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7
8 BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
9

10 In the Matter of Draft Cease and Desist Order No.
11 2008-00XX-DWR Against California American
Water Company
12
13

CLOSING BRIEF

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1 **I. Introduction**¹

2 Much of this case hinges on a single question: Should the State Water Resources Control
3 Board (“Board”) adhere to its prior order – Order 95-10.² California American Water Company
4 (“CAW”) believes it should and it must. Clearly, in Order 95-10, the Board adjudicated CAW’s
5 Carmel River water rights and found CAW had been extracting more water than permitted under
6 those rights.³ That, however, is not the extent of the order. The Board did much more.

7 In Order 95-10, the Board considered the needs of the people on the Monterey Peninsula and
8 the needs of public trust resources. The Board decided CAW could extract more water than it was
9 permitted under the water rights it holds. In the words of the Board: “[t]he people and businesses on
10 the Monterey Peninsula must continue to be served water from the Carmel River in order to protect
11 public health and safety.” (Order 95-10, p. 37.) As a result, the Board authorized CAW to extract up
12 to 11,285 acre-feet of water from the Carmel River, at a minimum.⁴ And, in exchange for that
13 authorization, the Board ordered CAW to diligently pursue alternative supplies, increase its effort to
14 encourage conservation, and operate its facilities to mitigate for impacts on public trust resources.

15 CAW has respected the interim solution issued by the Board. It has continuously and
16 aggressively sought alternative supplies. It has implemented conservation measures and changed its
17 operations, as required. CAW’s response has not come without cost. CAW has invested millions of
18 dollars and tens of thousands of person hours. The community on the Monterey Peninsula has also
19 responded. The community has achieved a level of conservation that far exceeds that achieved by
20 most, if not all other communities in California. (Hearing Transcript, Phase 2 (“HT2”), p. 807:20-
21

22 ¹ CAW requested an extension to the page limit for its closing brief, to ensure it was able to fully brief all matters. The
23 Hearing Officers denied this request on September 23, 2008. Due to this denial, CAW was unable to fully brief all issues
and objections. CAW hereby incorporates all prior objections as presented orally and reflected in prior pleadings. CAW
hopes to use its reply brief to respond to issues raised by other participants, but not briefed herein.

24 ² The Hearing Officers admitted into evidence Order 95-10 as Exhibit SWRCB 2. CAW recognizes the Board amended
25 Order 95-10 pursuant to the terms of a settlement and subsequent orders. (Order 98-04; Order 2002-02.) For ease of
reference, CAW does not, in each reference, indicate that the order has been amended. Also, CAW does not refer to it by
its exhibit number.

26 ³ As reflected in the language of Order 95-10, CAW does not divert surface water from the Carmel River, but extracts
subsurface Carmel River water. For this reason, CAW characterizes its diversion in this brief as extraction.

27 ⁴ More specifically, Order 95-10 orders CAW to cease and desist extractions of Carmel River water in excess of 14,106
28 acre-feet. (Order 95-10, p. 40.) It also compels CAW to implement measures that have the goal of achieving 20 percent
conservation. (*Id.*, pp. 40-41.) As a result, Order 95-10 is often cited loosely as establishing a 11,285 acre-foot
extraction limit (80 percent of 14,106 acre-feet is approximately 11,285 acre-feet).

1 809:13.) The prosecution team presented no evidence to the contrary.

2 Instead, the prosecution team and others support their position by asking the Board to ignore
3 most of the history described above. In a very candid statement, the prosecution team explained:
4 “95-10 is very important and also irrelevant.” (Hearing Transcript, Phase 1 (“HT1”), p. 16:25-17:1.)
5 The prosecution team and others consider Order 95-10’s limitation of CAW’s water rights important,
6 but quickly dismiss the remainder of the order. They want the Board to issue a cease and desist order
7 based solely on CAW’s extraction of more water than permitted under its water rights.

8 The position of the prosecution team and others ignores extensive evidence. It assumes the
9 Board, in Order 95-10, did not allow CAW to extract more water than otherwise available under its
10 water rights, did not compel CAW to mitigate its effects on public trust resources, did not compel
11 CAW to “diligently pursue” alternative water supplies, and did not compel CAW to increase its
12 efforts to encourage conservation. The prosecution team and others do not provide support for these
13 assumptions or explain why the Board should undermine the delicate balance struck in Order 95-10.
14 Their position inexplicably runs counter to well-established legal principles, as well as the
15 overwhelming evidence in the record.

16 Incredibly, the position of the prosecution team and others is plagued with deficiencies
17 beyond their fundamental attempt to undermine and have the Board unlawfully interpret Order 95-10.
18 The prosecution team and others ask the Board to issue a cease and desist order without providing
19 sufficient evidence to support the requested remedy. They do not provide evidence the proposed
20 remedy will protect trust resources or health and safety. In fact, evidence presented at the hearing
21 reveals the prosecution team and others promote issuance of a cease and desist order to maintain a
22 single punitive focus; reducing CAW’s extractions of water from the Carmel River. That, however,
23 was the focus of the hearing that resulted in Order 95-10 and therefore Order 95-10 controls the issue.

24 During the hearing, the prosecution team and others alleged the remedy they propose – step
25 reductions in CAW’s extractions – will protect public trust resources. However, they did not identify
26 any relationship between the proposed remedy and benefits to public trust resources. Indeed, the
27 record contains no evidence that the proposed changes in CAW extractions (again subsurface) will
28 increase the amount of surface water in the Carmel River. Nor is there evidence the proposed

1 changes in CAW extractions will improve public trust resources, including the population of
2 steelhead. The overwhelming evidence demonstrates trust resources in the Carmel River watershed,
3 although clearly not at the recovery point, have improved significantly, particularly since the issuance
4 of Order 95-10.

5 The prosecution team and others also fail to provide evidence to support a finding that the
6 proposed remedy will protect public health or safety. The prosecution team alleged the proposed
7 further step reductions in CAW's extractions would maintain quantities of water available for
8 beneficial use on the Monterey Peninsula. On this point, the prosecution team relied upon the
9 opinion of an engineer, who, although a dedicated public servant, has no municipal experience and no
10 experience operating water utilities. Upon cross examination, it became clear that reliance was
11 misplaced. The uninformed opinion of the prosecution team's witness was juxtaposed against the
12 expert opinions of the elected officials of the municipalities on the Monterey Peninsula and the
13 opinion of the Director of Engineering for CAW – each of whom warned the Board the remedy
14 proposed by the prosecution team and others would jeopardize the public. The opinion of the
15 prosecution team's witness also conflicts with the Board's prior finding that maintaining CAW's
16 extractions at existing levels is necessary "to protect public health and safety." (Order 95-10, p. 37.)

17 **II. Background**

18 See CAW Pre-Hearing Brief on Procedural Matter, Section II (Background), filed with the
19 Board on April 9, 2008, which CAW hereby incorporates herein by reference. (A copy of Section II
20 is attached as Attachment 1.)

21 **III. Burden Of Proof And Standard Of Proof**

22 In an enforcement-related administrative proceeding, the burden of proof, including the
23 burden to affirmatively demonstrate the appropriateness of a particular remedy, is on the prosecution
24 team. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.) The Board has
25 specifically acknowledged this principle in relation to its enforcement proceedings. (See Board Order
26 WQC 84-5.) Because administrative proceedings are civil in nature, the prosecution team's claims
27 must be proven by a preponderance of evidence, just as a court would apply in a civil action. (See
28 *People v. Garcia* (2006) 39 Cal.4th 1070, 1078; Board Order WR 87-2.)

1 **IV. Neither The Prosecution Team Nor Any Other Entity Participating In This Proceeding**
2 **Presented Legal Argument Or Evidence To Support The Issuance Of A Cease And**
3 **Desist Order**

4 In this case, the Board may only impose a cease and desist order against CAW, if the Board
5 finds CAW has violated or is threatening to violate condition 2 of Order 95-10, a condition that
6 requires CAW to diligently pursue new water supplies. In this proceeding, no entity presented
7 evidence to support the issuance of a cease and desist order. The evidence before the Board reflects
8 the fact that CAW has and continues to aggressively pursue additional water supplies.

9 **A. The Board, Based On The Case Brought By The Prosecution Team, Identified A**
10 **Narrow Scope For The Liability Phase Of This Hearing**

11 The prosecution team asserts CAW should be subject to a cease and desist order. The legal
12 bases for the draft cease and desist order proposed by the prosecution team are: (1) an alleged
13 violation of condition 2 of Order 95-10, and (2) an alleged trespass by CAW.⁵

14 **B. The Board Can Issue A Cease And Desist Order Against CAW Only If The**
15 **Board Finds CAW Is Threatening To Violate Or Has Violated Condition 2 Of**
16 **Order 95-10**

17 The prosecution team and others contend, albeit without any evidence or legal support, that
18 CAW can trespass upon the waters of the State even if CAW complies with condition 2 of Order 95-
19 10. (Prosecution Team Pre-hearing Brief, p. 1.) They believe the Board can act without regard to its
20 standing order and issue a cease and desist order against CAW, based on Water Code section 1052
21 and a finding of trespass. CAW does not dispute the Board's general authority to address a water-
22 right related trespass using a cease and desist order. Clearly, under section 1052, water use can
23 amount to a trespass if it is not "authorized." (Water Code, § 1052.) However, in the current
24 circumstance, CAW's compliance with Order 95-10 insulates it from a cease and desist order. Order
25 95-10 provides CAW with authority to extract Carmel River water in excess of its water rights.
26 Thus, notwithstanding the prosecution team's allegation, only if CAW has violated Order 95-10, and
27 in this case condition 2, can the Board issue a cease and desist order.

28 **1. Order 95-10 Is An Interim Physical Solution That Authorizes CAW To Extract**
Water In Excess Of That Permitted Under Its Water Rights

Order 95-10 is a unique, interim physical solution, which provides CAW with a non-

⁵ See Exhibit SWRCB 7 and the March 13, 2008, March 29, 2008 and May 29, 2008 rulings.

1 traditional authorization to extract water in excess of its water rights. "A 'physical solution' involves
2 the application of general equitable principles to achieve practical allocation of water to competing
3 interests so that a reasonable accommodation of demands upon a water source can be achieved."⁶
4 The Board, through Order 95-10, struck precisely this type of balance; implementing a practical
5 allocation of water based on competing interests. (Order 95-10, pp. 38-44.)

6 In Order 95-10, the Board, in unambiguous terms, found:

- 7 1. Prior to 1995, CAW had been extracting, on average, 14,106 acre-feet of water from
8 the Carmel River, (*id.*, p. 14.);
- 9 2. At the time, the water rights held by CAW entitled it to extract up to 3,376 acre-feet of
10 water from the Carmel River, (*id.*, pp. 17-25); and
- 11 3. CAW could not significantly reduce its diversions of Carmel River Water; "[t]he
12 people and businesses on the Monterey Peninsula must continue to be served water
13 from the Carmel River in order to protect public health and safety." (*Id.*, p. 37.)

14 Based on those findings, the Board recognized it could "request the Attorney General to take action
15 under Section 1052 [of the Water Code]." (*Id.*, p. 39.) It also recognized it had an alternative course
16 available. It could "suspend a referral provided that Cal-Am takes appropriate actions to: mitigate the
17 effect of its diversions on the environment and develop and diligently pursue a plan for obtaining
18 water from the Carmel River or other source consistent with California water law." (*Id.*, p. 39.) The
19 Board took the alternative path.

20 In condition 2 of Order 95-10, the Board ordered CAW to "diligently implement one or more
21 of the following actions to terminate its unlawful diversion from the Carmel River: (1) obtain
22 appropriate permits. . . ; (2) obtain water from other sources of supply. . . and/or (3) contract with
23 another agency. . . ." (*Id.*, p. 40.) As CAW diligently pursued alternative water supplies, the Board
24 required CAW to "forthwith cease and desist from diverting any water in excess of 14,106 [acre-feet
25 per annum] from the Carmel River, until unlawful extractions from the Carmel River are ended."
26 (*Id.*, p. 39 (emphasis added).) It imposed a requirement that CAW implement conservation measures,
27 which, in combination with then-existing measures, would have a goal of achieving 15 percent

28 ⁶ *Imperial Irrigation Dist. v. State Wat. Res. Control Bd.* (1990) 225 Cal.App.3d 548, 572 (citing *Hutchins*, the California Law of Water Rights (1956) 351-354.) See also *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560-561 (supporting the application of a physical solution to resolve dispute involving users of surface water).

1 conservation in the 1996 water year and 20 percent conservation in each subsequent year.⁷ It also
2 imposed measures to mitigate CAW diversions from the Carmel River, generally, and from upper
3 reaches of the Carmel River, specifically. (*Id.*, p. 40.)

4 The Board made clear CAW could be subject to an enforcement action based on a trespass
5 claim if it violated a condition in Order 95-10. The Board wrote: "The Chief, Division of Water
6 Rights, is authorized to refer any violation of these conditions to the Attorney General for actions
7 under Section 1052 or to initiate such other enforcement actions as may be appropriate under the
8 Water Code." (*Id.*, p. 45.) The plain language of Order 95-10 clearly reflects the intent of the Board
9 – to impose an interim physical solution that allows CAW to continue to extract in excess of its water
10 rights while it pursues a new water source, provided CAW complies with those other terms and
11 conditions imposed on it. (*Id.*, pp. 40-44.) It makes equally clear in the annunciation of enforcement
12 options CAW would be subject to enforcement action only if it violates Order 95-10.

13 2. During The 13 Years Since The Board Issued Order 95-10, The Board Has
14 Consistently Interpreted Order 95-10 As Authorizing CAW To Extract Water
15 In Excess Of That Allowed Under Its Water Rights

16 Throughout the 13 years since it issued Order 95-10, the Board knew CAW has been
17 extracting Carmel River water in excess of the amount allowed under its water rights and consistently
18 sanctioned such excessive extractions.⁸ The prosecution team concedes the point.

19 The Board has been aware CAW extracts more water than allowed under its water rights. The
20 Board received approximately 50 quarterly reports from CAW since 1995. In each of those reports,
21 CAW reported the actions it had been and/or planned to take to continue its compliance with Order
22 95-10. (Ex. CAW 30B-30WW.) The Board responded in writing to the CAW quarterly reports.
23 Those Board responses reflect its consistent recognition that CAW was extracting more water than
24 allowed under its water rights, and that such diversions were consistent with Order 95-10.⁹

25 ⁷ Order 95-10, p. 39. As explained in footnote 4 above, because of the requirement to impose measures that have a goal
of achieving a 20 percent reduction, people often reference an 11,285 acre-feet limit established by Order 95-10 (14,106 x
80% = 11,285).

26 ⁸ It is this authorization which prohibits enforcement under trespass; trespass is defined by Water Code section 1052 as
unauthorized use of water. (Water Code, § 1052.)

27 ⁹ Ex. SWRCB 8-2(d), p. 1 ("Cal-Am provided records to document that it produced a total of 10,025 afa for the 1994-
1995 water year . . . The available data indicates that Cal-Am operated within the production cap specified in Order 95-
10."); Ex. SWRCB 8-2(f), p. 2 ("Condition 3(b) limits the quantity of water which Cal-Am can pump from the Carmel
28 River system to 11,990 acre-feet (af) during the 1996 water year and 11,285 af during subsequent water years."); Ex.
SWRCB 8-2(g), p. 1 ("Order 95-10 sets the 1996-97 water year diversion limitation at 11,285 af."); Ex. SWRCB 8-2(h),

1 In addition to the citations in footnote 8 above, CAW highlights two examples. In 2002,
2 James Kassel, acting on behalf of the Board, wrote: "The report states that Cal-Am complied with
3 the diversion limits of Order 95-10. The Division concurs that Cal-Am complied with the 11,285
4 acre-feet (af) diversion limit." (Ex. SWRCB 8-2(s)).¹⁰ Similarly, Kathy Mrowka, approximately ten
5 years earlier, communicated on behalf of the Board, stating: "Condition 3(b) limits the quantity of
6 water which Cal-Am can pump from the Carmel River system to 11,990 acre-feet (af) during the
7 1996 water year and 11,285 af during subsequent water years." (Ex. SWRCB 8-2(f), p. 2.) Through
8 the testimony of its witnesses, not surprisingly since they included Ms. Mrowka, the prosecution team
9 acknowledges the Board authorized CAW to extract in excess of water rights.¹¹

10 3. The Law Bars A Finding By The Board That CAW Has Committed A
11 Trespass If It Complies With Order 95-10

12 Well established legal principles preclude the Board from issuing a cease and desist order
13 against CAW when CAW is complying with Order 95-10. Collateral estoppel and res judicata "rest
14 upon the sound policy of limiting litigation by preventing a party who has had one fair adversary
15 hearing on an issue from again drawing it into controversy and subjecting the other party to further
16 expense in its reexamination." (Cal. Jurisprudence 3rd, Judgments, § 150.) They are "intended to
17 preserve the integrity of the judicial system and promote judicial economy." (*Id.*) In this
18 circumstance, and for the precise reason they exist, those doctrines preclude the Board from
19 subjecting CAW to a cease and desist order, so long as CAW is in compliance with Order 95-10.

20 p. 2 ("In the quarterly submittal, Cal-Am established diversion goals for the Carmel River wells, and identified the
21 quantity of water that can be pumped monthly in order to meet the 11,285 afa goal established in Order 95-10."); Ex.
22 SWRCB 8-2(i), p. 1 ("Cal-Am documented that it has complied with the 11,285 acre-feet (af) per annum water
23 conservation goal in Order 95-10."); Ex. SWRCB 8-2(l), p. 1 ("The California-American Water Company extracted a
24 total of 10,739 acre-feet (af) from the Carmel River, or 4.8 percent less than the 11,285 af goal established in Order 95-
25 10."); Ex. SWRCB 8-2(p) ("The submittal documents that the California-American Water Company has complied with
26 the requirements of Order 95-10 for the 2004-2005 water year, including the 11,285 acre-feet annual diversion limit.");
27 Ex. SWRCB 8-2(s) ("The report states that Cal-Am complied with the diversion limits of Order 95-10. The Division
28 concurs that Cal-Am complied with the 11,285 acre-feet (af) diversion limit.")

¹⁰ Exhibit SWRCB 8-2 is a single exhibit that includes 24 Board responses to CAW quarterly reports. Attachment 2 is a
table CAW prepared that identifies each Board response and designates each with letter – (a) through (x). Thus, for
purposes of clarity, when citing to a specific response, CAW has references the exhibit as well as the assigned letter, as
reflected in Attachment 2.

¹¹ HT1, p. 47:14-16 (Ms. Mrowka: "Order 95-10 describes the water conservation goal of 11,285 acre-feet per annum,
and that is the operating limit at this time."), 100:15-25; HT2, 179:22-180:2 (Mr. Rubin: "Though you would agree the
State Water Resources Control Board contemplated that for some period after the issuance of Order 95-10 California
American Water would continue to extract more than 3,376 acre-feet of water from the Carmel River?" Mr. Stretars:
"Yes, I agree to that."), 190:22-25 (Mr. Rubin: "Under Order 95-10, California American Water has a Carmel River
extraction limit of 11,285, is that correct?" Mr. Stretars: "Yes".)

1 Collateral estoppel precludes a party from re-litigating issues in a second proceeding that were
2 litigated and determined in a prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341
3 (“*Lucido*”).) Collateral estoppel will bar an issue from being re-litigated if: (1) the issue decided in a
4 prior proceeding is identical to the current issue, (2) the issue was actually litigated, (3) the issue was
5 necessarily decided in the prior litigation, (4) the prior proceeding resulted in a final judgment on the
6 merits, and (5) the party against whom collateral estoppel is being asserted is the same as, or in
7 privity with, a party to the prior proceeding. (Ex. CAW-015, p.11 [quoting *Lucido*, 51 Cal.3d at p.
8 341].) Similarly, res judicata “operates as a bar to the maintenance of a second suit between the same
9 parties on the same cause of action.” (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880.) Res judicata
10 applies if: (1) a claim or issue raised in the present action is identical to a claim or issue raised in a
11 prior proceeding, (2) the prior proceeding resulted in a final judgment on the merits, and (3) the party
12 against whom the doctrine is being asserted was a party or in privity with a party to the prior
13 proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 253.)

14 Collateral estoppel and res judicata apply to claims and issues that the prosecution team and
15 others present in this proceeding. Administrative agencies, including the Board, recognize these
16 doctrines. (Ex. CAW-015, p.13 [quoting *People v. Sims* (1982) 32 Cal.3d 468, 479 (superseded on
17 another grounds)]; *Williams v. City of Oakland* (1973) 30 Cal.App.3d 64, 68.)

18 The Board issued Order 95-10, based on complaints filed by a number of entities, including
19 the Sierra Club and the Carmel River Steelhead Association. (Exs. CAW 01-04.) The complaints
20 alleged CAW was extracting water from the Carmel River without authorization, and the alleged
21 unauthorized extractions were adversely affecting public trust resources. (Exs. CAW-04, CAW-01.)
22 Pursuant to those claims, in 1992, the Board began a multi-year evaluation of CAW’s Carmel River
23 water extractions, which culminated in a comprehensive adjudicatory hearing. (Order 95-10, p. 14.)
24 In response to the complaints and as a result of the hearing, the Board reviewed thousands of pages of
25 technical data and heard countless hours of testimony. (*Id.*, pp. 11-12, 21-22.) The Board considered
26 the extent of CAW’s Carmel River water rights, and the impacts of CAW’s extractions, within and
27 outside of its water rights, on instream beneficial uses including: vegetative resources (*id.*, pp. 25-26),
28 wildlife resources, (*id.*, pp. 26-27), fishery resources, (*id.*, p. 27); and steelhead resources in

1 particular. (*Id.*, pp. 27-28.)

2 As a result of this exhaustive review, the Board issued Order 95-10. Order 95-10 defined
3 CAW's water rights and identified the effects of CAW's continued extractions in excess of its water
4 rights on other beneficial uses of Carmel River water, including public trust resources. (*Id.*, pp. 39-
5 40.) The claims and issues addressed in Order 95-10 were necessarily decided. Order 95-10
6 represents the Board's determination on all pled issues and all evidence presented. (Cal. Code Regs.,
7 tit. 23, § 768.) The participants in the hearing had the opportunity to challenge the manner in which
8 the Board addressed the claims and issues. In fact, the Sierra Club and the Carmel River Steelhead
9 Association took advantage of that opportunity and filed a petition for writ of mandate with the
10 Superior Court of California, County of Monterey. (Ex. CAW-016.)

11 In their second amended petition for writ of mandate, petitioners Sierra Club and Carmel
12 River Steelhead Association explained:

13 The complaints alleged that Cal-Am: 1) does not have the legal right to divert water
14 from wells in Carmel Valley; diversions are adversely affecting the public trust
15 resources with the Carmel River; and 2) diversions from San Clemente Dam are not a
16 reasonable method of diversion. In Order No. WR 95-10, the State of California
17 Water Resources Control Board ("Board") determined that Cal-Am: 1) does not have
18 legal right for about 10,730 acre-feet (af) annually which it currently diverts from the
19 Carmel River, and 2) diversions are having an adverse affect on the public trust
20 resources of the Carmel River. The Board imposed certain requirements on Cal-Am
21 that petitioners believe are inadequate to protect instream uses and public trust
22 resources of the Carmel River.

19 (*Id.*, p. 2:10-18.) All of the parties to that action, including the petitioners noted above and the Board
20 agreed to dismiss the action with prejudice. (Ex. CAW-017.) Thus, while some might not like the
21 outcome and have second thoughts on their decision to dismiss the case with prejudice, it should be
22 beyond reasonable dispute that, in Order 95-10, the Board addressed the allegations raised and made
23 determination thereon. The Board cannot reconsider them now.¹²

24 In sum, the claims and issues related to CAW's use of Carmel River water were previously
25 and actually adjudicated. Order 95-10 was the result of extensive briefing and a formal hearing
26 before the Board. It reflects a decision by the Board on the claims and issues raised by the parties
27

28 ¹² Interestingly, even if the Board believed it could reconsider claims or issues previously presented to it, subject matter
jurisdiction to address complaints with Order 95-10 now rests with the California Superior Court. (Ex. CAW 17, ¶8.)

1 and participants thereto. It was made only after consideration of all presented evidence. Order 95-10
2 represents the Board's final judgment on the merits. If there were any debate as to the effect of Order
3 95-10, the debate should have ended when all parties agreed to dismiss their challenges to Order 95-
4 10 with prejudice. Accordingly, the Board cannot issue a cease and desist order simply because
5 CAW extracts more water than permitted under its water rights. This issue has previously been
6 reviewed at length in a formal hearing, adjudicated, determined on the merits, appealed and settled.
7 Therefore, review based on CAW extractions in excess of its water rights would amount to an
8 unlawful reopening of the very claims and issues settled by Order 95-10. The Board has not and
9 should not accept an attack of a prior order through an enforcement action.¹³

10 **C. The Board Does Not Have Sufficient Evidence To Support A Finding That CAW**
11 **Has Violated Condition 2 Of Order 95-10**

12 Notwithstanding the two issues identified by the prosecution team, for the reasons explained
13 above, liability in this proceeding must hinge on whether CAW is in compliance with condition 2 of
14 Order 95-10. There is apparent disagreement over the intent of Order 95-10's condition 2. CAW
15 believes condition 2 requires CAW to aggressively seek water supplies, a requirement that CAW has
16 met. The prosecution team and others interpret condition 2 very differently; they believe condition 2
17 orders CAW to terminate all extractions from the Camel River in excess of CAW's water rights. The
18 prosecution team and others allege CAW is violating condition 2 because CAW extracts more water
19 than allowed under its water rights. Legal principles of interpretation and the evidence presented
20 during this proceeding require the Board to accept CAW's position.

21 1. Condition 2 Of Order 95-10 Requires CAW To Maintain A Consistent Effort
22 To Acquire Alternative Supplies

23 When interpreting prior orders, the Board should employ traditional principles of
24 interpretation. If the words of the order are unambiguous, the Board need not delve deeper. (Board
25 Order No. 87-08, p. 13; *Chevron, U.S.A., Inc. v. NRDC, Inc.* (1984) 467 U.S. 837, 842-43

26 _____
27 ¹³ Board Order No. WR 2007-0027-EXEC, p. 11 (attempting to revisit an order through a later enforcement action
28 constitutes an "improper collateral attack"); *North Gualala Water Co. v. State Wat. Res. Control Bd.* (2006) 139
Cal.App.4th 1577, 1607 (concluding that a water right permittee cannot accept permit conditions and then wait two years
to challenge the premise on which they were based); *See also*, Water Code §§ 1126(b), 1122; *Imperial v. McDougal*
(1977) 19 Cal.3d 505, 510-511.

1 (“Chevron”).) It should give the words their usual and ordinary meaning. Only in the event the
2 words create ambiguity should the Board look beyond the order. (*Chevron*, p. 842-43; Board Order
3 No. 91-03, p. 17.)

4 **a. Condition 2 Clearly And Unambiguously Requires CAW To**
5 **Maintain A Consistent Effort To Acquire Alternative Water**
6 **Supplies**

7 The Board should accord the words in condition 2 of Order 95-10 their plain meaning. When
8 that is done, condition 2 is clear and unambiguous. Condition 2 states:

9 Cal-Am shall diligently implement one or more of the following actions to terminate
10 its unlawful diversions from the Carmel River: (1) obtain appropriate permits for
11 water being unlawfully diverted from the Carmel River, (2) obtain water from other
12 sources of supply and make one-for-one reductions in unlawful diversions from the
13 Carmel River, provided that water pumped from the Seaside aquifer shall be governed
14 by condition 4 of this Order not this condition, and/or (3) contract with another agency
15 having appropriate rights to divert and use water from the Carmel River.

16 (Order 95-10, p. 40 (emphasis added).) Webster’s Law Dictionary defines “diligent” as “constant in
17 effort” and “implement” as “put into effect according to or by means of a definite plan or procedure.”
18 (Webster’s Encyclopedia Unabridged Dictionary of the English Language (1996).) Based on those
19 plain meanings, condition 2, must be interpreted to compel CAW to maintain a consistent effort, the
20 purpose of which is to obtain alternative water supplies. The effort can be accomplished through the
21 three actions identified in condition 2.

22 **b. The Record And Prior Rulings By The Board Support An**
23 **Interpretation Of Condition 2, Which Requires CAW Maintain A**
24 **Consistent Effort To Acquire Alternative Water Supplies**

25 Assuming, *arguendo*, the Board found the language of condition 2 ambiguous and needed to
26 look beyond the plain meaning of the language, the non-operative sections of Order 95-10 and the
27 evidence in the record support an interpretation of condition 2 which requires CAW make a
28 consistent effort toward one or more actions identified therein, actions that are intended to result in
the acquisition of new water supplies. Nothing suggests condition 2 was intended to simply order
CAW to terminate extractions.

The Board discusses condition 2’s requirements in section 8.0 of Order 95-10. There, the
Board wrote:

1 [T]he SWRCB can suspend such a referral provided that Cal-Am takes appropriate
2 actions to: (a) mitigate the effects of its diversions in the environment; and (b) develop
3 and diligently pursue a plan for obtaining water from the Carmel River or other
4 sources consistent with California Water law.

5 (Order 95-10, p. 37 (emphasis added).) The evidence and testimony presented in this proceeding
6 reflects a similar interpretation.¹⁴ Further, the prosecution team witnesses testified on cross-
7 examination that the prosecution team interprets condition 2 to require CAW to “diligently pursue”
8 an alternate water source.¹⁵

9 If there were any remaining doubt, outside of this proceeding and unrelated to CAW, the
10 Board long ago defined diligence consistent with the interpretation provided above. The Board
11 wrote:

12 Diligence is defined to be the ‘steady application to business of any kind, constant
13 effort to accomplish any undertaking.’ The law does not require any unusual or
14 extraordinary effort, but only that which is usual, ordinary and reasonable. . . . It is the
15 doing of an act, or series of acts with all practical expedition with no delay except such
16 as may be incident to the work.

17 (Decision No. A 1149 D 430 (1938), p. 6.)

18 2. The Record Conclusively Demonstrates CAW Has And Will Continue To
19 Comply with Condition 2

20 Condition 2 of Order 95-10 requires the diligent pursuit of alternate water supplies. No
21 evidence has been presented that would support a finding that CAW lacks diligence in its pursuit of
22 alternative water supplies. All of the evidence in the record proves just the opposite.¹⁶

23 Simultaneous to the issuance of Order 95-10, the Board issued permit 20808 to the Monterey
24 Peninsula Water District (“MPWMD”) for the New Los Padres Dam Project (“NLP Dam project”).
25 CAW supported the NLP Dam project and, at the time, contemplated a contract with the MPWMD
26 for a water supply. (Ex. CAW-029, p. 2:22-25; Ex. CAW-031, p. 1:20-25; Ex. CAW-032, pp. 1:28-

27 ¹⁴ Ex. SWRCB 8-2 (a) (“Order 95-10 requires Cal-Am to diligently pursue a legal water supply.”); PT-8, p. 2 (“The
28 S[tate] W[ater] B[oard] has withheld enforcement action provided Cal-Am adhered to the terms of Order 95-10 and was
diligently pursuing water rights for its diversions.”)

¹⁵ HT1, p. 136:9-14 (Mr. Rubin: “The State Board explained condition 2 in Order 95-10 as a requirement that California
American Water develops and diligently pursues a plan for obtaining water from the Carmel River or from other sources
consistent with California water law; is that correct?” Ms. Mrowka: “Yes.”), 138:12-17 (Mr. Rubin: “Are you aware that
the Division of Water Rights has also expressed the position that in order to comply with Condition 2 of Order 95-10
California American Water is to diligently pursue a legal water supply?” Mrs. Mrowka: “Yes.”)

¹⁶ For complete description of all actions undertaken by CAW, see Exhibit CAW-029 through CAW-032.

1 2:7.) However, the NLP Dam project was defeated by voters, and, immediately thereafter, CAW
2 began pursuing its own dam project, the Carmel River Dam and Reservoir project ("CR Dam
3 project"). (Ex. CAW-029, p. 2:23-28; Ex. CAW-031, p. 1:23-28; Ex. CAW-032, p. 2:5-8; HT1, pp.
4 270:3-271:3.)

5 From 1995 to 2003, CAW invested significant resources pursuing the CR Dam project.¹⁷
6 CAW worked in conjunction with MPWMD to transfer water permits from the NLP Dam project to
7 the CR Dam project. In addition, CAW submitted a separate application for appropriative rights to
8 36,130 acre-feet of Carmel River water (Application No. 30644), which remains pending. (Ex.
9 MPWMD 1, p. 13.) CAW completed a full environmental impact report, conducted community
10 outreach, and otherwise fully funded the CR Dam project effort. (See fn. 15 and fn. 16.)

11 In 1998, the California Legislature, through Assembly Bill 1182 and the California Public
12 Utilities Commission ("CPUC") required a change in the focus of CAW's effort. They demanded a
13 comprehensive investigation of alternatives to the CR Dam project. (Ex. CAW-029, p. 2:23-28; Ex.
14 CAW-030, p. 2:15-18; Ex. CAW-032, pp. 2:26-3:2.) This comprehensive consideration of
15 alternatives became known as Plan B. The Plan B process includes the evaluation of numerous water
16 supply options. (Ex. CAW-032, pp. 3:3-5:18.) During this time, CAW again applied for
17 appropriative rights to the Carmel River, submitting Application Nos. 30715 and 30215 for
18 appropriation of Carmel River water.

19 In 2002, the National Marine Fisheries Service ("NMFS") officially opposed the CR Dam
20 project and MPWMD requested CAW withdraw its application for the CR Dam project. (Ex. CAW
21 32, pp. 4:12-16, 5:3-5.) And, in 2003, the CR Dam project was officially rejected by the MPWMD.
22 (Ex. CAW-029, p. 3:11; Ex. CAW-032, pp. 4:25-5:1.) As a result, the Coastal Water Project
23 ("CWP") emerged from the Plan B process as the preferred course of action to obtain long-term
24 alternative water supplies. (Ex. CAW-031, p. 2:8-9; Ex. CAW-032, p. 5:14-20.) CAW held
25 extensive public outreach meetings during 2004 and 2005, to educate and receive feedback on the
26

27 ¹⁷ Ex. CAW-029, pp. 2:26-28, 3:6-8; Ex. CAW-031, pp. 1:25-2:21 (costs incurred in pursuing CR Dam project); Ex.
28 CAW-032, p. 2:7-25 (CAW crafted CR Dam project in an attempt to solve issues with NLP Dam project), 4:12-5:8
(CAW pursued CR Dam project despite opposition); HT1, p. 233:14-22 (From 1996 to 2003 CAW pursued development
of the CR Dam project).

1 CWP from its customers. (Ex. CAW-030, pp. 2:25-3:24.) As the lead agency, the CPUC required
2 CAW prepare a proponent's environmental assessment ("PEA"). (Ex. CAW-029, p. 3:13-14.) CAW
3 immediately arranged for the preparation of the PEA. (Ex. CAW-032, p. 6:12-15; Ex. CAW-032B.)
4 The PEA was finalized and submitted to the CPUC in July 2005. (Ex. CAW-030, p. 4:3-4; Ex.
5 CAW-032, p. 6:17-19.)

6 Immediately thereafter, CPUC began preparation of an environmental impact report; the
7 CPUC expects to finalize the report in 2009. (Ex. CAW-029, p. 3:15-16; Ex. CAW-032, p. 6:22-23.)
8 To date, CAW has invested over \$17 million implementing the CWP. (Ex. CAW-031, p. 2:22-3:9;
9 CAW-031C.) Currently, CAW is funding the CPUC's environmental study and impact report, and is
10 working with the CPUC to facilitate its completion. (Ex. CAW-029, p. 3:15-16; Ex. CAW-032, p.
11 6:22-23.)

12 In the meantime, CAW continues to do all it can to move Plan B forward. (Ex. CAW-030, p.
13 4:6-8; Ex. CAW-032, p. 6:20-25.) In 2006, CAW began biological surveys and environmental
14 studies, usually performed after the completion of the environmental impact report, to facilitate the
15 process. (Ex. CAW-030, pp. 5:25-6:17; Ex. CAW-032, p. 6:27-28; Ex. CAW-032C.) CAW has also
16 obtained permits and constructed a pilot desalination plant, which has already begun initial testing.
17 (Ex. CAW-030, pp. 6:18-7:11; Ex. CAW-032, p. 7:1-5.) Further, CAW continues its active public
18 outreach efforts. (Ex. CAW-030, pp. 4:22-5:21.)

19 CAW worked with the MPWMD to obtain appropriate water rights for an aquifer storage
20 and recharge project, phase 1 ("Phase 1 ASR"). (Ex. CAW-029, p. 3:17-24; Ex. CAW-030, pp. 1:24-
21 2:12.) In 2007, the Board granted permit 20808A, jointly to CAW and MPWMD providing rights to
22 extract and store up to 2,426 acre-feet per annum of Carmel River water. (Ex. CAW-030, p. 2:7-13.)
23 CAW entered into an agreement with the City of Sand City to operate and manage a desalination
24 plant, where a portion of the water produced therefrom will, for a period of time, be used to offset
25 CAW's Carmel River extractions. (Ex. CAW-029, pp. 4:24-5:8.)

26 CAW amended Application 30215 in an effort to permit 2,900 acre-feet of Table 13 water.
27 (Ex. CAW-029, pp. 3:25-4:12; HT1, pp. 404:21-405:4.)¹⁸

28 ¹⁸ HT1, pp. 405:14-21 (CAW is currently pursuing the application), 458:13-22, 460:23-461:6 (as recommended by the

1 Further, CAW considered various other actions, such as: 3 MGD and 7 MGD desalination
2 plants, groundwater development projects, dredging San Clemente and Los Padres reservoirs, water
3 purchases from outside of the Carmel River watershed, production from small weirs in the Carmel
4 River, surface water impoundment, as well as contracting for appropriative water rights from the
5 Marina Coast Water District and the Carmel Development Corporation. (Ex. CAW-029, 4:13-5:23.)

6 These actions as described in more detail in the testimony submitted by CAW reflect that,
7 since 1995, CAW has consistently and actively pursued alternative water supplies. It is beyond
8 reasonable dispute that CAW has and continues to apply constant effort and practical expedition to
9 developing supplemental water.

10 **D. Equitable Estoppel Precludes The Issuance Of A Cease And Desist Order**

11 In the event the Board finds Order 95-10 does not authorize CAW to extract more water than
12 allowed under its water rights, equity estops the Board from subjecting CAW to an enforcement order
13 pursuant to Water Code section 1052. The Board must allow CAW to continue to extract in excess of
14 its water rights.

15 The California Supreme Court established the rule for applying estoppel against public
16 entities in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 487-501. In that case, the Court began
17 by re-affirming the four elements that must be present in order to apply equitable estoppel:

18 (1) the party to be estopped must be apprised of the facts; (2) he must intend that his
19 conduct shall be acted upon, or must so act that the party asserting the estoppel had a
20 right to believe it was so intended; (3) the party asserting estoppel must be ignorant of
the true state of facts; and (4) he must rely upon the conduct to his injury.

21 (*Mansell*, p. 489.) In *Mansell*, the Court also established an additional layer of analysis – applying
22 estoppel against a public entity only when “justice and right require it.” (*Id.*, p. 493.) Justice and
23 right require estoppel against the government, when “injustice which would result from a failure to
24 uphold an estoppel is of sufficient dimension to justify an effect upon public interest or policy.” (*Id.*,
25 pp. 496-497.) All necessary elements are present here. Substantial injustice will in fact occur, if
26 estoppel is not applied against the Board.

27
28 Board, CAW is moving forward to perfect 2,900 acre-feet water right); Ex. CAW-030C, Response 2.1 (CAW's
Application No. 30215 remains pending).

1 First, since the issuance of Order 95-10, CAW consistently provided the Board with extensive
2 reports on CAW's compliance actions, which included evidence that CAW extracted more water than
3 allowed under its water rights. (Exs. CAW 030B - 30WW.)

4 Second, the Board regularly responded to those reports, which included statements
5 acknowledging the extent of CAW's extractions. (Exs. SWRCB 8-2(a)-(x).) Through these
6 correspondences, the Board was aware CAW extracted more water than allowed under its water
7 rights, repeatedly thanked CAW for its "continued compliance," and even informed CAW that, "if
8 there had been a violation noted, the Division would have promptly advised Cal-Am in order to
9 ensure that the violation was timely addressed." (Ex. SWRCB 8-2(m), p. 1, ¶ 3.) The
10 correspondence to and from the Board were received and sent by numerous representatives of the
11 Board, including Executive Director, Chief of the Division of Water Rights and Board senior
12 engineer. (Ex. SWRCB 8-2.) Therefore, CAW reasonably assumed the Board correspondence
13 represented the position of the Board, and accordingly relied on the representations.

14 Third, CAW had no reason to believe its actions were outside of the law. The Board is
15 charged with maintaining a stable system of water rights. (Water Code, § 174.) Until the prosecution
16 team commenced this action, CAW had not received any communication from the Board or its staff
17 which would suggest CAW was violating any provision of the Water Code or prior order of the
18 Board. Under the circumstances, CAW did not and should not have known extractions in excess of
19 the quantity allowed under its water rights amounted to a trespass.

20 Finally, CAW relied upon the Board's Order 95-10 and its subsequent communications. For
21 more than 13 years, the Board required CAW report its actions within the Carmel River Valley.
22 CAW submitted quarterly reports explaining what it had done, what it was doing, and what it planned
23 to do. All of CAW's planning efforts assumed it was authorized to extract more water from the
24 Carmel River than otherwise allowed under its water rights. Based on this understanding, CAW has
25 invested thousands of hours and spent millions of dollars planning long term water supply projects.
26 If the Board now revokes the authorization provided in Order 95-10, the CAW system could be
27 compromised. CAW will not be able to satisfy customer demand, leaving the public-at-large without
28 sufficient supply, and CAW's and the communities' investment in existing water supply planning and

1 development efforts may be jeopardized. (*See, e.g.*, CAW-037, pp. 3:25-4:11.)

2 For these reasons, CAW respectfully submits that the Board is itself estopped from issuing an
3 order in this proceeding. The Board cannot consistently interpret Order 95-10 over the course of 13
4 years to permit extractions up to the 11,285 acre-foot limit, and then abruptly reverse course to
5 undertake a “gotcha” enforcement action.

6 **V. The Board Does Not Have An Adequate Basis To Adopt The Remedy Proposed By The**
7 **Prosecution Team; The Only Remedy Supported By The Law And The Record Is One**
8 **That Allows CAW To Continue To Extract Up To 11,285 Acre-Feet Of Carmel River**
9 **Water Until Alternative Water Supplies Are Developed**

9 There is no evidence, much less sufficient evidence, to support a finding that CAW has or is
10 threatening to violate condition 2 of Order 95-10. Therefore, the Board cannot adopt a cease and
11 desist order against CAW. However, should the Board decide to issue a cease and desist order, any
12 remedy included therein must be narrowly tailored to address the basis for liability.

13 The prosecution team and others propose a remedy of further step reductions in CAW
14 extractions. However, they do not present evidence explaining what impact, if any, CAW is causing
15 to public trust resources as a result of the alleged Order 95-10 violation, do not present evidence
16 explaining the benefit bestowed on public trust resources if reductions in CAW extractions occur, do
17 not present evidence explaining CAW can achieve the proposed remedy, and do not present evidence
18 explaining its proposed remedy is protective of public health and safety. For these reasons, the Board
19 cannot adopt the remedy proposed by the prosecution team and others.

20 Instead, Order 95-10 and the evidence presented during the hearing on this matter support a
21 single remedy – one that allows CAW to continue to extract up to 11,285 acre-feet of Carmel River
22 water until alternative water supplies are developed, provided CAW remains in compliance with
23 Order 95-10. That is the remedy the Board previously determined was needed “to protect public
24 health and safety.” (Order 95-10, p. 37.) No evidence presented during this proceeding showed that
25 need has changed.

26 **A. The Evidence Does Not Support A Finding That The Remedy Proposed By The**
27 **Prosecution Team Protects Public Trust Resources**

28 The prosecution team and others allege the proposed remedy is necessary to protect public

1 trust resources, including the Central California coast steelhead trout and riparian habitat. (HT2, p.
2 18:15.) The prosecution team and others advance general statements concerning the effect of CAW's
3 diversions. (*See, e.g.*, Ex. PT-39, p. 4.) Those effects are precisely the same effects previously
4 identified by the Board in Order 95-10. There, the Board explained:

5 Cal-Am diversions are having an adverse effect on: the riparian corridor along the
6 river below San Clemente Dam at RM 18.5, wildlife which depend on instream flows
7 and riparian habitat, and steelhead which spawn in the river. Interim measures
8 mitigating the effects of Cal-Am diversions undertaken by the District should continue
9 to be implemented. Cal-Am should be required to implement interim measures in the
10 event the District fails to continue with its program. In addition, Cal-Am should be
11 required to implement other mitigation measures. Cal-Am should be required to
12 mitigate the effect of its diversions until such time as it is able to obtain water from the
13 Carmel River or other sources consistent with California water law.

14 (Order 95-10, p. 39.) Order 95-10 represents the Board's remedy in response to those identified
15 effects identified and calls for mitigation at the levels contemplated in the quotation provided above.
16 (*Id.*, pp. 40-45.) Now, the prosecution team and others might not like the manner in which the Board
17 addressed CAW's effects or the mitigation measures imposed on CAW. However, the time to raise
18 complaints has come and gone.¹⁹ As a matter of law and equity, this enforcement action cannot be
19 used as a collateral attack on Order 95-10.

20 Furthermore, the general allegations made by the prosecution team and others do not support
21 the proposed remedy. Witnesses testified that reductions in extractions by CAW will benefit
22 steelhead and riparian habitat. That testimony, however, does not survive scrutiny. The witnesses
23 who testified do not have the appropriate expertise. They are not hydrologists or geomorphologists.
24 (*See* Ex. PT-38.) They lack the expertise to opine on how changes in extractions (subsurface
25 extractions) by CAW could affect surface water flows.

26 Further, the witnesses recognized that statistical analyses are tools used to establish
27 relationships that withstand peer review, and that correlations are developed for those relationships to
28 determine the strength and direction of relationships. (HT2, p. 151.) Nonetheless, no witness was
able to establish such a relationship for the Carmel River or relied upon a previously established
relationship to support his/her testimony. (*Id.*) As a result, the prosecution team and others failed to

¹⁹ *See* Section IV, D, above.

1 present credible evidence that explains the effect CAW diversions, which exceed the quantity of
2 water available under its water rights, have on Carmel River surface flows. (HT2, pp. 152:14-19,
3 707:17-23.) And, even if one presumes the proposed reductions in extractions increase Carmel River
4 surface water, no credible evidence was presented to explain how the increase in surface water will
5 improve the abundance (increase population over time) of steelhead or the riparian habitat. (*Id.*, pp.
6 114:25-115:15.)²⁰

7 Indeed, the general statements that conditions for steelhead and the riparian habitat will
8 improve if the proposed remedy is adopted by the Board belie the fact that abundance of steelhead are
9 affected by numerous factors, most of which are unrelated to CAW's diversions from the Carmel
10 River. Factors that might affect steelhead include diversions by persons or entities other than CAW,
11 the existence of dams, ocean conditions, natural disasters (forest fires, drought), recreational fishing,
12 natural predation, climate changes, development in the watershed, urban/rural discharges, and
13 introduced non-native species. (*Id.*, pp. 149:9 -151:8.) The general statements that conditions for
14 steelhead and the riparian habitat will improve if the prosecution team's proposed remedy were
15 adopted also belie the fact that, even if there were some marginal benefit, that benefit could be
16 compromised by increases in third-party diversions. (*Id.* pp. 633:9-22, 707:3-9.)

17 For all of the reasons stated above, the evidence does not support a finding by the Board that
18 the remedy proposed by the prosecution team is needed to protect, or would even benefit, public trust
19 resources.

20 **B. The Prosecution Team's Remedy Will Jeopardize Public Health and Safety**

21 The prosecution team and others recognize that any remedy must protect the health and safety
22 of the Monterey Peninsula residents. The prosecution team and others assert the community on the
23 Monterey Peninsula can withstand significant, additional water supply reductions. That assertion is
24 based principally upon the testimony of an engineer who, although a dedicated public servant, has no
25 municipal experience, no experience operating water utilities, and who, not surprisingly given his
26 lack of experience in the area, makes a number of improper assumptions. The testimony and
27

28 ²⁰ Mr. Fife asks if there is anything in Ms. Ambrosius' testimony which quantifies the reduction of diversions on public trust resources, to which Ms. Ambrosius responds: "I do not explicitly get to that." (HT2, p. 115:14-15)

1 evidence presented by those who have expertise is consistent and unanimous – the remedy proposed
2 by the prosecution team and others will jeopardize public health and safety. That testimony and
3 evidence should not surprise the Board, since it made the same finding in 1995, when it concluded
4 that reductions in CAW diversions beyond those authorized under Order 95-10 would not be
5 sufficient to protect public health or safety. (Order 95-10, p. 37.)

6 1. The Prosecution Team Made Improper Assumptions Regarding The Minimum
7 Amount Of Water Needed By The Monterey Peninsula

8 The prosecution team, through Mr. Stretars, presented testimony on the minimum water needs
9 of the Monterey Peninsula. Mr. Stretars has no water planning experience and has never worked for
10 a municipality, a water district, or a water utility. (Ex. PT-23.) Nonetheless, he concluded that the
11 prosecution team’s proposed remedy would not jeopardize public health and safety. Mr. Stretars
12 based his determination, in part, on discussions with the California Department of Health Services,
13 Monterey County Department of Health Services, and Title 23 of the California Code of Regulations
14 (“Title 23”). (Ex., PT-49, p. 5; HT2, p. 55:13-25.) Through cross examination, Mr. Stretars
15 conceded the California Department of Health Services did not provide any guidance regarding the
16 quantity of water necessary to protect public health and safety of those on the Monterey Peninsula.
17 (HT2, p. 189 [“We didn’t get a real good answer”].) He offered nothing on his discussions with the
18 Monterey County Department of Health Services.

19 Further, while Mr. Stretars clearly relied upon Title 23 for his opinion, that reliance is clearly
20 misplaced. Mr. Stretars cited Title 23, section 697 for the proposition that 75 gallons per person per
21 day (“gppd”) is the minimum per capita residential supply reasonably necessary to protect health and
22 safety. From this, Mr. Stretars determined the minimum amount of water necessary for CAW to
23 avoid jeopardy to the public’s health and safety by multiplying 75 gppd by the census population
24 (approximately 110,000 people). (*Id.*, p. 172:2-6.) Upon cross examination, it became evident Mr.
25 Stretars’ calculation was oversimplified.

26 Title 23 categorizes water use, providing minimum requirements for in-home (*i.e.*, fully
27 plumbed), resorts, motels, residential landscape, etc. (Ex. CAW-041.) Mr. Stretars recognized this
28 categorization and testified he believed residential use (in-home and landscape) made up

1 approximately 60 percent of total use, with the remaining 40 percent dedicated to all other uses (*i.e.*,
2 other uses identified in section 697). (HT2, p. 109:8-14.) However, his calculation, admittedly,
3 accounted only for in-home use and provided no water for any of the remaining uses. Mr. Stretars'
4 testimony was not clear whether his calculation intended an immediate and complete moratorium on
5 all non-in-home uses or whether his calculation intended all uses to be included in the in-home use
6 calculation, forcing further reductions in in-home uses to accommodate for the remaining uses. (*Id.*,
7 pp. 109:15-112:20, 803:3-804:1.) In either case, the calculation performed by Mr. Stretars and relied
8 upon by the prosecution team does not add up. The prosecution team's conclusion that its proposed
9 remedy will not jeopardize public health and safety does not withstand scrutiny.

10 In addition to the error noted above, the prosecution team ignored other important factors that
11 should have been considered when assessing whether the proposed remedy might jeopardize public
12 health and safety. Three important examples are the prosecution team's failure to consult the
13 Department of Public Health, consider the impact on the CAW distribution system, and consider the
14 impact in context with the Seaside Basin Adjudication. (HT2, pp. 56:9-14, 164:4-9, 169:3-10.)²¹

15 The Department of Public Health regulates drinking water standards and water systems to
16 ensure public health. (California Health and Safety Code § 116270 *et seq.*) In order for the CAW
17 system to properly function and comply with Department of Health Services' requirements, a specific
18 pressure must be maintained. (HT2, p. 1261:18-22.) However, the prosecution team did not consider
19 these requirements when developing its proposed remedy. (*Id.*, p. 167:19-23.) Also, the proposed
20 reduction of extractions may result in reduced pressure in the CAW system, which may compromise
21 ability to provide necessary public services (*i.e.* fire hydrant pressure). (CAW-037, pp. 3:28-4:14.)
22 Finally, as also discussed in subsection 2 immediately below, the prosecution team completely
23 ignores the fact that it is proposing further reductions in CAW's available supplies at a time when
24 CAW must respond to reductions caused by the Seaside Basin Adjudication. (*Id.*; *see also* Ex. CAW-
25 05.)

26
27
28 ²¹ Citation to Mr. Stretars testimony which includes total water available from the Seaside Basin. At no point does Mr. Stretars account for the Seaside Basin Adjudication.

2. The Prosecution Team Made Improper Assumptions Regarding The Supply Of Water Available To The Community On The Monterey Peninsula

To support its position that the proposed remedy would not jeopardize public health and safety, the prosecution team identified and relied upon a number of projects and conservation measures, which it believed are “immediately achievable.” While the projects and measures are real, the prosecution team’s reliance upon them is again misplaced.

For example, Mr. Stretars’ testimony states the City of Sand City desalination project will yield 300 acre-feet of water which can immediately be used to reduce CAW extractions from the Carmel River. However, on cross examination, Mr. Stretars conceded he did not know when the Sand City plant would be completed and did not adequately account for the fact that the quantity of water available to CAW would decrease over time. (HT2, pp. 187:15-25, 95:11-16.)

Similarly, Mr. Stretars assumed CAW would be able to immediately reduce its extractions from the Carmel River by 920 acre-feet because of Phase 1 ASR. Mr. Stretars assumed the 920 acre-feet would be available every year. (HT2, pp. 53:18-20, 92:2-93:16.) Mr. Stretars conceded he did “not specifically” know how much water Phase 1 ASR currently yields. (*Id.*, p. 91:15-18.) Witnesses from MPWMD explained the Phase 1 ASR 920 acre-feet yield is the estimated annual average and the actual water available could range annually from zero to 1,500 acre-feet. (*Id.*, p. 816:18-21.)

Further, Mr. Stretars estimated CAW could “save” an additional 549 acre-feet through unaccounted for water. (Ex. PT-49, p. 2.) It became clear during cross-examination that Mr. Stretars’ estimate of unaccounted for water was made with very little understanding of the CAW system; he understood that addressing the amount of unaccounted for water might result in water savings, but conceded he was unable to identify the type of actions required to reduce unaccounted for water and therefore was not aware of the time and cost required to undertake the needed improvements. (HT2, pp. 167:19-23, 186:3-24, 101:16-103:24.)

In addition, Mr. Stretars alleged CAW could reduce its extractions by 15 percent if it were required to operate under the MPWMD’s Stage 3 conservation. (*Id.*, p. 180:12-17.) Mr. Stretars’ calculation did not account for a fact he conceded: staged conservation does not result in guaranteed savings, but encourages action that might reduce water use. (*Id.*, p. 180:7-11.) Also, the witnesses

1 for MPWMD explained Stage 3 conservation is not intended to reduce water use below the 11,285
2 acre-feet. (*Id.*, p. 806:6-21.) It allows for measures to be taken to bring water use to the 11,285 acre-
3 foot limit, when projected use might exceed that limitation. (*Id.*)

4 Finally and as noted above, the prosecution team fails to place into context CAW's Carmel
5 River extractions, the project discussed above, and the Seaside Basin Adjudication. Evidence
6 presented during the hearing reflects the fact that supply of water from the Seaside Basin available to
7 CAW has decreased and will continue to decrease. (*See* Ex. CAW-005.) The prosecution team does
8 not explain how the further reductions it now proposes, in conjunction with the Seaside Basin
9 reductions, will not jeopardize public health and safety.

10 3. If Adopted By The Board, The Remedy Proposed By The Prosecution Team,
11 Would Impose Obligations On CAW That It Cannot Assume Without
12 Violating The Law

13 The prosecution team alleges its proposed remedy is "immediately achievable." (HT2, pp
14 175:21-176:2.) That however is not true, unless CAW violates its existing legal mandates. As a
15 public utility, the CPUC has primary jurisdiction over CAW and CAW cannot discontinue water
16 service, unless ordered by the CPUC.²² (Cal. Pub. Util. Code § 451.) Likewise, CAW requires
17 action by the CPUC to implement a moratorium or otherwise ban new water service. (*Id.* *See also*
18 Cal. Pub. Util. Code § 2708.) In fact, the CPUC oversees all of CAW's business. Thus, as a CPUC
19 regulated entity, CAW cannot unilaterally comply with a cease and desist as proposed by the
20 prosecution team and others.

21 4. Witnesses With Expertise Consistently and Uniformly Testified The Remedy
22 Proposed By The Prosecution Team Will Harm Public Health and Safety

23 Witnesses with experience operating water utilities and with municipal experience
24 consistently and uniformly testified the remedy proposed by the prosecution team will harm public
25 health and safety. The Director of Engineering for CAW, Mark Schubert, explained how the remedy
26 proposed by the prosecution team and others would place public health and safety at risk. Mr.
27 Schubert also explained the proposed remedy would result, at least at times, in CAW having simply

28 ²² Due to page restrictions, CAW was unable to fully brief the law applicable to CAW as an entity regulated by the CPUC. CAW anticipates more extensive briefing on this topic in its reply brief.

1 insufficient supplies to meet the demands of its customers. (Ex. CAW-037.)

2 Mr. Schubert explained further the step reductions proposed by the prosecution team and
3 others could compromise CAW's ability to deliver potable water. Mr. Schubert highlighted some
4 concerns, which included CAW's ability to maintain an operational distribution system, as well as
5 maintain a system that delivers water consistent with CPUC and California Department of Public
6 Health standards. (Ex. CAW-037.)

7 In addition, the cities of Seaside, Sand City, Monterey, and Carmel each sent its mayor to
8 testify. They all presented testimony which explains why the remedy proposed by the prosecution
9 team and others would jeopardize public health and safety. (HT2, pp. 363:18-364:1, 406:25-408:11,
10 444:25-445:23, 464:1-12, 467:1-14, 444:9-22, 399:19-400:10, 442:19-444:3, 466:14-25, 397:17-
11 398:3, 446:2-20, 464:13-16, 804:19-24.) These statements by the representatives of the
12 municipalities should not be surprising; the Board drew the same conclusion in Order 95-10. The
13 Board determined that, to protect the public health and safety, CAW was required to continue
14 diversion in excess of its water rights, up to the 11,285 acre-foot limit. (Order 95-10, p. 40.)

15 **C. The Only Appropriate Remedy In This Case Is One That Allows CAW To**
16 **Continue To Extract Up To 11,285 Acre-Feet Of Carmel River Water Until An**
17 **Alternative Water Supply Is Developed, Provided That CAW Remains In**
Compliance With Order 95-10

18 The overwhelming evidence demonstrates the existing regulatory oversight of CAW is
19 sufficient during the interim period CAW pursues alternative water supplies. There is no doubt the
20 Board maintains control through the mitigation, conservation and operations controls in Order 95-10.
21 In addition, other measures are in place. For example, CAW extractions are governed by a
22 memorandum of agreement among California Department of Fish and Game ("CDFG"), the NMFS
23 and MPWMD. (Exhibit MPWMD-1, pp. 13:26-14:9.) CAW, MPWMD, CDFG, and NMFS develop
24 quarterly water budgets that guide CAW's extractions. (*Id.*, p. 8:21-24.) And, NMFS and CAW
25 have entered into a conservation agreement and settlement agreement. (Ex. PT 47; Ex. PT 48.)

26 With these regulatory controls in place, the steelhead and riparian habitat have improved
27 significantly. The evidence in the record cannot reasonably be refuted. Indeed, the prosecution
28 team's witness Joyce Ambrosius, a fisheries biologist with NMFS, attested that the steelhead

1 population has significantly recovered. (HT2, p. 125:1-10.) Witnesses for the Carmel River
2 Steelhead Association concede fish counts in recent years mark a 60-year high. (*Id.*, p. 614:21-24.)
3 And, experts for the MPWMD testified riparian habitat and the steelhead populations are more robust
4 today than they were in 1995. (*Id.*, pp. 764:18-21, 780:6-16.) For the reasons stated above, including
5 those stated in other sections of this brief, the only remedy supported by law and the record is one
6 that allows CAW to continue to extract up to 11,285 acre-feet of Carmel River water until it develops
7 alternative water supplies.

8 **VI. This Proceeding Violated CAW's Due Process Rights**

9 CAW maintains its objection that this proceeding has violated CAW's right to due process.²³
10 The bases for CAW's objections were renewed during the proceeding. For example, the president of
11 CAW, Kent Turner, testified that, during the time the prosecution team evaluated the merits of its
12 case, Mr. Turner attended a meeting with Board staff that included Buck Taylor, counsel to and
13 member of the hearing team, and Kathy Mrowka, a member of the prosecution team. (HT1, pp. 93:2-
14 94:4, 455:19-456:23.) At the meeting, CAW's compliance with Order 95-10 was discussed. (*Id.*)
15 Shortly thereafter, the prosecution team issued its draft cease and desist order. At a minimum, this
16 series of events reflects an improper mixing of advisory and prosecutorial roles. This action must be
17 dismissed for failure to afford CAW due process.

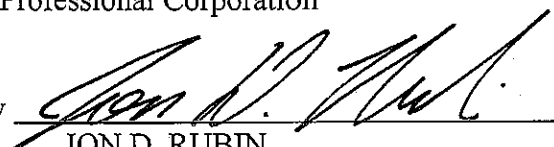
18 **VII. Conclusion**

19 For the reasons stated above, the Board cannot and should not issue a cease and desist order
20 against CAW.

21 Dated: October 9, 2008

Respectfully submitted,

22 DIEPENBROCK HARRISON
23 A Professional Corporation

24 By 
25 JON D. RUBIN
26 Attorneys for California American Water Company)

{00130303; 1

27 ²³ See Motion to Ensure Due Process, filed with the Board on April 23, 2008, which CAW hereby incorporates herein by
28 this reference (a copy of the Motion is attached as Attachment 3); letter from CAW to Hearing Officers Baggett and
Wolff, filed June 9, 2008, which CAW hereby incorporates herein by this reference (a copy of the letter is attached as
Attachment 4).

PROOF OF SERVICE

1 I declare as follows:

2 I am over 18 years of age and not a party to the within action; my business address is 400
3 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County,
4 California.

5 On October 9, 2008, I served a copy of the foregoing document following document entitled
6 **CLOSING BRIEF** on the following interested parties in the above-referenced case number to the
7 following:

8 See Attached Service List of Participants

9 **BY MAIL**
10 By following ordinary business practice, placing a true copy thereof enclosed in a sealed
11 envelope, for collection and mailing with the United States Postal Service where it would
12 be deposited for first class delivery, postage fully prepaid, in the United States Postal
13 Service that same day in the ordinary course of business as indicated in the attached
14 Service List of Participants and noted as "Service by Mail."

12 **ELECTRONIC MAIL**
13 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the
14 electronic mail transfer system in place at Diepenbrock Harrison, originating from the
15 undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail
16 address(es) indicated in the attached Service List of Participants and noted by "Service
17 by Electronic Mail."

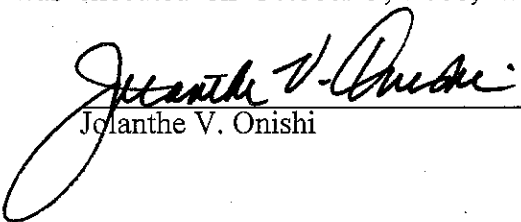
15 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above. The
16 facsimile machine I used complied with California Rules of Court, rule 2003 and no
17 error was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I
18 caused the machine to print a transmission record of the transmission, a copy of which is
19 attached to this declaration.

17 A true and correct copy was also forwarded by regular U.S. Mail by following
18 ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for
19 collection and mailing with the United States Postal Service where it would be deposited
20 for first-class delivery, postage fully prepaid, in the United States Postal Service that
21 same day in the ordinary course of business.

20 **BY OVERNIGHT DELIVERY**
21 Federal Express Golden State Overnight
22 Depositing copies of the above documents in a box or other facility regularly maintained
23 by Federal Express, or Golden State Overnight, in an envelope or package designated by
24 Federal Express or Golden State Overnight with delivery fees paid or provided for.

22 **PERSONAL SERVICE**
23 via process server
24 via hand by

24 I certify under penalty of perjury under the laws of the State of California that the foregoing
25 is true and correct and that this declaration was executed on October 9, 2008, at Sacramento,
26 California.

27 
28 Jolanthe V. Onishi

**CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
JUNE 19, 2008 HEARING
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25
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28

ATTACHMENT 1

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.

(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".])

ATTACHMENT 2

**Cease and Desist Order Hearing for
California American Water
Carmel River in Monterey County**

**Index of Exhibit SWRCB 8-2
(Single exhibit that includes 24 Board responses to CAW quarterly reports)**

Exhibit No.	Description
SWRCB 8-2(a)	December 21, 1995 Letter to California American Water Company from Katherine Mrowka, Associate WRC Engineer
SWRCB 8-2(b)	December 26, 1995 Letter to Larry Foy, California American Water Company from Edward C. Anton, Chief Division of Water Rights
SWRCB 8-2(c)	March 11, 1996 Letter to Larry Foy, California American Water Company from Edward C. Anton, Chief Division of Water Rights
SWRCB 8-2(d)	March 11, 1996 Letter to California American Water Company from Katherine Mrowka, Associate WRC Engineer
SWRCB 8-2(e)	September 12, 1996 Letter to Larry Foy, California-American Water Company from Edward C. Anton, Chief Division of Water Rights
SWRCB 8-2(f)	September 20, 1996 Letter to Larry Foy, California American Water Company from Edward C. Anton, Chief Division of Water Rights
SWRCB 8-2(g)	September 20, 1996 Letter to California American Water Company from Katherine Mrowka, Associate WRC Engineer
SWRCB 8-2(h)	May 15, 1997 Letter to Larry Foy, California American Water Company from Walt Pettit, Director
SWRCB 8-2(i)	May 15, 1997 Letter to Larry Foy, California American Water Company from Walt Pettit, Director
SWRCB 8-2(j)	May 5, 1997 Letter to Larry D. Foy, California American Water Company from Edward Anton, Chief Division of Water Rights
SWRCB 8-2(k)	April 17, 1998 Letter to Larry D. Foy, California American Water Company from Edward Anton, Chief Division of Water Rights

**Cease and Desist Order Hearing for
California American Water
Carmel River in Monterey County**

**Index of Exhibit SWRCB 8-2
(Single exhibit that includes 24 Board responses to CAW quarterly reports)**

Exhibit No.	Description
SWRCB 8-2(l)	November 3, 1998 Letter to Larry Foy, California American Water Company from Harry Schueller, Chief Division of Water Rights
SWRCB 8-2(m)	November 3, 1998 Letter to Larry Foy, California American Water Company from Harry Schueller, Chief Division of Water Rights
SWRCB 8-2(n)	September 2, 1999 Letter to Judy Almond, California American Water Company from Katherine Mrowka, Senior Hearings Engineer
SWRCB 8-2(o)	March 27, 2001 Letter to Terry Ryan, California American Water Company from Harry Schueller, Chief Division of Water Rights
SWRCB 8-2(p)	November 14, 2001 Letter to Judith Almond, California American Water Company from Edward Anton, Chief Division of Water Rights
SWRCB 8-2(q)	February 4, 2005 Letter to Steven Leonard, California American Water Company from Katherine Mrowka, Chief Watershed Unit 3
SWRCB 8-2(r)	February 4, 2005 Letter to Steven Leonard, California American Water Company from Katherine Mrowka, Chief Watershed Unit 3
SWRCB 8-2(s)	May 20, 2005 Letter to Steven Leonard, California American Water Company from Katherine Mrowka, Chief Watershed Unit 3
SWRCB 8-2(t)	September 13, 2005 Letter to Steven Leonard, California American Water Company from Victoria Whitney, Division Chief
SWRCB 8-2(u)	November 16, 2005 Letter to Steven Leonard, California American Water Company from Katherine Mrowka, Chief Watershed Unit 3
SWRCB 8-2(v)	March 2, 2006 Letter to Steven Leonard, California American Water Company from Victoria Whitney, Division Chief

**Cease and Desist Order Hearing for
California American Water
Carmel River in Monterey County**

**Index of Exhibit SWRCB 8-2
(Single exhibit that includes 24 Board responses to CAW quarterly reports)**

Exhibit No.	Description
SWRCB 8-2(w)	August 17, 2006 Letter to Steven Leonard, California American Water Company from Katherine Mrowka, Chief Watershed Unit 3
SWRCB 8-2(x)	March 15, 2007 Letter to Steven Leonard, California American Water Company from Victoria Whitney, Division Chief

ATTACHMENT 3

1 JON D. RUBIN, State Bar No. 196944
2 JONATHAN R. MARZ, State Bar No. 221188
3 VALERIE C. KINCAID, State Bar No. 231815
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5 A Professional Corporation
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7 Sacramento, CA 95814-4413
8 Telephone: (916) 492-5000
9 Facsimile: (916) 446-4535

10 Attorneys for California American
11 Water Company

2007 APR 22 PM 4:00

12 BEFORE THE CALIFORNIA

13 STATE WATER RESOURCES CONTROL BOARD

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

17 **MOTION BY CALIFORNIA AMERICAN
18 WATER COMPANY TO ENSURE DUE
19 PROCESS**

20 **I. Introduction**

21 NOTICE IS HEREBY GIVEN that California American Water Company ("CAW") hereby
22 moves the State Water Resources Control Board ("State Water Board") for an order demonstrating
23 that CAW will be afforded due process. CAW is before the State Water Board because
24 Mr. James W. Kassel and other State Water Board staff are seeking a cease and desist order against
25 CAW. The draft cease and desist order proposed by Mr. Kassel alleges CAW violated Condition 2
26 of State Water Board Order No. 95-10 ("Order 95-10"). It proposes a remedy that threatens the
27 economy of the Monterey Peninsula, and the health and safety of its residents. In part because Mr.
28 Kassel incorrectly concludes that the State Water Board should issue a cease and desist order
(incorrectly concludes that CAW violated Condition 2 of Order 95-10), and, to protect against the
inevitable harm to the Monterey Peninsula if the State Water Board were to issue the proposed
cease and desist order, CAW requested that the State Water Board conduct a formal hearing on that
issue.

///

1 When conducting such a hearing, the State Water Board must afford CAW its
2 constitutionally afforded due process protections. At this time, the structure of the proceeding gives
3 rise to concerns that such protections do not exist in this proceeding. CAW therefore requests the
4 State Water Board take the necessary steps to ensure CAW receives a fair hearing; one without the
5 appearance of bias. CAW recognizes that in order for the State Water Board to do that, it may be
6 required to disqualify members of the State Water Board staff from this proceeding.¹

7 **II. The Current Structure Of This Hearing May Cause The State Water Board To**
8 **Violate CAW's Due Process Protections**

9 **A. Due Process Protections Must Be Afforded In Administrative Adjudications**

10 The Constitutional provisions affording due process require administrative agencies to
11 provide a fair and impartial system for adjudicatory proceedings. (*Richardson v. Perales* (1971)
12 402 U.S. 389, 401 [due process protections apply to administrative proceedings]; *Haas v. County of*
13 *San Bernardino* (2002) 27 Cal.4th 1017, 1025 (“*Haas*”) [“Speaking of administrative hearings, and
14 articulating the procedural requirements “demanded by rudimentary due process” in that setting, the
15 court has said that, “of course an impartial decision maker is essential.”] (quoting *Goldberg v. Kelly*
16 (1970) 397 U.S. 254, 271).)

17 A hearing may run afoul of due process protections, not only if there is a showing of actual
18 bias but also when there is an *appearance* of bias. (*Morongo Band of Mission Indians v. State*
19 *Water Resources Control Board*, 153 Cal.App.4th 202, 210 (“*Morongo*”) [actual bias is no longer
20 the “touchstone for disqualification in administrative hearings.”]; *Haas*, p. 1029 [“We need find no
21 instance of actual judicial bias”]; *Nightlife Partners Ltd. v. City of Beverly Hills* (2003) 108
22 Cal.App.4th 81, 90 (“*Nightlife Partners*”) [“Just as in a judicial proceeding, due process in an
23 administrative hearing also demands an appearance of fairness and the absence of even a *probability*

24 _____
25 ¹ The State Water Board has the duty to demonstrate compliance with due process. (*Howitt v. Superior Court* (1992)
26 3 Cal.App.4th 1575, 1587.) Further, it would be a significant burden for CAW to serve discovery requests and depose
27 every staff member on the hearing team, the prosecutorial team, and all other potential participating staff. (*Ibid.* [“As a
28 practical matter, were the burden allocated otherwise, it would seldom if ever be possible” to prove due process was
violated.]) Also, if CAW were to conduct discovery, it would run the risk of a greater level of enforcement. In its pre-
hearing brief, the prosecutorial team cautioned against delay; indicating that, if there were a delay in this proceeding, the
prosecutorial team may seek a greater level or alternative enforcement against CAW. Undoubtedly, the type of
discovery required to determine the role(s) of State Water Board staff would delay this proceeding.

1 of outside influence on the adjudication.”] (emphasis in original); *Yaqub v. Salinas Valley Memorial*
2 *Healthcare System* (2004) 122 Cal.App.4th 474, 486 [“The question is not whether the judge is
3 actually biased, but whether a person aware of the facts might reasonably entertain a doubt that the
4 judge would be able to act without integrity, impartiality and competency.”].) At a minimum, the
5 appearance of bias occurs when “advocacy and decision-making roles are combined.” (*Howitt v.*
6 *Superior Court* (1992) 3 Cal.App.4th 1575, 1585 (“*Howitt*”).) The prohibition on combining roles,
7 or “dual representation,” precludes a single person from serving advisory and prosecutorial
8 functions, particularly if the person holds those dual roles during the same time frame, even if the
9 matters are unrelated. (*Morongo*, p. 5 [“The fact that she wore a prosecutorial hat in one proceeding
10 and an advisory hat in another in the same time frame is sufficient” to establish a due process
11 violation.]; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817 (“*Quintero*”) [in its
12 evaluation of the prosecutorial appearance of Halford, who had previously advised the Board on a
13 number of occasions, the court stated: “Here, there is no evidence that Halford acted as both the
14 Board’s legal advisor and in a prosecutorial function in this case. However, Halford’s other
15 interactions with the Board give the appearance of bias and unfairness and suggest the probability of
16 his influence on the Board.”]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage*
17 *Control Appeals Bd.* (2006) 40 Cal.4th 1, 5 (“*Quintanar*”) [“One fairness principle directs that in
18 adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision
19 maker or the decision maker’s advisers in private. Another directs that the functions of prosecution
20 and adjudication be kept separate, carried out by distinct individuals.”].)

21 In addition to the appearance of bias, due process prohibits ex parte communications on
22 substantive issues between those who are prosecuting a claim and the decision-making body or its
23 advisors. (Govt. Code, 11430.10; *Quintanar*, p. 10 [“An agency prosecutor cannot secretly
24 communicate with the agency decision maker or the decision maker’s advisor about the substance
25 of the case prior to issuance of a final decision.”].) The purpose of restricting ex parte
26 communication is, in part, to allow administrative agencies to maintain internal adjudicative
27 proceedings, while ensuring the non-agency party receives a neutral and fair determination.
28 (*Quintanar*, p. 10 [“Procedural fairness does not mandate the dissolution of unitary agencies, but it

1 does require some internal separation between advocates and decision makers to preserve
2 neutrality.”]; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159 [“[T]he right of a
3 hearing before an administrative tribunal would be meaningless if the tribunal were permitted to
4 base its determination upon information received without the knowledge of the parties.”].) Unitary
5 administrative agencies must implement procedures to guarantee the prosecutorial and decision
6 making parties are sufficiently “screened” from each other. (*Howitt*, p. 1587 [“Performance of both
7 roles by the same [agency] is appropriate only if there are assurances that the advisor for the
8 decision maker is screened from any inappropriate contact with the advocate.”].) The party relying
9 on the method of separation has the burden of proving the advocate and decision makers are
10 sufficiently screened. (*Ibid.* [“The burden of providing such assurances must rest with the
11 [agency] performing the dual roles . . .”].) If properly implemented, internal screening procedures
12 should be evident. (*Ibid.* [“If the advisor has been screened, it should be relatively easy for
13 [agency] counsel to explain the screening procedures in effect.”].)

14 **B. Documents Prepared By The State Water Board Staff Raise Due Process**
15 **Concerns For CAW**

16 CAW is concerned that the structure of this proceeding violates due process because of an
17 appearance of bias.² CAW is also concerned that, because there is ambiguity as to the roles of
18 certain State Water Board staff, the prohibition on ex parte communications may not ensure CAW
19 receives a fair hearing.

20 On or about March 5, 2008, the State Water Board officially noticed this proceeding.
21 (CAW-0010 (Office Notice of Hearing).) In the notice, the State Water Board identified the staff
22 who were assigned to prosecute and the staff that would assist the Hearing Officers in deciding the
23 case. (*Id.*, p. 1.) However, prior to and since its receipt of the notice, CAW received at least two

24 _____
25 ² In its notice for this proceeding, the State Water Board makes clear that its rules against ex parte communications
26 apply to the prosecutorial team. (Exhibit CAW-0010, p. 3.) CAW recognizes that the prohibition against ex parte
27 communication helps provide due process protections. However, that prohibition, alone, does not ensure all due process
28 requirements are satisfied. Notwithstanding any ex parte rules, due process prohibits bias or the appearance of bias.
(*See Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.App.4th 1, 5*
[“One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the
ultimate decision maker or the decision maker’s advisers in private. Another directs that the functions of prosecution
and adjudication be kept separate, carried out by distinct individuals.”].)

1 documents prepared by the State Water Board staff that raise due process concerns.

2 On January 15, 2008, Mr. Kassel notified CAW that he would pursue a cease and desist
3 order against CAW. (CAW-007 (Letter from James Kassel).) When Mr. Kassel sent that letter, he
4 provided copies to Mr. Thomas Howard, Chief Deputy Director of the State Water Board, Ms.
5 Victoria A. Whitney, Deputy Director for Water Rights, and Mr. Andy Sawyer, Assistant Chief
6 Counsel. (*Id.*, p. 2.)

7 On April 3, 2008, Charles Lindsay, Chief Hearings Unit for the State Water Board, Division
8 of Water Rights, sent an email regarding the status of a non-party entity in this proceeding. (Exhibit
9 CAW-0020 (Charles Lindsay e-mail).) Mr. Lindsey addressed this correspondence to the parties,
10 the non-party entities, and members of the hearing team. However, he also provided copies of the
11 correspondence to Ms. Whitney, Mr. Sawyer, and Mr. Les Grober, Supervisor for the Hearing &
12 Special Project Section of the State Water Board. (*Ibid.*) None of those staff members were
13 assigned to either the prosecutorial or hearing teams. (*See* Exhibit CAW-0010 (Official Notice of
14 Hearing), p. 3). Although this type of communication usually signals interest or involvement in a
15 matter, it is unclear what, if any, role these parties play in this proceeding. At a minimum, the
16 communications from Mr. Kassel and Mr. Lindsay give rise to an appearance of bias.

17 The inclusion of Mr. Howard, Ms. Whitney, Mr. Sawyer, and Mr. Grober in
18 communications related to this proceeding suggests there could be an unlawful mixing of advocacy
19 and decision-making roles. Mr. Howard, Ms. Whitney, Mr. Sawyer, and Mr. Grober serve the State
20 Water Board in various capacities. An appearance of bias will arise if any one of them concurrently
21 serves as a prosecutor and an advisor, even if proceedings are unrelated. The appearance of bias
22 may also exist if any one of the afore-mentioned staff historically held one role and in this
23 proceeding holds the other. The lack of disclosure regarding interested, but unassigned staff
24 members does not allow CAW to determine if an appearance of bias is avoided. To the contrary,
25 the communications received by CAW suggest otherwise.

26 ///

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1 Furthermore, if Mr. Howard, Ms. Whitney, Mr. Sawyer, or Mr. Grober is involved in this
2 proceeding, it is not possible for CAW to ensure how its due process rights are protected through ex
3 parte communication rules. These State Water Board staff members were not designated in the
4 March 5, 2008 notice for this proceeding. As a result, the rules prohibiting against ex parte
5 communications do not explicitly apply to them. CAW believes Mr. Howard, Ms. Whitney, Mr.
6 Sawyer, or Mr. Grober each supervises State Water Board staff, including members of the
7 prosecutorial team and hearing team for this proceeding. If that belief is true, the circumstance
8 gives rise to serious due process concerns. The State Water Board has the burden of proving the
9 advocate and decision makers are sufficiently screened. At this time, it has not done that. Internal
10 screening procedures are not evident. As a result, the State Water Board must demonstrate to CAW
11 that the decision-makers have been and will continue to be screened from any inappropriate contact.

12 **C. Composition Of Prosecutorial Team May Violate Due Process**

13 Notwithstanding the arguments above, Mr. Kassel's membership on the prosecutorial team
14 may give rise to due process violations. For an extended period of time, Mr. Kassel appeared to
15 have a principle role in determining whether CAW was in compliance with Order 95-10. As an
16 example, on June 7, 2006, Mr. Kassel signed a letter written by Ms. Whitney and sent on behalf of
17 the State Water Board. The letter discussed CAW's compliance with Order 95-10. (Exhibit CAW-
18 021 (James Kassel Compliance Letter).) The letter expressed concern with the level of progress by
19 CAW and the Monterey Peninsula Water Management District in complying with Order 95-10.
20 (Exhibit CAW-021, p. 1 (James Kassel Compliance Letter).) The fact that Ms. Whitney and Mr.
21 Kassel apparently acted on behalf of the State Water Board not only suggests Mr. Kassel advised
22 the State Water Board, but the authority delegated to Mr. Kassel likely placed him directly in the
23 seat of the decision-maker (he expressed concern with CAW compliance efforts).³

24 At some time after signing the June 7, 2006 letter but before January 15, 2008, Mr. Kassel
25 (and possibly Ms. Whitney and other staff members) apparently switched roles, taking on a
26

27 ³ Other State Water Board staff may have a similar conflict as Mr. Kassel. The State Water Board must explain the
28 roles of all State Water Board staff who were identified as part of the prosecutorial team, part of the hearing team, or
identified in correspondence served in this proceeding.

1 prosecutorial function. He and other unknown staff of the State Water Board prepared and issued a
2 notice informing CAW that Mr. Kassel and other State Water Board staff would prosecute a cease
3 and desist order against CAW. (Exhibit CAW-007 (Letter from James Kassel), p. 1.)⁴ The State
4 Water Board recognized Mr. Kassel's new role as prosecutor in its March 5, 2008 official notice for
5 this proceeding. (Exhibit CAW-0010 (Office Notice of Hearing), p. 3.) There, the State Water
6 Board designated Mr. Kassel as a member of the prosecutorial team. (Exhibit CAW-0010 (Office
7 Notice of Hearing), p. 3.)

8 If the appearances above prove true, Mr. Kassel (and possibly other State Water Board staff)
9 as advisors to the decision-maker or directly as the decision-makers are precluded from acting and
10 subsequently from appearing before the State Water Board in a prosecutorial role. (*Quintero*, p. 816
11 ["An ongoing relationship with the Board is enough to show the probability of actual bias. It would
12 only be natural for the Board members who have looked to [Mr. Kassel] for advice and guidance, to
13 give more credence to his arguments."]; *Nightlife Partners*, p. 94 [determined an individual who
14 served as an advisor was prohibited from appearing before the Board in a prosecutorial role].) To
15 allow him or any other State Water Board staff member such dual representation in the same matter,
16 or on a matter involving substantially similar issues, would clearly violate CAW's due process.
17 (*Morongo*, p.5; *Quintero*, p. 817; *Quintanar*, p. 5.)

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27 ⁴ The fact that CAW is not aware of the staff members with whom Mr. Kassel work when preparing the notice and draft
28 cease and desist order provides an additional reason CAW is concerned that its due process rights have not be protected
in this proceeding.

1 **III. Conclusion**

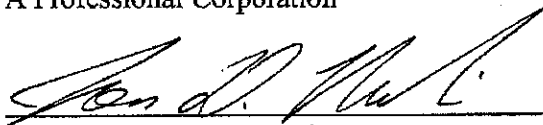
2 The State Water Board is required to conduct this proceeding in a manner that affords CAW
3 due process. Documents from the State Water Board and its staff raise serious concerns with the
4 ability of the State Water Board to meet that obligation. Therefore, CAW respectfully requests the
5 State Water Board demonstrate that CAW will be afforded due process. CAW recognizes to do
6 that, it may be necessary for the State Water Board to disqualify members of its staff from further
7 participation in this proceeding.

8 Dated: April 23, 2008

Respectfully submitted,

9
10 DIEPENBROCK HARRISON
A Professional Corporation

11
12 By


13 JON D. RUBIN
Attorneys for California American Water Company

PROOF OF SERVICE

1 I declare as follows:

2 I am over 18 years of age and not a party to the within action; my business address is 400
3 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

4 On April 23, 2008, I served a copy of the foregoing document following document entitled
5 **MOTION BY CALIFORNIA AMERICAN WATER COMPANY TO ENSURE DUE**
6 **PROCESS** on the following interested parties in the above-referenced case number to the
7 following:

8 See Attached Service List of Participants

9 **BY MAIL**

10 By following ordinary business practice, placing a true copy thereof enclosed in a sealed
11 envelope, for collection and mailing with the United States Postal Service where it would
be deposited for first class delivery, postage fully prepaid, in the United States Postal
Service that same day in the ordinary course of business as indicated in the attached
Service List of Participants and noted as "Service by Mail."

12 **ELECTRONIC MAIL**

13 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the
14 electronic mail transfer system in place at Diepenbrock Harrison, originating from the
undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail
address(es) indicated in the attached Service List of Participants and noted by "Service by
Electronic Mail."

15 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above. The
16 facsimile machine I used complied with California Rules of Court, rule 2003 and no error
was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I
caused the machine to print a transmission record of the transmission, a copy of which is
attached to this declaration.

17 A true and correct copy was also forwarded by regular U.S. Mail by following
18 ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for
collection and mailing with the United States Postal Service where it would be deposited
19 for first-class delivery, postage fully prepaid, in the United States Postal Service that
same day in the ordinary course of business.

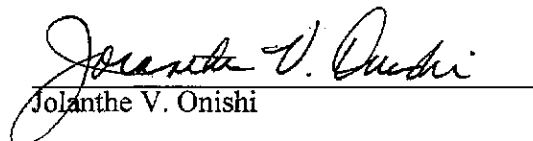
20 **BY OVERNIGHT DELIVERY**

21 Federal Express Golden State Overnight
22 Depositing copies of the above documents in a box or other facility regularly maintained
by Federal Express, or Golden State Overnight, in an envelope or package designated by
23 Federal Express or Golden State Overnight with delivery fees paid or provided for.

24 **PERSONAL SERVICE**

25 via process server
26 via hand by

27 I certify under penalty of perjury under the laws of the State of California that the foregoing
28 is true and correct and that this declaration was executed on April 23, 2008, at Sacramento,
California.


Jolanthe V. Onishi

1 CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
2 JUNE 19, 2008 HEARING
3 SERVICE LIST OF PARTICIPANTS

4 Service by Electronic Mail:

5 **Division of Ratepayer Advocates**
6 Andrew Ulmer
7 Division of Ratepayer Advocates
8 California Public Utilities Commission
9 505 Van Ness Avenue
10 San Francisco, CA 94102
11 (415) 703-2056
12 eau@cpuc.ca.gov

13 **Public Trust Alliance**
14 Michael Warburton
15 Resource Renewal Institute
16 Room 290, Building D
17 Fort Mason Center
18 San Francisco, CA 94123
19 Michael@rri.org

20 **Carmel River Steelhead Association**
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22 P.O. Box 207
23 Quincy, CA 95971
24 (530) 283-1007
25 mjattv@sbcglobal.net

26 **City of Seaside**
27 Russell M. McGlothlin
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National Marine Fisheries Service
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Long Beach, CA 90802
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christopher.keifer@noaa.gov

1 **Service by Electronic-Mail (Cont.):**

2 **Monterey County Hospitality Association**
3 Bob McKenzie
4 P.O. Box 223542
5 Carmel, CA 93922
6 (831) 626-8636
7 info@mcha.net
8 bobmck@mbay.net

California Salmon and Steelhead
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June 9, 2008

Via e-mail: wrhearing@waterboards.gov
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Board Members and Hearing Officers
State Water Resources Control Board
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**Re: Proposed Draft Cease and Desist Order No. 2008-XXXX-XXX,
California American Water**

Dear Hearing Officers Baggett and Wolff:

I write on behalf of California American Water Company ("CAW") and to you in your capacity as the hearing officers in the proceeding to consider the above-referenced proposed order. CAW maintains significant concerns with the manner in which this proceeding is being conducted. Specifically, CAW does not believe it will be afforded due process if the proceeding continues as it is currently structured.¹

Less than two months ago, CAW filed a motion explaining that, because of the structure of the proceeding, CAW's due process might be jeopardized. CAW requested, in part, the State Water Resources Control Board ("State Water Board") take the necessary steps to ensure CAW would receive a fair hearing; one without the appearance of bias. One of the concerns expressed by CAW was the circumstance whereby State Water Board staff who previously assisted the State Water Board with

¹ Given the significance of its concern, CAW wanted to quickly raise this issue to you. If the hearing officers desire legal briefing on this issue, CAW will prepare and file such a pleading.

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adjudicatory functions related to Order 95-10 now appeared to serve to prosecute CAW for alleged violations of that same order. No change to this proceeding was made as a result of CAW's motion.

An adjudicatory proceeding violates due process rights and challenges the foundation of a fair proceeding if the proceeding is conducted with an undue risk of bias. This past Friday, the State Water Board prosecutorial team filed written testimony for this proceeding, including testimony for Ms. Mrowka. Ms. Mrowka's testimony makes clear that, if this proceeding continues as it is currently structured, CAW will not be afforded due process. The structure of this proceeding creates an unacceptable risk of bias.

Ms. Mrowka explains that she has historically assisted the State Water Board with adjudicatory functions related to Order 95-10. Ms. Mrowka is prepared to testify under oath that she was "responsible for assisting the State Water Board during the [Order 95-10] proceeding and was also responsible for assisting with the preparation of Order WR 95-10 and Decision 1632 as a result of the hearing." (Exhibit PT 2, p. 2.) She also concedes she "routinely write [sic] Cal Am regarding its compliance." (Exhibit PT 2, p. 3.) She explains: "the letters generally state whether Cal Am has complied with Order WR 95-10." (Exhibit PT 2, p. 6.)

The written testimony that she prepared in support of the prosecutorial team reflects her current assignment, assisting in the prosecution of an alleged violation of the same order she apparently helped prepare and for which she determined whether CAW was in compliance. Ms. Mrowka clearly worked with the prosecutorial team to prepare and submit testimony for this hearing. Her current role can only be interpreted to reflect Ms. Mrowka's position on the prosecutorial team.² To state or find otherwise presumably would be a concession that the prosecutorial team violated ex parte rules.

Like the argument made by CAW in its prior motion, due process protections are compromised when one like Ms. Mrowka, who historically acted as an adjudicator or member of a team performing an adjudicatory function on an issue, now supports the

² Ms. Mrowka, as well as other State Water Board staff members, have been designated part of the prosecutorial team in another pending proceeding. (See Notice of Public Hearing and Pre-Hearing Conference In Re: Proposed Revocation of Permits 16209, 16210, 16211 and 16212 (Applications 18721, 18723, 21636 and 21637), a copy of which is enclosed hereto.) The participation by Ms. Mrowka and possible others in that separate yet concurrent proceeding raise due process issues and concerns, as well.

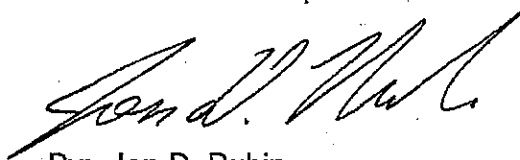
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prosecution effort related to that same issue. Thus, for the above-stated reasons, CAW renews its prior objection on due process grounds. Thank you in advance for your prompt consideration of this objection. Given the existing schedule, CAW respectfully requests a timely response to this letter.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation



By: Jon D. Rubin
Attorneys for California American Water Company

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CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER

JUNE 19, 2008 HEARING

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