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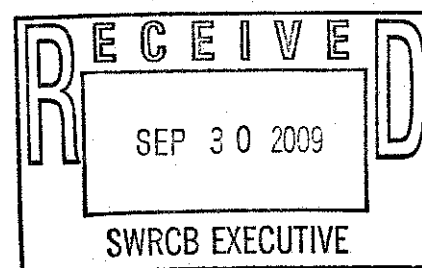
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September 30, 2009

**Via E-mail: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)**  
**and U.S. Mail**

Jeanine Townsend, Clerk to the Board  
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**Re: COMMENT LETTER – 10/20/09 BOARD MEETING: CAL-AM CDO**

Dear Members of the State Water Resources Control Board:

On or about September 16, 2009, the State Water Resources Control Board (State Water Board) released a proposed cease and desist order concerning California American Water's (CAW) use of Carmel River water (Proposed CDO). CAW writes to respectfully request that the State Water Board NOT adopt the Proposed CDO. CAW is disappointed the Proposed CDO does not resolve many of the concerns previously raised by CAW and the interests of the people on the Monterey Peninsula.<sup>1</sup>

It appears the Proposed CDO has two purposes: to instigate construction of a single long-term water supply solution for the Monterey Peninsula and to cause CAW, in the short term, to extract less water from the Carmel River. CAW supports these goals.

<sup>1</sup> Previously, CAW presented arguments against adoption of a cease and desist order and objections to the manner in which the proceeding was conducted. CAW presented those arguments and objections in briefs, through written motions, in letters, and orally. CAW incorporates by this reference the arguments and objections it has previously raised. Nothing in this letter is intended or should be interpreted as suggesting the Proposed CDO adequately addresses or that CAW waives those arguments and objections.

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Indeed, CAW, the California Public Utilities Commission, and many interested parties on the Monterey Peninsula are working to achieve them. The Proposed CDO may attempt to further those purposes; unfortunately, it does that without a clear understanding of the law, the regulatory constraints on investor-owned utilities, the ability of a utility to affect consumer behavior, and the facts surrounding water supply planning on the Monterey Peninsula. As a result, the State Water Board is considering a Proposed CDO that it does not have the legal authority to issue it. Even if it did, and more troubling still, the State Water Board is considering a Proposed CDO that would do more harm than good. The Proposed CDO has frustrated, and if issued will likely continue to frustrate, ongoing short and long-term water supply planning efforts.

1. THE FINDINGS IN THE PROPOSED CDO, THAT CAW COMMITTED A TRESPASS AND VIOLATED CONDITION 2 OF ORDER 95-10, ARE NOT SUPPORTED BY LAW OR EVIDENCE

The Proposed CDO is premised upon CAW violating Water Code section 1052 and Condition 2 of Order 95-10. The law and evidence do not support those findings. CAW presented extensive argument to support that position and highlights two of those points here.

**A. The Proposed CDO Lacks Legal Or Evidentiary Support For The Finding That The State Water Board Did Not Authorize CAW's Extractions In Excess Of Its Water Rights**

To support the finding that CAW violated Water Code section 1052, the Proposed CDO summarily finds nothing in Order 95-10 allows CAW to extract water in excess of CAW's rights. In doing so, the Proposed CDO, with no explanation, ignores:

1. The finding in Order 95-10 that CAW had been extracting in excess of 10,000 acre-feet of Carmel River water each year. See Order 95-10, p. 39.
2. The finding in Order 95-10 that CAW "cannot significantly reduce its extractions from the wells along the Carmel River." See Order 95-10, p. 37.
3. The condition in Order 95-10, which orders CAW to "cease and desist from [extracting] any water in excess of 14,106 [acre feet per annum]." See Order 95-10, p. 40.

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4. The conditions in Order 95-10, which order CAW "to mitigate the effect of its [extractions] until such time as it is able to obtain water from the Carmel River or other sources consistent with California water law." See Order 95-10, p. 39.

These findings and conditions present a clear position of the State Water Board that under its order – Order 95-10 – it expected and established a framework by which CAW would extract more water than authorized under its water rights.

The Proposed CDO also ignores the uncontroverted 13 years of correspondence between the State Water Board staff and CAW – 13 years of correspondence in which CAW explained it was extracting within the 14,106 acre-foot diversion limit set in Order 95-10, and in which the State Water Board staff expressed its view that CAW remained in compliance with the directives of the State Water Board, as established in Order 95-10.

One of the most relevant examples of this correspondence relates to the 2004 water year. For that year, CAW informed the State Water Board of the quantity of water CAW extracted from the Carmel River and the alternative supplies CAW pursued. Exhibit CAW 030KK. The State Water Board staff responded to that information on or about February 4, 2005. In a letter prepared by Katherine Mrowka, SWRCB Exhibit 8, Tab 2, the staff explained, not only had CAW "continued to comply" with Order 95-10, but that if CAW had acted outside of what the State Water Board authorized or directed, the State Water Board, Division of Water Rights, would have "promptly advised [CAW] in order to ensure that the violation was timely addressed." SWRCB Exhibit 8, Tab 2. Prior to CAW receiving the notice for the draft cease and desist order in January 2008, the State Water Board and its staff never informed CAW it was operating outside of what the State Water Board ordered in Order 95-10.

In sum, the language of Order 95-10, as reflected by 13 years of correspondence, supports a finding that the State Water Board not only expected CAW to continue to extract in excess of its water rights but established a framework under which that would occur.

### **B. The Proposed CDO Ignores The Law And Evidence By Finding CAW Violated Condition 2 Of Order 95-10**

The Proposed CDO finds CAW violated Condition 2 of Order 95-10. The basis for that finding is a determination CAW failed to "terminate" extractions in excess of its water rights. Presumably, the determination that a "termination" was the requirement of Condition 2 is an interpretation derived from testimony offered by the prosecution team, based on one word taken out of context. The following exchange occurred during the direct examination by Reed Sato of John Collins:

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MR. SATO: In your opinion, is Cal Am violating Condition 2 of Order 95-10?

MR. COLLINS: Yes.

MR. SATO: Can you summarize your reasons for your testimony as to why you reached this conclusion?

MR. COLLINS: In Condition 2 of Order 95-10, there is a key word. That key word is terminate. Since 1995, Cal Am has attempted supplemental projects to aid in reducing its annual diversions; however, in the 12 years that have passed, the illegal diversions have not been terminated.

Hearing Transcript, Ph. 1, Vol. 1, pp. 42:17-43:2. The prosecution team, thus, attempted to meet its burden by simply showing CAW has not terminated extractions in excess of its water rights. That showing was not hard.

Clearly, CAW had not terminated extractions in excess of its water rights. As explained above and many times before, when the State Water Board issued Order 95-10, it allowed CAW to do just that. It is in part for that very reason the showing by the prosecution team does not support a finding that CAW violated Condition 2 of Order 95-10. Condition 2 does not say "CAW shall terminate extractions in excess of its water rights." It says (necessarily) much more than that. Condition 2 speaks of diligently implementing actions to obtain alternative supplies. The State Water Board wrote:

Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful diversions from the Carmel River: (1) obtain appropriate permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply . . . , (3) contract with another agency having appropriate rights to divert and use water from the Carmel River.

Order 95-10, p. 40 (emphasis added). The State Water Board explained that requirement compels CAW to "develop and diligently pursue a plan" to obtain alternative water supplies. Order 95-10, p. 37. See also Exhibit SWRCB 8, tab 2 (Jan. 14, 2004 letter from Victoria Whitney stating twice Order 95-10 requires CAW to "diligently pursue a legal water supply").

Indeed, under cross examination, Ms. Mrowka conceded condition 2 of Order 95-10 requires "diligent pursuit," not termination. The following two exchanges occurred during cross-examination of Ms. Mrowka:

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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.

\* \* \*

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?

MS. MROWKA: Yes.

Hearing Transcript, Ph. 1, Vol. 2, pp. 14-13-14-22, 15:12-15-17.

Logic precludes the interpretation of Condition 2 offered by the prosecution team and accepted in the Proposed CDO. Logic demands the State Water Board interpret Condition 2 to do more than require "termination." If Condition 2 only required termination, when did the State Water Board expect CAW to terminate its extractions? How could that limited interpretation of Condition 2 be reconciled with Conditions 1 and 3? If Condition 2 requires CAW to terminate extractions in excess of CAW's water rights, why did the State Water Board order CAW, in condition 1, to cease and desist extractions in excess of 14,106 acre-feet? Why did the State Water Board order CAW, in Condition 3, require CAW to implement measures that had a 20 percent conservation goal? Clearly, it would not have. The prosecution team's position, now contained in the Proposed CDO, is irreconcilable with the unambiguous language of Order 95-10.

Thus, to support a finding CAW violated Condition 2 of Order 95-10, the prosecution team must have presented evidence that CAW lacked diligence in its effort to terminate extractions in excess of its water rights. The record is devoid of that evidence. To the contrary, the record shows CAW consistently and aggressively implemented actions intended to make available to CAW alternative water supplies. Thousands of hours and millions of dollars have been spent, and continues to be spent, in CAW's efforts to terminate Carmel River water extractions occurring without a water right. The above-quoted testimony of Mr. Collins supports that. He recognized that CAW has "attempted supplement projects." Notably, Mr. Collins did not testify that CAW lacked diligence in that effort.

In fact, the California Public Utilities Commission previously found that CAW's efforts to continually advance the Carmel River Dam and Reservoir project between

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1998 and 2005 demonstrated "reasonable management behavior" in light of Order 95-10's mandate to find an alternative water supply, and took the extraordinary step of allowing the stranded costs of that abandoned project to be recovered in the rates charged to CAW's customers. See Exhibit CAW-31B. CAW is perplexed as to how the State Water Board can reach an opposite conclusion about the reasonableness and implications of CAW's efforts.

The prosecution team attempted to avoid the plain meaning of Condition 2, as consistently reflected by State Water Board staff, and what should be the inevitable conclusion that CAW was in compliance with Condition 2 of Order 95-10. During the direct examination of Katherine Mrowka, the following exchange occurred:

**MR. SATO:** Does any of your correspondence or actions address Cal Am's compliance with Condition 2 of 25 Order 95-10?

**MS. MROWKA:** No, it does not. I have not written letters specifically stating that Cal Am has complied with Condition 2 of the order because Cal Am has not yet obtained legal rights for all of its diversions.

Hearing Transcript, Ph. 1, Vol. 1, pp. 36:23-37:5. Ms. Mrowka's testimony at best misleads the State Water Board.

The record is replete with evidence that CAW informed the State Water Board of actions it was pursuing to meet the requirement of Condition 2, and the State Water Board staff, including Ms. Mrowka, responded by informing CAW it was in compliance with Order 95-10. And, when the State Water Board staff was concerned with CAW's efforts, the State Water Board staff expressed those concerns. However, never did the State Water Board staff express concern with CAW's compliance with Condition 2.

Therefore, if the strained interpretation offered by the prosecution team and accepted in the Proposed CDO were correct, how could the State Water Board staff, for 13 years, be aware CAW unlawfully extracted water in excess of its water rights, yet take no enforcement action (or even warn CAW its actions could be the subject of an enforcement action)? Again, the only logical explanation is the position advanced by the prosecution team and accepted in the Proposed CDO is wrong. Condition 2 of Order 95-10 must be read as fully stated in Order 95-10 and as interpreted by the State Water Board staff for 13 years – that CAW must diligently pursue alternative water supplies. The record demonstrates CAW met the requirement of that condition.

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### **2. THE PROPOSED CDO REQUIRES ACTIONS OUTSIDE OF CAW'S CONTROL AND IMPROPERLY AND INEQUITABLY EXPOSES CAW TO FUTURE ENFORCEMENT ACTIONS AND CIVIL LIABILITY**

CAW takes its obligation to comply with the law very seriously. The State Water Board is contemplating issuance of a Proposed CDO that would leave compliance outside of CAW's sole control. That result is contrary to law. CAW provides four examples of compliance actions that require action from persons or entities other than CAW.

**Requires Joint Effort To Affect Demand.** The Proposed CDO requires CAW to "undertake demand management." Proposed CDO, p. 44. However, CAW cannot unilaterally undertake that action. As recognized in the Proposed CDO, that undertaking requires, at a minimum, the Monterey Peninsula Water Management District to act.

**Assumes CAW Can Unilaterally Implement Small Projects.** The Proposed CDO requires CAW to "develop small projects." Proposed CDO, p. 44. In most, if not all cases, development of small projects requires (1) approval by federal, state, and/or local agencies, and/or (2) agreements by third parties. Thus, whether CAW can develop small projects, particularly within the 24 month-mandated period, is necessarily dependent upon actions of others.

**Assumes CAW Can Simply Stop Pumping Water.** The reality of the Proposed CDO is that it assumes CAW can and will shut off pumping of Carmel River water when CAW reaches the base supply [10,878 acre-feet], as lessened by the immediate [549 acre-feet] and annual reductions [121 then 242 acre-feet]. CAW cannot do that. Shutting off Carmel River extractions would jeopardize public health and safety, would cause CAW to violate legal mandates (i.e., mandates imposed under the Public Utilities Code), and would compromise CAW's distribution system.

**Assumes CAW Can Direct Limited Supplies.** Another reality of the Proposed CDO is that CAW will likely have supplies insufficient to meet all of the needs on the Monterey Peninsula. The Proposed CDO presumes CAW can direct limited supplies from "lower priority" to "higher priority" water users. That is simply not the case. CAW's Monterey system is not designed to direct limited water resources; as one might expect in the United States, it is designed to supply the community at large with water.

Some might argue the relief provision, section 3(b), will ensure CAW's concerns do not materialize. Section 3(b) does not reduce the concern level, it increases it.

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Under section 3(b), the State Water Board, Deputy Director for Water Rights, may provide CAW relief from reductions if three conditions are met: (1) a moratorium is imposed (2) demand has been reduced by 13 percent, and (3) public health and safety will be threatened if relief is not granted.

Condition 1 is outside of CAW's control. There is no evidence CAW can unilaterally impose a moratorium. The evidence in the record supports the opposite conclusion.

Also, Conditions 2 and 3 likely are inherently inconsistent. As drafted, before relief can be granted to protect health and safety, a 13 percent reduction in demand must occur. Implicit in these two conditions is a finding that the additional 13 percent reduction can occur without jeopardizing public health and safety. There is no evidence to support the implied finding. The only evidence conflicts with it.

As proposed, the State Water Board, Deputy Director for Water Rights, may NOT be able to grant relief even if public health and safety are at risk because either another entity may refuse to grant a moratorium or because a 13 percent reduction has not been achieved.

### **3. THE PROPOSED CDO IMPOSES CONDITIONS ON CAW THAT HAVE NO EVIDENTIARY SUPPORT**

The Proposed CDO requires CAW to "implement one or more small projects, that, when taken together, total not less than 500 afa." Proposed CDO, p. 66. The project(s) must be implemented within 24 months. *Id.* The only support for that condition appears on page 44 of the Proposed CDO. There, it states:

Cal-Am introduced evidence that it had entered into negotiations to obtain a temporary supply of water from the Margaret Eastwood Trust and Clint Eastwood from the Odello well fields and from the Rancho Canada Golf Course. Cal-Am's failure to complete negotiations was not explained. (See section 14.2, ¶ 5, *supra*.) Other small projects that could provide a temporary supply of water may also be available.

Proposed CDO, p. 44. Nothing in this section of the Proposed CDO or elsewhere in the evidentiary record supports a conclusion that CAW can implement small projects which provide CAW with the right to 500 acre-feet of water, no less within 24 months. In fact, the evidentiary record supports just the opposite. The record demonstrates that CAW has pursued but has been unable to obtain significant new rights, particularly within a short period of time (i.e. 24 months).



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As to the question left open by the above quote, CAW's negotiations with representatives of Eastwood's organization were on-going at the time of the CDO proceeding, and no opportunity to supplement the testimony was provided after the close of the evidentiary hearings. CAW learned, as the State Water Board's files reveal, however, that Eastwood's Odello rights are derived from Table 13 of Decision 1632. CAW has adequate Table 13 rights of its own to meet its limited in-basin uses, which are the only uses that can be served by Table 13 rights.

#### **4. THE PROPOSED CDO IS AMBIGUOUS AND REQUIRES CLARIFICATION**

##### **A. 13 Percent Reduction Included As Condition Precedent For Relief**

As discussed above, the Proposed CDO allows the State Water Board, Deputy Director for Water Rights, to provide relief from annual reductions [121 and then 242 acre-feet], if three conditions are met. One of those conditions is "the demand for potable water by Cal-Am customers has been reduced by 13 percent." It is unclear how that reduction would be measured. The Proposed CDO attempts to explain that the percentage would be measured against "the adjusted base required by this condition for the year in which the conservation requirement is imposed." Proposed CDO, p. 65 fn. 61. That explanation does not provide clarity for CAW.

In Water Year 2011, the Proposed CDO would authorize CAW to extract no more than 10,308 acre-feet of Carmel River water [10,978 acre-foot "base", less the 549 acre-foot "immediate reduction", and less 121 acre-foot "annual reduction"]. If CAW wanted relief from the 121 acre-foot annual reduction, CAW would have to demonstrate a 13 percent reduction and, according to footnote 61, that reduction is from the adjusted base. Thus, does the Proposed CDO require CAW to show "reduced demand" of 1,356 acre feet [13 percent of 10,978 acre-feet, less 549 acre-feet]? Does that mean CAW's extractions would have to be below 9,073 acre-feet [10,978, less 549 acre-feet, less 1,356 acre-feet]?

##### **B. ASR Project**

Two aspects of the Proposed CDO's discussion of the Aquifer Storage and Recovery Project ("ASR") are unclear to CAW. First, how does the Proposed CDO affect the water rights for the ASR? Must the amount of Carmel River water pumped under the ASR project water rights be deducted from the base amount? Or, must the amount of Carmel River water recovered from the Seaside basin under the ASR project water rights be deducted from the base amount?

Second, what must be done to satisfy Condition 3(c)? The Proposed CDO states: "Water pumped from the [ASR] project for delivery to customers shall be consistent with the requirements of paragraph "c" below. However, paragraph "c"

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presents many actions CAW "should" take. It is unclear if those provisions of paragraph "c" are discretionary or mandatory.

### **C. Small Projects**

Three aspects of the Proposed CDO's discussion of small projects are unclear to CAW. First, does the Proposed CDO draw a distinction between the nature of the water produced from a small project? Does the Proposed CDO require a treatment of water purchased from a person who holds but has not exercised a right to Carmel River water different from water purchased from a person who holds and has exercised an annual right to Carmel River water? Does the Proposed CDO require treatment of water purchased from outside of the Carmel River basin different from water purchased from within the Carmel River basin?

Second, if there are more than 500 acre-feet of water available from small projects, how must that additional water be accounted? Must the additional water be subtracted from the base? Or, must the additional water be used to offset the effects of the immediate, annual, or Seaside Basin reductions?

Third, the Proposed CDO requires CAW, within 90 days of its entry, to prepare and submit to the Deputy Director of Water Rights the projects that CAW will implement. How should CAW address a small project that may be implemented but that was identified after the 90 period?

### **D. System Losses**

In its August 26, 2009 letter commenting on the July 27, 2009 draft cease and desist order, CAW explained the arbitrary treatment of CAW's system losses. At some point, the hearing team apparently agreed. The hearing team proposes a modification of footnote 33, which appears on page 42 of the Proposed CDO. The modification reflects a deletion of text in which the hearing team expressed its view on the proposed reductions in system losses. The hearing team initially wrote:

Eight years is arbitrarily selected as the time frame in which to perform the work of reducing system losses.

Proposed CDO, p. 42. The Proposed CDO recommends replacing that language with text indicating that CAW could "save" time on reducing system losses. That replacement language does not resolve the arbitrary nature of the time frame. It does not explain away the view of the hearing team.

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### **5. THE REPORTING REQUIREMENTS REACH TOO FAR**

The reporting requirement in the Proposed CDO reaches too far, either imposing on CAW an obligation to provide information it cannot attest to under penalty of perjury or by imposing on a CAW employee a burden that, based on our review of State Water Board orders, decision, and filing forms, has never been put in place before.

The Proposed CDO would impose new reporting requirements on CAW. The Proposed CDO would require CAW to inform the State Water Board of: (1) water savings attributable to actions that reduce system losses, (2) water savings attributable to conservation actions that reduce demand for potable water, (3) increased use of water at existing service due to a change in zoning or use, and (4) account information for all new service connections. Proposed CDO, p. 67. There is no evidence before the State Water Board that CAW can provide that information. Indeed, it cannot, particularly on a monthly basis, with the level of accuracy demanded, and under penalty of perjury. The evidence only supports CAW's ability to provide pumping data, consumption data, reports on the activities undertaken by CAW to reduce system losses, and reports on the activities undertaken by CAW to encourage conservation.

The Proposed CDO would also require a representative from CAW to attest, "under penalty of perjury", that all statements in the report are true and correct. CAW is unaware of any similar requirement being imposed on an entity that is the subject of a cease and desist order. The State Water Board does require a person to sign under penalty of perjury, but that requirement is always conditioned upon the information being true and correct "to the best of the person's knowledge." See Water Right Application, Water Right Complaint Form, Small Domestic/Stock-Pond Form, Petition for Change Form, Temporary Change Petition Form. Thus, if the State Water Board requires a representative to sign the quarterly reports under penalty of perjury, it should be with a similar condition, particularly with the inherent uncertainty of the information the SWRCB is seeking in these reports.

### **6. CONCLUSION**

The Proposed CDO should not be issued. The Proposed CDO ignores the reality set by the State Water Board in 1995 when it issued Order 95-10. At that time, the State Water Board carefully balanced competing demands. It issued an order that is now beyond challenge. In that order, the State Water Board ordered CAW to eliminate extractions in excess of its water rights by diligently pursuing and obtaining alternative water supplies. During that time, the State Water Board expected CAW to extract more water than permitted under its water rights. It imposed on CAW requirements to minimize the effects of those extractions. These facts are beyond reasonable dispute. Most importantly, the record is clear that CAW has continuously and aggressively pursued alternative supplies.

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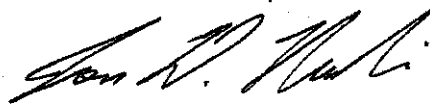
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In an attempt to force a long-term solution on the Monterey Peninsula, the Proposed CDO ignores all of this. It places CAW in a no-win position. It would subject CAW to a cease and desist order for which it cannot ensure compliance. It would subject CAW to a cease and desist order that may require CAW to violate laws and regulations of the California Public Utilities Commission. And, it would subject CAW to a cease and desist order that will likely jeopardize public health and safety. Those results are unfair and unlawful. For the reasons stated above and all of the other reasons previously presented by CAW, CAW respectfully requests the State Water Board NOT issue the Proposed CDO.

Thank you for your time and attention to this matter.

Very truly yours,

DIEPENBROCK HARRISON  
A Professional Corporation



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