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7

8
9 BEFORE THE CALIFORNIA
10 STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of Draft Cease and Desist Order
12 No. 2008-00XX-DWR Against California
American Water Company

**CALIFORNIA AMERICAN WATER PRE-
HEARING BRIEF ON PROCEDURAL
MATTERS**

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1 SUMMARY OF POINTS

2 *California American Water ("CAW") recognizes that the Hearing Officers and Hearing*
3 *Team will likely receive a relatively large number and volume of briefs on procedural issues.*
4 *With that in mind, CAW provides the following outline of its pre-hearing brief. This outline*
5 *is a condensed summary of CAW's arguments. The brief should be reviewed in its entirety to*
6 *fully consider CAW's positions.*

7 BACKGROUND

- 8
- 9 • On January 15, 2008, Mr. James W. Kassel, Assistant Deputy Director for Water Rights for the
10 State Water Resources Control Board ("State Water Board"), notified CAW that he would seek
11 a cease and desist order ("CDO") against CAW for its alleged violation of Condition 2 of Order
12 95-10. At that time, Mr. Kassel transmitted to CAW a draft CDO.
 - 13 • On February 4, 2008, CAW requested that the State Water Board hold a hearing to address Mr.
14 Kassel's allegations. The State Water Board issued an official notice for a hearing on March 5,
15 2008.
 - 16 • The State Water Board held a pre-hearing conference on March 19, 2008, at which Hearing
17 Officer Baggett confirmed that Mr. Kassel's letter, the draft CDO, and the notice for the
18 hearing were limited to a single issue: whether CAW violated Condition 2 of Order 95-10. At
19 the pre-hearing conference, several non-party entities seeking to intervene in this matter
20 requested that the State Water Board expand the scope of this hearing.

21 REQUESTS TO EXPAND THE SCOPE OF THIS HEARING MUST BE DENIED

- 22
- 23 • If the State Water Board were to expand the scope of this hearing:
 - 24 (a) It would violate the Water Code, State Water Board regulations, and Due Process
 - 25 protections.
 - 26 (b) It would violate well-established legal principles that require those seeking to intervene
 - 27 in an adjudication to take the case as originally brought.
 - 28 (c) It would violate the doctrines of res judicata and collateral estoppel.
 - (d) It would take action inconsistent with a prior settlement of litigation, which the parties
 - thereto settled with prejudice.

21 THE STATE WATER BOARD SHOULD BIFURCATE THE HEARING

- 22
- 23 • The hearing should be bifurcated into two phases: a liability phase and remedy phase.
24 Bifurcation will allow representation of all relevant evidence, while maximizing efficiency of
25 the hearing and clarity of the administrative record.

24 THE STATE WATER BOARD MUST RESERVE DECISION ON THE ROLE OF NON-PARTY
25 ENTITIES

- 26
- 27 • The State Water Board cannot decide what role, if any, non-party entities seeking to intervene
28 may serve in this hearing until the State Water Board addresses the scope of this hearing.
Accordingly, CAW reserves its right to submit written and/or oral argument to the State Water
Board regarding their level of participation, if any, of non-party entities, until after the State
Water Board address the scope of this hearing.

1 **I. Introduction**

2 On January 15, 2008, Mr. James W. Kassel, Assistant Deputy Director for Water Rights for
3 the State Water Resources Control Board (“State Water Board”), notified the California American
4 Water Company (“CAW”), that he would seek a cease and desist order from the State Water Board
5 against CAW. Mr. Kassel alleged that the State Water Board should issue a cease and desist order
6 against CAW because CAW was violating Condition 2 of State Water Board Order No. 95-10
7 (“Order 95-10”). Based on that notice, CAW requested that the State Water Board hold a formal
8 hearing to consider Mr. Kassel’s allegation. On March 5, 2008, the State Water Board noticed such
9 a hearing. The noticed hearing is consistent with Mr. Kassel’s allegation. On March 19, 2008, the
10 hearing officers held a pre-hearing conference. At that conference, Hearing Officer Arthur Baggett
11 confirmed the scope of the hearing is limited to that single issue.

12 Nonetheless, at a March 19, 2008 pre-hearing conference, a number of non-party entities
13 appeared before the State Water Board. Among those non-party entities were the Ventana Chapter
14 of the Sierra Club (“Sierra Club”), the California Sportfishing Protection Alliance (“CalSPA”), the
15 Carmel River Steelhead Association (“Carmel Steelhead Association”), the California Salmon and
16 Steelhead Association, and the Public Trust Alliance. Each of those non-party entities sought to
17 intervene in the hearing and to substantially expand its scope. For the reasons presented herein,
18 CAW strenuously objects to the expansion of the scope beyond that provided in the notice.¹

19 Simply stated, if the State Water Board were to expand the scope of the noticed hearing, the
20 rights of CAW and the law would be violated. The State Water Board must maintain the existing
21 scope of the hearing. It must initially consider whether CAW has violated Order 95-10, and, only if
22 it finds that a violation has occurred, consider what remedy it should impose. Addressing the issue
23 of liability for an asserted breach of Order 95-10 separate from the issue of appropriate remedy if a
24 breach occurred will maximize efficiency of the proceeding and clarity of the administrative record.

25
26 ¹ Whether it is appropriate for, and to what degree, any of the non-party entities to participate in this hearing may
27 depend upon whether the State Water Board decides to maintain or expand the existing scope of the hearing.
28 Accordingly, as set forth in Section V below, CAW reserves its right to submit written and/or oral argument to the State
Water Board regarding the level of participation, if any, of non-party entities, until after the State Water Board
addresses the scope of this hearing.

1 **II. Background**

2 **A. California American Water Company**

3 CAW is a California corporation authorized to conduct business in the state of California.
4 (Exhibit CAW-019 (Declaration of B. Kent Turner), filed concurrently herewith, p. 1.) It is a
5 wholly-owned subsidiary of American Water Works Company, Inc. (Exhibit CAW-019
6 (Declaration of B. Kent Turner), p. 1.) CAW has been issued a Certificate of Public Convenience
7 and Necessity by the California Public Utilities Commission (“CPUC”) to operate as a Class A
8 regulated water and wastewater utility. (Exhibit CAW-019 (Declaration of B. Kent Turner), p. 1.)
9 CAW collects, treats, and distributes water for public and private use and consumption. (Exhibit
10 CAW-019 (Declaration of B. Kent Turner, p. 1.) CAW provides water service to most of the
11 Monterey Peninsula, including the cities of Carmel, Del Rey Oaks, Monterey, Pacific Grove, Sand
12 City and Seaside. (Exhibit CAW-019 (Declaration of B. Kent Turner), p. 2.) In addition, CAW
13 services the unincorporated areas of the Carmel Valley and the Highway 68 corridor. (Exhibit
14 CAW-019 (Declaration of B. Kent Turner), p. 2.) Public Utilities Code section 451 requires CAW,
15 as a regulated public utility to furnish water to customers within its service area. (*See Hotchkiss v.*
16 *Moran* (1930) 109 Cal.App. 321; *W. H. Brockmann v. Smithson Springs Water Co.* (1957) 56
17 Cal.P.U.C. 28.) CAW’s mission is to provide a safe, reliable, and affordable water supply to its
18 customers. (Exhibit CAW-019 (Declaration of B. Kent Turner), p. 1.) Without sufficient water
19 supplies, the health and safety of CAW’s customers is jeopardized – a fact recognized by the State
20 Water Board in Order 95-10. (Staff Exhibit 2 (Order 95-10), p. 37.)

21 **B. Water Rights Order 95-10**

22 **1. Order 95-10**

23 Between 1987 and 1991, the Carmel Steelhead Association, Resident’s Water Committee
24 (“RWC”), Sierra Club, and California Department of Parks and Recreation (“DPR”), each filed a
25 complaint against CAW. (Exhibit CAW-001 (Carmel Steelhead Association Complaint); Exhibit
26 CAW-002 (Resident’s Water Committee Complaint); Exhibit CAW-003 (Department of Parks and
27 Recreation Complaint); and Exhibit CAW-004 (Sierra Club Complaint).) These complaints
28 alleged, at least in part: (1) CAW’s diversions of Carmel River water were unauthorized; (2) the

1 unauthorized diversions were unreasonable; and (3) the diversions caused harm to public trust
2 resources, including steelhead and other fisheries, wildlife, and riparian habitat. (Exhibit CAW-001
3 (Carmel Steelhead Association Complaint); Exhibit CAW-002 (Resident's Water Committee
4 Complaint); Exhibit CAW-003 (Department of Parks and Recreation Complaint); and Exhibit
5 CAW-004 (Sierra Club Complaint).)

6 The State Water Board, in Order 95-10, addressed each of those complaints. It determined
7 that, although CAW held water rights to 3,376 acre-feet per year from the Carmel River, CAW
8 would be authorized to divert up to 14,106 acre-feet per year. (Staff Exhibit 2 (Order 95-10), p. 40.)
9 When providing that authorization, the State Water Board imposed on CAW thirteen conditions,
10 one of which has now reduced the amount of water CAW can divert from the Carmel River to
11 11,285 acre-feet per year – a 20 percent reduction from 14,106 acre-feet. (See Staff Exhibit 2
12 (Order 95-10), p. 40.) The State Water Board imposed other conditions that require CAW to take
13 actions to mitigate for potential, continued impacts of its diversions on public trust resources. (Staff
14 Exhibit 2 (Order 95-10), pp. 40-44.) In Order 95-10, the State Water Board acknowledged that the
15 “physical solution” it developed was necessary because “[t]he people and businesses on the
16 Monterey Peninsula must continue to be served water from the Carmel River in order to protect
17 public health and safety.” (Staff Exhibit 2 (Order 95-10), p. 37.)

18 **2. Litigation Challenging Order 95-10**

19 CAW, Monterey Peninsula Water Management District (“MPWMD”), Sierra Club, Carmel
20 Steelhead Association, and CalSPA filed petitions for writ of mandate in Monterey County Superior
21 Court challenging Order 95-10. (Staff Exhibit 4 (Water Board Order No. WR 98-04 (“Order 98-
22 04”), pp. 1-2.) On February 19, 1998 reflecting *, the State Water Board issued Order 98-04. Order
23 98-04 was based in significant part, on a settlement reached among the parties to that litigation. As
24 a result of the State Water Board issuing Order 95-10, the parties to dismiss their actions with
25 prejudice (See Staff Exhibit (Order 98-4), pp. 2-6; Exhibit CAW-017 (Order Cases nos. M33519,
26 M33520, and 105610, June 6, 1998).

27 ///

28 ///

1 **3. Order 98-04, WR Order 2001-04, And WRO 2002-0002**

2 The State Water Board issued Order 98-04 on February 19, 1998. (Staff Exhibit 4 (Order
3 98-04), p. 6.) Order 98-04 modified Conditions 4, 5, 6, and 13 of Order 95-10. (Staff Exhibit 4
4 (Order 98-04), pp. 4-5) As modified, Condition 4 directed CAW to maximize production from the
5 Seaside Aquifer during periods of low flow and minimize production from the Seaside Aquifer
6 during periods of flow above 40 cubic feet per second.² (Staff Exhibit 4 (Order 98-04), p. 4.)
7 Condition 5 was modified to require extraction from downstream wells to the maximum extent
8 feasible “without inducing sea water intrusion.” (Staff Exhibit 4 (Order 98-04), p. 4.) Condition 13
9 was modified to include a reporting requirement which detailed the total amount being pumped
10 from wells and indicate the location and amount pumped from each well. (Staff Exhibit 4 (Order
11 98-04), p. 5.) The modified Condition 13 also required CAW to submit a quarterly water budget.
12 (Staff Exhibit 4 (Order 98-04), p. 5.)

13 As modified, Condition 6 required CAW to conduct two studies to evaluate the feasibility,
14 benefits, and costs of alternatives to using the Carmel Valley Filter Plant (“CVFP”) to provide more
15 surface flow to the Carmel River. (Staff Exhibit 4 (Order 98-04), p. 4.) Specifically, Condition 6
16 required: (1) a study on supplying water from downstream wells to areas now served by the CVFP,
17 and (2) a study on utilizing the Begonia Treatment Plant in lieu of the CVFP. (Staff Exhibit 4
18 (Order 98-04), p. 4.) CAW completed the first study prior to the State Water Board’s issuance of
19 Order 98-04. (Exhibit CAW-006 (State Water Board Order No. WR 2001-04-DWR (“Order 2001-
20 04”)), p. 8, fn. 4.) CAW also prepared the study on utilization of the Begonia Treatment Plant.
21 (Exhibit CAW-006 (Order 2001-04), p. 8.) Condition 6 required CAW to provide an opportunity
22 for comment. (Staff Exhibit 4 (Order 98-04), p. 4.) A number of entities and one person provided
23 the State Water Board with comments on findings of the Begonia Treatment Plant study. (Exhibit
24 CAW-006 (Order 2001-04), p. 8.)

25 Thereafter, on April 18, 2001, upon consideration of the submitted comments, the State
26

27 ² On March 27, 2006, the Superior Court issued a final decision in an adjudication of the Seaside Basin. That decision
28 will likely cause CAW to reduce over time its appropriation of water from the Seaside Basin. (Exhibit CAW-005
(Seaside Basin Adjudication).)

1 Board issued Order 2001-04. (Exhibit CAW-006 (Order 2001-04).) Order 2001-04 imposed
2 additional conditions that required CAW to modify its diversion practices. (Exhibit CAW-006
3 (Order 2001-04), pp. 17-18.) Petitions for reconsideration of Order 2001-04 were filed by CAW,
4 the Carmel Steelhead Association, MPWMD, and the Sierra Club. (Staff Exhibit 5 (State Water
5 Board Order No. WRO 2002-0002 (“Order 2002-02”)), p. 4.) The State Water Board granted the
6 petitions for reconsideration and held a hearing to consider whether Order 2001-04 should be
7 modified. (Staff Exhibit 5 (Order 2002-02), p. 4.) As a result of that hearing, the State Water
8 Board issued Order 2002-02. Through that Order, the State Water Board rescinded Order 2001-04
9 and established a new set of requirements CAW needed to meet to comply with Condition 6 of
10 Order 95-10. (Staff Exhibit 5 (Order 2002-02), pp. 17-20.)

11 **C. Notice of Draft Cease and Desist Order**

12 On January 15, 2008, Mr. Kassel, Assistant Deputy Director for Water Rights for the State
13 Water Board, sent a letter to Mr. Turner, president of CAW, providing CAW with notice that Mr.
14 Kassel intended to pursue an enforcement action against CAW. (Exhibit CAW-007 (Letter from
15 James Kassel), p. 1.) In his letter, Mr. Kassel indicated that he approved the issuance of a draft
16 cease and desist order because the “Division staff determined that in the twelve years since Order
17 95-10 was adopted, [CAW] has not complied with Condition 2 of that Order.” (Exhibit CAW-007
18 (Letter from James Kassel), p. 1.) Mr. Kassel enclosed with his letter a draft cease and desist order
19 (“Draft CDO”). The Draft CDO contained proposed findings to support Mr. Kassel’s view that
20 CAW has not complied with Order 95-10. (Staff Exhibit 7 (Draft CDO), p. 5.) It also proposed a
21 schedule of mandatory CAW diversion reductions. (Staff Exhibit 7 (Draft CDO), p. 5.) As
22 required by law, Mr. Kassel provided CAW with 20 days to request a hearing before the State Water
23 Board. (Exhibit CAW-007 (Letter from James Kassel), p. 1.)

24 On February 4, 2008, CAW timely responded to Mr. Kassel’s letter, requesting a hearing on
25 the Draft CDO. (Exhibit CAW-008 (Letter from Jon D. Rubin).) Shortly thereafter, on February
26 22, 2008, the State Water Board informally provided notice that it would hold a pre-hearing
27 conference, a meeting to receive public policy statements, and an evidentiary hearing. (Exhibit
28 CAW-009 (Letter from Charles L. Lindsay).) The State Water Board provided official notice of the

1 pre-hearing conference, the meeting to receive public policy statements, and the hearing on
2 March 5, 2008. (Exhibit CAW-010 (Official Notice of Hearing), p. 1.)

3 The State Water Board's official notice for this hearing maintains the same focus as Mr.
4 Kassel's letter and the Draft CDO. In the official notice, the State Water Board describes why it
5 issued the Draft CDO and what requirements it imposed on CAW through Order 95-10. (Exhibit
6 CAW-010 (Official Notice of Hearing), p. 2.) Then, the State Water Board describes the Draft
7 CDO. Those statements are followed by a presentation of the key issue:

8 Should the State Water Board adopt the draft CDO? If the draft CDO should be
9 adopted, should any modifications be made to the measures in the draft order? What
10 is the basis for each modification?

11 (Exhibit CAW-010 (Official Notice of Hearing), p. 3.)

12 In addition, the notice identified the State Water Board prosecutorial team and CAW as the
13 two parties to this hearing.³ (Exhibit CAW-011 (Information Regarding Appearance), p. 1.) It
14 acknowledged that non-party person or entities "may participate as authorized by the hearing
15 officer." (Exhibit CAW-011 (Information Regarding Appearance), p. 1.) Upon receipt of the
16 hearing notice, 18 non-party entities expressed interest in intervening in this hearing by filing
17 notices of intent to appear. The State Water Board held the pre-hearing conference on March 19,
18 2008. During the pre-hearing conference, Hearing Officer Baggett confirmed that the current scope
19 of the hearing concerned a single issue: whether CAW has violated Condition 2 of Order 95-10.
20 (Exhibit CAW-018 (Certified Pre-hearing Conference Transcript ("Pre-hearing Transcript")), p. 39,
21 ln. 24-25.) Hearing Officer Baggett stated that whether CAW has violated Condition 2 of 95-10 is
22 "the current scope of this proceeding." (Exhibit CAW-018 (Pre-hearing Transcript), p. 39, ln. 24-
23 25).

24 Notwithstanding that statement, non-party entities the Sierra Club, CalSPA, Carmel
25 Steelhead Association, California Salmon and Steelhead Association, and the Public Trust Alliance
26 requested an expansion of the hearing's scope. (Exhibit CAW-018 (Pre-hearing Transcript), p. 22,

27 ³ CAW is concerned that the State Water Board may not afford it due process in this hearing. CAW reserves its right to
28 file a motion asserting that its due process rights may be violated due to the composition of the State Water Board's
prosecutorial and hearing teams.

1 ln. 11-13; p. 25, ln. 19-21; p.33, ln. 9-11; p.34, ln. 6-8.) Hearing Officer Baggett recognized that if
2 he were to grant the requests, he would:

3 [R]eopen basically [Order 95-10]. Reopen the hearing. Take new evidence in on
4 [sic] the state and the condition of the river. . . . And that wouldn't be as quick as
5 just dealing with the narrow issue of the cease and desist, which is before us now.
6 It's much narrower than opening up the whole proceeding.

6 (Exhibit CAW-018 (Pre-hearing Transcript), p. 27, ln. 8-16).

7 **III. Scope of Hearing**

8 **A. Law and Equity Demand That The Scope Of This Hearing Remain Limited To**
9 **The Issue of Whether CAW Has Violated Order 95-10**

10 It is beyond reasonable argument that the existing scope of this hearing is limited to a single
11 issue: whether CAW has violated condition 2 of Order 95-10. The notice provided by Mr. Kassel
12 on January 15, 2008, (Exhibit CAW-007 (Letter from James Kassel)), the notice provided by the
13 State Water Board on March 5, 2008, (Exhibit CAW-010 (Official Notice of Hearing)), and Hearing
14 Officer Baggett's statements on March 19, 2008, (Exhibit CAW-019 (Pre-Hearing Transcript))
15 establish and confirm that scope. Nothing in the record suggests that the State Water Board would
16 consider any other issues.

17 The State Water Board is now faced with requests by non-party entities the Sierra Club,
18 CalSPA, Carmel Steelhead Association, California Salmon and Steelhead Association, and the
19 Public Trust Alliance that ask the State Water Board to conduct a much more expansive hearing.
20 (Exhibit CAW-018 (Pre-hearing Transcript), p. 22, ln. 11-13; p. 25, ln. 19-21; p.33, ln. 9-11; p.34,
21 ln. 6-8.) Law and equity require the scope to remain as currently defined.

22 The Water Code, State Water Board regulations, due process protections, well-established
23 principles on intervention, and the legal doctrines of collateral estoppel and res judicata all demand
24 that the State Water Board not change the scope of the hearing. The policies underlying the legal
25 doctrines of collateral esoppel and res judicata, such as equity and economy of the hearing, also
26 deter the re-visiting of previously resolved issues.⁴ Thus, the request of non-party entities Sierra

27 ⁴ Similarly, the Water Code encourages use of preclusion where appropriate. (*See generally*, Wat. Code, § 1850
28 ["determinations made pursuant to a cease and desist order shall be conclusive and shall preclude any party to the order
from raising those issues in any subsequent administrative proceeding".])

1 Club, CalSPA, Carmel Steelhead Association, California Salmon and Steelhead Association, and
2 the Public Trust Alliance must be denied.

3 **1. The Water Code, State Water Board Regulations, And Due Process**
4 **Prohibit Expansion Of The Scope Of This Hearing**

5 If the State Water Board were to expand the scope of this hearing, as requested during the
6 pre-hearing conference, the State Water Board would violate the Water Code, State Water Board
7 regulations, and due process rights of CAW. Under the Water Code, the State Water Board may
8 issue a cease and desist order only after providing the person or entity against whom the proposed
9 order would issue sufficient notice and an opportunity for a hearing. (Wat. Code, § 1831(c)4.) If
10 that person or entity requests a hearing, the State Water Board must notice a hearing. (Cal. Code
11 Regs., tit. 23, § 647.2.) The hearing notice must contain a statement of facts and “information that
12 would tend to show the proscribed action.” (Wat. Code, § 1834.) Further, the scope of the hearing
13 must be tailored to the issues set forth in the notice. (Exhibit CAW-012 (State Water Board Order
14 No. 99-012), p. 9, fn. 7 [due process prevented the State Water Board from considering a transfer of
15 more than 8,860 acre-feet because the hearing notice stated the proceeding would consider up to
16 that amount]; Exhibit CAW-013 (State Water Board Order No. WR 78-17), p. 5 [“[T]he scope of
17 the [State Water] Board’s action was specifically limited in the notices of the action.”]; Exhibit
18 CAW-014 (State Water Board Order No. WR 97-02), p. 4 [“A request for hearing must specify the
19 issues unresolved among the parties, and the [State Water Board] must restrict any hearing to such
20 issues.”].) In this case, the actions of the State Water Board and its staff defined the issue. It cannot
21 be expanded at this time.

22 The notice provided to CAW presents only one issue: whether CAW has violated condition
23 2 of Order 95-10. (Exhibit CAW-007 (Letter to James Kassel), p. 1; Exhibit CAW-010 (Official
24 Notice of Hearing), pp. 2-3.) The notice contains statements of facts and information that allegedly
25 show a violation of Order 95-10. It does not show an alleged violation of any other proscribed
26 action. CAW has not received notice that a hearing might be held on any other issue. Thus, if the
27 State Water Board were to expand the hearing, as requested by non-party entities, the scope of

28 ///

1 hearing would not be tailored to the issue set forth in the notice. The notice will not have properly
2 informed CAW of the totality of allegations. Expanding the hearing to issues beyond that set forth
3 in the notice violates CAW's due process protections established, in part, through the Water Code
4 and State Water Board regulations.

5 **2. Expansion Of This Hearing Should Be Precluded By Well-Established**
6 **Legal Principles That Require Those Seeking To Intervene To Take The**
7 **Case As Originally Brought**

8 Non-party entities the Sierra Club, CalSPA, Carmel Steelhead Association, California
9 Salmon and Steelhead Association, and Public Trust Alliance should be precluded from expanding
10 the scope of this hearing under well established principles governing the role of non-parties seeking
11 to participate in pending legal proceedings. The State Water Board has not designated any of those
12 non-party entities as participants. (Exhibit CAW-011 (Information Regarding Appearance at Water
13 Rights Hearings), p. 1.) Currently, they are simply entities seeking to intervene in this hearing. It is
14 well established proposed intervenors may not broaden the scope of the proceeding they seek to
15 join. (*City of San Diego v. Otay Municipal Water District* (1962) 200 Cal.App.2d 672, 681;
16 *LePleux v. Applegate* (1958) 164 Cal.App.2d 9, 11; *Bernheimer v. Bernheimer* (1948) 87
17 Cal.App.2d 242.) It is common sense that an "interest entitling a person to intervention must be an
18 interest in the matter . . . as originally brought." (*LePleux v. Applegate, supra*, 164 Cal.App.2d at
19 p. 11.) Similar to the judiciary, the State Water Board should not allow non-party entities to
20 substantially and substantively change this hearing.

21 **3. Collateral Estoppel and Res Judicata Prohibit Any Hearing Scope**
22 **Expansion**

23 The principles underlying the doctrines of collateral estoppel and res judicata also preclude
24 the Sierra Club, CalSPA, Carmel Steelhead Association, California Salmon and Steelhead
25 Association, and Public Trust Alliance from expanding the scope of this hearing. Collateral
26 estoppel and res judicata are legal doctrines which conserve valuable resources and eliminate
27 unnecessary proceedings. Collateral estoppel precludes a party from re-litigating issues in a second
28 proceeding that have been litigated and determined in a prior proceeding. (*Lucido v. Superior Court*

///

1 (1990) 51 Cal.3d 335, 341 (“*Lucido*”).) Collateral estoppel will bar an issue from being re-litigated
2 if: (1) the issue decided in a prior proceeding is identical to the current issue, (2) the issue was
3 actually litigated, (3) the issue was necessarily decided in the prior litigation, (4) the prior
4 proceeding resulted in a final judgment on the merits, and (5) the party against whom collateral
5 estoppel is being asserted is the same as, or in privity with, a party to the prior proceeding. (Exhibit
6 CAW-015 (State Water Board Order No. WR-2006-0008-EXEC (“Order 2006-0008-EXEC”)), p.11
7 [quoting *Lucido*, 51 Cal.3d at p. 341].)

8 Similarly, res judicata “operates as a bar to the maintenance of a second suit between the
9 same parties on the same cause of action.” (*Clark v. Leshner* (1956) 46 Cal.2d 874, 880.) Res
10 judicata applies if: (1) a claim or issue raised in the present action is identical to a claim or issue
11 raised in a prior proceeding, (2) the prior proceeding resulted in a final judgment on the merits, and
12 (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the
13 prior proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 253 [quoting *Brinton v. Bankers*
14 *Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556].)

15 Administrative agencies, including the State Water Board, recognize the doctrines of
16 doctrines of collateral estoppel and res judicata. (Exhibit CAW-015 (Order 2006-0008-EXEC),
17 p.13 [quoting *People v. Sims* (1982) 32 Cal.3d 468, 479][superseded on another grounds] (“*Sims*”);
18 *Williams v. City of Oakland* (1973) 30 Cal.App. 3d 64, 68].) The requirements of collateral
19 estoppel and res judicata are met in this proceeding and should bar any change in the scope of this
20 hearing.

21 Based on statements made during the March 19, 2008 pre-hearing conference, CAW
22 believes the Sierra Club, the CalSPA, the Carmel Steelhead Association, the California Salmon and
23 Steelhead Association, and the Public Trust Alliance seek to change the scope of this hearing to
24 allow litigation of the same claims and same issues previously adjudicated and settled in Order 95-
25 10. In 1992, the State Water Board began a multi-year evaluation of Carmel River water diversions
26 by CAW, which culminated in a comprehensive adjudicative hearing. (Staff Exhibit 2 (Order 95-
27 10), p. 14.) The State Water Board reviewed thousands of pages of technical data and heard
28 countless hours of expert testimony regarding the history and use of Carmel River water by CAW.

1 (Staff Exhibit 2 (Order 95-10), pp. 11-12, 21-22.) In rendering Order 95-10, the State Water Board
2 considered the impact of CAW's diversions on instream beneficial uses including: vegetative
3 resources (Staff Exhibit 2 (Order 95-10), pp. 25-26), wildlife resources, (Staff Exhibit 2 (Order 95-
4 10), pp. 26-27); fishery resources, (Staff Exhibit 2 (Order 95-10), p. 27); and steelhead resources in
5 particular. (Staff Exhibit 2 (Order 95-10); Exhibit CAW-018 (Pre-hearing Transcript), p. 12, ln. 21-
6 25 ["Order 95-10 makes many explicit findings concerning the fishery and Steelhead resources of
7 the Carmel River and the impact of the diversion by the CAW on these resources"].) As a result of
8 this exhaustive review, the State Water Board issued Order 95-10. That Order addressed CAW's
9 water rights to Carmel River water and the effects of CAW's continued diversions on other
10 beneficial uses of Carmel River water. (Staff Exhibit 2 (Order 95-10), pp. 39-40.)

11 Contrary to the contention expressed by the Sierra Club, CalSPA, Carmel Steelhead
12 Association, the California Salmon and Steelhead Association, and the Public Trust Alliance at the
13 pre-hearing conference, the State Water Board drafted Order 95-10 to address claims and issues
14 prospectively. Order 95-10 authorizes CAW to continue diversions from the Carmel River and sets
15 forth a plan to protect other beneficial uses of Carmel River water during those continued
16 diversions, including protections for fish and wildlife. (Staff Exhibit 2 (Order 95-10), p. 38 [the
17 State Water Board's "primary concern" was "the adoption of an order which, until a legal supply of
18 water can be developed or obtained, will require that Cal-Am: (1) minimize its diversions from the
19 Carmel River, (2) mitigate the environmental effects of its diversions, and (3) prepare a plan setting
20 forth (a) specific actions to develop or obtain a legal supply of water and (b) the dates specific
21 actions will have occurred so that progress on the plan can be objectively monitored."].) Therefore,
22 expansion promoted by the Sierra Club, CalSPA, the Carmel Steelhead Association, the California
23 Salmon and Steelhead Association, and the Public Trust Alliance seek would have the State Water
24 Board hear the same claims and issues as those already resolved by Order 95-10.

25 The claims and issues the Sierra Club, the CalSPA, the Carmel Steelhead Association, the
26 California Salmon and Steelhead Association, and the Public Trust Alliance likely seek to litigate in
27 this hearing were previously and "actually litigated." A claim or issue is actually litigated if has
28 been "properly raised, by the pleadings or otherwise, and is submitted for determination, and is

1 determined...” (Rest.2d, Judgments, § 27, com. D, p. 255.) As previously mentioned, Order 95-10
2 was the result of extensive briefing and a formal hearing before the State Water Board. (Staff
3 Exhibit 2 (Order 95-10).) It reflects a decision by the State Water Board on the claims and issues
4 raised by the parties and participants thereto.

5 The claims and issues addressed in Order 95-10 were necessarily decided. The State Water
6 Board’s Order is conclusive as to the right of CAW to Carmel River water and CAW’s effect on
7 other beneficial uses. Those conclusions responded to foundational issues presented through
8 briefing and the hearing which resulted in Order 95-10. (Staff Exhibit 2 (Order 95-10), pp. 39-40.)

9 Further, Order 95-10 was a final judgment on the merits. As previously noted, the State
10 Water Board held adjudicatory hearings, which provided ample opportunity to present evidence.
11 Only after consideration of all presented evidence did the State Water Board render its final
12 decision, Order 95-10, on the merits. (Cal. Code Regs., tit. 23, § 768; *See also* Section III.A.4.
13 below.)

14 Finally, estoppel and res judicata preclude re-litigation by those directly involved in prior
15 proceedings *and* those in privity with the participant of the prior proceeding. The Sierra Club, the
16 CalSPA, and the Carmel Steelhead Association each participated in the prior hearing. Therefore,
17 collateral estoppel and res judicata must preclude those non-party entities from expanding the scope
18 of this hearing to include claims and issues addressed in the hearing leading to Order 95-10.

19 Collateral estoppel and res judicata also preclude scope expansion requests from the
20 California Salmon and Steelhead Association and the Public Trust Alliance because those non-party
21 entities were in privity with participants in the hearing that resulted in Order 95-10. In the context
22 of collateral estoppel, privity requires: (a) an identity or community of interest with the party in the
23 first action, (b) adequate representation by the party in the first action, and (c) a reasonable
24 expectation that the prior adjudication would be binding. (*Clemmer v. Hartford Insurance Co.*
25 (1978) 22 Cal.3d 865, 875; *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 948.) The California Salmon
26 and Steelhead Association and the Public Trust Alliance share close communities of interest with
27 the Carmel Steelhead Association, the CalSPA, and the Sierra Club. Each of those entities shares
28 the interests in fish and wildlife, public trust resources, and the Carmel River and the surrounding

1 waterways. In addition, the interests of the California Salmon and Steelhead Association and the
2 Public Trust Alliance were adequately represented in the hearing that resulted in Order 95-10.
3 (*Lewis v. County of Sacramento* (1990) 218 Cal.App.3d 214, 219.) Given the extensive nature of
4 the prior proceedings, the California Salmon and Steelhead Association and the Public Trust
5 Alliance must have expected they would be bound by Order 95-10.

6 In sum, the doctrines of collateral estoppel and res judicata are intended to further equity and
7 judicial economy. (Exhibit CAW-015 (Order 2006-0008-EXEC), p. 12 [quoting *Lucido*, pp. 342-
8 343].) An expansion of this hearing would allow the non-party entities to take a second bite of the
9 apple. It would also force the State Water Board to engage in a hearing, likely to last many days if
10 not weeks, after it has already spent countless hours hearing, reviewing, and rendering a decision on
11 the same, previously settled issues.

12 **4. The State Water Board Must Maintain The Existing Scope Of This**
13 **Hearing Based On Prior Settlement Of Litigation**

14 Similar to the argument presented above, the State Water Board must maintain the existing
15 scope of this hearing based on prior settlement of litigation brought by the Sierra Club, CalSPA, and
16 the Carmel Steelhead Association. Upon issuance of Order 95-10, the Sierra Club, CalSPA, and the
17 Carmel Steelhead Association filed a petition for writ of mandate in Monterey County Superior
18 Court challenging the validity of Order 95-10. (Exhibit CAW-016 (Second Amended Petition for
19 Writ of Mandate, Case No. 105610).) In their petition, the Sierra Club, CalSPA, and the Carmel
20 Steelhead Association challenged Order 95-10 based on their belief Order 95-10 was not
21 sufficiently protective of instream beneficial uses and the public trust doctrine. (Exhibit CAW-016
22 (Second Amended Petition for Writ of Mandate, Case No. 105610).) On February 19, 1998, the
23 State Water Board issued Order 98-04, which reflected the settlement reached among the parties.⁵
24 (Staff Exhibit 4 (Order 98-04).) Order 98-04 stated that it would take effect upon an entry of
25 judgment accepting the stipulation to settle the petitions for writ of mandate. (Staff Exhibit 4
26 (Order 98-04), p. 6.) On or about June 5, 1998, Monterey County Superior Court entered an order
27

28 ⁵ Order 98-04 also addressed the petitions for writ of mandate filed by CAW and MPWMD.

1 settling all petitions and dismissing all claims with prejudice. (Exhibit CAW-017 (Order, Cases
2 Nos. M33519, M33520, and 105610).)

3 The Sierra Club, CalSPA, and the Carmel Steelhead Association seek to reopen claims
4 settled by Order 95-10 (as amended or modified by Order 98-04).⁶ However, the State Water Board
5 must bar those non-party entities from expanding the scope to allow for re-litigation of claims. A
6 dismissal with prejudice is considered a final judgment on the merits entitled to res judicata effect,
7 thereby barring any later lawsuit on the same claim. (*Rice v. Crow* (2000) 81 Cal. App. 4th 725,
8 734.) “Where the parties to an action settle their dispute and agree to a dismissal, it [] amounts to a
9 decision on the merits and as such is a bar to further litigation on the same subject matter between
10 the parties.” (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal. 3d 287, 312 [quoting *Datta*
11 *v. Staab* (1959) 173 Cal.App.2d 613, 621].) Therefore, the State Water Board must not expand the
12 scope of this hearing, as requested by the Sierra Club, CalSPA, and the Carmel Steelhead
13 Association. It would only allow them to re-litigate claims previously raised and settled.

14 **IV. To Maximize The Efficiency Of The Proceeding And Clarity Of The Administrative**
15 **Record, The State Water Board Should Bifurcate This Hearing**

16 This hearing provides an ideal opportunity to bifurcate issues. Bifurcation would allow the
17 State Water Board to better manage this hearing; allowing the State Water Board to first receive
18 evidence on the issue of liability, and only accept evidence on the issue of remedy if the State Water
19 Board finds CAW liable. Federal and state courts have long conducted proceedings in such a
20 manner. “[T]he purpose of bifurcation [is] to assist expeditious resolution of cases.” (*Sagi*
21 *Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 448 (“*Sagi Plumbing*”).)
22 It expedites and simplifies the presentation of evidence. (*Foreman & Clark Corp. v. Fallon* (1971)
23 3 Cal.3d 875, 888.) It also helps the adjudicator of facts clarify intricate legal issues. (*Sagi*
24 *Plumbing*, 123 Cal.App.4th at 449.) The State Water Board should use this tool in this hearing. A
25 potentially bifurcated hearing in this case will inevitably maximize efficiencies, avoid duplication,
26 and provide increased clarity.

27 _____
28 ⁶ Note that the California Superior Court retained jurisdiction to enforce the terms of the Stipulation. (Exhibit CAW-
017 (Order, Cases Nos. M33519, M33520 and 105610), ¶ 8.)

1 **V. The State Water Board Must Reserve Decision On The Status Of Non-Party Entities**

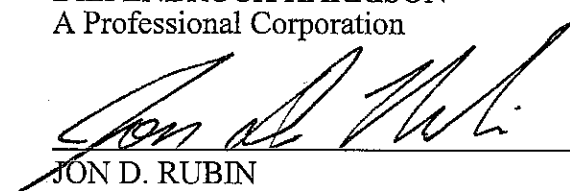
2 The State Water Board possesses broad discretion to determine if non-party entities should
3 be allowed to participate in a hearing, and if entities are allowed to participate, what constraints
4 should be imposed on them. (See 23 Cal. Code Regs. § 648.1.) When exercising its discretion, the
5 State Water Board must assess whether the non-party entities have an interest in the hearing, what
6 are the benefits of participation, if any, and whether the existing parties may be prejudiced by
7 increasing the number of participants. The State Water Board cannot consider those questions in
8 the abstract. They must be considered in the context of the hearing scope. Likewise, until the State
9 Water Board addresses the requests by non-party entities to expand the scope of this hearing, CAW
10 cannot determine whether there is an appropriate role for the non-party entities that seek to
11 intervene in this hearing. Therefore, CAW reserves its right to submit written and/or oral argument
12 to the State Water Board regarding the level of participation in this hearing, if any, of non-party
13 entities, until after the State Water Board issues a determination on the scope of this hearing.

14
15 Dated: April 9, 2008

Respectfully submitted,

16 DIEPENBROCK HARRISON
17 A Professional Corporation

18 By


19 JON D. RUBIN

20 Attorneys for California American Water Company