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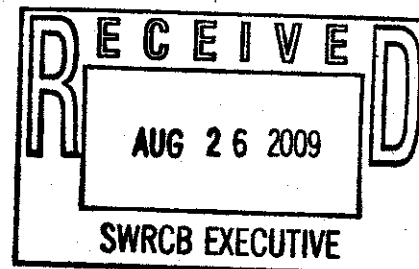
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R. JAMES DIEPENBROCK
(1929 - 2002)

August 26, 2009

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1010 I Street
Sacramento, CA 95814

Re: California American Water Cease and Desist Order -
COMMENTS TO DRAFT CEASE AND DESIST ORDER



Dear Ms. Townsend:

California American Water Company (CAW) hereby comments on the July 27, 2009 draft cease and desist order (Draft CDO). The Draft CDO improves upon the January 15, 2008 draft cease and desist order proposed by the State Water Resources Control Board (State Water Board), Division of Water Rights.

In the Draft CDO, the State Water Board highlights the importance of the CAW's \$3,500,000 payment for programs to benefit the steelhead and steelhead habitat. CAW thanks the State Water Board for recognizing the importance of funding these programs. The \$3,500,000 payment was made in April, and additional payments will be made in future years. The money is currently available for mitigation programs. CAW supports all efforts to put these funds to immediate use to benefit the steelhead, and urges all interested parties to move these programs forward.

The Draft CDO, nonetheless, remains unacceptable. After investing significant resources in this proceeding, participating in a 7-day hearing, and waiting more than one year for a decision, CAW expected an equitable, factually accurate, and legally supportable order. The Draft CDO meets none of those expectations.¹

¹ Earlier in this proceeding, CAW presented arguments and objections in its pre-hearing brief, through written motion and letter, orally, in a closing brief, and in a reply to the closing briefs filed by others. CAW incorporates by this reference the arguments and objections it has previously raised. Nothing in this comment letter is intended to suggest the Draft CDO adequately addresses or that CAW waives those arguments and objections.

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The Draft CDO is inequitable. It fails to recognize the significant investments made by CAW and the Monterey Peninsula community, in compliance and consistent with State Water Board Order 95-10. For the past 14 years, CAW and Monterey Peninsula residents have invested millions of dollars and dedicated significant resources to implement conservation measures to protect public trust resources. The results are real. CAW has consistently diverted less water than authorized by Order 95-10. The people on the Monterey Peninsula have used significantly less water than the average per capita water use in this State. And, since the issuance of Order 95-10, Carmel River conditions for fish and wildlife have improved. The Draft CDO fails to recognize these achievements and in fact penalizes both CAW and the Monterey Peninsula community for their significant efforts and accomplishments.

Further, as those investments have been made, CAW has continued to work with the California Public Utilities Commission and the interests on the Monterey Peninsula to develop a long-term, reliable water supply. The project, referred to as the "Coastal Water Project", is designed to reduce CAW's diversions from the Carmel River to within its water rights. The California Public Utilities Commission issued a draft environmental impact report for the Coastal Water Project, and the comment period for that document has closed. CAW expects the California Public Utilities Commission will release a final environmental impact report in September 2009, and the "Certificate of Public Convenience and Necessity to Construct and Operate" by May 2010.

The Draft CDO makes little mention of the Coastal Water Project. It discusses the Coastal Water Project in the context of actions CAW has pursued or is pursuing. However, it does not consider how the Coastal Water Project may be affected by the Draft CDO. That lack of consideration is of great concern to CAW. If the State Water Board issues the Draft CDO, attention will necessarily shift from Coastal Water Project, which is on the cusp of a decision, to the smaller, relatively short-term actions CAW might have to undertake to comply with the Draft CDO.

The Draft CDO is not supported by evidence. The Draft CDO requires CAW to further reduce its diversions from the Carmel River. The ordered reductions are based on faulty assumptions, do not recognize the regulatory environment in which CAW operates, and are not realistic or feasible on the whole. As to this error, two examples are provided at this point:

First, in an effort to minimize the difficulties CAW will have in meeting demands with the Draft CDO proposed reductions, the Draft CDO assumes CAW can operate with little impact from the adjudication of the Seaside Groundwater Basin (Seaside Basin Judgment). It does this by positing CAW can "aggressively" implement measures to reduce system losses, to replace toilets, showerheads and faucets, and to reduce

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use of potable water for outdoor irrigation. (Draft CDO, pp. 39-42.) However, these measures are the same measures the Draft CDO relies upon to support the Carmel River reductions. (See Draft CDO, p. 58.) The measures are and will continue to be implemented. Unfortunately, their benefits cannot be counted twice.

The Draft CDO assumes CAW will be able to reduce its Carmel River diversions by 549 acre-feet from system loss reductions, 330 acre-feet by replacing toilets, showerheads and faucets, and 100 acre-feet by limiting use of potable water for outdoor irrigation (for a total "savings" of 979 acre-feet). The Draft CDO finds those actions, in 2009, might "save" 121 acre-feet of water. (Draft CDO, pp. 39-41.) As explained below, those assertions are based on incorrect assumptions. Additionally, they also do not "save" sufficient water to satisfy the Seaside Basin Judgment and the Draft CDO. Under the Seaside Basin Judgment, CAW must reduce extractions by 387 acre-feet in calendar year 2009, with continued reductions until CAW has reduced its extractions by 2,355 acre-feet in 2021. In addition, under the Draft CDO, CAW would have to reduce diversions by 977 acre-feet in 2009 (from 11,285 to 10,978, less 549, less 121), with additional reductions occurring in each year thereafter (either 121 or 242), with a total reduction of approximately 7,909 acre-feet. The numbers simply do not add up. Under the Draft CDO, CAW and the Monterey Peninsula will have substantially less water available to them.

As a result, the Draft CDO will likely do exactly what it warns against: threaten public health and safety and further injures the local economy. The Draft CDO cautions:

"[A]n immediate and substantial reduction in the quantity of water that [CAW] diverts from the Carmel River could present a threat to public health and safety." (Draft CDO, p. 38.)

"The peninsula area economy is also dependent upon the vitality of the hospitality industry. A marked and substantial reduction in the quantity of water that [CAW] may divert from the river would, in all likelihood, affect the number of visitors that can be served by the hospitality industry and the economy of the area." (Draft CDO, p. 38, fn 38.)

Second, the Draft CDO places CAW's ability to comply outside of its control. To satisfy many of the conditions in the Draft CDO, action by the California Public Utilities Commission and/or the Monterey Peninsula Water Management District is required. Other actions require changes in water use by the Monterey Peninsula community (i.e., specific levels of conservation), which CAW can try to effect but cannot guarantee a specific result.

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Thus, the Draft CDO, if adopted, may force CAW to answer the following question:

If CAW cannot meet the required reductions, should it violate the mandates of the Judgment in the Seaside Basin Adjudication, violate the mandates of the State Water Board, or violate the mandates of the California Public Utilities Commission?

That question clearly has no correct answer.

The Draft CDO ignores the comprehensive nature of Order 95-10. CAW is equally concerned with the Draft CDO's disregard for substantial portions of Order 95-10, and the actions undertaken since that order was issued. Based upon a reading of the Draft CDO, one might conclude Order 95-10 only defined CAW's water rights and warned CAW the State Water Board may exercise its enforcement discretion in the future. Order 95-10, however, did much more than that – it ordered CAW to (1) cease diversions from the Carmel River in excess of 14,106 acre-feet, (2) implement conservation measures with a goal of reducing the 14,106 acre-feet by an additional 20 percent, and (3) undertake actions that would minimize and mitigate for the effects of those diversions on fish and wildlife, including steelhead.²

Further, the Draft CDO suggests Order 95-10 includes clear direction to CAW that it could be subject to an enforcement action at any time it diverted in excess of defined water rights (3,376 acre-feet). Just the opposite is true. The State Water Board ensured CAW it would be insulated from an enforcement action if it complied with Order 95-10. Order 95-10 explained that the State Water Board was taking an "alternative" path and suspending enforcement, "provided that [CAW] takes appropriate actions to: (a) mitigate the effect of its diversions on the environment and (b) develops and diligently pursues a plan for obtaining water from the Carmel River or other sources consistent with California water law." (Order 95-10, p. 37.) It informed CAW the State

² Order 95-10 orders CAW to cease and desist extractions of Carmel River water in excess of 14,106 acre-feet. (Order 95-10 at 40.) As a result of the 20 percent conservation goal, 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).

Order 95-10 also authorized CAW to serve the 380 acre-foot entitlements granted to the Pebble Beach Company in exchange for Pebble Beach Company's agreement to finance the Carmel Area Waste Water District – Pebble Beach Community Service District Wastewater Reclamation Project. That project has been constructed to save an estimated 800 acre-feet of CAW potable water previously used to irrigate golf courses and other open spaces in the Del Monte Forest. (Order 95-10, p. 6, fn. 2)

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Water Board would only exercise its enforcement authority if CAW violated conditions in Order 95-10. (Draft Order, p. 45.)³

The current proceeding cannot be used to re-write the provisions of Order 95-10. If the State Water Board is unhappy with Order 95-10, it has the authority to notice a new proceeding to modify, revoke or stay the order. It cannot bootstrap into this proceeding – one based on an alleged violation of Condition 2 to Order 95-10 – conditions that effectively and completely restructure Order 95-10. (See condition 6 of the Draft CDO, which explains conditions 1, 3(b) and 4 of Order 95-10 would be superseded by the Draft CDO.) On this single issue, the record is clear and undisputed. CAW's efforts have been consistent and aggressive. At all times up to the commencement of this proceeding, the State Water Board agreed. Accordingly, for these reasons and others presented below, the State Water Board cannot and should not issue the Draft CDO; to do so would amount to an abuse of discretion.

I. IT WOULD BE INEQUITABLE TO CAUSE FURTHER ECONOMIC HARM TO THE MONTEREY PENINSULA

If adopted, the Draft CDO would likely cause significant economic harm. This is a price the Monterey Peninsula should not have to pay. CAW and the communities on the Monterey Peninsula have invested significant resources to conserve water. Through wastewater reclamation, rebate programs, retrofitting incentives, marketing, outreach and water conservation efforts in place since, if not before, 1995, the per-capita Peninsula water use has dropped to approximately 70 gallons per person per day; significantly lower than most areas of California. (Hearing Transcript, Ph. 2, Vol. 3, p. 746.) And, CAW has been able to maintain diversions from the Carmel River below the 11,285 acre-foot limit set forth in Order 95-10.

Also since 1995, CAW, the Monterey Peninsula Water Management District, and/or the communities on the Monterey Peninsula have invested thousands of hours and millions of dollars in efforts to minimize and mitigate for the effects of Carmel River

³ Like CAW, the Pebble Beach Company relied upon the "framework" established by the State Water Board, investing significant resources in a reclamation project. As explained in more detail above, footnote 2, the Pebble Beach Company financed \$34 million for the first phase and an additional \$33 million for the second phase of the reclamation project. (Exhibit PBC-A, pp. 3-4.) Order 95-10 recognizes the Pebble Beach Company entitlement. (Order 95-10, p. 6, fn 2.) And, before making its investment in the reclamation project, the Pebble Beach Company requested and received an opinion from the State Water Board. The State Water Board opined Pebble Beach Company held an entitlement to Carmel River water and that entitlement was outside the limitations imposed by Order 95-10. (Exhibit PBC-8. See also Exhibit PBC-7.) For these reasons, as well as others, equitable and legal principles require the State Water Board to recognize the Pebble Beach Company's water entitlement.

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diversions on fish and wildlife. They have implemented all of the mitigation measures required by Order 95-10, including implementation of the water mitigation program, shifting its pumping to downstream wells, bypassing early storm water runoff, studying fish passage, and removing rock outcroppings. (Order 95-10, pp. 41-44.) They have also restored riparian habitat and implemented actions to better manage the Carmel River Beach and Lagoon. (Exhibits CAW-43; MPWMD-LH3; PT-48.) In addition, CAW has agreed to fund programs for the protection and conservation of steelhead and paid \$3,500,000 in April of this year for that effort. (See Exhibit PT-48.)

The resources spent on the above actions represent tremendous effort by business and community. The Draft CDO ignores these efforts, failing to present any legally compelling reason, supported by evidence, for imposing a cease and desist order on CAW or subjecting the communities on the Monterey Peninsula to a regulatory drought of greater extent than that imposed by Order 95-10.

II. THE DRAFT CDO IS UNREASONABLE AND LIKELY INFEASIBLE

CAW has been diligent in its effort to affect water use on the Monterey Peninsula. Among other actions, CAW is implementing a main replacement program, it has obtained permission from the California Public Utilities Commission to modify its rate structure, and it has obtained permission from the California Public Utilities Commission to increase the rates it charges for water. CAW is not concerned with an order by the State Water Board that compels CAW to continue those efforts. CAW will continue those efforts whether or not such an order is issued. CAW is concerned with an order, like the Draft CDO, that does not compel action, but that compels results that are unrealistic and outside of CAW's control.

A. There Is No Basis For The Draft CDO's Assumption That CAW Can Achieve The Base Or The Immediate Reductions

The Draft CDO, if adopted, will require CAW, starting October 1, 2009, to reduce its diversions from the current limitation of 11,285 acre-feet to 10,308 acre-feet (10,978 base, less 549, less 121). That 977 acre-foot reduction is in addition to reductions required by the Seaside Basin Judgment (387 acre-feet in 2009). (See Exhibit CAW-5, pp. 41-42, Exhibit MPWMD DF-10.) Ultimately, under the Draft CDO and the Seaside Basin Judgment, CAW will lose access to approximately 10,264 acre-feet (2,355 acre-feet under the Seaside Basin Judgment and 7,909 acre-feet under the Draft CDO), which equates to a 68 percent reduction in the total supply with the majority of that reduction from the Draft CDO reductions that otherwise would have been available.

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Nothing in the Draft CDO explains how CAW may achieve the annual or ultimate levels of reduction required by the Draft CDO, particularly when considered in context with the Seaside Basin Judgment. CAW has and will continue to aggressively take actions to reduce its diversions from the Carmel River, even if the Draft CDO is not issued. Notwithstanding, the evidence does not support a conclusion that CAW can implement action that will allow it to continue to meet the demands on the Monterey Peninsula, as well as the reduced diversion limits for the Carmel River and Seaside Basin. (See above, pp. 2-3.) Nothing in the record suggests otherwise. As a result, the Draft CDO may force CAW to quickly answer the question raised earlier: if CAW cannot meet the required reductions, should it violate the mandates of the Judgment in the Seaside Basin Adjudication, violate the mandates of the State Water Board, or violate the mandates of the California Public Utilities Commission?

B. The Proposed Annual Reductions Are Infeasible

The Draft CDO proposes annual reductions in CAW's Carmel River diversions which are not likely feasible. The Draft CDO assumes CAW can meet the annual step reductions by limiting system losses, retrofitting toilets, showerheads and faucets, and limiting potable water used for outside irrigation. None of those actions can be implemented unilaterally by CAW – each implicates action required by third parties. They also are unlikely to produce the water savings necessary for CAW to comply with the Draft CDO.

1. The Draft CDO Misunderstands And Thus Draws Improper Conclusions Regarding System Losses

The Draft CDO places great reliance upon potential reductions in CAW "system losses." The reliance is misplaced and can only be made by ignoring the testimony of several witnesses highly experienced in water system operations, and wholly accepting the confused testimony of the prosecution team's witness, Mr. Stretars, who has never operated or managed a water system or worked in the industry. (Exhibit PT-23.) In his testimony, Mr. Stretars estimated CAW could "save" an additional 549 acre-feet through reductions in "unaccounted for water." (Exhibit PT-49, p. 2.) It became clear during the proceeding Mr. Stretars was making an apples to oranges comparison, and did not understand the difference between the terms used. (Compare Hearing Transcript, Ph. 1, Vol. 2, p. 441:14 and Hearing Transcript, Ph. 1, Vol. 3, p. 811:6-16 with Hearing Transcript, Ph. 2, Vol. 1, p. 100:22-103:24, 182:6-184:11 and Hearing Transcript, Ph. 2, Vol. 3, p. 811:9-25.)

"Non revenue water" is water for which CAW does not recover revenue. It includes: water used to fight fires or for other public emergencies; water used for

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flushing or backwashing as required for proper operation and maintenance; water that is stolen from hydrants; water that is lost due to under-registering of meters; water that is lost due to unmetered consumption, water consumed without authorization, and water that is lost because of leaks. (Hearing Transcript, Ph.1, Vol.2, pp. 441:14-442:22; 444:9-17; Ph.2, Vol.1, pp. 100:22-103:24, 182:6-184:11, and Exhibit CAW 37A, pp.3:15-4:11.) System losses are losses due primarily to unauthorized consumption, under-registering meters, and leakages. (Hearing Transcript, Ph. 2, Vol. 3, p. 811:17-25.) In other words, "system losses" are a component of "non revenue water" and a reduction in non-revenue water may not result in a reduction in water used. (*Id.*, Hearing Transcript, Ph. 2, Vol. 3, p. 811:6-16.)⁴ It may mean CAW is able to recover additional revenue.

The Draft CDO confuses these terms. The evidence reflects CAW's "non revenue water" accounts for 12 percent of CAW's total water production from all sources. The Draft CDO then compares the 12 percent "non revenue water" to the industry standard for "system losses", which is 10 percent. Because these terms are not interchangeable, but reflect different measurements, the comparison is inappropriate.

In this regard, the Draft CDO concludes CAW's "system loss" may be viewed as preventable "waste or unreasonable use or unreasonable method of diversion" under Water Code section 100." (Draft CDO, p. 40.) That conclusion is outside the scope of the proceeding and unsupported by evidence. The State Water Board did not notice the proceeding as one that would undertake an Article X, section 2 analysis. The only evidence in the record is CAW's "non-revenue water" losses are reasonable. (Hearing Transcript, Ph. 1, Vol. 2, p. 442:1-3.)

In fact, when CAW discounts water put to beneficial use for which no revenue is recovered -- under-registering meters (due to the physical limitations of water meters to measure all water that passes through them), and non-revenue uses (fire fighting water, for example) -- CAW has approximately 1½ percent of true "system losses", what Mr. Stretars may have been calling "Unaccounted For Water." It is not the 12 percent Mr. Stretars presumed. Thus, if CAW could eliminate all of those losses, CAW will "save" 1½ percent of its water supply or 200 acre-feet. This savings may only be realized after replacing CAW's entire network of buried pipes at a cost of hundreds of millions of dollars; likely in excess of \$1,000,000 per acre foot of savings. Even then, there would be no assurance the savings will be realized.

⁴ Not only are these facts consistent with the evidence presented by expert witnesses of CAW and the Monterey Peninsula Water Management District, but it is also consistent with American Water Works Association Water Audits and Loss Control Programs Manual of Water Supply Practices.

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Further, the percentage of non-revenue water losses is a function of the number of gallons used per person. (Hearing Transcript, Ph.1, Vol. 2, p.443:1-12.) This means that the less water that is used, the higher the percentage of non-revenue water losses, even though the actual amount of losses remains the same or even decreases. This is particularly true on the Monterey Peninsula where per person consumption is well below average, causing system losses to be a higher percentage of total usage than it would be elsewhere.

Also, the Draft CDO concludes CAW could expedite main replacement and thus realize immediate and consistent reductions in "system losses". (Draft CDO, p. 40.) Underlying this conclusion appears to be two assumptions: (1) CAW has not begun replacing mains, and (2) CAW bases its decision on main replacement solely on its ability to recover costs. (Draft CDO, p. 40.) The Draft CDO goes so far as including the statement that "private businesses acting illegally are not excused from immediately complying with the law in order to make sure they can recoup their costs from their customers." (Draft CDO, p. 40 fn. 30.) The assumptions are wrong. The statement is gratuitous and inappropriate.

CAW has been replacing its mains on a regular basis. In the last five years, CAW has replaced 35,000 feet of main and the California Public Utilities Commission has authorized CAW to spend \$7,100,000 for main replacement over the next three years. (Hearing Transcript, Ph. 2, Vol. 5, p. 1263-64; California Public Utilities Commission, Comment Letter.) Yes, CAW does consider rate recovery for programs like main replacement. However, the California Public Utilities Commission has already exercised its jurisdiction over that issue.⁵ Also, the timing for main replacement is driven by many factors, only one of which is rate recovery. Most of the factors are practical considerations. As examples, CAW must obtain permits to perform the main replacement work, there must be CAW staff and/or independent contractors to perform the work, the work must be sequenced to limit the effect it has on the communities (including traffic congestion, road closures, and road restoration activities), and cost, irrespective of rate recovery versus benefit. (See discussion above explaining leakages and other losses of water amount to 200 acre-feet and complete main replacement likely costs hundreds of millions of dollars.)

⁵ In fact, the State Water Board's attempt to exercise jurisdiction with respect to the main replacement program may conflict with the jurisdiction of the California Public Utilities Commission because the California Public Utilities Commission has already reviewed CAW's main replacement program in the context of the recently concluded general rate case. (See, e.g., Cal. Pub. Util. Comm. Decision 09-07-021, (2009) 2009 Cal. PUC LEXIS 346; *Citizens Utility Company of California v. Superior Court* (1976) 56 Cal.App.3d 399, 407.)

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For these reasons, the number used in the Draft CDO as an assumption of reductions from "system losses" is entirely arbitrary and not supported by the evidence.

2. Conservation Measures (Retrofit Program, Outdoor Potable Water) Will Not Necessarily Ensure Annual Reductions Are Achieved

The Draft CDO assumes CAW can achieve a level of reduction through continued implementation of water conservation actions. That assumption is not supported by evidence.

Initially, the Draft CDO posits CAW can save 41 acre-feet per year over the next eight years through continued implementation of the retrofit program. (Draft CDO, p. 40.) While the retrofit program "saved" water, there is no evidence a similar, annual level of savings will occur in the future. Not unexpectedly, the Draft CDO cites nothing to support its "view" that the program will be complete in the next eight years, (Draft CDO, p. 40), or that 41 acre-feet of water could be saved in each of the next eight years. (Draft CDO, p. 41.)

The Draft CDO also asserts CAW can save an additional 12 acre-feet per year through outdoor irrigation conservation. The assertion fails for at least two reasons. First, the assertion relies too heavily on the testimony from a Monterey Peninsula Water Management District witness. The witness explained reductions in outdoor irrigation in the Monterey area could contribute around 100 acre-feet of savings. (Exhibit MPWMD-SP-12, p.8:6-9.) However, the witness explained her estimate was based on 2006-07 aggregated data and conditioned it upon a need for additional analysis before a refined figure could be developed. (*Id.*) The witness did not testify that a consistent level of reduction could occur, particularly within the time frames contemplated in the Draft CDO.

Second, the Draft CDO assumes CAW has absolutely control over outdoor water use. That assumption is incorrect. CAW can encourage behavior through aggressive conservation measures, assuming approval by the California Public Utilities Commission.⁶ However, conservation measures cannot guarantee a level of water use. In her testimony, Ms. Pintar, the Water Demand Manager for the Monterey Peninsula Water Management District, could not have made this point more clear:

⁶ Here, as with the main replacement program, the California Public Utilities Commission has exercised jurisdiction over both the extent to CAW's conservation program and the allowance of potable water for outdoor irrigation use, and therefore the State Water Board's exercise of jurisdiction here may intrude on the jurisdiction of the California Public Utilities Commission. (Cal. Pub. Util. Comm. Decision 09-07-021, (2009) 2009 Cal. PUC LEXIS 346; *Citizens Utility of California v. Superior Court*, *supra*.)

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Mr. Rubin: Ms. Pintar, when the Monterey Peninsula Water Management District adopts a conservation measure, can it guarantee a particular reduction in water use that will result?

Ms. Pintar: No.

(Hearing Transcript, Ph. 2, Vol.3, p. 835.) Because of that uncertainty, witnesses were unwilling to testify to a specific reduction schedule that would avoid jeopardy to health and safety. (See, e.g., Exhibit MPWMD DF-9A, p. 6:15-17.)

In sum, CAW is able and will continue to implement conservation measures; it cannot, however, ensure such measures will result in a specified reduction of water use. The Draft CDO would place CAW in the inequitable and unlawful position where it could not control its ability to comply. (Cal. Code of Civ. Proc., § 3531; *Schnittger v. Rose* (1903) 139 Cal. 656; *Stevenson v. Petruilis* (2006) 141 Ca. App.4th 1074.)

3. The Petition Process To Obtain "Relief" From The Step Reductions Provides Little Protection For CAW Or The Monterey Peninsula Community

The Draft CDO provides a petition process. The process provides no relief from the base or immediate reductions. It purports to allow CAW to obtain relief from the annual reductions, but only if specific conditions are satisfied. (Draft CDO, p. 59-60.) The conditions allow for relief if CAW "has imposed a moratorium on new connections", the Monterey Peninsula Water Management District "has imposed a 15 percent conservation requirement", and "consumption is being reduced by no less than 90 percent." (Draft Order, p. 59.) The 90 percent reduction would be measured against the moving target of the "adjusted base." (Id.) The requirement is contrary to law, not only because it sets the bar so high (higher, in fact, than absolute compliance) that it amounts to no petition process at all, but also because the requirements of that process cannot be achieved by CAW alone.

The Draft CDO requires both the California Public Utilities Commission and the Monterey Peninsula Water Management District to take certain acts before CAW can petition for relief. (Draft CDO, p. 59.) However, neither the California Public Utilities Commission nor the Monterey Peninsula Water Management District would be subject to the Draft CDO.

Moreover, the Draft CDO posits CAW can unilaterally impose a moratorium under Water Code section 350. (Draft CDO, pp. 47, 59.) Section 350 of the Water Code may allow CAW to declare a water shortage emergency condition and take actions as a result of that declaration. But, assuming section 350 does provide that

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authority, the Draft CDO does consider the potentially conflicting mandates of section 350 and California Public Utilities Code section 2708.

California Public Utilities Code section 2708 is clear: CAW can apply for a moratorium, but it is within the discretion of the California Public Utilities Commission to order a moratorium. (See Pub. Util. Code, § 2708.) The Draft CDO does not address the potential for section 2708 to preempt Water Code section 350 (i.e., if the California Public Utilities Commission does not grant a moratorium). Should the California Public Utilities Commission deny the moratorium, CAW may not be able to meet the stated condition, and may not be able to meet the requirements of the Draft CDO, yet apparently bars the State Water Board's Deputy Director for Water Rights from granting relief, irrespective of public health and safety.

Also, as a condition precedent to CAW obtaining relief, the Draft CDO plainly requires the Monterey Peninsula Water Management District to impose conservation measures and for the community on the Monterey Peninsula to achieve a continually and increasing level of conservation. (Draft CDO, p. 59.) The relief would be predicated on action by the Monterey Peninsula Water Management District, action not required elsewhere in the Draft Order. And, CAW cannot dictate the actions of the Monterey Peninsula Water Management District or the people on the Monterey Peninsula. There is no evidence that such reductions are attainable through voluntary conservation efforts. Such a result is unlawful and untenable.

4. The Draft CDO Fails To Include A Termination Provision

The Draft CDO contemplates CAW making annual reductions until CAW no longer diverts in excess of its water rights. (Draft CDO, p. 59.) The CDO, however, includes no termination provision. Given the apparent intent, the Draft CDO should make plain that once CAW diverts within its water rights, the conditions in Order 95-10 and the cease and desist order no longer have effect.

C. The Draft CDO Misinterprets CAW's Authority Regarding "Will Serve" Letters

The Draft CDO assumes CAW issues "Will Serve" letters as a means of committing new water supplies or to allow for water use on land for which there has been a change in zoning or use. (Draft CDO, p. 58.) That assumption is incorrect. The primary purpose of a will-serve letter issued by CAW is to confirm that the proposed water service is within CAW's service territory. Provided the requested service is within CAW's territory, such letters state that should a customer receive all necessary permits, and subject to all laws, regulations, and orders, CAW will serve that customer, as it is

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obligated to do. In other words, the letter is simply a restatement of CAW's obligations as a regulated water utility, and is not a contract containing a new or separate obligation.

D. The 500 Acre-Foot Reduction From Small Projects May Be Infeasible

The Draft CDO provides CAW 90 days to submit a plan that identifies "small projects" that it can implement within 24 months of entry of the Draft CDO. (Draft CDO, p. 60.) The projects must, "when taken together, total not less than 500 afa." (*Id.*) The projects would not offset reductions. They would reduce the "base" from 10,978 to 10,478 acre-feet.

The Draft CDO does not propose to evaluate the plan demanded of CAW and then determine the amount of water savings and the timing for those savings based on that plan. Instead, the Draft CDO arbitrarily sets a number, and then assumes that number can and will be achieved. The Draft CDO does not provide any analysis on whether such "small projects" exist on the Monterey Peninsula. The uncontroverted evidence in this proceeding demonstrates the small project requirement may not be feasible or capable of achieving the 500 acre-foot requirement. (See, e.g., Exhibits CAW-029 [describing efforts on small desalination programs and water purchases from local water permittees]; CAW-032 [describing all efforts, including small projects, investigated by plan B].)

Even more troubling is the Draft CDO's complete disregard for the cost and difficulty of implementing such projects. By ignoring cost and feasibility, the Draft CDO assumes that money and time are no object. The Draft CDO's mandate for small but very expensive projects could have the very real and serious impact, however, of sidetracking the only real solution: introduction of a new water source. By focusing on small and expensive projects that will not produce substantial, new water supplies, the Draft CDO leads CAW down a dead-end path and away from the primary goal of Order 95-10.

⁷ The requirement to propose and implement small projects also conflicts with Order 95-10 and may infringe upon the jurisdiction of the California Public Utilities Commission. In Order 95-10, as reflect in the 14 years of correspondence, the State Water Board contemplated CAW to implement larger "projects" to satisfy Condition 2. Further, the Public Utilities Commission is currently evaluating the Coastal Water Project. Through that process, a significant number of "small projects" were considered but dismissed from detailed analysis. (See Exhibit CAW-029; Draft Order, p. 34.)

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III. ADDITIONAL CONCLUSIONS RENDERED IN THE DRAFT CDO ARE NOT SUPPORTED BY EVIDENCE

The Draft CDO fails to consider evidence in the record that undermines its findings and conclusions.

A. Failure To Properly Account For Impacts To CAW's Water Supply From The Seaside Basin Adjudication

The amount of water CAW is able to extract from the Seaside Basin will need to be reduced over time. In 2009, CAW will lose access to 387 acre-feet from the judgment in the Seaside Basin. (Exhibit CAW-5.) The amount increases over time, with an ultimate reduction requirement of 2,355 acre-feet. The Draft CDO recognizes this reduction, however, it incorrectly minimizes and miscalculates the effect of the reduction by (1) only disclosing the initial 2009 reduction and not addressing reductions required in future years, and (2) improperly offsetting the reduction with water saving measures, such as conservation and water main replacement, that have previously been considered and relied upon to support the Draft CDO mandated reductions. (Draft CDO, pp. 41-42.)

B. Proposes Changes To The ASR Program Which Are Unlawful And Unreasonable

The Draft CDO, if adopted, seeks to modify the ASR Program by affecting the timing for water storage and use. (Draft CDO, p. 60.) The ASR Program involves CAW and the Monterey Peninsula Water Management District and a water right permit they jointly hold (Permit 20808A). The modification proposed in the Draft CDO would effectively modify Permit 20808A, an action that, as a matter of law, cannot be made. Permit 20808A is outside the scope of this proceeding, and involves rights held in part by the Monterey Peninsula Water Management District, which is participating in the proceeding, but not as a party.

Additionally, changes to Permit 20808A proposed in the Draft CDO are inappropriate. The Draft CDO would require the Deputy Director for Water Rights to annually approve carry-over of water appropriated under Permit 20808A and stored in the Seaside Basin. The nature of the program, and particularly a decision regarding carryover, does not lend itself to annual approvals, particularly annual approvals that are not required to be made within a time certain.

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C. Failure To Consider System Operational Limits

The Draft CDO ignores the evidence regarding the practical operational limits of the CAW system. CAW introduced extensive evidence regarding system facilities requirements. (Exhibit CAW-37A.) In its testimony, CAW explained reductions in the order of those proposed by the Draft CDO present significant risk to CAW's system. The reductions could jeopardize water pressure, the ability to backwash pressure filters, and the ability to store water in CAW's Segunda Reservoir. (*Id.*, p. 4.) The reduced water pressure may impair CAW's ability to achieve standards set by the California Public Utilities Commission and the California Department of Public Health and Safety. (*Id.*) None of this evidence is considered in the Draft CDO.

D. Failure To Consider Public Health And Safety Limits

The Draft CDO summarily dismisses evidence on public health and safety impacts the Draft CDO reductions are likely to cause. The Draft CDO states that it "should not give too much weight" to public health and safety concerns for three reasons: (1) CAW cannot be too worried about public health and safety because they continue to serve new connections to the system, (2) system unreliability is infrequent, occurring only "3 to 5 days at time", and (3) the problem can be resolved by reducing demand. (Draft CDO, p. 47.) These are not valid reasons to cast aside public health and safety concerns. First, as previously noted, CAW is obligated to provide service to certain connections and likely does not have unilateral authority to refuse service. (Hearing Transcript, Ph. 1, Vol. 2, p. 453-455.) Second, even if infrequent, if the system is unable to function in an emergency situation, the result could be devastating. Third, CAW has been and will continue to take measures to reduce demand, however, as previously noted, CAW cannot unilaterally control demand. The Draft CDO's failure to consider relevant evidence and apparent willingness to render conclusions without evidentiary support is illegal and potentially dangerous.

IV. THE CONCLUSION THAT THE DRAFT CDO IS NEEDED TO PROTECT FISH AND WILDLIFE IS CONTRARY TO LAW AND UNSUPPORTED BY EVIDENCE

The Draft CDO concludes that, to protect fish and wildlife, CAW must take action beyond that required by Order 95-10. (Draft CDO, p. 56, 57.) Specifically, the Draft CDO finds: "(a) the lower 9.5 miles of the Carmel River bed are dry for 5 to 6 months of each year, (b) the steelhead is a threatened species, (c) the river has been declared to be critical habitat for the steelhead, and (d) the earliest date which Cal-Am's illegal diversions may be brought to an end is 2016." (*Id.*, p. 57.) That conclusion and those

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findings are not tailored to the scope of this proceeding and are otherwise contrary to law.

The current proceeding is tailored to alleged violation of Condition 2 to Order 95-10. By failing to connect the conclusion and findings to effects caused by the alleged violation of Condition 2, the Draft CDO exceeds the scope of this proceeding. The Draft CDO revisits the same issue that caused the issuance of Order 95-10 – diversions by CAW in excess of its water rights having adverse effects on fish, wildlife and riparian habitat. (*Compare* Order 95-10, p. 25-27 *with* Draft CDO, p. 36-37.)

In Order 95-10, the State Water Board weighed testimony on the effects of CAW diverting up to and arguably in excess of 14,106 acre-feet of Carmel River Water on fish and wildlife. (Order 95-10, p. 25 *et seq.*) In Order 95-10, the State Water Board recognizes CAW's diversions were causing adverse impacts. As a result, the State Water Board concluded CAW must minimize and mitigate the effects of its diversions on the environment until such time as it is able to obtain water from the Carmel River or other sources. (Order 95-10, p. 39.) It ordered CAW to undertake nine or more actions for that purpose. (Order 95-10, p. 40-45.) CAW has performed all of those measures. In addition, CAW has entered into an agreement with NOAA Fisheries, (Exhibit PT-48), and has since the close of the hearing paid \$3,500,000 in furtherance of that agreement. The minimization and mitigation actions required in Order 95-10 appear to be succeeding. The number of adult steelhead reaching San Clemente Dam improved significantly since the 1990s (Exhibit CAW-40), and substantial amounts of riparian habitat have been restored. (Exhibit MPWMD-TC7.)

The other findings made to support the Draft CDO conclusion CAW must take action beyond that required by Order 95-10 to protect fish and wildlife have no bearing on this matter. The Draft CDO cites the 1997 listing of steelhead as threatened, the 2006 reaffirmation of the steelhead listing, and the 2005 designation of steelhead critical habitat. (Draft CDO, p. 37.) None of the "regulations" warrant a revisit of the issues considered in Order 95-10. Steelhead have been designated as a threatened species, but the listing is not a new event; it occurred in 1997, before the State Water Board agreed to dismiss the actions challenging Order 95-10 and before the State Water Board amended Order 95-10 through Order 98-04. (Exhibit CAW-17.) The Carmel River has been declared critical habitat for the steelhead, but the critical habitat designation has a regulatory effect on federal agencies. (20 Fed.Reg. 52488.) It does not implicate state action or action by private entities.⁸

⁸ See http://www.fs.fed.us/r9/wildlife/tes/docs/esa_references/critical_habitat.pdf, which is a United States Fish & Wildlife document explaining what is "Critical Habitat" and that "a critical habitat designation has no effect" on non-federal actions.

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Moreover, the conclusion that further CAW diversion reductions are necessary to protect fish and wildlife is completely unsupported by evidence. While some interested parties advanced evidence suggesting CAW diversions harm fish, no one identified any harm: (1) outside of that previously considered and addressed by Order 95-10, or (2) related to CAW's alleged violation of Condition 2. No one explained how reduced diversion by CAW from the subterranean sections of the Carmel River would improve conditions for surface sections. No one distinguished between the alleged impacts by CAW and the impacts caused by the many other factors that affect steelhead. (See Exhibit PT-41, p. 19 *et seq.*) The Draft CDO recognizes that point. It notes the insufficiencies in the evidentiary record. "[T]he effects of [CAW's] illegal diversions cannot be isolated from its legal diversions and the diversion of others." (Draft CDO, p. 42. See also Draft CDO, p. 36.) This evidentiary deficiency is compounded by the fact much of the information presented concerns impacts unrelated to CAW's diversions, (see, e.g., Exhibit PT-39, p. 5-6; Exhibit SC-21), and is based on pre-1995 data. (See, e.g., Exhibits PT-41 (a 1983 document); PT-42 (a 1986 document).)

Further, Kevan Urquhart, Senior Fisheries Biologist for the Monterey Peninsula Water Management District, explained succinctly why reductions like those proposed in the Draft CDO will not likely benefit fish. (Exhibit MPWMD KU1, pp. 6-7.) He wrote:

The community relies on direct diversion, as it has no direct access to any off stream storage, other than the Seaside Groundwater Basin, which is already tapped to the fullest legal extent during the dry season to relieve the Carmel River. Thus, cutbacks in CAW production may not be able to be solely focused at times during the river's spring/summer recession or the summer/fall low flow season when they might be most beneficial.

(*Id.*)

For these reasons, there is no evidentiary support for the Draft CDO conclusion that CAW must reduce diversions to protect fish and wildlife, beyond the reductions and measures the State Water Board already required in Order 95-10.

V. THE STATE WATER BOARD IS PRECLUDED BY LAW FROM ISSUING A CEASE AND DESIST ORDER ON THE INDEPENDENT GROUND OF TRESPASS; A CEASE AND DESIST ORDER CAN ISSUE FOR TRESPASS ONLY IF THERE IS A VIOLATION OF ORDER 95-10

The Draft CDO determined that CAW is liable for a trespass on the independent ground that CAW diverts Carmel River water in excess of its water rights. Such a conclusion, absent a finding that CAW violated Order 95-10, is precluded by law.

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A. Lack of Notice Bars Independent Trespass Prosecution (Prosecution of Trespass Absent Finding of Order 95-10 Violation)

Under the Administrative Adjudication Bill of Rights, in a proceeding like this, CAW is entitled to "notice." (Govt. Code, § 11425.10.) In cases where a draft cease and desist order issues, "[t]he notice shall contain a statement of facts and information that would tend to show the proscribed action." (Water Code, § 1834(a).) Mr. James W. Kassel, Assistant Deputy Director for Water Rights, provided the notice for this proceeding. In this January 15, 2008 letter, Mr. Kassel explained to CAW the Division was issuing a draft cease and desist order because of CAW's alleged violation of Condition 2 of Order 95-10. Mr. Kassel wrote: "Division staff determined that in the twelve years since Order 95-10 was adopted, [CAW] has not complied with Condition 2 of that Order." It was because of that determination, not in spite of it, Mr. Kassel asserted a trespass under Water Code section 1052. Thus, the State Water Board cannot seek to impose a cease and desist order against CAW for a trespass, absent a finding CAW is in violation of Order 95-10.

B. Order 95-10 Bars Independent Trespass Prosecution (Prosecution of Trespass Absent Finding of Order 95-10 Violation)

Further, the State Water Board, in Order 95-10, made plain CAW would only be subject to an enforcement action if it was found violating Condition 2 of Order 95-10. (Order 95-10, p. 45.) The State Water Board wrote:

The Chief, Division of Water Rights, is authorized to refer any violation of these conditions to the Attorney General for action under Section 1052 or to initiate such other enforcement action as may be appropriate under the Water Code.

(*Id.* (emphasis added).)

Moreover, the State Water Board cannot find a trespass occurred in this case. The Draft CDO concludes CAW trespassed when it diverted in excess of its water rights. (Draft CDO, pp. 32-33.) As a matter of law, there can be no such finding, where 95-10 authorized the diversion that forms the basis for the alleged trespass. Under Water Code section 1052, trespass is a "diversion or use of water subject to this division other than as authorized in this division." Here, Order 95-10 necessarily provides that authorization. Condition 1 to Order 95-10 unambiguously states: "[CAW] shall forthwith

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cease and desist from diverting any water in excess of 14,106 [acre-feet per annum] from the Carmel River."⁹

The interpretation that Condition 1 allows water use up to 14,106 (later reduced to 11,285)¹⁰ is consistently supported by State Water Board staff, as demonstrated by uncontroverted evidence in the record.¹¹ Over the 13 or so years since Order 95-10 was issued, the State Water Board staff characterized Condition 1 as establishing a diversion limit:

- Katherine Mrowka, then Associate Engineer: Identifying Order 95-10 as imposing a "production cap." (Exhibit SWRCB 8, Tab 2(c).)
- Katherine Mrowka, then Associate Engineer: Recording in a "Contact Report" that Order 95-10 required CAW to limit the 1996 water year production to 11,990 af." (Exhibit SWRCB 8, Tab 7.)
- Edward Anton, then Chief of the Division of Water Rights: explaining Order 95-10 establishes "water conservation goals limiting Cal-Am to diversion of 11,285 acre-feet per annum." (Exhibit SWRCB 8, Tab 15.)
- Edward Anton: Explaining again Order 95-10 imposed a "limitation on pumping." (Exhibit SWRCB 8, Tab 2(f).)
- Victoria Whitney, Chief of the Division of Water Rights: Writing "Order 95-10 requires [CAW] to immediately cease diversions from the Carmel River above 11,285 af." (Exhibit SWRCB 8, Tab 20.)
- Walt Pettit, then Executive Director: Directing CAW to schedule water to "comply with the diversion limitation cap . . . along with an explanation of the measures it intends to implement to meet the 11,285 af pumping limitation. (Exhibit SWRCB 8, Tab 2(i).)

Without regard for the evidence, the Draft CDO posits Order 95-10 does not authorize CAW's water use up to the 11,285 acre-foot amount. The Draft CDO

⁹ A contrary view would violate the well-established doctrine of implied conditions. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505.)

¹⁰ In addition to the 11,285 acre-foot limit must be the Pebble Beach Company entitlement.

¹¹ An agency's decision that "flatly contradicts" its original interpretation will not be entitled to deference and can be found unlawful. (See *Brewer v. Patel*, 20 Cal. App. 4th 1017, 1022 (Cal. App. 1st Dist. 1993), *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1106 (Cal. 2007).)

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attempts to support that argument. The Draft CDO claims nothing in the record supports a finding that the State Water Board intended to authorize CAW to use water to such a level and Order 95-10 cannot authorize water use because the only manner in which water use can be authorized is through its permitting process. The former claim simply is unsupported by the record. The latter claim fails to respect Order 95-10 and equitable principles of law.

As explained above, the record is replete with evidence that Order 95-10 limited CAW's diversions to 11,285 acre-feet per year. There is nothing that even suggests CAW would commit a trespass if it diverted within that amount.

Much is made in the Draft CDO of CAW's assertion that Order 95-10, as an interim physical solution, authorized, sanctioned, or otherwise condoned CAW's use of Carmel River water up to 11,285 acre-feet per year. CAW maintains its view that Order 95-10 is a physical solution. Physical solutions provide "a practical remedy that avoids waste or unreasonable use." (Draft CDO, p. 23.) Additionally, physical solutions allow for remedies that ensure water is beneficially used, to the maximum extent possible. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242-44.) That is a result intended by Order 95-10. And, in Order 95-10, the State Water Board was unwilling to reduce CAW's diversions below 11,285 acre-feet per annum. Thus, the State Water Board's "primary concern" was adoption of an order which would, until a legal supply of water could be developed or obtained, require [CAW]: (1) implement a plan to develop or obtain a legal supply of water, (2) minimize its diversions from the Carmel River, and (3) mitigate the environmental effects of its diversions. (Order 95-10, p. 39-40.)

Order 95-10 addressed CAW's diversion of Carmel River water in excess of its water rights. The State Water Board cannot now take the position it did not have the authority to issue Order 95-10. That argument is barred. Order 95-10 was the subject of legal challenge. The State Water Board, CAW, the Monterey Peninsula Water Management District, the Sierra Club, Carmel River Steelhead Association and the California Sportfishing Protection Alliance were all parties to Order 95-10 and litigation before the California Superior Court. All of the parties agreed to dismiss the litigation with prejudice. As a result, all of the parties relinquished their rights, if any, to challenge the State Water Board's authority to issue Order 95-10.

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C. Equitable Estoppel Bars Independent Trespass Prosecution (Prosecution of Trespass Absent Finding of Order 95-10 Violation)

The assertion in the Draft CDO that Order 95-10 does not authorize CAW's water use up to the 11,285 acre-foot amount is barred by equitable estoppel. Four elements that must be present in order to apply equitable estoppel:

(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a 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.

(*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Here, because estoppel should be applied against the State Water Board, "justice and right [must also] require it." (*Id.*, p. 493.) That additional element is met where "injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify an effect upon public interest or policy." (*Id.*, pp. 496-497.) Each of those elements is presented in this circumstance.

The State Water Board was aware of Order 95-10 and the actions of its staff, all of which reflect the treatment of Order 95-10 as providing a diversion limit. (Exhibit CAW 030B - 30WW; Exhibit SWRCB 8, Tab 2(a)-(x).) Over the years since Order 95-10 was issued, the State Water Board staff repeatedly thanked CAW for its "continued compliance," and even informed CAW that, "if there had been a violation noted, the Division would have promptly advised Cal-Am in order to ensure that the violation was timely addressed." (Exhibit SWRCB 8, Tab 2(m).) The State Water Board and its staff clearly intended that its conduct and the conduct of its staff would be relied upon by CAW.¹² What other purpose could the reporting and responses serve?

Further, until the prosecution team commenced this action, CAW had not received any communication from the State Water Board or its staff which would suggest CAW was violating any provision of the Water Code or prior order of the Board. And, in fact, CAW relied upon its ability to continue to divert up to 11,285 acre-feet when developing its efforts to reduce reliance upon the Carmel River. CAW has invested thousands of hours and spent millions of dollars planning long term water supply projects. As discussed previously, if the Draft CDO was issued, operation and

¹² In addition, the record is clear that the State Water Board would only take an enforcement action if CAW violated Order 95-10. (Order 95-10, p. 45; Exhibit PT-4; Exhibit PT-5; Exhibit SWRCB 8, Tab 2(j) (explaining CAW would be subject to enforcement action "if it does not comply with Order WR 95-10").)

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maintenance of the CAW system could be compromised, CAW will likely be unable to satisfy customer demands, leaving the public-at-large without sufficient supply, and CAW's and the communities' investment in existing water supply planning and development efforts may be jeopardized. (See, e.g., Exhibit CAW-037, pp. 3:25-4:11.)¹³

CAW raised this equitable estoppel argument previously. The Draft CDO attempts to dismiss CAW's argument for four reasons. First, the Draft CDO posits Order 95-10 was never intended to be interpreted as authorizing diversion up to the 11,285 acre-foot amount. That position is simply not supported by the evidence. Almost every staff person within the State Water Board involved in this matter has concluded Order 95-10 authorizes diversions up to 11,285 acre-feet. (See discussion above.)

Second, the Draft CDO asserts the State Water Board informed CAW it was in violation of Water Code section 1052. (Draft CDO, p. 27.) To support that assertion, the Draft CDO only cites documents related to the 1997-8 administrative civil liability complaint. The documents issued at that time reflect a decision by the State Water Board to issue the administrative civil liability complaint because it alleged CAW violated Order 95-10. (See Exhibits PT-4; PT-5 (explaining CAW had not complied with Order 95-10 and therefore the State Water Board issued the administrative civil liability complaint).) CAW disagreed with those allegations and as noted in the Draft CDO, the complaint was settled. Even so, the documents cited do not support a conclusion that CAW could be subject to enforcement without a violation of Order 95-10.

Third, the Draft CDO posits estoppel would violate public policy to "prevent the unlawful diversion of water." (Draft CDO, p. 28.) The Draft CDO suggests that, without its ability to issue a cease and desist order, the State Water Board would be precluded from "prevent[ing] the unlawful diversion of water." This suggestion belies the fact that the State Water Board has already reviewed CAW's diversions and acted on them. It issued a comprehensive order which included measures to minimize and mitigate the effects of CAW's diversions up to 11,285 acre feet on fish, wildlife and riparian habitat. It issued Order 95-10.

¹³ Equitable estoppel applies equally to the circumstances of the Pebble Beach Company. The State Water Board was apprised of Pebble Beach Company's reclamation project and its reliance on the water supply embodied in the water entitlement; the State Water Board must have intended its conduct would be acted upon or acted so that Pebble Beach Company had a right to believe it was so intended; the Pebble Beach Company was not aware of the State Water Board position the Pebble Beach Company could not so rely upon the water entitlement produced by the conservation of water from the reclamation project and the Pebble Beach Company relied upon the State Water Board's conduct to the injury of the Pebble Beach Company in financing the \$67 million reclamation project.

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The Draft CDO also ignores potentially overriding policy concerns – certainty in enforcement and with compliance, i.e., the ability to rely on and work with State Water Board staff as they carry out enforcement and compliance functions on behalf of the State Water Board. For 14 years, up until the issuance of the proposed order in January, 2008, CAW consistently informed the State Water Board of its efforts to comply and the State Water Board consistently informed CAW that it was in compliance with Order 95-10.¹⁴ The Draft CDO posits the notion that such reliance is misplaced, and even suggests it would be inappropriate for a regulated entity to rely upon statements by the State Water Board staff. (See, e.g., Draft CDO, p. 53.) The "Order" issued by the State Water Board in 1995, subject to litigation and settlement, can apparently be unilaterally revised and enforced retroactively. Years of mandatory reports approved by staff are subject to re-interpretation under the newly revised "Order." Repeated affirmations by staff regarding compliance with respect to CAW and water rights with respect to other parties, are meaningless. What is the message sent to the regulated community?

Fourth, the Draft CDO argues an appellate court case, *Feduniak v. California Coastal Commission*, 148 Cal.App.4th 1346, precludes the application of estoppel in this case. The facts in *Feduniak* are completely distinguishable from the circumstances here. *Feduniak* involved the question of whether estoppel could prevent enforcement of land use requirements against a landowner. After recognizing that estoppel is a question of fact, the Court of Appeal concluded that the agency at issue was not aware of the land use violations, the agency never intended the landowner to take action or so acted that the landowner had a right to believe it was so intended, and that public policy did not warrant application of estoppel because its application would circumscribe protections for the public. (*Id.*, pp. 1361, 1367, 1373.) None of those findings are relevant or can be made here.

D. Res Judicata and Collateral Estoppel Bar Independent Trespass Prosecution (Prosecution of Trespass Absent Finding of Order 95-10 Violation)

Trespass prosecution is barred by res judicata and collateral estoppel. CAW has previously announced the legal arguments in support of these legal doctrines and their application to the present matter and incorporates those arguments herein by reference.

¹⁴ Along with estoppel, this 14 year delay gives rise to the equitable doctrine of laches. Laches bars enforcement action after an "unreasonable delay plus either acquiescence in the act about which the complainant complains or prejudice to the party asserting the equitable defense resulting from the delay." (*Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628-629.)

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The Draft CDO does nothing to effectively refute these arguments. The Draft CDO simply claims that at the time Order 95-10 was issued it did not have the authority to issue a cease and desist order for trespass. (Draft CDO, p. 30.) The doctrines of res judicata and collateral estoppel do not turn on statutory authorization, but on previous adjudication of identical claims. Therefore, whether the State Water Board had the statutory authority to issue a violation of Water Code 1052 under a cease and desist order does not change the fact that Order 95-10 previously adjudicated the issue of whether CAW was authorized to divert water from the Carmel River. It is clear Order 95-10 previously adjudicated CAW's authorization to divert water from the Carmel River and therefore trespass is barred by res judicata and collateral estoppel. Further, the Draft CDO contends it is CAW's position that no new evidence should be allowed as to the effects of its diversions from the Carmel River. (Draft CDO, p. 30.) That contention is correct. The only permissible evidence is that related to impacts due to "diversions [] continuing for a longer period than was anticipated in 1995 or those diversions are claimed to have impacts that differ from what those impacts were understood to be in 1995." (Draft CDO, p. 31.) None of the evidence relied upon in the Draft CDO meets that threshold requirement.

For these reasons, law and equity preclude the State Water Board from undertaking an enforcement action, unless it finds CAW in violation of Order 95-10.

VI. THE DRAFT CDO IMPROPERLY CONCLUDES CAW VIOLATED CONDITION 2 OF ORDER 95-10

A. The Draft CDO Improperly Interprets The Requirements Under Condition 2 Of Order 95-10

The Draft CDO applies an incorrect standard to determine whether CAW has violated Condition 2 of Order 95-10. The Draft CDO concludes Condition 2 required CAW to diligently terminate diversions from the Carmel River that are outside of its water rights. (Draft CDO, p. 24-26.) CAW disagrees. Its disagreement is not based on "semantics", as the Draft CDO states. It is based upon the plain reading of Condition 2, particularly when read in conjunction with other operative and non-operative provisions of Order 95-10, and the 14 years of correspondence from the State Water Board.

The words of Condition 2 of Order 95-10 require CAW to diligently implement actions to obtain appropriative permits, water from sources other than the Carmel River, or a contract for the supply of water. The plain words cannot be read to require completion of the actions or termination of diversions in excess of water rights, as CAW cannot unilaterally control whether it can obtain permits or water rights, whether another entity will contract, or when any of those actions are completed.

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To the extent one reads ambiguity into Condition 2, that ambiguity is explained in the non-operative provisions of Order 95-10. There are at least four (4) references to the requirements imposed in Condition 2, all of which explain the requirement as one that requires the pursuit of additional supplies. (Order 95-10, pp. 25, 37, 38, 39-40.)

Over the 14 years since Order 95-10 issued, the State Water Board has supported an interpretation that CAW must diligently pursue or implement a plan. As an example, in 2004, Ms. Whitney informed CAW that "Order 95-10 requires [CAW] to diligently pursue a legal water supply and to immediately cease diversions from the Carmel River above 11,285 afa." (Exhibit SWRCB 8, Tab 20.) The witness for the prosecution team confirmed this interpretation. (Hearing Transcript, Ph. 1, Vol. 1, p. 136:9-14, 138:12-17.)

B. CDO Determination That CAW Violated Condition 2 Is Not Supported By Substantial Evidence

The Draft CDO concludes CAW's efforts are insufficient to meet Condition 2. The Draft CDO seems to support that conclusion with findings that Condition 2 requires and CAW failed to implement "smaller projects", and that CAW must do more than "evaluate, propose, or otherwise pursue lawful alternatives." (Draft CDO, p. 35.) In this regard, the Draft CDO conclusion and findings are unsupported by law and evidence. They are also contrary to the position taken by the State Water Board for the 13 or more years since Order 95-10 issued.

At the time Order 95-10 issued, the State Water Board was focused on CAW pursuing larger projects. The State Water Board contemplated CAW would pursue water entitlements from the then contemplated New Los Padres project, or a similar storage project. (See Order 95-10, fn. 21; Synopsis of Order 95-10; Exhibits CAW-029, p. 2:22-25; CAW-031, p. 1:20-25; CAW-032, pp. 1:28-2:7.) That is exactly what CAW did.

Initially, CAW supported the New Los Padres Dam project and, at the time, contemplated a contract with the Monterey Peninsula Water Management District for a water supply. (Exhibits CAW-029, p. 2:22-25; CAW-031, p. 1:20-25; CAW-032, pp. 1:28-2:7.) When voters defeated the financing for that project, CAW continued its effort to obtain a substitute supply. CAW invested significant resources pursuing the Carmel River Dam project. (Exhibits CAW-029, p. 2:23-28; CAW-031, p. 1:23-28; CAW-032, p. 2:5-8; Hearing Transcript, Ph. 1, Vol. 1, pp. 270:3-271:3.) When the California Legislature and the California Public Utilities Commission demanded a change in direction, CAW again continued that effort, but refocused this time on numerous water supply options. (Exhibit CAW-029, p. 2:23-28; CAW-030, p. 2:15-18; CAW-032, pp.

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2:26-3:2, 3:3-5:18.) The Coastal Water Project ("CWP") emerged from that effort as the preferred course of action.

During that time, CAW consistently informed the State Water Board of its efforts. As an example, on January 6, 2005, CAW wrote to the State Water Board. (Exhibit CAW-030LL.) In that correspondence, the first quarterly report for water year October 1, 2004 through September 30, 2005, CAW explained it "proposed an alternative water supply project to meet the Order 95-10 as modified by subsequent orders. . . . [CAW] amended its application [with the California Public Utilities Commission] for a new reservoir on the Carmel River to include the desalination/ASR project originally developed by the [California Public Utilities Commission]." (Exhibit CAW-030LL, p. 5.)¹⁵

The State Water Board responded to this correspondence. The State Water Board thanked CAW for its "continuing to comply with Order 95-10." (Exhibit SWRCB 8, Tab 2(q).) It went further. It explained "[i]f there had been a violation noted, the Division would have promptly advised Cal-Am in order to ensure the violation was timely addressed." (Exhibit SWRCB 8, Tab 2(q).) The evidence in the record includes many other similar examples. At no time did the State Water Board inform CAW that it must take alternative actions if it was to comply with Order 95-10.

Notwithstanding its focus on a comprehensive solution, CAW continued to pursue smaller water supplies. CAW has been and will continue to implement a main replacement program. (Hearing Transcript, Ph. 1, Vol. 5, pp. 1263:19-1264:9.) It applied for permission and received authorization from California Public Utilities Commission to implement a tiered rate restructure. (*Id.*, pp. 1339:17-1341:2.) And, it has applied for permission and received authorization from the California Public Utilities Commission to increase its rates. (*Id.*, pp. 1343:21-1345:13.) Each of those actions should reduce the amount of water CAW relies upon from the Carmel River. (*Id.*, pp. 1344:12-1345:9.) Notwithstanding that intent, CAW cannot guarantee the actions will reduce Carmel River diversions by a specified amount. (*Id.*, p. 1343:13-16.)

CAW has also pursued additional supplies. Some of those efforts have been successful, while others have not. The Draft CDO appears to concede these efforts were made, but dismisses them because "evaluation, proposal, or pursuit of alternative supplies" is simply not enough. (Draft CDO, p. 35.) There is no evidentiary support for that conclusion. No one presented evidence of actions CAW failed to take. There is no

¹⁵ The current project is described in the draft Environmental Impact Report (EIR) for the Coastal Water Project published by the California Public Utilities Commission on January 30, 2009. (See <http://www.cwp-eir.com/docs.html>.)

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evidence in the record showing CAW did not take advantage of an opportunity to obtain additional supplies.

Indeed, as discussed above, the position ignores Order 95-10 and a practical consideration implicit in Order 95-10 – one entity cannot unilaterally obtain supplemental water. The act of obtaining an entitlement to water requires action by others, be it approvals or agreements. As an example, to obtain a new water right, CAW would have to obtain a permit from the State Water Board. The State Water Board's permitting process often takes years. It would be hard to fault CAW (find it out of compliance with Order 95-10) for not obtaining a new water right because of the process the State Water Board must follow.¹⁶

In sum, the Draft CDO concludes CAW violated Condition 2; that conclusion is unsupported by legal theory or evidence. The law and evidence are clear. CAW has been diligent in its efforts to obtain alternative water supplies. As the State Water Board informed it for the 14 years between the time Order 95-10 issued and this proceeding started, CAW has complied with Condition 2.

VII. THE STATE WATER BOARD HAS NOT AFFORDED CAW DUE PROCESS

The errors described above and in prior briefs are compounded by the fact the proceeding was not conducted in a manner required by law and infringed upon CAW's rights to a fair hearing. The State Water Board did not afford CAW its federal and state due process protections. Under federal and state law and to allow for due process, the State Water Board must avoid proceedings in which there is actual bias or in which the probability of actual bias is too high to be constitutionally tolerable. (See, e.g., *Morongo Band of Indians v. State Water Resources Control Board "Morongo"*, 45 Cal.4th 731, 738 (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).) The current proceeding involved a probability of actual bias too high to be tolerated.

This probability is the result of numerous factors, the most egregious of which is the failure of the State Water Board to separate functions; particularly the functions delegated to Ms. Kathy Mrowka, a senior engineer for the Division of Water Rights.¹⁷ Ms. Mrowka served as or assisted the adjudicator, investigator, and prosecutor on the issue of CAW diversions from the Carmel River. Ms. Mrowka participated on the

¹⁶ Indeed, the Aquifer Storage and Recovery Project took the State Water Board at least four (4) years to process.

¹⁷ Another example of a failure to separate functions is with Ms. Whitney, who served as an investigator, (see Exhibit SWRCB 8, Tab 20; Exhibit SWRCB 8, Tab 21), and now serves on the hearing team. (May 13, 2008 Ruling on Procedural Issues, p. 7-8.)

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hearing (adjudication) team in the proceeding leading to Order 95-10. She was a principal staff person assigned to drafting the order. Ms. Mrowka investigated CAW's compliance with Order 95-10. She authored at least 10 of the 14 letters responding to the quarterly compliance reports required under Order 95-10. And, Ms. Mrowka assisted with the prosecution of this action. She provided significant testimony on her interpretation of and opinion on CAW's actions to comply with Order 95-10.

The Draft CDO responds to CAW's due process concern by alleging *Morongo* held the appearance of bias, without evidence of actual bias, is insufficient to deny due process. (Draft CDO, p. 16-17.) *Morongo* does not stand for that proposition. While in the absence of actual bias there is a presumption of impartiality, (*Morongo*, p. 615), the presumption is overcome by a showing that an agency has not respected the separation of function requirement under the Administrative Procedures Act. (*Id.*, p. 615-16.) For the reasons presented above, such is the case here.¹⁸

Notwithstanding its interpretation of *Morongo*, the Draft CDO concludes the State Water Board separated functions. (Draft CDO, p. 20.) That conclusion is not supportable. As to Ms. Mrowka, consistent with the discussion above, the Draft CDO recognizes Ms. Mrowka's multiple roles related to CAW's diversions from the Carmel River. The Draft CDO explains, Ms. Mrowka was "a member of the hearing team that assisted the State Water Board when Order 95-10 was adopted." (Draft CDO, p. 20.) And, Ms. Mrowka reviewed the [compliance] reports and drafted correspondence to [CAW] for the Division. . . . as adjudicator, investigator, and prosecutor. . . . (Draft CDO, p. 20.) Footnote 1 to the Draft CDO identifies Ms. Mrowka as part of the Prosecution Team, albeit for purposes of the ex parte prohibition. (Draft CDO, p. 1.)

The Draft CDO also seeks to de-emphasize Ms. Mrowka's dueling roles by (i) explaining Ms. Mrowka's responses to CAW's reports on 95-10 compliance "were not prepared as part of an investigation leading to the issuance of the draft CDO," (ii) noting

¹⁸ The unacceptable appearance of bias also results from a failure by the State Water Board to explain the roles of staff members. The hearing notice identified Buck Taylor, Paul Murphey, Ernest Mona and Jane Farwell as members of the hearing team, and Yvonne West, Reed Sato, Jim Kassel, John O'Hagan, Mark Stretars, and John Collins as members of the prosecution team. (Exhibit CAW-010.) It said nothing about other staff of the State Water Board. During the proceeding, several correspondences were addressed to other State Water Board staff members, including Thomas Howard, Andy Sawyers, Les Grober, Vicky Whitney. (Exhibits CAW-007; CAW-020.) It was not until after CAW raised concern the hearing officer explained the State Water Board treats at least some of those staff people as part of the hearing team. (See May 13, 2008 Ruling.) Also, no document produced by the State Water Board or its staff explained Kathy Mrowka's role, until the prosecution team submitted on or about March 13, 2008 a notice of intent to appear. Even then, it was not until the Draft CDO issued that CAW learned Ms. Mrowka was treated as a member of the prosecution team for purposes of complying with ex parte prohibitions. (Draft CDO, fn. 1.)

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Ms. Mrowka's role in this proceeding was limited to a witness, and (iii) Ms. Mrowka's adjudicatory function during the proceeding was more than four years ago. Those findings are either unsupported or do not de-emphasize but highlight CAW's concerns and increase what should be an unacceptable risk of bias. Nothing changes the fact Ms. Mrowka served in different capacities related to the same subject matter.

The evidence shows and the Draft CDO concedes Ms. Mrowka was the principal person at the State Water Board responsible for reviewing CAW's quarterly compliance report. She was also the principal person at the State Water Board to inform CAW if it was acting in compliance with Order 95-10. (Exhibit SWRCB 8, Tab 2(p).) How could Ms. Mrowka be so involved in CAW's compliance with Order 95-10 from 1995 through at least 1997, yet have no effect on the decision whether CAW was in compliance with Order 95-10? The Draft CDO does not provide an explanation.

The fact that Ms. Mrowka participated in this proceeding as a witness, rather than a staff person initially assigned to the prosecution team, should have no effect on the issue of separation of powers. Ms. Mrowka participated as a friendly witness for the prosecution team. She was free to discuss with the prosecution team the issues raised in this proceeding. Her testimony reached each of the critical issues on liability. Ms. Mrowka testified to her interpretation of Order 95-10. She rendered conclusions as to (i) CAW's compliance with Order 95-10, (ii) when the State Water Board may pursue an enforcement action against CAW, and (iii) whether in this proceeding the actions/inactions by CAW allow for the issuance of an order. (Exhibit PT-2, p. 8.) The scope and effect of Ms. Mrowka's testimony cannot be discounted because she was "only" a witness for the prosecution team.

Finally, the time separating the issuance of Order 95-10 and this proceeding does not insulate against a claim alleging violation of separation of function, it supports it. The temporal separation increases the risk the State Water Board will accord Ms. Mrowka's testimony undue weight because of her role as an adjudicator and investigator, roles served in substantial part or completely before the existing board-members were appointed to the State Water Board.¹⁹ Ms. Mrowka testified on issues for which she had first hand knowledge of Order 95-10 and CAW's compliance therewith, first hand knowledge each of the State Water Board members lack.

¹⁹ The harm caused by the failure to separate functions is compounded by the fact that Ms. Mrowka and Mr. Buck Taylor, a member of the hearing team in this proceeding, served on the hearing team for the proceeding which resulted in Order 95-10.

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For the reasons stated above, if the State Water Board adopts the Draft CDO it will further deprive CAW of due process. Nothing can overcome the fact the proceeding was not conducted in a manner required by law.

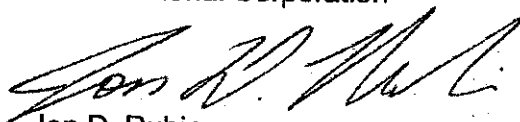
VIII. CONCLUSION

In 1995 and through Order 95-10, the State Water Board created a stable regulatory framework from which CAW and those on the Monterey Peninsula could develop a long-term reliable water supply. The State Water Board authorized CAW to divert in excess of its water rights. In exchange, the State Water Board demanded CAW implement aggressive conservation measures and implement measures to minimize and mitigate for the impacts to fish and wildlife. The State Water Board informed CAW it would not exercise its prosecutorial discretion if CAW met the State Water Board's demands.

For 14 years, CAW complied. The State Water Board staff agreed. Nonetheless, in 2008, the State Water Board, Division of Water Rights, abruptly changed course. It caused significant instability when it issued a draft cease and desist order. The Monterey Peninsula is on the cusp of a solution to the water supply crisis. The State Water Board should not now dispense of Order 95-10 and cause a prolonged distraction to achieving a real solution. If the State Water Board adopts the Draft CDO, it will do just that. For this reason, and all of the reasons presented by CAW, CAW respectfully requests the State Water Board decide no cease and desist order should be issued.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation



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cc: Service List (attached)
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