NOAA Fisheries attempt[s] to introduce additional evidence through" Appendix B.  
23 Motion, at 2.

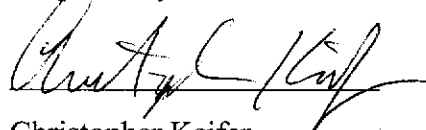
24 <sup>3</sup>Appendix B "makes no reference to any testimony, oral or written," and "nothing within the  
25 document indicates who authored" Appendix B. Motion, at 2.

26 <sup>4</sup>The City has joined in the Member Units' assertion that Appendix B "cannot be considered  
27 as evidence." Member Units' Motion to Strike, at 5, line 5. On this much, NOAA agrees with both  
28 the Member Units and the City. Appendix B cannot be considered as evidence, because it is *not*  
evidence, and was not submitted as evidence.

1 The City takes an additional step and requests that lines 23 - 28 on page 17 of NOAA  
2 Fisheries' Closing Brief also be stricken from the record. In the text of the NOAA Fisheries' closing  
3 argument the City seeks to prevent the Board from considering, NOAA requests that the Board add  
4 permit terms requiring that no fish passage option be eliminated from study on grounds of  
5 "feasibility" or cost. NOAA Fisheries showed quite plainly elsewhere in its closing brief the  
6 temptation to define "feasibility" strictly in terms of cost, thereby preventing development of  
7 information regarding fish passage options that will be important to the Board's consideration of  
8 how best to protect public trust values in the Santa Ynez. See NOAA Fisheries' Closing Brief at 12  
9 n.17; at 14; and at 14 n.19. NOAA's request that the Board prevent, through an appropriate permit  
10 term, such potential abuse of the concept of "feasibility"<sup>5</sup> is in no way evidence. Neither is the text  
11 identified by the City in lines 23 - 27 of page 17 a reference to Appendix B.<sup>6</sup> Appendix B contains  
12 further detailed suggestions for permit terms delineating the manner in which the Board should order  
13 any fish passage studies to be conducted, but *no discussion whatsoever* of potential abusive  
14 confounding of cost issues with technical feasibility considerations.

15 The identified text in lines 23 - 27 is a requested permit term standing separate and apart from  
16 the other requested permit terms contained in Appendix B. Therefore, the motion to strike that  
17 specifically identified text from NOAA's Closing Brief should also be denied.

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19  
20 Respectfully submitted,

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22 Christopher Keifer  
23 National Oceanic and Atmospheric Administration  
Office of General Counsel, Southwest Region

24 Dated: March 5, 2004  
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26 <sup>5</sup>NOAA Fisheries' Closing Brief, at 17, lines 23 - 27.

27 <sup>6</sup>There is one, and only one, sentence in NOAA Fisheries' Closing Brief that refers to  
28 Appendix B. That sentence starts on line 27 and concludes on line 28 of page 17.

**PROOF OF SERVICE**

I hereby certify that on March 5, 2004, I deposited in with the United States Postal Service copies of the NOAA Fisheries' Opposition to City of Lompoc's Motion to Strike 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.)**

Cachuma Conservation Release Board  
Mr. Gregory K. Wilkinson  
Best, Best & Krieger, LLP  
3750 University Avenue, Suite 400  
Riverside, CA 92501  
[gkwilkinson@bbklaw.com](mailto:gkwilkinson@bbklaw.com)

City of Solvang  
Mr. Christopher L. Campbell  
Baker, Manock & Jensen  
5260 N. Palm Avenue, Suite 421  
Fresno, CA 93704  
[clc@bmj-law.com](mailto:clc@bmj-law.com)

U.S. Bureau of Reclamation  
Mr. Stephen R. Palmer  
2800 Cottage Way, Room E-1712  
Sacramento, CA 95825  
Fax: (916) 978-5694

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](mailto:gkwilkinson@bbklaw.com)

City of Lompoc  
Ms. Sandra K. Dunn  
Somach, Simmons & Dunn  
813 Sixth Street, Third Floor  
Sacramento, CA 95814-2403  
[sdunn@lawssd.com](mailto:sdunn@lawssd.com)

California Trout, Inc.  
c/o Ms. Karen Kraus  
Environmental Defense Center  
906 Garden Street  
Santa Barbara, CA 93101  
[kkraus@edcnet.org](mailto:kkraus@edcnet.org)

Santa Barbara County Parks  
Ms. Terri Maus-Nisich  
Director of Parks  
610 Mission Canyon Road  
Santa Barbara, CA 93105

Santa Ynez River Water  
Conservation District  
Mr. Ernest A. Conant  
Law Offices of Young Wooldridge  
1800 – 30<sup>th</sup> Street, Fourth Floor  
Bakersfield, CA 93301  
[econant@youngwooldridge.com](mailto:econant@youngwooldridge.com)

Department of Fish and Game  
Office of General Counsel  
Mr. Harlee Branch  
1416 Ninth Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814

Christopher Keifer  
NOAA Office of General Counsel  
Southwest Region  
501 West Ocean Blvd., Ste 4470  
Long Beach, CA 90802-4213