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# State Water Resources Control Board

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**Arnold Schwarzenegger**  
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**MAY 13 2008**

To: Enclosed Service List of Participants

**RULINGS ON PROCEDURAL ISSUES INVOLVING THE CONSIDERATION OF A CEASE AND DESIST ORDER AGAINST CALIFORNIA AMERICAN WATER (CAL AM) FOR UNAUTHORIZED DIVERSION OF WATER FROM THE CARMEL RIVER IN MONTEREY COUNTY**

This letter rules on procedural matters raised at the March 19, 2008 pre-hearing conference, in the pre-hearing briefs and reply briefs authorized at the pre-hearing conference, and in a letter of March 21, 2008 from the hearing officer.

### **1.0 HEARING ISSUES**

The scope of this hearing is determined by the hearing notice that specifies:

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence relevant to determining whether to adopt, with or without revision, a draft Cease and Desist Order (CDO). The draft order was issued against Cal Am on January 15, 2008 by the Assistant Deputy Director for the Division of Water Rights (Division) for the unauthorized diversion of water from the Carmel River in Monterey County.

The Key Issue identified in the hearing notice is:

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

The hearing notice defines the scope of the hearing, and the State Water Board will not enlarge the hearing to address issues beyond the scope of this enforcement proceeding.

### **1.1 Violations Subject to the Hearing**

The notice of proposed cease and desist order and accompanying draft cease and desist order allege that Cal Am is diverting water from the Carmel River in excess of its rights, as recognized in State Water Board Order WR 95-10, to divert 3,376 afa in violation of Water Code section 1052, and that Cal Am is diverting water in violation of condition 2 of Order WR 95-10.

Cal Am argues that the sole issue is whether Cal Am has violated condition 2 of Order WR 95-10, an argument apparently intended to exclude from the hearing the issue whether Cal Am is diverting water in violation of Water Code section 1052. The hearing issues include the issue of whether Cal Am is diverting water in excess of its water rights, in violation of Water Code section 1052.

***California Environmental Protection Agency***

## 1.2 Remedies for Violation

In considering what remedy to impose in an enforcement proceeding, the State Water Board is not limited by the recommendations of the prosecution team. (See State Water Board Order WR 2008-0015 at p. 6 [in proceeding on administrative civil liability complaint, State Water Board may set civil liability higher or lower than the amount advocated by the prosecution team].) The State Water Board may be limited by the hearing notice and, for some remedies, by the need for an initial pleading. Thus, for example, the State Water Board cannot impose civil liability for diversion or use of water in violation of Water Code section 1052 unless an administrative civil liability complaint is issued and the hearing notice is revised to include imposition of administrative civil liability. But consistent with the hearing notice, and depending on the evidence presented, the State Water Board may consider including in a cease and desist order requirements such as a ban on new service connections, a ban on increased water deliveries to existing service addresses, a ban or limit on landscape irrigation, additional water conservation measures, alternative water supplies, or measures to protect public trust resources during any period of continued unauthorized diversions, that are not included in the proposed cease and desist order. The State Water Board may also consider a referral to the Attorney General because notice and an opportunity for a hearing are not required before the State Water Board makes a referral to initiate an enforcement action in Superior Court.

## 2.0 A BIFURCATED HEARING IS UNNECESSARY

Cal Am contends that the State Water Board should hold a bifurcated hearing: a hearing for the question of whether a violation has occurred and a separate hearing for what remedy may be appropriate. The prosecution team contends that a bifurcated hearing is unnecessary based on undisputed evidence of Cal Am's recent diversions.

Cal Am recognizes that the principles of collateral estoppel apply to the parties to Order WR 95-10, and that Order WR 95-10 determined that Cal Am's claimed water rights were limited to 3,376 acre-feet per annum (afa). Cal Am further claims, however, that Order WR 95-10 somehow authorizes Cal Am to divert a much larger amount, up to 11,285 afa. Because Cal Am argues that violation of Order WR 95-10 is the sole issue in the hearing, it is unclear whether Cal Am contends that (1) Order WR 95-10 amounts to a water right permit<sup>1</sup> authorizing the appropriation of water for purposes of Water Code section 1052, or (2) is an interim physical solution. It may be that the argument is merely intended to express the view that Order WR 95-10 itself does not require Cal Am to terminate its diversions, so long as total diversions do not exceed 11,285 afa. Either way, Cal Am raises a legal argument, and it does not appear that evidence is needed to address that argument. Even if the State Water Board accepted an argument that Order WR 95-10 does not require Cal Am to eliminate its diversions, Cal Am is still subject to the issuance of a cease and desist order for violation of Water Code section 1052.

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<sup>1</sup> None of the mandatory statutory requirements for the issuance of a permit for the appropriation of water were complied with.

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It is not clear, however, whether Cal Am's legal argument is the sole basis for its claim that liability is in dispute. The notice of proposed cease and desist order contends that Cal Am is diverting amounts in excess of its water rights, but is unclear whether Cal Am concedes that it is diverting in excess of its water rights. As the prosecution team observes, factual stipulations could streamline this proceeding. If Cal Am and the prosecution team are willing to stipulate to the amount of Cal Am's diversions, and assuming the stipulated amount exceeds 3,376 afa, the need for a hearing on whether a violation has occurred would be obviated, and the hearing could proceed directly to what remedy may be appropriate. If Cal Am contests the issue, however, it is entitled to a hearing to decide whether a violation has occurred or is threatened. If the parties are unable to resolve through stipulation the issue of whether diversions exceed, or threaten to exceed, the amounts recognized in Order WR 95-10 as within Cal Am's rights, separating the hearing into two phases, with evidence on the violation issue heard before proceeding to the issue of remedy, could serve to better organize the proceedings and to promote settlement.<sup>2</sup>

### **3.0 THE HEARING**

The issues upon which evidence will be received will be taken in two phases:

During the first phase evidence may be presented addressing the issues of whether Cal Am is diverting water in violation of Water Code section 1052 and whether Cal Am has complied with the requirements of Order WR 95-10 and amendments thereto.

During the second phase evidence may be presented as to what compliance measures and schedule of compliance should be included in any cease and desist order issued to Cal Am and how such an action may be most effectively and equitably implemented.

#### **3.1 Phase One**

Only evidence will be accepted that tends to prove that Cal Am is or is not in violation of Water Code section 1052 and has or has not complied with the requirements of Order WR 95-10, and amendments thereto.

#### **3.2 Phase Two**

Only evidence will be accepted that tends to show what provisions should or should not be incorporated in a cease and desist order, if one is issued. All relevant evidence will be accepted including, but not limited to: (1) what water supply alternatives are or may become available to

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<sup>2</sup> In addition to Cal Am's request that the hearing be bifurcated, we have received comments from interested persons arguing the State Water Board should put off the hearing for an unspecified period and instead assist the community in pursuing alternative water supplies. Holding the hearing in phases may help to address some of these concerns, and we do not believe that suspending the hearing would be in the public interest. We understand that obtaining the necessary approvals and financing for alternative water supplies may require coordination among several different agencies, but presentations during the remedy phase can address this issue. Moreover, to the extent there is disagreement about whether Cal Am is in violation and how promptly any violations should be corrected, completing these proceedings may help focus the community and other agencies on the need to reach agreement on and diligently implement corrective action for any violations determined to be occurring or threatened.

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Cal Am and its customers, (2) when those alternatives may become available, (3) the effects of reducing the supply of water to Cal Am customers, and (4) the impacts on public trust resources of Cal Am's continued diversions from the Carmel River under alternative schedules for compliance.

#### **4.0 EVIDENCE PERTAINING TO PUBLIC TRUST RESOURCES WITHIN AN ENFORCEMENT PROCEEDING**

The State Water Board will give consideration to public trust resources within the context of an enforcement proceeding. For example, the extent of harm to the public trust may be relevant to determining how long the schedule should be for achieving compliance. A cease and desist order may also include measures to avoid or mitigate adverse impacts on public trust uses during a period of continuing violations before full compliance is achieved. Where the parties propose different remedies, public trust impacts will also be relevant to the State Water Board's choice of remedies.

Some parties may be requesting the State Water Board to apply the public trust doctrine to both Cal Am's legal and illegal diversions from the Carmel River. Such an inquiry is outside the scope of the issues noticed for this proceeding. The Board declines to initiate an ancillary proceeding to consider the application of the public trust doctrine to Cal Am's legal diversions from the Carmel River at this time.

#### **5.0 TESTIMONY PROPOSED IN NOTICES OF INTENT TO APPEAR**

Given the summary nature of the information contained in the Notices of Intent to Appear (NOI), it is unclear in some instances to what extent the proposed testimony will be relevant to either phase of the hearing. Participants in this proceeding should give careful consideration to the relevance of any testimony offered.

#### **6.0 STANDING OF PERSONS FILING NOTICES OF INTENT TO APPEAR; SCOPE OF PARTICIPATION**

Diversions from rivers and streams have many direct and indirect third party effects. Order WR 95-10 and the NOIs filed for this proceeding demonstrate the numerous third party concerns surrounding Cal Am diversions from the Carmel River. The State Water Board encourages the participation of persons interested in a proceeding so that their concerns can be made known and addressed.

Accordingly, except as provided below, those persons who have filed an NOI may participate in this proceeding. Participation shall be limited to the matters set forth in each Notice of Intent provided that any evidence offered must conform to the requirements of the March 5, 2008, Notice of Hearing (see particularly Attachment A), and this ruling.

##### **6.1 Standing of the Defenders of Wildlife and Mr. George T. Riley**

The Notice of Hearing required that persons who wished to participate in this proceeding should have filed an NOI no later than noon on March 14, 2008. Two NOI's were filed late.

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### 6.1.1 Defenders of Wildlife

The Defenders of Wildlife (Defenders) filed its NOI on March 14 but after the 12 noon cutoff time. The Defenders did not: (1) list any witnesses or subjects for which testimony might be offered, (2) indicate intent to present a policy statement or (3) indicate intent to participate by cross-examination or rebuttal. Finally, the Defenders did not appear at the March 19, 2008 pre-hearing conference.

Defenders will not be designated as a party in this proceeding. (See Cal. Code Regs., tit. 23, § 648.1, subd. (a).) Defenders may participate in this proceeding as an interested person, without being designated as a party, by filing a written policy statement no later than the beginning of the hearing on June 19, 2008. Because a policy statement submitted by an interested person may include any legal arguments that a party could have submitted on the merits, and because Defenders has not listed any witnesses or indicated any intent to participate by cross-examination, it appears that Defenders can protect its interest through participation as an interested person. Defenders can also help promote its interests by offering its assistance to one or more of the other nongovernmental organizations and public agencies that are parties to this proceeding and will be presenting evidence and legal arguments for the protection of fish and wildlife. Moreover, with the participation of these other nongovernmental organizations and public agencies, the State Water Board is reasonably assured that the hearing record will include the evidence the Board needs to satisfy its public trust obligations.

### 6.1.2 Mr. George Riley

Mr. Riley filed an NOI on April 5, 2008, over 3 weeks late, pleading unfamiliarity with State Water Board procedures. He indicates a desire to offer evidence in three areas: (1) "evidence of local delay on 95-10", (2) "evidence of pressure working" and (3) "what modifications to CDO can have greatest impact." Mr. Riley appeared on April 1, 2008 in Monterey, California, and made a public policy statement.

As in the case of Defenders, Mr. Riley has not timely complied with the procedural requirements for participation as a party, other parties can be expected to present evidence related to the issues he intends to raise, and there does not appear to be any other reason why his participation as a party would benefit the proceedings. While unlike Defenders, Mr. Riley has indicated an intent to present evidence, it also appears that much of his proposed testimony will be in the nature of legal and policy arguments concerning whether voluntary compliance efforts should be backed up by an enforceable compliance schedule. Presenting these arguments in the form of testimony would result in an undue consumption of time. Like Defenders, Mr. Riley may work with other parties that share his concerns, and Mr. Riley may also submit a written policy statement prior to June 19, 2008.

## 7.0 MOTION TO STRIKE IS DENIED

On April 22, 2008, Cal Am filed a motion to strike portions of the pre-hearing briefs. Cal Am contends that the briefs "...include arguments that are irrelevant, unsupported or inadequately supported assertions, and documents attached to briefs without evidentiary foundation...." The motion is denied for three reasons. First, the persons filing those briefs have not had an opportunity to respond to Cal Am's motion to strike. Second, the briefs and attachments have

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not been offered into evidence, and are not considered as part of the evidentiary record of these proceedings. The briefs are treated as arguments, not facts. Third, the briefs have been considered only for purposes of ruling on the procedural issues addressed in this letter. Fourth, even where the briefs make arguments concerning what evidence should be considered or what should be included in a cease and desist order, they serve to illustrate what issues the parties believe should be included within the scope of the proceeding. Indeed, some of the material Cal Am proposes to strike can best be understood as requests that the scope of the hearing be enlarged. We decline to enlarge the scope of the proceeding, but we do so for the reasons stated in this ruling, not based on a refusal to read the portions of the briefs asking us to enlarge the proceedings.

#### **8.0 OFFICIAL NOTICE:**

Official notice is taken of the following determinations made pursuant to the Federal Endangered Species Act:

- The steelhead (*Onchorynchus mykiss*) population within the South Coast Central Evolutionary Unit was federally listed as threatened on August 18, 1997 (62 FR 43937), and reaffirmed January 5, 2006 (71 FR 834).
- The California red-legged frog (*Rana aurora draytonii*) was federally listed as threatened on May 23, 1996. (61 Federal Register 25813.)

Official notice is taken of two items originated within the State Water Board:

- An April 3, 2008 email from Mr. Larry Lindsay to the parties and other participants in this proceeding, advising that the State Water Board would rule on the standing of the Defenders of Wildlife around May 8, 2008. The email was also copied to various persons within the State Water Board.
- The letter dated June 7, 2006, from Victoria Whitney, Deputy Director for Water Rights, to California American Water and the Monterey Peninsula Water Management District. The letter addresses a number of matters concerning the diversion and use of water from the Carmel River.

We take official notice solely for the purposes of ruling on the procedural matters considered in this letter. If a party seeks consideration of these items as part of the evidence for Board's consideration on the merits of whether a cease and desist order should be issued or what a cease and desist order should include, the party should make a separate request for official notice.

#### **9.0 RE: MOTION TO ENSURE DUE PROCESS**

On April 22, 2008, Cal Am filed a motion to ensure due process. Cal Am is concerned that its due process may be threatened due to communications within the State Water Board and by the fact that a member of the prosecution team is a manager within the State Water Control Board and as such may have undue influence with the members of the Board.

**9.1 January 15, 2008 letter from Mr. Kassel to Cal Am**

This letter and the attached draft cease and desist order provided Cal Am with the notice required for issuance of a proposed cease and desist order, and informed Cal Am of its right to request a hearing. Courtesy copies were sent to David A. Berger, General Manager of the Monterey Peninsula Water Management District, and the following members of State Water Board management: Tom Howard, Chief Deputy Director; Victoria Whitney, Deputy Director for Water Rights; and Andy Sawyer, Assistant Chief Counsel.

When this letter was copied to the members of State Water Board management, there was no adjudicative proceeding pending. Although it was not unreasonable to anticipate that a hearing might be requested, it was by no means certain. Indeed, it was not clear that a hearing would be required until Cal Am filed a request for a hearing on February 4, 2008, nearly three weeks later.

Administrative agencies having dual prosecutorial and judicial roles must be able to share information that will enable their management to anticipate what demands are being made or may be made on agency staffing. No credible argument can be made that copying agency management on a notice of proposed cease and desist order somehow biases the agency in favor of issuing the proposed order if the party receiving notice requests a hearing. Receipt of copies of the notice of a proposed cease and desist order obviously does not constitute service as an investigator or prosecutor in the pre-adjudicative stage of these proceedings. It merely informs agency management of an exercise of prosecutorial discretion that has already occurred. (See also Gov. Code, § 22425.30, Law Revision Commission Comment ["a person has 'served' in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with the person who personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation."])

**9.2 Email originating from Mr. Larry Lindsay**

Cal Am is concerned that its due process may be threatened because the Chief of the Hearings Unit, when sending an email to all the parties and participants to this proceeding, also sent copies to four persons within the State Water Board who are not identified as members of either the prosecution team or the hearing team. Obviously, the email is not an improper ex parte contact because it was sent to all parties. Further, it cannot reasonably be argued that copying additional Board staff not identified as members of prosecution team or hearing team on a communication sent to all parties somehow constitutes bias on the part of the decision maker.

Cal Am's motion may be understood as a request for clarification as to the role of the Board personnel who were copied on the email and of other personnel. Those persons are: Michael Lauffer, Andy Sawyer, Larry Lindsay, Les Grober, Vicky Whitney, Tom Howard and Dorothy Rice. These persons and Chief Deputy Director Jonathan Bishop are not involved in the day-to-day work of this proceeding but as part of management will be kept advised of the work of this proceeding. Some of these persons also exercise supervisory authority over the work of members of the hearing team in this proceeding, or may be consulted by the hearing officers or other Board members in this proceeding. As a matter of practice in this and other water right proceedings, the State Water Board applies the same ex parte rules to supervisors and

managers who are substantially involved in an advisory function, either through their supervision of the work of hearing team members in the proceeding or through their advice to Board members in the proceeding, as apply to hearing team members. These supervisory and management personnel do not accept ex parte communications from the prosecution team or other parties.

While there has been no mixing of advocacy and advisory roles by the supervisory and managerial personnel who may have some involvement in this proceeding, all parties' understanding of the applicability of the rule against ex parte contacts and the appearance of fairness would be improved if the hearing notice were revised to specifically address this issue. The hearing notice will be updated accordingly.

### **9.3 Composition of the Prosecution Team does not Violate Due Process**

Mr. Kassel is listed as a member of the prosecution team in the March 5, 2008 hearing notice. The listing promotes due process. Mr. Kassel issued the notice of proposed cease and desist order, and thus might be expected to advocate in support of the proposed cease and desist order if he were allowed to advise the Board in this matter. Listing Mr. Kassel as a member of the prosecution team precludes him from communicating with Board members or hearing team members, either directly or indirectly, regarding an issue in the proceeding. (See Gov. Code, § 11430.10.)

Nor can it be reasonably argued that the identification of Mr. Kassel as a member of the prosecution team creates an appearance of bias, let alone an impermissible risk of bias. An attorney for the Office of Enforcement is serving as the attorney advocate for the prosecution team. The prosecution team does not list Mr. Kassel as a proposed witness (see Notice of Intent to Appear by the prosecution team).

### **10.0 REVISED HEARING SCHEDULE:**

The schedule of the hearing noticed on March 5, 2008 is modified as follows:

- **Phase One:** The first phase of the hearing shall commence at 9:00 a.m. on **Thursday, June 19, 2008** and shall continue, as necessary, on June 20. For phase one, the deadline for receipt and service of the list of exhibits, proposed witness testimony, exhibits and witness qualifications is **Friday, June 6, 2008, no later than 12 noon.**
- **Phase Two:** The second phase of the hearing will commence on **Wednesday, July 23, 2008**, and shall continue, as necessary, on July 24 and 25. For phase two, the deadline for receipt and service of the list of exhibits, proposed witness testimony, exhibits and witness qualifications is **Wednesday, July 9, 2008, no later than 12 noon.**

Additional hearing days will be scheduled if necessary.

### **11.0 REFUSAL TO ACCEPT ELECTRONIC SERVICE**

When filing a Notice of Intent to Appear, the Monterey Peninsula Water Management District, the City of Sand City and the City of Carmel by the Sea declined to accept electronic service

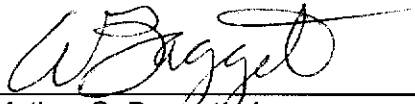


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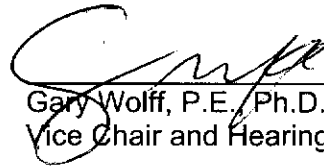
from the State Water Board and others participating in this proceeding. This requires unnecessary additional work for the hearing team and for the parties. It also tends to undermine efforts to conserve resources by not reducing the use of paper. The State Water Board requests that the decisions to decline electronic service be reconsidered.

Should you have further questions in this matter, please contact Paul Murphey, Division of Water Rights Hearings Unit, (916) 341-5435, or [PMurphey@waterboards.ca.gov](mailto:PMurphey@waterboards.ca.gov); or Buck Taylor, Office of Chief Counsel, (916) 341-5595, or [BGTaylor@waterboards.ca.gov](mailto:BGTaylor@waterboards.ca.gov).

Sincerely,



Arthur G. Baggett, Jr.  
Board Member and Hearing Officer



Gary Wolff, P.E., Ph.D.  
Vice Chair and Hearing Officer

Enclosure

## CAL AM SERVICE LIST

*[for purposes of this ruling; persons denied party status by this ruling will not be included in the service list for other matters requiring service on all parties]*

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May 12, 2008

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