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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 16 COUNTY OF LOS ANGELES

19 **SANTA BARBARA CHANNELKEEPER,**
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 Petitioner,
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 v.
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STATE WATER RESOURCES CONTROL
 23 **BOARD, a California State Agency; CITY**
 24 **OF BUENAVENTURA, a California**
 25 **municipal corporation,**
 Respondents.

Case No. 19STCP01176

SWRCB'S AND CDFW'S RESPONSE TO PROPOSED PHYSICAL SOLUTION

Date: July 19, 2021
 Time: 1:30 p.m.
 Dept.: 10
 Judge: Honorable W. Highberger
 Trial Date: None Set
 Action Filed: September 19, 2014

26 **CITY OF SAN BUENAVENTURA, a**
 27 **California municipal corporation,**

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Cross-Complainant,

v.

DUNCAN ABBOTT, an individual; et al.,

Cross-Defendants.

Respondent and intervenor State Water Resources Control Board (the “State Water Board”) and intervenor California Department of Fish and Wildlife (the “Department”) respectfully submit this joint brief, as authorized by the Court at the July 6, 2021, status conference, to explain their major concerns with the current draft of the proposed physical solution lodged with the Court on July 12, 2021 by cross-complainant City of San Buenaventura (the “City”) and certain other major water diverters. The State Water Board and the Department have been engaged in confidential settlement conversations with the City and hope to continue those conversations. From our perspective, those conversations have not resulted in meaningful compromise by the City, but we hope that will change in the future. While not a comprehensive list, the following five issues highlight the flaws in the current version of the proposed physical solution. We provide this brief without prejudice to the State Water Board’s and the Department’s future positions and arguments in this litigation.

As a prelude, it remains important to understand that the impetus for this litigation was the dire state of steelhead in the Ventura River. Southern California steelhead are endangered and protected as such by the U.S. Endangered Species Act. (See Designated Critical Habitat: Critical Habitat for 19 Evolutionarily Significant Units of Salmon and Steelhead in Washington, Oregon, Idaho, and California, 65 Fed.Reg. 7764, 7775, 7778, table 16 (Feb. 16, 2000) [critical habitat designation]; Endangered and Threatened Species: Listing of Several Evolutionary Significant Units (ESUs) of West Coast Steelhead, 62 Fed.Reg. 43937 (Aug. 18, 1997) [final rules]; Endangered and Threatened Species: Proposed Endangered Status for Five ESUs of Steelhead and Proposed Threatened Status for Five ESUs of Steelhead in Washington, Oregon, Idaho, and California, 61 Fed.Reg. 41541, 41553-54 (Aug. 9, 1996) [proposed rules].)They are disappearing.

1 In resolving this adjudication, the Court will have to, in part, make a finding that the physical
2 solution “is consistent with Section 2 of Article X of the California Constitution.” (Code Civ.
3 Proc., § 850, subd. (a).) That constitutional provision includes the requirement that any use of
4 water be reasonable. (Cal. Const., art. X, § 2.) Further, any reasonable use must comply with the
5 public trust doctrine, including the protection of fisheries. (*National Audubon Society v. Superior*
6 *Court* (1933) 33 Cal.3d 419, 426; *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60.) The State
7 Water Board’s and the Department’s settlement position is informed by the fact that at least one
8 trial court has found that the “[p]ublic trust doctrine occupies an exalted position in any judicial
9 or administrative determination of water resource allocation.” (Statement of Decision,
10 *Environmental Defense Fund v. East Bay Municipal Utility District* (Alameda County Superior
11 Court No. 425955), p. 27, provided to the Court with the Request for Judicial Notice filed on
12 March 10, 2021.) This means, at a minimum, that the use of water in the Ventura River
13 watershed must not jeopardize the existence of an endangered species, such as Southern
14 California steelhead. (See, e.g., Fish & G. Code, § 2053, subd. (a).)

15 Given the requirements of the public trust doctrine and the need to protect the endangered
16 species in the watershed, the first major problem with the proposed physical solution in its current
17 form is that it provides absolutely no new improvements to water flow in the Ventura River
18 watershed. The only flow requirements in the proposed physical solution are a re-statement of
19 interim flow requirements in the small stretch of the Ventura River at Foster Park, which was
20 already agreed to by Santa Barbara Channelkeeper and the City. (See Section 7.3.5(1).) There is
21 nothing new. And there is nothing in any other part of the watershed, even though those other
22 parts of the watershed are just as important as the Foster Park area. Under the proposed physical
23 solution, for example, San Antonio Creek (where many steelhead spawn and young salmon
24 mature) could go dry because of surface water diversions, including dam diversions, and
25 groundwater pumping, and there would be nothing that would be specifically and explicitly in
26 place to prevent this obvious harm to the fishery.

27 The simple fact is that fish need water to survive and thrive. The proposed physical
28 solution is blind to this basic biological fact. Instream flows are critical for steelhead survival for

1 three primary reasons. First, flows create habitat area or quantity – fish must live in the water,
2 and higher flows produce more area of wetted channel that fish can occupy. Second, flows
3 change how water moves through the channel, which affects the characteristics of that habitat, or
4 habitat quality. Both habitat quantity and habitat quality can control food supply, predation,
5 growth rates, and ability of fish to migrate through a river. Finally, instream flows maintain and
6 reshape the channel over time, ensuring habitat quality over longer time scales.

7 Second, instead of providing water flow improvements, the proposed physical solution
8 requires certain habitat improvement projects. These include fish passage improvements, gravel
9 enhancement, boulder and large woody material augmentation, and Arundo removal. (See
10 Section 7.3.4.) But the proposed physical solution nowhere says how much of each of these
11 projects will be done, where specifically they will be done (so they can be effective), or a date for
12 achievement of any goal. Instead, the projects are described in vague ways with no performance
13 criteria. As proposed, they are practically meaningless.

14 Third, the proposed physical solution attempts to set up a structure for achieving “good
15 condition” for steelhead in the Ventura River. (See, e.g., Section 7.3.) But there is no target date
16 — no goal — for when to try to achieve that “good condition.” And there is no concrete,
17 quantitative definition of “good condition” (or the baseline conditions to be measured from) so
18 that progress towards “good condition” can be measured in an objective way that all can agree on.

19 Fourth, in spite of these flaws, the proposed physical solution appears to rely on “adaptive
20 management” to create and adjust a management plan to fill in the details. But that should give
21 the Court little assurance. There is little that the Court can rely on that the conditions for
22 Southern California steelhead will improve, and the use of water will be reasonable, as it must
23 make a finding on. Instead, in January 2021, the State Water Board and the Department
24 suggested to the City that the City actually draft the management plan now and attach it to the
25 proposed physical solution; that way, the parties and the Court can know exactly what will
26 happen, and not “trust” the management committee to implement the right approach.

27 The proposed physical solution contemplates the management plan being completed in a
28 year and a half. (See Section 7.4.1.) The City should use the time now to draft the management

1 plan so that the parties can understand the details of how the management plan will be
2 implemented. That would have the added benefit of both having the State Water Board and the
3 Department finish their ongoing scientific work regarding the Ventura River watershed and
4 having the local groundwater sustainability agencies for two of these groundwater basins finish
5 their groundwater management plans, as required by the Sustainable Groundwater Management
6 Act, before the Court would be determining whether this physical solution should be imposed.

7 Fifth, the proposed physical solution creates a management committee to make decisions
8 under the proposed physical solution and make any necessary changes. But the composition of
9 the voting members of the management committee includes just a handful of major water users in
10 the Ventura River watershed. (See Sections 7.7.1, 7.7.3.4.) And the two biggest water users have
11 twice the votes of the other members of the management committee. (Section 7.7.3.4.) The
12 voting composition of the management committee does not include any smaller water users, and
13 it does not include any advocates for wildlife such as Santa Barbara Channelkeeper. To be
14 balanced and representative, the composition of the management committee needs to be modified.

15 Rather than propose an actual, concrete solution to the management of the watershed
16 however, the proposing parties are simply putting the solution in the hands of the management
17 committee, dominated by the major water users. So, the City's proposed solution is to sue all the
18 parties in the watershed and bring them into a comprehensive adjudication, and then put the fate
19 of the watershed, the fishery, and the proposed management plan in the hands of the major water
20 users, with no additional flows required and no agreed-upon long term management plan. This is
21 not an adequate physical solution, but a recipe for further problems.

22 In these ways, at least, the proposed physical solution needs to be improved before it can be
23 an effective, consensus approach to solving the issues in this case.

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1 Dated: July 15, 2021

Respectfully Submitted,

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