24. CONDITIONAL TAKE OF SOUTHERN CALIFORNIA STEELHEAD

Today's Item **Information ☐** **Action ☒**

If the Commission determines that listing may be warranted, consider regulatory action to allow take of southern California steelhead (*Oncorhynchus mykiss*) under certain circumstances by either authorizing a notice of intent to adopt a regulation at a future meeting or adopting an emergency regulation at this meeting, and consider taking final action under the California Environmental Quality Act.

Summary of Previous/Future Actions (for full summary, see Agenda Item 23)

- **Today discuss and consider authorizing conditional take of southern California steelhead** **Apr 20-21, 2022; Monterey/Trinidad**

Background

At its Feb 16-17, 2022 meeting, FGC held a public hearing regarding the petition to list southern California steelhead (SCS) as an endangered species under the California Endangered Species Act (CESA). After oral testimony concluded, FGC discussed the item, closed the public hearing and administrative record pursuant to California Fish and Game Code Section 2074.2, and continued deliberation on the question of whether listing SCS as endangered may be warranted to today's meeting (Agenda Item 23). FGC also asked staff to work with DFW, the petitioner, tribes, and other interested parties to develop a draft regulation, consistent with the purposes of CESA, that would permit the take of SCS and allow critical infrastructure and other essential projects to continue operations.

If FGC determines that listing may be warranted, SCS will become a candidate species and DFW will undertake a one-year status review before FGC makes a final decision on listing. Candidate species are protected from unauthorized take during the remainer of the listing process pursuant to Fish and Game Code Section 2085. Fish and Game Code Section 2084 permits FGC to authorize the take of any candidate species, subject to terms and conditions it prescribes and based on the best available scientific information, consistent with CESA.

DFW proposes a draft regulation (Exhibit 2) that, if adopted by FGC, would authorize take of SCS during the candidacy period. The take authorization would apply to certain projects or activities that relate to flood control, highways and the diversion, impoundment, or discharge of water that provide certain benefits to public peace, health, safety or general welfare, and that meet other specific conditions described in the proposed addition of Section 749.13. The take authorization would be contingent on a current, valid federal instrument that authorizes take under the federal Endangered Species Act – a biological opinion or an incidental take pPermit issued by the National Marine Fisheries Service. The project proponent must demonstrate they have complied with Fish and Game Code Section 1602 by (1) submitting a final lake and streambed alteration agreement (LSAA), (2) indicating they have initiated the process of obtaining an LSAA by paying the applicable fees, or (3) affirming that an LSAA is not required for the project. As proposed, DFW would examine all submitted materials and make a written determination as to whether all requirements have been met.

An emergency exists because of the immediate, serious harm to the public health, safety, or general welfare that would be caused by work delays or stoppages for projects or activities that relate to: (1) flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure; (2) projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements; or (3) projects or activities that relate to the diversion, impoundment or discharge of water and that provide water supply or water treatment for essential domestic, agricultural, industrial or other commercial uses. Under the regulation, DFW may only authorize take for projects that meet the California Administrative Procedure Act definition of an emergency, namely, those for which not issuing take authorization would cause "serious harm to the public peace, health, safety, or general welfare."

Regarding projects or activities that provide water supply, on March 28, 2022 Governor Newsom ordered through Executive Order N-7-22 that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect. The critical need for water delivery under these serious drought conditions reinforces the emergency nature of the regulation.

Today, FGC will discuss and consider the potential regulation to authorize conditional take of SCS during the candidacy period. By adopting this regulation, FGC would authorize the incidental take of SCS during the candidacy period that may result from activities previously mentioned.

If FGC adopts an emergency regulation at this meeting, staff would submit the regulation to the Office of Administrative Law for filing. If FGC authorizes a notice of proposed rulemaking (i.e., regular rulemaking in lieu of an emergency regulation) at this meeting, the regulation would be considered at a future meeting. A regulation adopted pursuant to FGC's authority under Section 2084 would only authorize take during the time that SCS is a candidate species under CESA.

Significant Public Comments

1. Casitas Municipal Water District requests that, if FGC finds listing SCS under CESA may be warranted, FGC authorize interim incidental take in accordance with Fish and Game Code Section 2084 for operations, maintenance and repair of existing water system facilities (Exhibit 4).
2. United Water Conservation District provides information on its operations and two of its water projects, and supports Section 2084 language attributed to the Association of California Water Agencies, which is similar to the language proposed by DFW. In the absence of such a regulation, it urges FGC to include United's facilities in any Section 2084 regulation that allows for take of SCS during its candidacy period (Exhibit 5).
3. Orange County Water District states that it would be beneficial for DFW and FGC staff to clarify in the Section 2084 regulation that stocked fish are not "native" SCS as it would avoid needless confusion and improper allegations in the future should stocked fish be found dead as part of normal operations of the water agencies (Exhibit 6).

Recommendation

FGC staff: Adopt the proposed emergency regulation authorizing conditional take of southern California steelhead as proposed in exhibits 1 and 2 and discussed today.

Exhibits

1. DFW memo for proposed Section 749.13, received Apr 6, 2022
2. Draft statement of proposed emergency regulatory action and proposed regulation text, received Apr 6, 2022
3. Draft economic and fiscal impact statement (STD 399) and addendum, received Apr 6, 2022
4. Letter from Michael L. Flood, General Manager, Casitas Municipal Water District, received Apr 6, 2022
5. Letter from Anthony Emmert, Assistant General Manager, United Water Conservation District, received Apr 7, 2022
6. Letter from Michael R. Markus, General Manager, Orange County Water District, received Apr 7, 2022

Motion

Moved by _____ and seconded by _____ that the Commission finds, pursuant to Section 399 of the Fish and Game Code, that adopting the proposed emergency regulation is necessary for the immediate preservation of the public peace, health, safety, or general welfare.

The Commission further determines, pursuant to Section 11346.1 of the Government Code, that an emergency situation exists and finds the proposed regulation is necessary to address the emergency.

Therefore, the Commission adopts the emergency regulation to add Section 749.13 to Title 14, California Code of Regulations, as discussed today.

State of California
Department of Fish and Wildlife

Original on file,
received April 6, 2022

M e m o r a n d u m

Date: March 30, 2022

To: Melissa Miller-Henson
Executive Director
Fish and Game Commission

From: Charlton H. Bonham
Director

Subject: **Submittal of Emergency Statement for Addition of Section 749.13 to Title 14, California Code of Regulations: Incidental Take of Southern California Steelhead**

Please find attached the Finding of Emergency and Statement of Proposed Emergency Regulatory Action to Add Section 794.13 to Title 14, California Code of Regulations (Emergency Statement), STD399 Economic and Fiscal Impact Statement, and STD399 Addendum. At the February 17, 2022, Fish and Game Commission (Commission) meeting, the Commission asked the Department of Fish and Wildlife (Department) to work with stakeholders to develop a potential Fish and Game Code (FGC) Section 2084 regulation that would allow take of Southern California steelhead under certain conditions. At its April 20-21, 2022, meeting, the Commission will consider whether listing Southern California steelhead (*Oncorhynchus mykiss*) as endangered under the California Endangered Species Act (CESA) may be warranted pursuant to FGC Section 2074.2.

Candidate species are protected from take under CESA pursuant to FGC Sections 2080 and 2085 during the CESA status review period. Under FGC Section 2084, CESA provides that the Commission may adopt regulations to authorize take of candidate species, based on the best available scientific information, when the take is otherwise consistent with CESA. As with all regulations, the Commission may adopt a regulation under FGC Section 2084 on an emergency basis when it determines that a situation exists which threatens public health and safety or general welfare.

The Department has worked with stakeholders to develop the FGC Section 2084 regulation described in the attached Emergency Statement for the Commission to consider for adoption through an emergency rulemaking action at the Commission's April 20-21, 2022, meeting. If adopted by the Commission and approved by the Office of Administrative Law, this potential emergency regulation would be effective upon the Office of Administrative Law filing the regulation and would continue for a period of 180 days. If the Commission adopts this regulation, the Commission would, subject to specific terms and conditions, authorize the incidental take of Southern California steelhead during the CESA candidacy period that may result from projects or activities related to flood control; highways; and the diversion, impoundment, or discharge of water that provide certain public benefits.

If you have any questions or need additional information, please contact Ed Pert, Regional Manager, South Coast Region, via email at SCSH@Wildlife.ca.gov.

Attachments: Emergency Statement
STD399 Economic and Fiscal Impact Statement
STD399 Addendum
CEQA Notice of Exemption

ec: Garry Kelley, Acting Deputy Director
Wildlife and Fisheries Division

Jay Rowan, Branch Chief
Fisheries Branch

Ed Pert, Regional Manager
South Coast Region

Richard Burg, Program Manager
South Coast Region

Erinn Wilson-Olgin, Program Manager
South Coast Region

Chris Stoots, Assistant Chief
Law Enforcement Division

Brian Hennes, Attorney
Office of the General Counsel

Ona Alminas, Program Manager
Regulations Unit

Jenn Greaves, CESA Analyst
Fish and Game Commission

David Thesell, Program Manager
Fish and Game Commission

CALIFORNIA FISH AND GAME COMMISSION
FINDING OF EMERGENCY AND
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Emergency Action to
Add Section 749.13
Title 14, California Code of Regulations
Re: Incidental Take of Southern California Steelhead

Date of Statement: April 1, 2022

Unless otherwise specified, all section references in this document are to Title 14, California Code of Regulations.

I. Statement of Facts Constituting the Need for Emergency Regulatory Action

Background

On June 14, 2021, the California Fish and Game Commission (Commission) received a petition (the Petition) from California Trout to list Southern California steelhead (*Oncorhynchus mykiss*, hereinafter "SCS"), as endangered under the California Endangered Species Act (CESA). SCS is defined in the petition as all *O. mykiss*, including anadromous and resident life histories, below manmade and natural complete barriers to anadromy from the Santa Maria River, San Luis Obispo County (inclusive) to the U.S. Mexico border. The anadromous and resident life history forms of the species *O. mykiss* commonly referred to as "steelhead" and "rainbow trout," respectively, overlap in distribution and interbreed throughout much of their range. It is difficult if not impossible to visually distinguish between the two life histories in freshwater, especially during early life stages.

A Southern California steelhead Distinct Population Segment (Southern California steelhead DPS) is currently listed under the federal Endangered Species Act. That federal-listing has the same geographic scope as the SCS CESA listing proposed by California Trout in its petition; however, the federal listing only includes the anadromous life history of *O. mykiss*. It is important to note that it is difficult if not impossible to visually distinguish between the two life histories in freshwater, especially during early life stages. Even genetic analysis may not reveal which life history an individual *O. mykiss* has or will express. Accordingly, for management purposes the National Marine Fisheries Service generally considers any *O. mykiss* within the rivers included in the geographic scope of the Southern California steelhead DPS listing to be a part of that listing unit.

On December 15, 2021, the Commission received the California Department of Fish and Wildlife's (Department) 90-day evaluation report on the Petition. In that evaluation report the Department determined that there is sufficient scientific information in the petition to indicate that the petitioned action may be warranted.

On February 17, 2022, the Commission closed the public hearing and administrative record and continued the deliberation and decision on whether listing SCS as endangered under CESA may be warranted to a future Commission meeting to be held no later than May 18, 2022. Continuing the deliberation and decision allowed the Commission to consider a potential 2084 regulation in the same Commission meeting in which the Commission might make a may-be-warranted finding that would make SCS a candidate species under CESA.

On April 21, 2022, the Commission found that listing SCS under CESA may be warranted pursuant to FGC Section 2074.2, and SCS will become a CESA candidate species upon the Commission's publication of a notice of finding that the Commission has accepted the California Trout Petition for consideration and designated SCS as a candidate species under CESA.

Statutory Authority

Candidate-species are protected from take under CESA pursuant to Fish and Game Code (FGC) sections 2080 and 2085. FGC Section 86 states that "[t]ake means hunt, pursue, catch, capture, or kill or attempt to hunt, pursue, catch, capture, or kill." Under FGC Section 2084, CESA provides that the Commission may adopt regulations to authorize take of candidate species, based on the best available scientific information, when the take is otherwise consistent with CESA. As with all regulations, the Commission may adopt a regulation under Section 2084 on an emergency basis when it determines that a situation exists that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Consistency Determinations (CD) pursuant to FGC Section 2080.1 or Incidental Take Permits (ITP) pursuant to FGC Section 2081, subdivision (b), may also authorize the take of CESA candidate species. CESA take may only be authorized through a CD after the Department has determined that a project's federal take authorization under the federal Endangered Species Act meets certain CESA criteria; some federal take authorizations will likely not entirely meet those criteria. The Department may authorize CESA take through an ITP on a project-specific basis, which would be a substantially more lengthy and costly process for getting CESA take authorization than through this proposed emergency regulation.

Finding of Emergency

The Commission considered the following factors in determining whether an emergency exists: public health, safety, and general welfare, as well as the magnitude of potential harm; the immediacy of the need; and whether the anticipation of harm has a basis firmer than simple speculation and has determined that an emergency regulation authorized under FGC Section 2084 is needed. In this case, an emergency exists because of the immediate, serious harm to the public health, safety, or general welfare that would be caused by work delays or stoppages for projects or activities that relate to flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure; projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements; or projects or activities that relate to the diversion, impoundment, or discharge of water and provide water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses. Regarding projects or activities that provide water supply, on March 28, 2022, in Executive Order N-7-22, Governor Newsom ordered that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect. The proposed addition of Section 749.13 creates a special order allowing incidental take of SCS during CESA candidacy for certain activities subject to specific terms and conditions described below.

II. Proposed Emergency Regulations

Under this emergency regulation the Commission will authorize the incidental take of SCS during the candidacy period that may occur during the implementation of certain projects or

activities that relate to flood control; highways; and the diversion, impoundment, or discharge of water; that provide certain benefits to public peace, health, safety, or general welfare; and that meet other specific conditions described in the proposed addition of Section 749.13. The following paragraphs justify each subsection as follows:

749.13(a): This subsection is necessary to inform how the proponent of a project or activity seeking take authorization shall submit to the Department written documentation via email or physical mail to demonstrate that the project or activity satisfies the criteria in subsections (a)(1)-(4).

(a)(1): This subsection lists the types of projects or activities that would satisfy this first of four criteria in subsections (a)(1)-(4). Flood control, and the diversion, impoundment, or discharge of water are mentioned to define to project proponents of the scope of in-stream activities and applicability of this regulation. The definition of “highway” in subsection (a)(1) is the same as in Section 360 of the California Vehicular Code: “‘Highway’ is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.” Referencing this code is necessary to ensure clarity to project proponents of the scope of transportation nexus and applicability of this regulation.

(a)(2): This subsection describes the public benefits that the types of projects or activities listed in subsection (a)(1) must provide to satisfy this second of four criteria in subsections (a)(1) through (4).

Projects or activities that provide flood protection necessary to prevent flood damage to communities or infrastructure may take SCS through work in wetted streams. Without CESA take authorization through this emergency regulation for the take of SCS during candidacy, the risk of unlawful take of a CESA candidate species may cause these flood-protection projects or activities to not be undertaken or significantly delayed if they must instead seek CESA take authorization from the Department through other non-emergency CESA take authorization pathways.

Projects or activities that provide public-safety benefits through highway maintenance or improvements may take SCS through work in wetted streams. Take of SCS may occur during the construction of highway projects when water diversions, which dewater streams and rivers that may be occupied by SCS, are necessary to install bridges or culverts. Without CESA authorization through this emergency regulation for the take of SCS during candidacy, the risk of unlawful take of a CESA candidate species may cause these highway maintenance or improvement projects or activities to not be undertaken or significantly delayed if they must instead seek CESA take authorization from the Department through other non-emergency CESA take authorization pathways.

Ongoing water diversions that provide drinking water or supply water for agriculture, local industries, or other commercial uses are necessary to ensure public health, safety, and general welfare. Projects or activities that provide water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses may take SCS through work in wetted streams. Take of SCS may occur through dewatering of streams and rivers or entrainment or injury at a point of diversion. Without CESA authorization for the take of a CESA candidate species through this emergency regulation, the risk of unlawful take of a CESA candidate species may cause these water-supply or water-treatment projects or activities to not be undertaken or significantly delayed if they must instead seek CESA take

authorization from the Department through other non-emergency CESA-take-authorization pathways.

(a)(3): This subsection describes the federal take authorization and associated documents that are required to satisfy this third of four criteria in subsections (a)(1) through (4). This required federal take authorization is specifically cross-referenced in subsections 749.13(c) and (d).

(a)(4): This subsection describes the requirement related to notification pursuant to FGC Section 1602 that is necessary to satisfy this fourth of four criteria in subsections (a)(1) through (4). Under FGC 1602, when an entity is required to notify the Department and the Department determines the activity may substantially adversely affect an existing fish and wildlife resource, the Department may issue a final agreement to that entity that includes reasonable measures necessary to protect the resource, which may include SCS.

(b): This subsection creates a 30-day timeline, which is necessary to give the Department sufficient time to review the written documentation that the proponent of a project or activity has submitted and make a determination on whether the project or activity satisfies the criteria in subsections (a)(1) through (4) while also ensuring that the Department will promptly make such determinations.

(b)(1) and (b)(2): The requirements in these subsections that the Department make its determinations in writing are intended to ensure transparency and clarity in the Department's determinations.

(c): This subsection describes how any CESA take authorization conferred by this emergency regulation shall have the same operational requirements and be for the same type and amount of take as the federal take authorization for the project or activity that satisfied subsection (a)(3). This subsection is intended to limit the scope of the CESA take authorization (operational requirements and type and amount of take) to the scope of the federal take authorization that CESA take authorization is based on. Further, this subsection is intended to provide a mechanism for the Department to revoke the CESA take authorization if the project or activity is not complying with the terms of its federal take authorization.

(d): This subsection is intended to ensure that only projects that continue to have valid federal take authorization will continue to have CESA take authorization.

(e): This subsection describing responsibility of project proponent to ensure consistency with all applicable laws is necessary to clarify the limitations of the intended effect of this emergency regulation.

III. Identification of Reports or Documents Supporting Regulation Change

A summary of general scientific information on the life history of Southern California steelhead is presented in the National Marine Fisheries Service's Southern California Steelhead Recovery Plan published in January 2012 available online at: https://www.fisheries.noaa.gov/resource/document/southern-california-steelhead-recovery-plan.

IV. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

The Commission anticipates that there will be costs to the State, specifically the (Department). Estimated program costs of $87,980.64 over the proposed emergency regulation period of 180 days will be absorbed within existing budgets.

Table 1. Estimated Department Implementation Costs for Making Determinations as Required Under this Special Order Relating to Take of Southern California Steelhead

DFW Classification	Activity/Task	Hourly Rate[1]	Hours per Task	Projected Cost
Senior Environmental Scientist	Review whether project or activity satisfies specified criteria	$76.35	2	$152.70
Senior Environmental Scientist	Review whether project or activity satisfies specified criteria	$76.35	2	$152.70
Senior Environmental Scientist	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$76.35	6	$458.10
Senior Environmental Scientist, Supervisor	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$101.80	6	$610.80
Environmental Program Manager	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$123.92	6	$743.52
Regional Manager	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$123.02	2	$246.04
Attorney IV	Consultation with Region	$110.72	4	$466.92
	Subtotal per project			$2,830.78
	Overhead[2]	24.32%		$688.45
	Total per project cost			$3,519.23
	Grand Total for 25 Projects			$87,980.64

[1] Hourly Rate includes mean wages per CalHR payscale 2022 and Department benefit rates.
[2] Non-Federal Project Overhead rate for FY 2022 is 24.32% per Department Budget Branch.
Note: Minor discrepancies (less than $1.00) may be apparent in total costs due to rounding error.

Other State agencies, such as California Department of Transportation (Caltrans) may also be affected if they pursue a take allowance through the Department. An estimate of Caltrans potential per project costs is detailed in Table 2.

Table 2. Estimated Caltrans Implementation Costs for Take of Southern California Steelhead

Caltrans Classification	Activity/Task	Hourly Rate[1]	Hours per Task	Projected Cost
Senior Planner	Draft correspondence	$67.84	1.00	$67.84
Attorney IV	Review correspondence	$116.73	0.33	$38.52
Deputy Director	Approve filing	$129.88	0.25	$32.47
	Subtotal per project		1.58	$138.83
	Overhead[2]	24.32%		$33.76
	Total per project costs			$172.59

[1] Hourly Rate includes mean wages per CalHR payscale 2022 and estimated benefit rates.
[2] Non-Federal Project Overhead rate for FY 2022 is estimated to be 24.32% estimate
Note: Minor discrepancies (less than $1.00) may be apparent in total costs due to rounding error.

(b) Nondiscretionary Costs/Savings to Local Agencies:

This emergency regulation will not introduce nondiscretionary costs or savings to local agencies. Should an agency choose to consider the review and issuance of a permit, the process would likely entail the review of project plans, census information, and relocation plans.

(c) Programs Mandated on Local Agencies or School Districts:

None.

(d) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

V. Authority and Reference

The Commission adopts this emergency action pursuant to the authority vested by Sections 399 and 2084 of the Fish and Game Code to implement, interpret, or make specific Sections 399 and 2084 of the Fish and Game Code.

VI. Section 399 Finding

Delays or stoppages for projects or activities that relate to flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure that would likely occur without this emergency regulation because of SCS CESA protections would jeopardize that flood protection.

Delays or stoppages for projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements that would likely occur without this emergency regulation because of SCS CESA protections would jeopardize those public safety benefits.

Delays or stoppages for projects or activities related to the diversion, impoundment, or discharge of water that provide water supply or water treatment for essential domestic, agricultural, industrial, or commercial uses that would likely occur without this emergency regulation because of SCS CESA protections would jeopardize those water supply or water treatment public benefits. Regarding projects or activities that provide water supply, on March 28, 2022, in Executive Order N-7-22, Governor Newsom ordered that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect.

Pursuant to Section 399, subdivision (b), of the Fish and Game Code, the Commission finds, based on the information above, that adopting this regulation is necessary for the immediate preservation of the public peace, health and safety, and general welfare.

Informative Digest (Plain English Overview)

On June 14, 2021, the California Fish and Game Commission (Commission) received a petition (the Petition) from California Trout to list Southern California steelhead (*Oncorhynchus mykiss*, hereinafter "SCS"), as endangered under the California Endangered Species Act (CESA). SCS is defined in the petition as all *O. mykiss*, including anadromous and resident life histories, below manmade and natural complete barriers to anadromy from the Santa Maria River, San Luis Obispo County (inclusive) to the U.S. Mexico border. The anadromous and resident life history forms of the species *O. mykiss* commonly referred to as "steelhead" and "rainbow trout," respectively, overlap in distribution and interbreed throughout much of their range. It is difficult if not impossible to visually distinguish between the two life histories in freshwater, especially during early life stages.

A Southern California steelhead Distinct Population Segment (Southern California steelhead DPS) is currently listed under the federal Endangered Species Act. That federal-listing has the same geographic scope as the SCS CESA listing proposed by California Trout in its petition; however, the federal listing only includes the anadromous life history of *O. mykiss*. It is important to note that it is difficult if not impossible to visually distinguish between the two life histories in freshwater, especially during early life stages. Even genetic analysis may not reveal which life history an individual *O. mykiss* has or will express. Accordingly, for management purposes the National Marine Fisheries Service generally considers any *O. mykiss* within the rivers included in the geographic scope of the Southern California steelhead DPS listing to be a part of that listing unit.

On December 15, 2021, the Commission received the California Department of Fish and Wildlife's (Department) 90-day evaluation report on the Petition. In that evaluation report the Department determined that there is sufficient scientific information in the petition to indicate that the petitioned action may be warranted.

On February 17, 2022, the Commission closed the public hearing and administrative record and continued the deliberation and decision on whether listing SCS as endangered under CESA may be warranted to a future Commission meeting to be held no later than May 18, 2022. Continuing the deliberation and decision allowed the Commission to consider a potential 2084 regulation in the same Commission meeting in which the Commission might make a may-be-warranted finding that would make SCS a candidate species under CESA.

On April 21, 2022, the Commission found that listing SCS under CESA may be warranted pursuant to FGC Section 2074.2, and SCS will become a CESA candidate species upon the Commission's publication of a notice of finding that the Commission has accepted the California Trout Petition for consideration and designated SCS as a candidate species under CESA.

Candidate-species are protected from take under CESA pursuant to Fish and Game Code (FGC) sections 2080 and 2085. FGC Section 86 states that "[t]ake means hunt, pursue, catch, capture, or kill or attempt to hunt, pursue, catch, capture, or kill." Under FGC Section 2084, CESA provides that the Commission may adopt regulations to authorize take of candidate species, based on the best available scientific information, when the take is otherwise consistent with CESA. As with all regulations, the Commission may adopt a regulation under Section 2084 on an emergency basis when it determines that a situation exists that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Consistency Determinations (CD) pursuant to FGC Section 2080.1 or Incidental Take Permits (ITP) pursuant to FGC Section 2081, subdivision (b), may also authorize the take of CESA candidate species. CESA take may only be authorized through a CD after the Department has determined that a project's federal take authorization under the federal Endangered Species Act meets certain CESA criteria; some federal take authorizations will likely not entirely meet those criteria. The Department may authorize CESA take through an ITP on a project-specific basis, which would be a substantially more lengthy and costly process for getting CESA take authorization than through this proposed emergency regulation.

The Commission considered the following factors in determining whether an emergency exists: public health, safety, and general welfare, as well as the magnitude of potential harm; the immediacy of the need; and whether the anticipation of harm has a basis firmer than simple speculation and has determined that an emergency regulation authorized under FGC Section 2084 is needed. In this case, an emergency exists because of the immediate, serious harm to the public health, safety, or general welfare that would be caused by work delays or stoppages for projects or activities that relate to flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure; projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements; or projects or activities that relate to the diversion, impoundment, or discharge of water and provide water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses. Regarding projects or activities that provide water supply, on March 28, 2022, in Executive Order N-7-22, Governor Newsom ordered that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect. The proposed addition of Section 749.13 creates a special order allowing incidental take of SCS during CESA candidacy for certain activities subject to specific terms and conditions described below.

Commission staff have searched the California Code of Regulations and have found no other state regulation relating to the Commission's ability to allow for incidental take of a candidate species under CESA, and therefore concludes that the proposed regulation is neither inconsistent nor incompatible with existing state regulation.

PROPOSED REGULATORY TEXT

Section 749.13, Title 14, California Code of Regulations, is added to read:

§749.13 Special Order Relating to Take of Southern California Steelhead (*Oncorhynchus mykiss*) During Candidacy Period.

The commission authorizes the take of Southern California steelhead during the candidacy period for each of the projects or activities described in this section, subject to the following terms and conditions:

(a) The proponent of a project or activity seeking take authorization pursuant to this section shall submit to the department by emailing to SCSH@wildlife.ca.gov or mailing to California Department of Fish and Wildlife, Fisheries Branch, Attention: Southern California Steelhead Take Authorization, P.O. Box 944209, Sacramento, CA 94244-2090 written documentation to demonstrate that the project or activity:

(1) Relates to flood control; a “highway” as defined in Section 360 of the Vehicle Code; or the diversion, impoundment, or discharge of water;

(2) Provides flood protection necessary to prevent flood damage to communities or infrastructure and is therefore immediately necessary to avoid serious harm to the public peace, health, safety, or general welfare; public-safety benefits through highway maintenance or improvements and is therefore immediately necessary to avoid serious harm to the public peace, health, safety, or general welfare; or water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses and is therefore immediately necessary to avoid serious harm to the public peace, health, safety, or general welfare;

(3) Has valid take authorization from the National Marine Fisheries Service through a federal incidental take statement or incidental take permit under the federal Endangered Species Act for the Southern California steelhead Distinct Population Segment. The written documentation required by this subsection (a)(3) shall include a copy of the incidental take statement or incidental take permit through which the project or activity has valid take authorization from the National Marine Fisheries Service and shall also include any associated biological assessment, biological opinion, or habitat conservation plan; and

(4) Does not require the proponent of the project or activity to submit a written notification pursuant to Fish and Game Code Section 1602 or the proponent of the project or activity has submitted a notification pursuant to Section 1602 and has either received a final agreement pursuant to Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code or paid the applicable fees pursuant to Section 1609.

(b) Within thirty calendar days of receipt of the written documentation required by subsection (a), the department shall determine in writing whether the project or activity satisfies the criteria in subsections (a)(1) through (4).

(1) If the department determines the project or activity does not satisfy the criteria in subsections (a)(1) through (4), the department shall provide a written explanation detailing the reasons for its determination.

(2) If the department determines the project or activity does satisfy the criteria in subsections (a)(1) through (4), the department shall provide the proponent of the project or activity written confirmation of take authorization pursuant to this section.

(c) The proponent of a project or activity receiving take authorization pursuant to subsection (b)(2) shall undertake the project or activity as described in the federal incidental take statement or incidental take permit for the project or activity. The state take authorization conferred by this section shall be for the same type and amount of take as the federal take authorization required by subsection (a)(3). If the department determines the proponent of a project or activity receiving take authorization pursuant to subsection (b)(2) has not undertaken the project or activity as described in the federal take authorization required by subsection (a)(3) or has exceeded the type or amount of take authorized by the federal take authorization required by subsection (a)(3), the department shall revoke the state take authorization conferred by this section for the duration of the Southern California steelhead candidacy period.

(d) If the federal take authorization that satisfied subsection (a)(3) for a project or activity is amended, is replaced, expires, or is revoked, the Department shall revoke the state take authorization conferred by this section. If the proponent of the project or activity receives new federal take authorization, it may reapply for state take authorization using the process set forth in subsection (a).

(e) Nothing in this section is intended to be or shall be construed to be a general project or activity approval. It shall be the responsibility of the proponent of each project or activity receiving take authorization pursuant to this section to obtain all necessary permits and approvals and to comply with all applicable federal, state, and local laws.

Note: Authority cited: Sections 399 and 2084, Fish and Game Code. Reference: Sections 399 and 2084, Fish and Game Code.

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

STD. 399 (Rev. 10/2019)

ECONOMIC IMPACT STATEMENT

DEPARTMENT NAME	CONTACT PERSON	EMAIL ADDRESS	TELEPHONE NUMBER
Fish and Game Commission	David Thesell	fgc@fgc.ca.gov	916 902-9291

DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400	NOTICE FILE NUMBER
Emergency Action to Add Section 749.13 ,Title 14, CCR, Re: Special Order Re. to Take of So. Cal. Steelhead	Z

A. ESTIMATED PRIVATE SECTOR COST IMPACTS *Include calculations and assumptions in the rulemaking record.*

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts business and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☒ h. None of the above (Explain below): Emergency action

If any box in Items 1 a through g is checked, complete this Economic Impact Statement.
If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.

2. The _____ (Agency/Department) estimates that the economic impact of this regulation (which includes the fiscal impact) is:

- ☐ Below $10 million
- ☐ Between $10 and $25 million
- ☐ Between $25 and $50 million
- ☐ Over $50 million *[If the economic impact is over $50 million, agencies are required to submit a Standardized Regulatory Impact Assessment as specified in Government Code Section 11346.3(c)]*

3. Enter the total number of businesses impacted: _____

Describe the types of businesses (Include nonprofits): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

4. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

5. Indicate the geographic extent of impacts: ☐ Statewide

☐ Local or regional (List areas): _____

6. Enter the number of jobs created: _____ and eliminated: _____

Describe the types of jobs or occupations impacted: _____

7. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here? ☐ YES ☐ NO

If YES, explain briefly: _____

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (Rev. 10/2019)

DRAFT DOCUMENT

ECONOMIC IMPACT STATEMENT (CONTINUED)

B. ESTIMATED COSTS *Include calculations and assumptions in the rulemaking record.*

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

   a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

   b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

   c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

   d. Describe other economic costs that may occur: _____

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. *Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.* $ _____

4. Will this regulation directly impact housing costs? ☐ YES ☐ NO

   If YES, enter the annual dollar cost per housing unit: $ _____

   Number of units: _____

5. Are there comparable Federal regulations? ☐ YES ☐ NO

   Explain the need for State regulation given the existence or absence of Federal regulations: _____

   Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS *Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: _____

2. Are the benefits the result of: ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

   Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation: _____

D. ALTERNATIVES TO THE REGULATION *Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (Rev. 10/2019)

DRAFT DOCUMENT

ECONOMIC IMPACT STATEMENT (CONTINUED)

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation: Benefit: $ _____ Cost: $ _____

Alternative 1: Benefit: $ _____ Cost: $ _____

Alternative 2: Benefit: $ _____ Cost: $ _____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ YES ☐ NO

Explain: _____

E. MAJOR REGULATIONS *Include calculations and assumptions in the rulemaking record.*

California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code section 57005). Otherwise, skip to E4.

1. Will the estimated costs of this regulation to California business enterprises **exceed $10 million**? ☐ YES ☐ NO

If YES, complete E2. and E3
If NO, skip to E4

2. Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

(Attach additional pages for other alternatives)

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: Total Cost $ _____ Cost-effectiveness ratio: $ _____

Alternative 1: Total Cost $ _____ Cost-effectiveness ratio: $ _____

Alternative 2: Total Cost $ _____ Cost-effectiveness ratio: $ _____

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding $50 million in any 12-month period between the date the major regulation is estimated to be filed with the Secretary of State through 12 months after the major regulation is estimated to be fully implemented?

☐ YES ☐ NO

If YES, agencies are required to submit a Standardized Regulatory Impact Assessment (SRIA) as specified in Government Code Section 11346.3(c) and to include the SRIA in the Initial Statement of Reasons.

5. Briefly describe the following:

The increase or decrease of investment in the State: _____

The incentive for innovation in products, materials or processes: _____

The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: _____

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (Rev. 10/2019)

DRAFT DOCUMENT

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT *Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

$ _____

☐ a. Funding provided in _____

Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. Funding will be requested in the Governor's Budget Act of _____

Fiscal Year: _____

☐ 2. Additional expenditures in the current State Fiscal Year which are NOT reimbursable by the State. (Approximate)
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

$ _____

Check reason(s) this regulation is not reimbursable and provide the appropriate information:

☐ a. Implements the Federal mandate contained in _____

☐ b. Implements the court mandate set forth by the _____ Court.

Case of: _____ vs. _____

☐ c. Implements a mandate of the people of this State expressed in their approval of Proposition No. _____

Date of Election: _____

☐ d. Issued only in response to a specific request from affected local entity(s).

Local entity(s) affected: _____

_____

☐ e. Will be fully financed from the fees, revenue, etc. from: _____

Authorized by Section: _____ of the _____ Code;

☐ f. Provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each;

☐ g. Creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Annual Savings. (approximate)

$ _____

☐ 4. No additional costs or savings. This regulation makes only technical, non-substantive or clarifying changes to current law regulations.

☒ 5. No fiscal impact exists. This regulation does not affect any local entity or program.

☐ 6. Other. Explain _____

_____

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT
(REGULATIONS AND ORDERS)

STD. 399 (Rev. 10/2019)

DRAFT DOCUMENT

FISCAL IMPACT STATEMENT (CONTINUED)

B. FISCAL EFFECT ON STATE GOVERNMENT *Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☒ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

$ 87,980.64

It is anticipated that State agencies will:

☒ a. Absorb these additional costs within their existing budgets and resources.

☐ b. Increase the currently authorized budget level for the _____ Fiscal Year

☐ 2. Savings in the current State Fiscal Year. (Approximate)

$ _____

☐ 3. No fiscal impact exists. This regulation does not affect any State agency or program.

☐ 4. Other. Explain _____

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS *Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

☐ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

$ _____

☐ 2. Savings in the current State Fiscal Year. (Approximate)

$ _____

☒ 3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program.

☐ 4. Other. Explain _____

FISCAL OFFICER SIGNATURE	DATE
DocuSigned by: Haley Young 258337CD2C094D2...	3/29/2022

The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY	DATE

Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399.

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER	DATE

STD399 CALCULATIONS WORKSHEET
ADDENDUM

Emergency Action to Add Section 749.13,
Title 14, California Code of Regulations
Re: Incidental Take of Southern California Steelhead

Economic Impact Statement

Emergency regulations do not require an economic impact statement; only fiscal impacts must be evaluated (California Government Code Section 11346.1).

Fiscal Impact Statement

A. Fiscal Effect on Local Government

The proposed addition of Section 749.13 to Title 14, California Code of Regulations (CCR) creates a special order allowing incidental take of Southern California steelhead (*Oncorhynchus mykiss*), during the California Endangered Species Act (CESA) candidacy period for certain water diversion and supply activities. The proposed addition of Section 749.13 does have the potential to have a fiscal impact on local government, that would not be eligible for state reimbursement (pursuit to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

B. Fiscal Effect on State Government

The Commission anticipates that there will be a fiscal effect on the State, specifically the California Department of Fish and Wildlife (Department) for program startup and implementation as shown in Table 1. The implementation costs per project are estimated to be $3,519.23. The Department anticipates approximately 25 separate projects, resulting in total program costs of $87,980.64 over the 180 days of the proposed action. The identified program costs are within existing budgets.

Table 1. Estimated Department Implementation Costs for Making Determinations as Required Under this Special Order Relating to Take of Southern California Steelhead

DFW Classification	Activity/Task	Hourly Rate[1]	Hours per Task	Projected Cost
Senior Environmental Scientist (Region)	Review whether project or activity satisfies specified criteria	$76.35	2	$152.70
Senior Environmental Scientist (Fisheries Branch)	Review whether project or activity satisfies specified criteria	$76.35	2	$152.70
Senior Environmental Scientist	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$76.35	6	$458.10
Senior Environmental Scientist, Supervisor	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$101.80	6	$610.80
Environmental Program Manager	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$123.92	6	$743.52
Regional Manager	Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department's determination on whether it does or does not	$123.02	2	$246.04
Attorney IV	Consultation with Region	$110.72	4	$466.92
	Subtotal per project			$2,830.78
	Overhead[2]	24.32%		$688.45
	Total per project cost			$3,519.23
	Grand Total for 25 Projects			$87,980.64

[1] Hourly Rate includes mean wages per CalHR payscale 2022 and Department benefit rates.
[2] Non-Federal Project Overhead rate for FY 2022 is 24.32% per Department Budget Branch.
Note: Minor discrepancies (less than $1.00) may be apparent in total costs due to rounding error.

Other State agencies, such as California Department of Transportation (Caltrans) may also be effected if they pursue a take allowance through the Department. An estimate of Caltrans potential per project costs is detailed in Table 2.

Table 2. Estimated Caltrans Implementation Costs for Take of Southern California Steelhead

Caltrans Classification	Activity/Task	Hourly Rate[1]	Hours per Task	Projected Cost
Senior Planner	Draft correspondence	$67.84	1.00	$67.84
Attorney IV	Review correspondence	$116.73	0.33	$38.52
Deputy Director	Approve filing	$129.88	0.25	$32.47
	Subtotal		1.58	$138.83
	Overhead[2]	24.32%		$33.76
	Total per project costs			$172.59

[1] Hourly Rate includes mean wages per CalHR payscale 2022 and estimated benefit rates.
[2] Non-Federal Project Overhead rate for FY 2022 is estimated to be 24.32%.
Note: Minor discrepancies (less than $1.00) may be apparent in total costs due to rounding error.

C. Fiscal Effect on Federal Funding of State Programs

The proposed action will not have a fiscal effect on federal funding of state programs.

April 7, 2022

California Fish and Game Commission
PO Box 944209
Sacramento, CA 94244-2090
Via email: fgc@fgc.ca.gov

SENT VIA ELECTRONIC MAIL

Subject: Comment Letter for Casitas Municipal Water District Related to the Petition to List Southern California Steelhead under the California Endangered Species Act

Introduction

Casitas Municipal Water District (Casitas) appreciates the opportunity to comment on the petition by California Trout (CalTrout) to list southern California steelhead (*Oncorhynchus mykiss,* steelhead) as endangered under the California Endangered Species Act (CESA). This petition was submitted to the California Fish and Game Commission (Commission) on June 7, 2021.

Casitas, as well as the United States Bureau of Reclamation (Bureau), have been active participants in the recovery of steelhead in the Ventura River since the federal listing in 1997, through the design, construction, and operation of a state-of-the-art fish passage facility and fish passage lifecycle monitoring station. Casitas has developed meaningful instream flows for steelhead in coordination with the National Marine Fisheries Service (NMFS) and CDFW. Casitas is concerned that having an additional listing under CESA may impede this type of collaborative approach in the future and create conflicts in implementing conservation measures and recovery actions. Casitas agrees that recovery actions are paramount to the viability and success of steelhead. However, after a thorough review of the petition and subsequent petition evaluations, Casitas has some concerns and comments to share with the Commission.

On August 20, 2021, Casitas submitted a comment letter to CDFW, which outlined initial concerns regarding the CalTrout petition (Appendix A). Casitas also submitted a letter to the Commission on December 9, 2021 (Appendix B), regarding CDFW Petition Evaluation Report (Evaluation Report) that was made available to the public in November 2021. In this letter to the Commission, Casitas outlined concerns that the comments and issues raised in the initial comment letter to CDFW were not addressed in the Evaluation Report.

Following a thorough review of the Evaluation Report, CDFW Petition Evaluation Presentation (Evaluation Presentation) made on February 17, 2022, and other recent presentations and comments regarding the petition, Casitas has identified multiple concerns regarding the basis and implementation of a CESA listing for steelhead. This comment letter will address the following concerns:

- Insufficient data on resident *O. mykiss* population abundance and trends
- Effects of drought on recovery
- Incidental take provision during the candidacy period
- Other State actions that are supporting recovery outside of CESA

Insufficient Data on Resident *O. mykiss* Population Abundance and Trends

CalTrout referenced documentation of the large historical population in the Santa Ynez River, Ventura River, Santa Clara River, and Malibu Creek watersheds during the 1940s; however, these documents can all trace their origin to a single CDFW field correspondence by Clanton and Jarvis (1946) recounting a one-day field trip through the Ventura Watershed (Appendix C). This document was subsequently used by several authors to extrapolate the Clanton and Jarvis speculation on the number of adult steelhead spawning in the Ventura River, to other watersheds in southern California. The dubious use of this field correspondence by historic authors to extrapolate speculations, and failure of current authors to verify the scientific validity of their cited sources, has resulted in a distorted and exaggerated historic adult steelhead population that CalTrout has used.

Both Caltrout and CDFW narrowly focus on the history of anadromous steelhead and do not include information regarding resident *O. mykiss*. The CalTrout petition and CDFW evaluation disregarded other historical documents that address the extensive *O. mykiss* planting program implemented by CDFW from the 1890s through 1930s (Bowers 2008). During the 1910s, there were approximately 3 million trout per year transplanted from northern California hatcheries, such as the Sisson Hatchery in Mount Shasta, into the southern California watersheds, including the Santa Clara and Ventura rivers. The fish transplanted were predominately steelhead and a mix of resident and anadromous forms. Population data collected in southern California watersheds during this time were therefore heavily influenced by the millions of *O. mykiss* being transplanted from northern hatcheries.

The lack of data concerning the resident life history of *O. mykiss* in southern California should be addressed prior to a CESA listing decision for all life forms of the species. The only current population abundance and trend data utilized in the CalTrout petition and Evaluation Report relate to the anadromous form of *O. mykiss*. CDFW clarified in the Evaluation Report that the CalTrout petition defined southern California steelhead "as all *Oncorhynchus mykiss*, including anadromous and resident life histories, below manmade and natural complete barriers to anadromy from the Santa Maria River, San Luis Obispo County (inclusive) to the U.S-Mexico Border with the understanding that anadromous (adult southern steelhead) arise from anadromous and resident naturally spawning adults" (CDFW 2021), consistent with the southern California Distinct Population Segment (DPS) definition. More scientific surveys of resident *O. mykiss* population abundance in southern and central California watersheds are needed to determine if the listing is justified for resident *O. mykiss*. In the Evaluation Report, CDFW brings attention to this sole focus on the anadromous form of *O. mykiss* population abundance and trend and acknowledges the limited information available on resident *O. mykiss*. Throughout the Evaluation Report, CDFW repeatedly states that "internal data on resident *O. mykiss* observations in various southern California streams was collected by [CDFW] and the Santa Monica Mountains Resource Conservation District (RCD) for the years 2004-2021" (CDFW 2021). However, these critical data are not made public within the Evaluation Report. If both resident and anadromous forms of *O. mykiss* in southern California are being considered for CESA listing, then data on resident *O. mykiss* should be collected and made publicly available.

Effects of Drought on Recovery

As discussed in the first comment letter (Appendix A), extended drought conditions over the past decade have significantly affected steelhead recovery in southern California. In 2022, southern California recorded one of its driest January and February on record, and little to no precipitation has occurred thus far in March (NOAA 2022). The 2021/2022 water year appears to be following a similar trend of low precipitation as previous years, which will likely further exacerbate drought conditions. The lack of rainfall in southern California watersheds during the past decade must be considered when evaluating the effectiveness of current recovery actions. Should wet conditions return to the region, steelhead numbers would likely increase because of recovery actions already undertaken in recent years. Should drought conditions persist, as expected with climate change, then a CESA listing is not likely to result in an increase in steelhead abundance in southern California. Not only do persistent drought conditions negate any clear benefits of steelhead recovery actions, Casitas would be burdened with additional regulatory compliance, which would directly hinder operations.

Incidental Take Provision during the Candidacy Period

If the Commission proceeds with listing southern California steelhead as endangered under CESA, Casitas requests that the Commission authorize interim incidental take in accordance with California Fish and Game Code Section 2084 for operations, maintenance, and repair of existing water system facilities. For water agencies to continue meeting the needs of the public during the candidacy period, it is critical that a Section 2084 regulation ensure that CDFW can authorize incidental take expeditiously and avoid lengthy delays for ongoing diversion, storage, and discharge operations. This regulation could be modeled after the 2084 rule that was adopted for coho salmon in the early 2000s (14 CCR § 749.1).

Other State Actions Supporting Recovery Outside of CESA

Numerous small- and large-scale recovery actions are occurring in the DPS (see Appendix A). Many of these actions are in the advanced planning stages and could be implemented within the next ten years, while others are already completed and operational. These actions are anticipated to result in a measurable increase in steelhead numbers in the DPS over a reasonable timeframe (i.e., decades) as described in the NMFS Recovery Plan for the DPS.

As previously mentioned, Casitas has been an active participant in the recovery of southern California steelhead. Casitas completed an $8 million dollar steelhead fish passage improvement project to the Robles Diversion Facility (Robles) on the Ventura River in 2005. The Robles Fish Passage Facility Project was completed in part with CDFW grants. Casitas worked with CDFW, NMFS, and others to design this state-of-the art fish passage facility, which is now operated under a NMFS Biological Opinion (2003). This passage facility, as well as meaningful instream flows for steelhead, provides access to historic spawning and rearing habitat upstream of the facility. As of 2020, a total of 1,341 *O. mykiss* individuals have been documented passing upstream or downstream through the fish passage lifecycle monitoring station at the facility. This facility is just one of many improvement projects undertaken that will aid in the recovery of steelhead within the DPS. Casitas is concerned that a separate and redundant regulatory process under CESA will create conflicts with how Robles is operated and will burden Casitas with additional permitting requirements not made transparent to the Commission or the public as to the benefits to the species beyond those already provided by the federal listing.

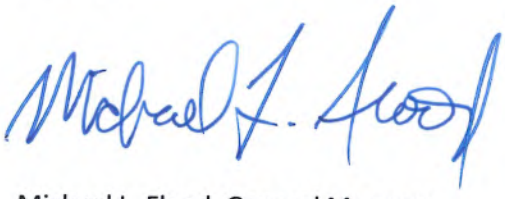
Conclusion

The message of the CalTrout petition is that the current federal recovery process is not resulting in an increase in steelhead numbers in the DPS and that a CESA listing will provide additional and unique actions fostering an increase in steelhead numbers. Never is it demonstrated, nor is any evidence presented, as to how a CESA listing is expected to increase steelhead numbers. Recovery actions are complex and take considerable time and funding to plan, design, permit, build, and study outcomes. It is our opinion and experience that adding an additional regulatory obligation under CESA will not help move projects forward in a reasonable manner but will more likely cause substantial delays. As stated above, CDFW is already a regulatory partner with NMFS on federal consultations and recovery efforts. Continuing collaboration between local and state agencies and water districts will be required to manage steelhead habitat while still providing safe and affordable drinking water to southern California residents. Casitas believes that there is no need to list this species under CESA, as the current recovery plan is already being managed and implemented with CDFW working as a partner to NMFS. Maintaining this current collaborative process would avoid conflicts in conservation and recovery programs that might arise if an additional CESA listing were put into effect.

Casitas continues to urge the Commission to deny the petition to list southern California steelhead as endangered under CESA. If the Commission determines that a listing may be warranted, Casitas requests that ongoing coordination occur with Casitas and other southern California water districts during the process of crafting regulations to ensure that steelhead protection and recovery does not conflict with the ability to provide safe drinking water to southern California residents.

Casitas will continue to collaborate with local, state, and federal agencies in the effort towards steelhead recovery. We appreciate your review of this comment letter and please feel free to contact me with any questions or correspondence.

Sincerely,



Michael L. Flood, General Manager
Casitas Municipal Water District
1055 North Ventura Avenue
Oak View, CA 93022
Via email: [redacted]

Literature Cited

Bowers, K., History of Steelhead and Rainbow Trout in Ventura County: Newsprint from 1872 to 1954, Volume I, United Water Conservation District, July 10, 2008.

California Trout (CalTrout). 2021. Notice of Petition: Southern California Steelhead (*Oncorhynchus mykiss*). Submitted to the California Fish and Wildlife Commission. June 7, 2021.

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Dagit, R., M. Booth, M. Gomez, T. Hovey, T., S. Howard, S. D. Lewis, S. Jacobson, M. Larson, D. Mccanne, and T. Robinson. 2020. Occurrences of Steelhead Trout (*Oncorhynchus mykiss*) in southern California, 1994-2018. 106. 39-58.

National Marine Fisheries Service (NMFS). 2012. Southern California Steelhead Recovery Plan. Southwest Region, Protected Resources Division, Long Beach, California.

National Marine Fisheries Service (NMFS). 2016. 5-Year Review: Summary and Evaluation of Southern California Coast Steelhead Distinct Population Segment. National Marine Fisheries Service. West Coast Region. California Coastal Office. Long Beach, California.

National Oceanic Atmospheric Administration (NOAA). 2022. National Integrated Drought Information System (NIDIS) of Current Drought Monitor Conditions of California.

Appendix A

Casitas Comment Letter dated August 20, 2021

SENT VIA ELECTRONIC MAIL

August 20, 2021

Vanessa Gusman
California Department of Fish and Wildlife
Fisheries Branch
PO Box 944209
Sacramento, CA 94244-2090
via email: [redacted]

Subject: Comment Letter for Casitas Municipal Water District Related to the Petition to List Southern California Steelhead Under the California Endangered Species Act

Introduction

The Casitas Municipal Water District (Casitas) appreciates the opportunity to comment on the petition by California Trout (CalTrout) to list southern California steelhead (steelhead) Distinct Population Segment (DPS) as endangered under the California Endangered Species Act (CESA). This petition was submitted to the California Fish and Game Commission (Commission) on June 7, 2021.

Casitas as well as the United States Bureau of Reclamation (Bureau) have been active participants in the recovery of steelhead in the Ventura River since the federal listing in 1997 by designing and operating a diversion with a state-of-the-art fish passage facility and fish passage lifecycle monitoring station. Additionally, Casitas developed meaningful instream flows for steelhead in coordination with the National Marine Fisheries Service (NMFS) and the California Department of Fish and Wildlife (CDFW). Casitas agrees that recovery actions are paramount to the viability and success of this species. However, after a thorough review of the petition, Casitas has some concerns and comments to share with CDFW and the Commission. This letter will address concerns Casitas has in that adding an additional permitting process will most likely delay projects, including recovery actions that are already in place or are in the advanced planning stages, as well as additional concerns regarding elements of recovery that CalTrout did not provide in their petition letter. Additionally, CDFW is already involved in steelhead recovery by partnering with NMFS on Section 7 and Section 10 federal ESA consultations and by conducting monitoring and research on the steelhead DPS. The federal and state governments are already dictating and requiring recovery actions through the NMFS recovery plan for southern California steelhead. Adding steelhead to the list of those species covered under the CESA will most likely duplicate recovery efforts already occurring resulting in unnecessary redundancies and delays. CalTrout is expecting recovery to occur in a timeframe that is not reasonable or realistic. Many recovery actions have been implemented and many large scale actions are in the advanced planning phases. The unprecedented drought that has occurred since 2007 has had a significant adverse effect on the recovery of the species resulting in no change in the steelhead numbers in the region. Would adding this species to the list of those species covered under the CESA change that or provide additional, meaningful recovery actions not already included in the federal recovery plan? Lastly, we are concerned that CalTrout is requesting

the Commission to only list the federally designated DPS of southern California steelhead, whereas the CESA does not extend beyond the species or subspecies level (i.e., it does not extend to distinct populations segments or evolutionarily significant units). The CESA defines an endangered species as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease" (California Fish and Game Code Section 2062). CalTrout also is requesting the Commission to only consider the anadromous form of *Oncorhynchus mykiss* and to not consider the resident form of the species for CESA listing, which we believe goes against the CESA definition of a species. The remainder of this comment letter includes these topics:

Regulatory and Permit Burdon and Redundancy

Recovery Timeframe

Recovery Actions Implemented and Planned

Effects of Drought on Recovery

The State is Already Involved in Recovery Through Federal Consultations

Other State Actions That are Supporting Recovery Outside of CESA

Regulatory and Permit Burden and Redundancy

If the Commission were to list southern California steelhead as endangered under CESA, Casitas and other entities that have projects potentially affecting steelhead will now have an additional permit process that will cause additional delays and, in our opinion, will only include redundancies that are already included in federal biological opinions and multiple other permits required to implement projects including restoration and recovery projects. A list of recovery projects that will aid in the recovery of the species and have the potential to be delayed due to an additional permit requirement are included below.

CalTrout believes if the Commission determines a listing is warranted, "CDFW will have direct authority to oversee projects proposed within the current limits of anadromy. This will provide CDFW the ability to establish species-specific mitigation measures that must be met for take coverage to be authorized" (CalTrout 2021). The CDFW is already a partner in federal consultation and recovery efforts and have developed site-specific recovery measures in collaboration with NMFS. CDFW scientists have been involved with the federal consultation at the Robles Diversion Facility and are involved with other consultations in the DPS ultimately dictating some of the conservation and recovery measures and actions CalTrout believes would only occur if the species was listed under CESA. Since CDFW is already involved in the federal consultation process, there is no need to add additional regulatory burden on applicants and CDFW staff that are already involved in recovery of the species.

Recovery Timeframe

CalTrout's petition includes concerns about the lack of increased fish numbers since the listing in 1997. The federal recovery plan discusses the complexities in recovery planning and the timeframe required for biologically meaningful and quantifiable recovery based on objective, measurable criteria. This paragraph is included on page 5-1 of the recovery plan (NMFS 2012).

"The West Coast's salmon and steelhead populations have always been sensitive to the variability of the northeast Pacific climate-ocean system . . . So steelhead recovery as a form of human stewardship has to be judged over a broader timeline, with multi-year setbacks in population size considered to be a normal and expected event, and progress judged at the scale of multiple decades and even multiple human generations."

Dr. David A. Boughton, Chair, NOAA Fisheries South-Central/Southern California Steelhead Technical Recovery Team, 2010

Although the most recent NMFS 5-year review (NMFS 2016) determined there has been no appreciable increase in steelhead numbers since the listing, there are numerous large scale recovery and restoration actions in the planning stages with goals to increase steelhead numbers within the southern California DPS and neighboring segments. There are also large scale recovery actions occurring or that have already occurred in the neighboring south-central steelhead DPS (San Clemente Dam decommissioning, Los Padres dam fish passage design, Arroyo Grande Creek and watershed improvement projects) intended to aid in the recovery of the south-central California steelhead DPS, but will also aid in recovery of the southern California steelhead DPS. These recovery actions take time to develop through scientific research, advanced and sometimes unprecedented engineering design, and lengthy consultations with resource agencies. Adding additional consultation under CESA would only introduce redundancies to current requirements and consultations already involving CDFW, with potential consequences of delaying important recovery actions.

Recovery Actions Implemented and Planned

Numerous small- and large-scale recovery actions are occurring in the DPS. Many are in the advanced planning stages and could be implemented within the next ten years and some are already in place. These actions are anticipated to result in a measurable increase in steelhead numbers in the DPS over a reasonable timeframe as described in the NMFS recovery plan. Below is a list of recovery actions that have already occurred or are in the planning process. Note that this is not an exhaustive list and other recovery projects may exist of which we are unaware.

Robles Fish Passage Facility

Casitas completed an $8 million dollar steelhead fish passage improvement project to the Robles Diversion Facility on the Ventura River in 2005. This project was completed in part with CDFW grants. Casitas worked with CDFW, NMFS, and others to design this facility, which is now operated under a NMFS Biological Opinion. This passage facility now provides access to historic spawning and rearing habitat upstream of the facility. As of 2020, a total of 1,341 *O. mykiss* have been documented passing upstream or downstream through the facility. This facility is just one of many improvement projects undertaken that will aid in the recovery of steelhead in the DPS.

Matilija Dam Ecosystem Restoration Project

The Matilija Dam Ecosystem Restoration Project has been in the design and planning stages for decades. Delays due to funding, complexities with sediment, etc., are an indication of the diverse complexities that can occur with a large-scale recovery/restoration project. The good news is that upfront projects required before the dam can be removed started this year after years of planning and consultations. This project is similar to the San Clemente Dam decommissioning project that occurred on the Carmel

River in 2015. Monitoring results indicate that steelhead and other anadromous fish (Pacific lamprey) are now utilizing important habitats upstream in the Carmel River. The removal of Matilija Dam will be a big step toward improving steelhead numbers in the Ventura River and the DPS overall. The current projection timeline for dam removal is ten years.

Foster Park Fish Passage Improvement Project

The City of Ventura will be providing fish passage over an exposed subterranean diversion dam and exposed pipeline crossing over the next two years. This project is on the lower Ventura River and will provide unimpeded passage conditions for steelhead to reach high quality spawning and rearing habitats upstream.

Freeman Diversion HCP and Fish Passage Improvements

A draft Habitat Conservation Plan has been submitted to NMFS, the United States Fish and Wildlife Service (USFWS) and CDFW to obtain incidental take coverage for multiple species including steelhead at the Freeman Diversion on the Santa Clara River. This plan includes operations that provide instream flows that mimic the pattern, timing, magnitude and duration of flows for upstream and downstream migrating steelhead. The plan also includes a new fish passage facility at the diversion. This fish passage facility was developed through an alternatives analyses from a fish passage review panel and is designed to provide natural rate of migration past the facility for steelhead. Additional conservation measures including mitigation are included in this document that will assist in the recovery of steelhead in the DPS.

Santa Felica Dam Relicensing Project

The relicensing of the Santa Felicia Dam on Piru Creek, a tributary of the Santa Clara River, through the Federal Energy Regulatory Commission (FERC) included multiple requirements from the FERC, NMFS , the USFWS, the United States Forest Service and CDFW such as instream flows for steelhead migration and rearing, flows to maintain natural geomorphic processes, invasive species management, monitoring and adaptive management, and fish passage over Santa Felicia Dam. Some of these requirements are already in the implementation phase while others and are in the advanced planning phases.

Rindge Dam Decommissioning on Malibu Creek

The Rindge Dam on Malibu Creek is in the planning phase and CalTrout is a partner in moving this project forward. The CalTrout website states "the dam removal project is now poised to proceed into design phase, following recent authorization of the project's feasibility study led by the U.S. Army Corps of Engineers and pending formal approval in Congress. This is a major milestone, but the hard work is now ahead to complete design, put together a successful dam removal team, restore migration of the endangered southern steelhead, and secure funding for the >$200M project."

Quiota Creek Fish Passage Barrier Removals

The Cachuma Operation and Maintenance Board replaced numerous low flow crossings with bridges on Quiota Creek, a tributary to the Santa Ynez River. The original crossing were barriers to steelhead migration. They have all been replaced and passage has been restored to this creek.

Salsipuedes Creek and El Jaro Creek Fish Passage Barrier Structures

Fish passage structures have been constructed on these two tributaries to the Santa Ynez River, providing access to miles of habitat for steelhead.

Arroyo Hondo Creek Fish Passage Project

Fish passage was restored through a 300-foot culvert beneath highway 101 on Arroyo Hondo Creek on the Santa Barbara coast. This is a small coastal stream that provides excellent spawning and rearing habitat for steelhead. The CDFW has monitored fish passage in this creek using Sonar technology.

Solstice Creek Fish Passage Restoration

Passage barriers at road crossings have been removed and a passage design at the Hwy 1 crossing has been reviewed by a fish passage consultant that provided a peer review and passage design alternatives to NMFS and CalTrans. CalTrans is working with NMFS to start implementing the project. Solstice Creek is a small coastal stream located near Malibu in the Santa Monica Mountains.

Trabucco Creek Fish Passage Project

CalTrout is leading an effort to provide fish passage under the interstate 5 bridge in Trabucco Creek in the San Juan Creek watershed, Orange County, California. The project, which is in the 65% design phase will provide access to 15 miles of upstream high quality spawning and rearing habitat for steelhead.

This is not an exhaustive list of recovery efforts occurring in the DPS. The CalTrout petition states that Southern steelhead have seen little demonstrable improvement in population numbers and long-term persistence since the species' federal ESA listing in 1997. It also states that state and federal entities have had decades to address the precipitous and continuing decline in Southern steelhead populations through all manner of guidance, policy, and mandate. This contradicts the results of the NMFS 5-year review that states "while the status of the populations of steelhead within the Southern California Coast Steelhead DPS has not changed appreciably since the last status review, a number of recovery related activities have been undertaken which may result in some reduction in threats to the species, and potentially lead to a future increase in individual populations." The 5-year review highlights NMFS' belief that recovery actions will increase steelhead population numbers in the DPS and it does not conclude there is a "precipitous and continuing decline in Southern steelhead populations in the DPS" as stated in the CalTrout petition.

Although steelhead numbers are low, there are few robust monitoring programs over a meaningful timescale occurring in the DPS. The minimal data that does exist as well as anecdotal information was included in the most recent paper by Dagit et al. (2020), but the authors do acknowledge the lack of data in the DPS. It is too early to use fish numbers to demonstrate progress and population data is lacking in the DPS. The number of recovery actions occurring in the DPS are based on work conducted by project proponents, federal resource agencies, CDFW and project partners and stakeholders. These projects will aid in the recovery of this species and consequently the petition didn't demonstrate how an additional listing through CESA would provide unique conservation or recovery measures that are not already included in the NMFS recovery plan and California state planning documents.

Effects of Drought on Recovery

Southern California has experienced an unprecedented drought since 2007. This has resulted in substantial reductions in migration opportunities for southern steelhead in the DPS. In arid southern

California, steelhead require elevated winter flows to open seasonally closed sandbars in coastal lagoons as well sufficient instream flows in coastal rivers and streams to migrate to high quality spawning habitats. In some instances these sandbars never opened during the driest years of the drought and when they did, instream flows were not of a sufficient magnitude and duration for steelhead to make it to spawning habitat.

Due to the drought conditions that have occurred over more than a decade, it is not reasonable or prudent for CalTrout to postulate that there is a precipitous decline in steelhead numbers and that current recovery actions will not result in an increase in the numbers of steelhead in the DPS. Once wet conditions return to the region and multiple recovery actions are in place throughout this and neighboring DPSs, steelhead will have access to a significant amount of historic habitat, and once established, population numbers should increase.

Other State Actions That are Supporting Recovery Outside of CESA

The CDFW is currently conducting instream flow evaluations in priority drainages in California. One of these priority drainages is the Ventura River. The Ventura River is also one of five priority stream systems selected as part of the California Water Action Plan (WAP) effort. The WAP was developed to move California toward more sustainable water management. As part of the WAP, the CDFW Instream Flow Program is supporting flow enhancement activities and developing flow criteria in priority streams that support critical habitat for threatened and endangered anadromous salmonids. The intention of these evaluations is to aid in steelhead recovery.

The Sustainable Groundwater Management Act (SGMA) of California is recent state legislation enacted to help protect groundwater resources over the long-term. Under SGMA, groundwater agencies must develop groundwater sustainability plans. These plans must include an analysis of groundwater dependent ecosystems including potential impacts to sensitive species from groundwater pumping. Plans are under development in the Ventura River and other priority drainages in the DPS further aiding in the recovery of southern California steelhead.

Conclusions

The overarching theme of the CalTrout petition is that the current federal recovery process is not resulting in an increase in steelhead numbers in the DPS and that a CESA listing will somehow, without any supporting evidence, provide additional and unique actions fostering an increase in steelhead numbers. CalTrout states in their petition that "a number of large, complex fish passage barriers remain in place or not fully functional, even though significant investment over the years has supported advanced engineering design. The state ESA listing is anticipated to help move these projects forward into construction to realize their potential in species recovery" (CalTrout 2021). These complex projects take significant amounts of time and funding to analyze, design, permit, and build. It is our opinion and experience that adding an additional regulatory step through CESA will not help move projects forward, but will most likely cause substantial delays. As stated above, CDFW is already a regulatory partner with NMFS on federal consultations and recovery efforts. Consequently, there is no need to list this species under CESA since the current recovery plan is being managed and implemented with CDFW as a partner to NMFS.

We urge CDFW and the Commission to deny the petition to list southern California steelhead as endangered under CESA. We appreciate your review of this comment letter and please feel free to contact me with any questions or correspondence.

Sincerely,

Michael L. Flood, General Manager
Casitas Municipal Water District
1055 North Ventura Avenue
Oak View, California 93022
Via email: [redacted]

Literature Cited

California Trout (CalTrout). 2021. Notice of Petition: Southern California Steelhead (*Oncorhynchus mykiss*). Submitted to the California Fish and Wildlife Commission. June 7, 2021.

Dagit, R., M. Booth, M. Gomez, T. Hovey, T., S. Howard, S. Lewis, S. Jacobson, M. Larson, D. Mccanne, and T. Robinson. 2020. Occurrences of Steelhead Trout (*Oncorhynchus mykiss*) in southern California, 1994-2018. 106. 39-58.

National Marine Fisheries Service (NMFS). 2012. Southern California Steelhead Recovery Plan. Southwest Region, Protected Resources Division, Long Beach, California.

National Marine Fisheries Service (NMFS). 2016. 5-Year Review: Summary and Evaluation of Southern California Coast Steelhead Distinct Population Segment. National Marine Fisheries Service. West Coast Region. California Coastal Office. Long Beach, California.

Appendix B

Casitas Comment Letter dated December 9, 2021

December 9, 2021

California Fish and Game Commission
P.O. Box 944209
Sacramento, California 94244-2090

Sent via email to fgc@fgc.ca.gov

Subject: Comments on CDFW Evaluation Report on Petition to List Southern California Steelhead as Endangered Pursuant to the California Endangered Species Act

Dear California Fish and Game Commission:

We are writing to provide input with respect to the Petition to list the Southern California Steelhead under the California Endangered Species Act (CESA) dated June 7, 2021, and received by the Fish and Game Commission on July 2, 2021. The Commission then referred the petition to the California Department of Fish and Wildlife (CDFW) pursuant to Fish and Game Code section 2073 for preparation of an evaluation report on the petition. On November 30, CDFW released its written evaluation report ("Evaluation Report") to the public.

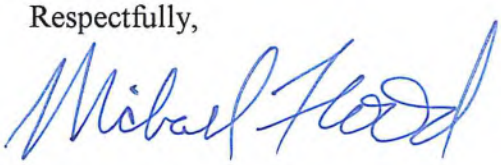
We have reviewed CDFW's Evaluation Report and discovered that it does not contain discussion of the substance of, or otherwise consider, the concerns raised in Casitas Municipal Water District's August 20, 2021 letter, nor does the Evaluation Report contain a discussion of the substance of any of the other timely submitted comment letters.

CDFW is mandated by Fish and Game Code section 2073.5 and Section 670.1 of Title 14 of the California Code of Regulations to consider all relevant information it receives on the petition and to evaluate the petition in light of that information. It does not appear, at least by review of the Evaluation Report, that consideration of all relevant information pertaining to the petition has occurred.

Due to CDFW's failure to include in the Evaluation Report any discussion or analysis of the relevant public comments it received concerning the petition, Casitas respectfully requests that the Commission remand the evaluation report back to CDFW with the direction that it prepare a revised evaluation report that evaluates the scientific information discussed and cited in the petition in relation to the public comments CDFW has received to date. To do otherwise would conflict with Fish and Game Code section 2073.5.[1]

[1] See Fish and Game Code§ 2073.5 ("Within 90 days of receipt of the petition, the department shall evaluate the petition on its face and in relation to other relevant information the department possesses or receives.")

Respectfully,



Michael Flood, General Manager
Casitas Municipal Water District
1055 North Ventura Avenue
Oak View, California 93022
Phone: 805-649-2251 ext. 111
Email: [redacted]

Appendix C

Clanton and Jarvis Field Correspondence dated May 8, 1946

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF FISH AND GAME

FIELD CORRESPONDENCE

FROM: D. A. Clanton & J. W. Jarvis

PLACE: Fillmore

TO: BUREAU OF FISH CONSERVATION

DATE: May 8, 1946

SUBJECT: FIELD INSPECTION TRIP TO THE MATILIJA-VENTURA WATERSHED IN RELATION TO THE CONSTRUCTION OF THE PROPOSED MATILIJA DAM.

Our observations were based soley on the problems of steelhead spawning areas, and sport trout-fishing in the district.

The proposed dam is to be located one-half mile above the mouth of the Matilija at its junction with the Ventura River, and just above Matilija Hot spring Resort. This area comprises one of the best spawning grounds of the entire river system, and the distance above the dam represents approximately twelve miles of spawning area or one-half of the entire stream area of the Matilija-Ventura section. In the check today, we found that the Ventura City water intake, which is located at Foster Park, is approximately ten miles below the proposed dam site. This same area constitutes the best spawning grounds of the Ventura River at this time.

In questioning members of the Ventura City Water Plant, we found t that due to incomplete specifications, no one knows the exact plans concerning the piping or transporting of the water from the dam to the present intake at Foster Park.

The present system of water pickup, utilizes an underground retaining wall which extends from the surface of the stream bed vertically to sixty feet below. This is the intake mentioned as being at Foster Park, located at Casitas Springs, ten miles below the proposed dam site.

Spawning areas below the Ventura City water intake are very poor, the distance to the ocean being approximately five miles.

Several water diversions are located between Matilija Dam Site, and the Ventura water intake. One large diversion is drawn out at the Matilija Ranch(Old Rice Ranch). This is located four miles below the proposed dam. In the past and during dry years, water is removed to the extent that the river bed goes completely dry, and it becomes necessary to do a small amount of rescue work in the Ojai Oaks area. This Steelhead Rescue covers a distance of four miles over loose gravel.

The North Fork of the Matilija represents a very small portion of the available spawning area of the Ventura System due to the fact that water conditions are poor. Until two years ago it was almost impossible for fish to get over a falls, which was located one-quarter mile inside the mouth of the stream. This rock ledge has now been blown out, and fish can get upstream a distance of about four miles. A small flow of water, and poor spawning conditions indicate that perhaps less than 2 percent of the fish in the river use this area for spawning.

Personal observations covering many years, as well as interviews with residents who have been in the area for over twenty years leads us to believe that at least 5o percent of the fish entering the Ventura

River eventually enter the main Matilija to spawn. In normal years this represents a minimum of between 2000 & 2500 adult spawning steelhead in the 12 mile area.

Most of the hatchery-fish planting is done in this area due to better water conditions, and cooler temperatures. Fishing catch records have shown that most of the hatchery fish are taken in this portion of the stream as well as the yearling steelhead, of which several hundred were seen today. These steelhead averaged between four and six inches in length. It is our belief that 48 percent of the adult steelhead spawn in the ten miles below the Matilija dam site as this stream bed constitutes a fair spawning ground, and in past years many beds have been seen there.

Coyote Creek is a tributary to the Ventrua River, entering at Foster Park. This is a steelhead spawning stream, and some rescue work has been done on the lower section of the stream in dry years. This tributary is also embodied in the proposed plan, and calls for a large water-retaining reservoir which will impound all the run-off from this stream.

Conclusions

Fishing streams in Ventura County are very limited, and an average of 70,000 to 100,000 fish have been planted yearly for the past years. Every consideration should be given so that all suitable waters for fish are utilized.

Permission to construct a dam in one of the few favorable fishing locations in the county should only be given with the understanding that every effort will be made to use the impounded waters as an improvement to the fishing conditions of the county. The present fishing asset amounts to at least $100,000.00 annually. Census checks made of winter steelhead fishing have shown 259 fishermen on the opening day in the five-mile area that is open to fishing from Foster Park to the ocean. This winter-Steelhead fishing has continued to improve in recent years. Summer fishing represents most of the angling in the area to be taken up by the construction of the Mitilija, and the waters above. Between 11:00 AM and 2:00 PM of the opening day of fishing season this year, 328 fishermen were checked by the wardens along a five-mile stretch of the area in question. Our observations today showed that there were 25 persons fishing druing the one-hour that we were in upper canyon.

It is impracticable to believe that a suitable fish ladder can be constructed over the 152 foot dam under present construction methods, and in lieu of this; every effort should be made to assure that enough water is released below the dam to adequately maintain fish life at all times.

The spillway on this dam should be an inclined apron with a deep hole at the bottom instead of a direct fall. By utilizing this type of spillway both adult and fingerling steelhead could pass over the dam without loss on their downward migration. Provisions could

easily be made for trapping adult steelhead at the base of the dam for transplanting above to spawn naturally. In the spring of the year, water should be released over the spillway for as long as is possible.

Fishing should be permitted in the impounded water, under the supervision of the water district, during the entire fishing season. Effort should be made to keep the impounded water, and the water above the dam proper well stocked in order to maintain maximum fishing in a county whose fresh-water fishing is very limited.

D. A. CLANTON
Asst. Supervisor of fish hatcheries

Willard Jarvis
Sr. Fisheries biologist

April 7, 2022

California Fish and Game Commission
PO Box 944209
Sacramento, CA 94244-2090
Sent via email: fgc@fgc.ca.gov

Dear Commissioners:

United Water Conservation District (United) submits the following additional information concerning its facilities and operations that may be impacted by the designation of southern California steelhead (*Oncorhynchus mykiss*) as a candidate species under the California Endangered Species Act (CESA). At the California Fish and Game Commission's (Commission) February 2022 public hearing on California Trout's (CalTrout) listing petition, the Director of the California Department of Fish and Wildlife (CDFW) proposed that the Commission also consider allowing for limited take under Section 2084 of the Fish and Game Code. It was further suggested that those public agencies requesting 2084 regulatory relief provide a list of their projects that may be impacted by designating steelhead as a candidate species. United is requesting 2084 relief for both its Santa Felicia Dam and its Freeman Diversion facilities, ongoing operations, and improvements. Details concerning these facilities, operations, and improvements are provided below.

A. Background

As background, United is located in Ventura County and operates as a California special district to protect and maintain the water resources of the Santa Clara River, its tributaries and associated aquifers in an environmentally balanced manner. As its name suggests, United's primary purpose is to conserve, protect and enhance the region's water supply for beneficial use pursuant to Article X, section 2 of the California Constitution. As one of only a handful of water conservation districts in California, United's unique role of water conservation and management is distinctly different than that of a wholesale or retail water purveyor. United's management focuses on long-term stewardship of water resources over the course of decades to preserve groundwater for future use, including treated drinking water and critical agricultural irrigation.

Two of the critical facilities supporting United's mission of water conservation and management are the Santa Felicia Dam and the Freeman Diversion. Both facilities are operated consistent with applicable federal mandates, including those from the National Marine Fisheries Services (NMFS) with respect to the federally endangered status of southern California steelhead under the Endangered Species Act (ESA), and, in the case of the Freeman Diversion, NMFS' 2016 mandate for compliance with the ESA, as confirmed by subsequent order of the United States District Court

for the Central District of California.[1] In fact, under the supervision of the federal court, and with both NMFS and CDFW oversight, United is designing and will be constructing a new state of the art fish passage facility to replace its current fish ladder. While omitted from its listing petition, not long ago CalTrout even agreed in open court and in writing that United's then current operations adequately protect steelhead.[2]

As has been the case since its creation nearly a century ago, United's efforts protect and provide a sustainable, clean and reliable water supply that supports the region's economy and quality of life for over 400,000 people within a nearly 213,000-acre region. The 2017 Highland Economic Study of the Socioeconomic Importance and Impacts of Freeman Diversion Water to Ventura County, which is already part of the administrative record, concluded that for every 12,500 acre-feet reduction of water diverted there is a corresponding loss to Ventura County's economy of 1,500 jobs and $91.1 million in income. As has been expressed in prior comments letters from United and others, there is a great deal of concern that the designation of southern California steelhead as a candidate species under CESA will ultimately result in a reduction of diversions for groundwater recharge in the area due to new state agency restrictions thus, creating substantial water quality, water availability, and financial hardships for the citizens of Ventura County, and in particular the disadvantaged communities that typically rely exclusively upon groundwater.

B. Santa Felicia Dam

The Santa Felicia Project was designed and constructed by United in 1955; hydroelectric facilities were added to the Santa Felicia Dam in 1986. The project is an integral part of United's overall management to recharge downstream groundwater supplies from basins that have been depleted due to substantial overdraft and to combat saltwater intrusion in the groundwater aquifers near the Pacific Coast. To accomplish this, water is retained and stored within Lake Piru during the winter and spring months when downstream groundwater basins are at their fullest level. Utilizing the stored water, United makes conservation releases averaging approximately 270 cubic feet per second (cfs), from the Santa Felicia dam in September and October when the downstream groundwater basin levels are at their seasonal lows. The conservation releases are designed to maximize the amount of water that reaches the Freeman Diversion Dam, located downstream on the Santa Clara River near the community of Saticoy, where the water is used to recharge coastal groundwater basins.

Federal Energy Regulatory Commission (FERC) license P-2153 covers the operation and maintenance of the Santa Felicia Project. United operates the Santa Felicia Project in accordance with the 2008 NMFS BO. United is currently complying with the RPAs. The 2008 BO for the operation and maintenance of the Santa Felicia Project includes incidental take (injury or death) of 10 adults and 1000 juvenile steelhead for the permit term under the RPA scenario. The 2016 BO for the wet crossing includes incidental take in the form of injury or death of 2 juvenile steelhead, capture of 30 juvenile steelhead, and crushing of one redd per year. Per guidance from CDFW, a

[1] *Wishtoyo Foundation, et al v. United Water Conservation District* (U.S. District Court for the Central District of California, Case No. 2:16-cvg-03869 GHK (PLAx). The Amended Judgment and Permanent Injunction and other relevant pleadings in that matter are already part of the administrative record before the Commission.

[2] The written CalTrout settlement agreement was submitted to the Commission by United in advance of the February public hearing and is part of the administrative record before the Commission. The agreement constitutes a retraxit under California law, barring application of CalTrout's petition to United's facilities. (*Kronkright v. Gardner* (1973) 31 Cal.App.3d 214, 219 [Dismissal of the earlier action with prejudice constituted a retraxit barring a new action based upon same operative facts]).

SAA is not required for the operation of the Santa Felicia Project Section 10(j)(1) of the Federal Power Act (FPA), and requires that FERC, when issuing a license, to include conditions, based on recommendations by federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act (FWCA) to "adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)" affected by the project.

C. Freeman Diversion

Since 1928, United and its predecessor (Santa Clara Water Conservation District) have diverted a portion of the flow in the Santa Clara River along the northern Oxnard Coastal Plain to groundwater recharge basins where the water infiltrates through the surface to recharge underlying groundwater resources as well as to pipelines that deliver surface water directly to users in lieu of pumping in critical areas (conjunctive-use).

The Freeman Diversion in its current form was built following a mandate from State Water Resources Control Board (SWRCB) and as part of the Seawater Intrusion Abatement Program (SIAP), a two-phase project to combat sea water intrusion. Phase I was the Pumping Trough Pipeline (PTP) and Phase II was the Freeman Diversion Improvement Project, completed in 1991.

United operates its facilities in accordance with water rights license 10173 and water rights permit 18908 issued by the SWRCB. The current Freeman Diversion operates in accordance with the 2016 NMFS mandate and subsequent federal court order and permanent injunction, which imposes the Reasonable and Prudent Alternatives (RPA) from a final (unadopted) 2008 Biological Opinion (BO) issued by NMFS. The 2008 BO includes incidental take of 2 adults and 90 juvenile steelhead per year under the RPA scenario. Current operations also in accordance with Streambed Alteration Agreement (SAA) No. 5-443-89 and the terms and conditions of Clean Water Act (CWA) Section 404 permit 86-116-TS by reference.

Primary operations activities include opening and closing gates (incl. sediment sluicing/ flushing) to divert water and operate the current Denil fish ladder and as noted above, diversion and fish ladder operations are currently dictated by the 2016 NMFS mandate and the federal court order and permanent injunction. As noted above, United is in the process of designing a new fish passage facility for the protection of southern California steelhead. This is being done under the supervision of the federal court and oversight of NMFS and CDFW. This new fish passage facility will cost United over $100 million to permit and construct. In relation to the construction and operation of the new fish passage facility, United is currently working with NMFS, the U.S. Fish and Wildlife Service (USFWS), and CDFW on a Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP) under Section 10 of the ESA.

United is under a very tight schedule for designing and constructing the new fish passage facility. (See Amended Judgment and Permanent Injunction and Order Granting United's Motion to Amend Judgment in *Wishtoyo Foundation, et al v. United Water Conservation District* [U.S. District Court for the Central District of California, Case No. 2:16-cvg-03869 GHK (PLAx).] Construction will commence upon approval of an HCP and issuance of an ITP by NMFS and USFWS, as well as upon receipt of all other regulatory approvals, including a CESA ITP and a SAA from CDFW. Many, including the Department, believe that designating steelhead as a candidate species risks

causing a significant delay in the design and construction of the project. It is therefore vital that there is a Section 2084 carve-out for United's facilities.

D. Proposed Section 2084 Regulation

It is United's understanding that ACWA is proposing the following Section 2084 regulation:

749.XX Special Order Relating to Take of Southern California Steelhead (Oncorhynchus mykiss) During Candidacy Period.

The Commission authorizes the take of Southern California steelhead during the candidacy period for each of the activities described in subsections (a), (b), or (c):

(a) The proponent of a project or activity shall provide the department written documentation to demonstrate that the project or activity:
  (1) Relates to flood-control; a "highway" as defined in Section 360 of the Vehicle Code; the diversion of water, or steelhead conservation, preservation or protection as defined in Section 399 of the Fish and Game Code;
  (2) Provides any of the following and is necessary either to avoid serious harm to the public peace, health, safety, or general welfare, or for the conservation, preservation or protection of species:
    A. Flood protection necessary to provide flood management to communities or infrastructure;
    B. Public safety benefits through highway maintenance or improvements;
    C. Water for essential domestic, agricultural, industrial, or other commercial uses, including dewatering for maintenance of water transfers; or
    D. Conservation, preservation, or protection of CESA protected species.
  (3) The project proponent is either not required to have take authorization from the National Marine Fisheries Service or has valid take authorization from the National Marine Fisheries Service through a federal incidental take statement or incidental take permit under the federal Endangered Species Act for Southern California steelhead Distinct Population Segment; and
  (4) The project proponent is not required to submit a written notification pursuant to Fish and Game Code Section 1602 or the project proponent has submitted a notification pursuant to Section 1602 and has either received a final agreement pursuant to Chapter 6 (commencing with Section 1600) of Division 2 of this code or paid the applicable fees pursuant to Section 1609; provided that:
    A. any measures identified by the department as necessary to protect Southern California Steelhead are incorporated into the signed Agreement and are fully implemented by the party undertaking the activity; and
    B. The project otherwise complies with other relevant provisions of this section.

(b) The project proponent is legally mandated to perform the activity.

(c) Incidental take of Southern California steelhead from activities not addressed in this section may be authorized during the candidacy period by the commission pursuant to Fish and Game

Code Section 2084 or by the department pursuant to Fish and Game Code Sections 2080.1 or 2081, on a case-by-case basis.

United agrees with and supports ACWA's proposal and believes it sufficiently addresses United's concerns regarding the candidacy designation. If, however, the Commission is unwilling to adopt ACWA's proposal, United asks that the Commission ensure that it includes United's facilities in any 2084 regulation that allows for take of steelhead during its candidacy period. This, of course, would also be consistent with CalTrout's settlement agreement with United.

Respectfully,

Anthony Emmert
Assistant General Manager

cc: Jay Rowan, California Department of Fish and Wildlife, Fisheries Branch
PO Box 944209, Sacramento, CA 94244-2090 via email: [redacted]

ORANGE COUNTY WATER DISTRICT
ORANGE COUNTY'S GROUNDWATER AUTHORITY

April 6, 2022

California Fish and Game Commission
PO Box 944209
Sacramento, CA 94244-2090

Sent via email to: fgc@fgc.ca.gov

Subject: California Fish and Game Commission proceedings on California Trout's Petition to list southern California steelhead as endangered under the California Endangered Species Act (CESA), and California Department of Fish and Game's evaluation of the petition

Dear California Fish and Game Commissioners:

The Orange County Water District (OCWD) was established by the State of California in 1933 to manage the Orange County Groundwater Basin (Basin). OCWD implements a successful sustainable groundwater management plan in accordance with the Orange County Water District Act in order to ensure the Basin provides a reliable source of water for the future. The Basin is recharged by the Santa Ana River (SAR), so regulation of the SAR that has the potential to frustrate OCWD's ability to replenish and manage the Basin is an area of potential concern for OCWD.

OCWD has reviewed the Petition submitted by California Trout (CalTrout) to the California Fish and Game Commission (Commission) to list Southern California steelhead (Oncorhynchus mykis) as endangered pursuant to the California Endangered Species Act (CESA), Fish and Game Code section 2050 et seq. OCWD has also reviewed the evaluation of CalTrout's petition prepared by the California Department of Fish and Wildlife (CDFW) pursuant to Fish and Game Code section 2073 (report titled 'Evaluation Of The Petition From California Trout To List Southern California Steelhead (*ONCORHYNCHUS MYKISS or "O. Mykiss"*)) As Endangered Under The California Endangered Species Act, Prepared by California Department of Fish and Wildlife, November 2021; [hereinafter 'CDFW Petition Evaluation']).

Based on flaws in CalTrout's Petition and in the CDFW Petition Evaluation as also described in OCWD's previous letter to the Commission dated February 3, 2022, a letter which is incorporated herein by reference, OCWD urges the Commission to reject the Petition submitted by CalTrout

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Due to ongoing stocking of non-native trout for recreational fishing in the Santa Ana River Watershed, OCWD seeks formal clarification and confirmation that the listing petition does not, and will not, apply to non-native trout. Our verbal and email conversations with CDFW staff indicate that CDFW Staff do not consider stocked fish to be subject to the proposed listing, but as part of the Fish and Game Code 2084 rulemaking currently under consideration, it would be extremely beneficial for CDFW staff and the Commission to simply clarify that stocked fish are not subject to the proposed listing. This is a critical point since, CalTrout personnel have conceded that a listing of O. Mykiss that includes stocked rainbow trout, which are extremely prevalent throughout California, would likely undermine any effort to list O. Mykiss as endangered. It strains credulity to say that a species is endangered and listing may be warranted while at the same time that same fish can be legally caught by anglers in stocked waterways throughout California. The listing and/or the 2084 rule should clearly indicate that stocked fish are not "native" O. Mykiss that are potentially subject to candidate species listing. This clarification will avoid needless confusion and improper allegations in the future should a stocked fish be found dead as part of the normal operations of the water agencies that stocked the fish in the first instance.

In the event the Commission takes action to proceed with listing Southern California Steelhead as an endangered species under CESA, OCWD requests that the Santa Ana River be specifically excluded from the listing area since the SAR is not within the limits of anadromy given existing and critical structural barriers existing within the SAR. As discussed below in this letter, the highly urbanized nature of the Santa Ana River watershed has resulted in the construction of an extensive series of man-made facilities—many of which are necessary for flood control purposes that make coastal Orange County safe and habitable—that limit any anadromous waters to only the lowest reach of the Santa Ana River near the coast which do not contain appropriate flows and river gravels to enable successful spawning. Due to these constraints, and as CDFW staff have informally acknowledged, there is no reasonable expectation that native Southern California Steelhead populations would be physically able to traverse the portion of the Santa Ana River upstream of approximately the I-405 freeway crossing.

Considerations Regarding the Santa Ana River

The lower portion of the Santa Ana River is a highly urbanized waterway for portions of the SAR that occur in Orange County. The Santa Ana River has been highly modified from the natural condition with extensive flood control improvements that include an approximately 6-mile long section near the coast that is concrete-lined, followed by fourteen flood control drop structures that would effectively restrict the ability of Southern California Steelhead to reach waters that could serve as anadromous O. Mykiss habitat. The concrete-lined section and drop structures are described below and are shown graphically on the Figure 1 prepared by OCWD.

The concrete-lined portion of the SAR begins approximately 4 miles from the mouth of the river north of the Adams Street bridge adjacent to the cities of Huntington Beach and Costa Mesa. This concrete lined and channelized section of the river continues

approximately 6 miles to the southern portion of River View Golf Course which is located north of the 17th Street bridge in the City of Santa Ana. The 6-mile section of the SAR remains continuously concrete-lined without any soft-bottom areas that could potentially provide refuge for migrating Southern California Steelhead.

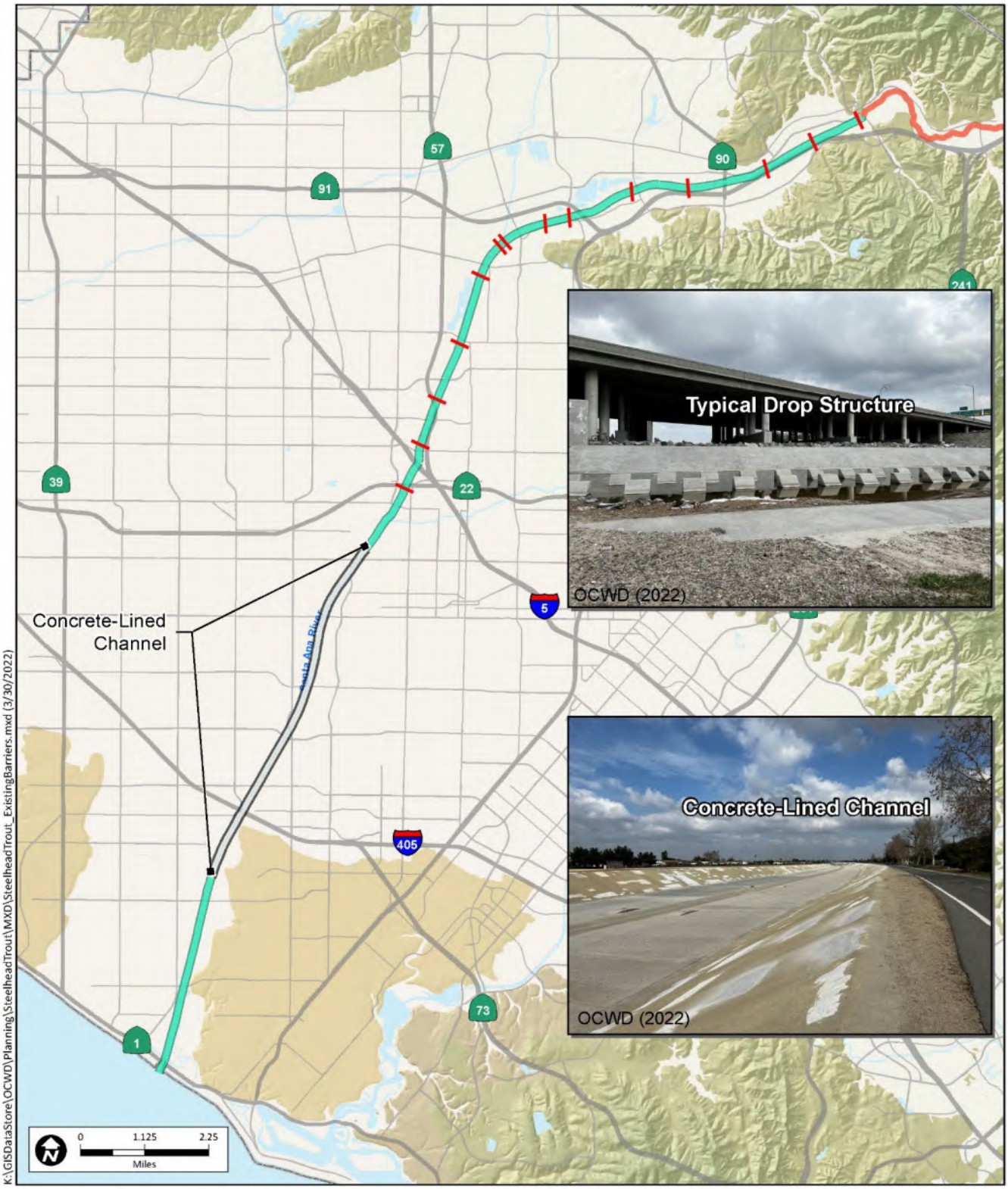
The US Army Corps of Engineers installed a series of 14 concrete drop structures in the Santa Ana River that are approximately 8 feet in height (see Figure 1). The drop structures occur along a soft-bottomed stretch of the Santa Ana River that extends from near the SR-22 Freeway crossing in the City of Santa Ana to a portion of the river just west of the Yorba Linda Boulevard bridge in the City of Anaheim. The drop structures were constructed along a portion of the Santa Ana River measuring approximately 11.5 total miles. These locations, along with a representative photo of the drop structures, are included on the enclosed exhibit prepared by OCWD.

Other limits on any potential anadromy include the presence of a golf course within the Santa Ana River in the City of Santa Ana that extends through the Santa Ana River for over a mile of the river's length. Additionally, the Santa Ana River from the Yorba Linda Boulevard Crossing to Prado Dam lacks lateral connectivity to the floodplain during most flow conditions due to the presence of an incised channel within the soft-bottom portions of the river. Finally, the lower Santa Ana River is separated from the headwaters by the presence of Prado Dam, which is a total barrier to fish passage. However, based on our discussions with CDFW staff, OCWD understands that it is highly unlikely any anadromous O. Mykiss could ever make it past the concrete lined portion of the river, much less past the drop structures, and all the way to Prado Dam.

The highly modified Santa Ana River system improvements have altered hydrologic and hydraulic conditions which exclude the presence of steelhead. The extirpation of the species in the SAR, to the extent it was ever fully established, is recognized by NMFS; the status review for Steelhead completed in 2005 includes mention of the Santa Ana River. The status review cites Nehlsen et al. (1991) as listing the Santa Ana River steelhead stock as extinct (NMFS 2005)[1]. Similarly, the 2016 status review states that native steelhead lineages have been nearly extirpated from the far southern California region of the native range of O. mykiss, with only a few relict populations persisting in the headwaters of the San Gabriel, Santa Ana, and San Luis Rey rivers (NMFS 2016)[2]. According to the California Natural Diversity Database, steelhead have not been observed in the Santa Ana River below Prado Dam for over 70 years.

[1] National Marine Fisheries Service. 2005. Updated Status of Federally Listed ESUs of West Coast Salmon and Steelhead. U.S. Dept. CommerNOAA Tech. Memo. Report by T.P. Good, R.S. Waples, and P. Adams.

[2] National Marine Fisheries Service. 2016. 5-Year Review: Summary and Evaluation of Southern California Coast Steelhead Distinct Population Segment. National Marine Fisheries Service. West Coast Region. California Coastal Office. Long Beach, California.


Typical Drop Structure
OCWD (2022)
Concrete-Lined Channel
Concrete-Lined Channel
OCWD (2022)
Santa Ana River
57
91
90
241
39
22
5
405
73
1
0
1.125
2.25
Miles
K:\GISDataStore\OCWD\Planning\SteelheadTrout\MXD\SteelheadTrout_ExistingBarriers.mxd (3/30/2022)
Santa Ana River - Concrete-Lined
Santa Ana River - Soft Bottom
Santa Ana River*
* North/East of Weir Canyon Road/Yorba Linda Blvd.
Structures in Santa Ana River
Drop Structures (14 total)
Existing Barriers
within Santa Ana River
SOURCE: OCWD (03/2022)

Also, the August 2010 draft report 'History and status of steelhead in California coastal drainages south of San Francisco Bay', by Titus, R. G., D. C. Erman, and W. M. Snider, *In draft* for publication as a Department of Fish and Game, Fish Bulletin, states:

> "CDFG fish sampling surveys in 1951 and 1955 in main stem sections of the Santa Ana River below Prado Dam produced no fish, although warmwater species were thought to be present. In 1957, the CDFG indicated that steelhead had occurred in the Santa Ana River drainage but that they were no longer found there; however, resident rainbow trout were still found in mountain headwaters (R. R. Bell, CDFG, unpubl. file letter of 16 October 1957; see also Swift et al. 1993). Flow in the lower Santa Ana is composed primarily of effluent from water treatment facilities except during the rainy season. Because of this, in addition to restricted releases from Prado Dam, fish occurrence in the lower Santa Ana is limited (C. Marshall, CDFG, unpubl. file letter of 30 August 1984). Nehlsen et al. (1991) listed the native Santa Ana River steelhead stock as extinct."

Over summer rearing habitat in the lower river (downstream of Prado dam is not present due to extensive urbanization and hydrologic modification. Boughton et al. (2006) found no potential over-summering habitat existing in the lower Santa Ana River. Levee construction and flood control activities have completely removed instream and riparian habitat from extensive reaches of the mainstem of the Santa Ana River (NMFS 2011)[3].

Prior to the construction of manmade barriers to fish passage, steelhead may have sporadically used the lower river as a migratory pathway to access higher quality spawning habitat in upper watershed tributaries. It is therefore possible that if remnant steelhead populations exist in the headwaters of the SAR, in some years, they could still theoretically produce anadromous progeny which seek to move downstream to the ocean then return in subsequent years to their natal spawning grounds. However, the presence of Seven Oaks and Prado dams make successful juvenile steelhead emigration impossible, or nearly so, in all but the wettest of water years where both dams spill. Even in these years, juvenile passage through non-native predator laden reservoirs and the extensive urban corridor is likely exceedingly rare. Given freshwater emigration and ocean survival rates for steelhead are low (less than 15%, [Shapovalov and Taft 1954][4], [Quinn 2005])[5], adult steelhead returning to the Santa Ana River is highly improbable under current conditions, conditions and associated critical infrastructure that is needed to prevent the catastrophic floods that historically plagued the SAR.

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[3] National Marine Fisheries Service. 2011. Southern California Steelhead Recovery Plan. Southwest Region, Protected Resources Division, Long Beach, California.

[4] Shapovalov, L., and A.C. Taft. 1954. The Life Histories of the Steelhead Rainbow Trout (Salmo gairdneri gairdneri) and Silver Salmon (Oncorhynchus kisutch) With Special Reference to Waddell Creek, California, and Recommendations Regarding Their Management. California Department of Fish and Game, Fish Bulletin, No. 98: 1-375

[5] Quinn, T.P. 2005. The Behavior and Ecology of Pacific Salmon and Trout. American Fisheries Society and University of Washington Press; Seattle, Washington

Successful upstream migration in the lower river is further precluded by the existence of an approximately 6-mile length of concrete lined, trapezoidal flood control channel just upstream of the tidally influenced river mouth and the presence of the fourteen flood control drop structures. Concrete flood control channels have been recognized throughout California as barriers to steelhead passage (Mann and Garello 2011[6], Phillips 2001[7], Council for Watershed Health 2020[8], NMFS 2011[9]). Flood control channels present hydraulic barriers (also referred to as a 'velocity barrier') to steelhead due to water velocities exceeding their swimming capability.

A velocity barrier likely exists in the concrete-lined channelized section of the Santa Ana River because the simplified channel lacks physical structures that displace the force of water. When migrating to spawning grounds, steelhead also need locations to rest and recover at speeds below 1.5 m/s (U.S. Bureau of Reclamation, 2019[10]). The existing flood control channel likely does not offer any locations for migrating fish to rest and recover when flows are high enough to provide sufficient passage depth. Conversely, during lower flows, the channel also likely results in a passage barrier due to the water being too shallow for fish to move between habitats. Of the 14 drop structures present in the lower river, three were assessed by CDFW and were identified in the California Fish Passage Assessment Database (CPAD) as total barriers. Documentation of the evaluations as available in the CPAD is provided in Attachment 1.

The lack of sufficient water in the SAR to recover southern California steelhead is noted in light of current and future conditions in the Santa Ana River Watershed. The Draft Upper Santa Ana River Habitat Conservation Plan (HCP) report dated May 2021 includes a forecast of Santa Ana River flow. The forecast of future flow rates in the SAR includes accounting for two forecasted conditions: the current condition with a repeat of historic rainfall and a second condition with additional planned water recycling and stormwater capture projects in the area tributary to Prado Dam. The planned water recycling and stormwater capture project in the area tributary to Prado Dam will reduce the flow rate of the Santa Ana River into Prado Basin and the flow through Prado Dam. The HCP's report forecasting indicates the future flow of the SAR entering Prado Basin during the month of April for the 50th percentile exceedance will be 56 cubic feet per second (cfs) with additional new projects identified in the HCP. This compares to the estimated current condition assuming a repeat of historic rainfall of 83 cubic feet per second (cfs) based on the 50th percentile exceedance (without additional new projects). The future flow rate of

[6] Mann, J. and M. Garello. 2011. Flood Channels: Fish Passage Design Evaluation and Refinement for the Mission Creek Flood Control Channel. Conference Paper - American Fisheries Society 140th Annual Meeting.
[7] Phillips, B. 2001. Design of Fish Passage Mitigation Measures for Existing Flood Control Channels. Proceeding of the 2001 International Symposium on Environmental Hydraulics.
[8] Council for Watershed Health. 2020. Conceptual Ecological Model and Limiting Factors Analysis for Steelhead in the Los Angeles River Watershed. Final Technical Memorandum. Prepared by Stillwater Sciences.
[9] National Marine Fisheries Service. 2011. Southern California Steelhead Recovery Plan. Southwest Region, Protected Resources Division, Long Beach, California.
[10] U.S. Bureau of Reclamation (2019). Design and Analysis of Ecosystem Features in Urban Flood Control ChannelsResearch and Development Office, Science and Technology Program. Final Report ST-2019-1726-01

the SAR entering Prado Basin is estimated to decrease 33 percent from the estimated current condition. This flow rate of the SAR entering Prado Basin, together with smaller amounts of flow from Chino Creek, has some additional losses due to evapotranspiration in Prado Basin. The flow that eventually passes through Prado Dam would all infiltrate in the SAR channel at least 10 miles upstream of the ocean. Thus, it simply makes no sense for a listing of the SAR for O. Mykiss since the barriers to anadromy are so substantial. We appreciate the Commission's review of our comments and look forward to working with the Commission, Commission staff, and CDFW on this matter.

Sincerely,

Michael R. Markus, P.E., D.WRE, BCEE, F.ASCE
General Manager

Attachments:

- Attachment 1 – California Fish Passage Assessment Database (CPAD) Lower Santa Ana River Search Results

Attachment 1
California Fish Passage Assessment Database (CPAD) Lower Santa Ana River Search Results

	Zoom	Species	Photo	PAD_ID	PassageID	StreamName	TributaryT	SiteName	SiteType	BarStatus	NumStructures	Protocol	AssessedBy
1	Go	Steelhead	Open	765173	413871	Santa Ana River	Pacific Ocean	Concrete drop structure	Dam	Total	Null	HEC-RAS Hydrologic Model	California Department of Fish and Wildlife

SurveyDate	TrtStatus	YrTreated	TreatedBy	StructOwner	LandOwner	Notes
2014	Null	Null	Null	Null	Orange County	USFWS Santa Ana Sucker 2014 assessment: Upstream of Imperial Highway Bridge. This is a very substantial concrete drop structure, about 87.8 meters wide and 3 meters high. In 2021, using LiDAR (reducing cell size to 5 ft) and Hec-Ras, this was estimated to be a complete barrier to steelhead upstream passage due to an estimated jump height of 7.35 feet during high flows and a jump height of 7.81 feet during low flows. Does not meet passage design criteria for juvenile or adult salmonids (0.5 ft and 1ft drop, respectively) or fish passage assessment criteria for adult salmonids (2 ft drop).

	Zoom	Species	Photo	PAD_ID	PassageID	StreamName	TributaryT	SiteName	SiteType	BarStatus	NumStructures	Protocol	AssessedBy
1	Go	Santa Ana Sucker	Open	765172	413870	Santa Ana River	Pacific Ocean	Concrete drop structure	Dam	Total	Null	HEC-RAS Hydrologic Model	California Department of Fish and Wildlife

SurveyDate	TrtStatus	YrTreated	TreatedBy	StructOwner	LandOwner	Notes
2014	Null	Null	Null	Null	Orange County	USFWS Santa Ana Sucker 2014 assessment: Downstream of Weir Canyon Bridge. This is a very substantial concrete drop structure, about 86.7 meters wide and 2.5 meters high. In 2021, using LiDAR (reducing cell size to 5 ft) and Hec-Ras, this was estimated to be a complete barrier to steelhead upstream passage due to an estimated jump height of 7.2 feet during high flows and a jump height of 6.18 feet during low flows. Does not meet passage design criteria for juvenile or adult salmonids (0.5 ft and 1ft drop, respectively) or fish passage assessment criteria for adult salmonids (2 ft drop).

	Zoom	Species	Photo	PAD_ID	PassageID	StreamName	TributaryT	SiteName	SiteType	BarStatus	NumStructures	Protocol	AssessedBy
1	Go	Steelhead	Open	765171	413869	Santa Ana River	Pacific Ocean	Concrete drop structure	Dam	Total	Null	HEC-RAS Hydrologic Model	California Department of Fish and Wildlife

SurveyDate	TrtStatus	YrTreated	TreatedBy	StructOwner	LandOwner	Notes
2014	Null	Null	Null	Null	Orange County	USFWS Santa Ana Sucker 2014 assessment: Weir Canyon Bridge is in the background to the right. This is a very substantial concrete drop structure, about 68 meters wide and 1.5 meters high. In 2021, using LiDAR (reducing cell size to 5 ft) and Hec-Ras, this was estimated to be a complete barrier to steelhead upstream passage due to an estimated jump height of 2.09 feet during high flows and a jump height of 3.01 feet during low flows. Does not meet passage design criteria for juvenile or adult salmonids (0.5 ft and 1ft drop, respectively) or fish passage assessment criteria for adult salmonids (2 ft drop).

Source: www.calfish.org/ProgramsData/HabitatandBarriers/CaliforniaFishPassageAssessmentDatabase.aspx accessed 3-3-2022