

1 **RUSSELL M. MCGLOTHLIN (State Bar No. 208826)**
2 **MICHAEL T. FIFE (State Bar No. 203025)**
3 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**
4 **21 East Carrillo Street**
5 **Santa Barbara, California 93101**
6 **Telephone: (805) 963-7000**
7 **Facsimile: (805) 965-4333**

8 **Attorneys for CITY OF SEASIDE**

9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10
11 **IN THE MATTER OF WHETHER THE**
12 **DRAFT CEASE AND DESIST ORDER**
13 **CONCERNING CALIFORNIA AMERICAN**
14 **WATER'S DIVERSION FROM THE**
15 **CARMEL RIVER SHOULD BE ISSUED**

CITY OF SEASIDE CLOSING BRIEF

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1 **I. INTRODUCTION**

2 The City of Seaside (“City”) acknowledges the adverse impacts to the Carmel River’s
3 riparian habitat caused by California American Water’s (“Cal Am”) diversions, and joins in the
4 common desire for the reduction of these diversions as rapidly as reasonably prudent. However,
5 with respect to this hearing, the State Water Resources Control Board (“Board”) should not issue a
6 cease and desist order (“CDO”) because the Prosecution has failed to satisfy its burden of proof to
7 demonstrate that a CDO is warranted.

8 However, if the Board is inclined to issue a CDO, the City urges the Board not to adopt the
9 draft CDO, which would impose an undue financial and social burden on the Monterey community,
10 without providing material improvement to the Carmel River’s in-stream habitat. The City also
11 specifically urges the Board not to mandate reductions that would require the adoption of a
12 moratorium upon the few new water service connections that may be established under the
13 Monterey Peninsula Water Management District’s (“MPWMD”) water allocation program. The
14 MPWMD water allocation program allows for a small amount of water (119 acre-feet) for new
15 water service connections within Cal Am’s service area. Beyond this comparatively minor quantity
16 of water for new connections, there is already a de facto moratorium in effect. Eliminating the
17 opportunity for the community to initiate the few new service connections made possible by this
18 119 acre-feet would produce little benefit for the Carmel River’s riparian habitat, but would
19 severely harm the community. Moreover, the evidence presented demonstrates that there are
20 alternatives to the draft CDO that could offer near-term improvements for the River’s riparian
21 habitat while new water supplies are developed without imposing undue community hardship.

22 **II. THE PROSECUTION FAILED TO SATISFY ITS BURDEN TO DEMONSTRATE**
23 **THAT CAL AM HAS VIOLATED ORDER 95-10 OR WATER CODE SECTION 1052**

24 As the moving party in this administrative hearing, the Prosecution bears the burden of
25 demonstrating, by a preponderance of evidence, that Cal Am has violated the requirements imposed
26 upon it by SWRCB WR Order 95-10 (“Order 95-10”), and that the draft CDO is an appropriate
27 remedy. (See *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 [the party
28

1 asserting the affirmative at an administrative hearing has the burden of proof, including both the
2 initial burden of going forward and the burden of persuasion by a preponderance of the evidence].)

3 The first phase of this hearing centered on whether Cal Am had violated the conditions set
4 forth in Order 95-10. In particular, Phase 1 focused on the diligence requirement in Condition 2,
5 and whether Cal Am is diverting water from the Carmel River in violation of Water Code Section
6 1052. For the issuance of a CDO in this hearing to be warranted, the Prosecution must have
7 affirmatively demonstrated by a preponderance of evidence that Cal Am has violated Order 95-10.
8 (*McCoy*, 183 Cal.App. at 1051.) In its closing brief, the MPWMD thoroughly discusses the reasons
9 why the Prosecution has failed to satisfy its burden of proof. The City joins with the arguments set
10 forth therein.
11

12 As the MPWMD explains, the Prosecution did not identify any instances where Cal Am
13 failed to use appropriate diligence in the satisfaction of Condition 2's directives to Cal Am to
14 legalize its diversions or obtain an alternative supply. Nor did the Prosecution present evidence that
15 other alternatives exist. Lacking such evidence, the Prosecution has not satisfied its burden of
16 proving that Cal Am has violated Condition 2 of Order 95-10.
17

18 In contrast, Cal Am and the MPWMD presented considerable evidence of the multiple
19 efforts that Cal Am has undertaken to procure water from various alternative water supply projects,
20 as well as the ongoing efforts toward completion of the Coastal Water Project. (*See* Exhibit MPWMD-
21 1, Testimony of D. Fuerst, Phase I, pp. 13-16 [explaining Cal Am's various efforts to obtain water
22 from alternative sources to reduce its Carmel River diversions]; Exhibit CAW-29, Testimony of K.
23 Turner, pp. 2-5 [describing various projects that Cal Am has pursued and/or evaluated to obtain
24 alternative water supplies since the adoption of Order 95-10].) Additional evidence was presented by
25 Cal Am and MPWMD concerning the substantial conservation achieved within the Cal Am system
26 since the entry of Order 95-10 in 1995. (*See* Exhibit MPWMD-SF12, Testimony of S. Pintar, Phase
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1 II [describing MPWMD/Cal Am conservation programs].) Indeed, water conservation within Cal
2 Am's Monterey service area is dramatically better than state-wide averages. (*See Id* [explaining
3 that average water use in the Cal Am service area has dropped from roughly 93 gallons per person,
4 per day (gppd) *during the rationing* period associated with the 1988 drought to roughly 90 gppd
5 currently, and that the state-wide average use is approximately 150 gppd].) Cal Am's multiple
6 efforts to develop new sources and maximize conservation demonstrate that Cal Am' has complied
7 with Condition 2's diligence requirement.
8

9 Moreover, from an equitable perspective, we note that, prior to the issuance of the draft
10 CDO, the Division of Water Rights never once provided any advance warning or other
11 communication indicating that it viewed Cal Am's efforts to obtain a legal water supply to be
12 insufficient to satisfy Condition 2's diligence requirement, or that Cal Am was otherwise in
13 violation of Order 95-10. (John Collins Testimony, Phase I Transcript, page 75.) At the least, such
14 dearth of advanced communication to Cal Am and the Monterey community is unfair and an
15 example of poor government operation.
16

17 The Prosecution has also failed to show that Cal Am is in violation of Water Code section
18 1052, which provides that the diversion or use of water subject to the Board's jurisdiction other than
19 as authorized by the Water Code is a trespass. Order 95-10 established that Cal Am did not possess
20 a legal right to withdraw water from the River in excess of 3,376 acre-feet per year ("afy").
21 However, because of the severe impacts that immediate reductions to Cal Am's diversions would
22 cause to the community absent an alternative legal water supply, Order 95-10 authorized Cal Am to
23 continue to produce water in excess of its legal right *subject to* the conditions set forth in Order 95-
24 10. Because the Prosecution has not produced evidence to substantiate its assertion that Cal Am has
25 violated the conditions imposed by Order 95-10 (indeed, the evidence demonstrates the opposite),
26 Cal Am's continued diversions in excess of its legal right remains in compliance with Order 95-10,
27
28

1 and thus cannot be held to be an unauthorized diversion pursuant to Water Code section 1052.

2 In considering this point, the Board should be mindful of what this hearing is *not*. This
3 hearing does not concern a proposed amendment of Order 95-10. Indeed, the Division of Water
4 Rights has not requested that the Board amend Order 95-10 nor presented evidence to support doing
5 so. The Division, of course, may seek to amend Order 95-10 in the future, and might in that
6 proceeding argue that too much time has expired since Order 95-10 was adopted, and that Cal Am
7 should be required to reduce diversions regardless of its diligence in seeking alternative water
8 supplies. However, this is not the subject of this hearing. The issue before the Board is solely
9 whether Cal Am is in compliance with Order 95-10's conditions. The Prosecution did not satisfy its
10 burden to demonstrate a violation of Order 95-10's conditions, and therefore the issuance of a CDO,
11 in any form, is unwarranted.
12

13
14 **III. THE REMEDY SET FORTH IN THE DRAFT CDO IS INAPPROPRIATE**

15 Assuming, *arguendo*, that the Board determines that the Prosecution produced sufficient
16 evidence to warrant issuance of a CDO, the approach set forth in the draft CDO is inappropriate.
17 The long-term solution, of course, is for Cal Am to cease diversions from the River in excess of its
18 legal right, thus eliminating roughly 7,000 afy of withdrawals. In the interim, before a complete
19 replacement water supply becomes available, select physical habitat mitigation projects may
20 provide meaningful improvements for in-stream habitat. (See Exhibit MPWMD-DF9A, Testimony
21 of D. Fuerst, Phase II, p. 7; Exhibit MPWMD-DF11 [list of priority projects for improvement of
22 Steelhead Trout habitat in the Carmel River developed by MPWMD based upon recommendations
23 from the National Marine Fisheries Service and the Carmel River Watershed Conservancy].)

24 Reductions made possible by interim water supply projects (e.g., the Aquifer Storage and
25 Recovery Project, and the Sand City Desalination Project) and conservation (e.g., the main
26 replacement program) can initiate reductions in River withdrawals to the extent the community's
27 water demands are satisfied. Comparatively small reductions in diversions will likely not materially
28

1 improve the River's habitat, however, because the riparian problems result from diversions of larger
2 orders of magnitude. The MPWMD's fisheries biologist, Kevan Urquhart, made this point in his
3 testimony, explaining that:

4 the draft CDO's first two levels of diversion cuts for CAW are
5 probably not enough to permanently re-water very much habitat, year
6 round in all water year types, thus may serve no more than a
7 policy/disciplinary benefit for the Board, and not much of an
8 ecological one for the river and its aquatic life, including steelhead
and red-legged frogs. The real obvious and major benefit to steelhead
and red-legged frogs will come from CAW establishing a new water
source, which allows it to cease all of its illegal diversions.

(See Exhibit MPWMD-KU1, Direct Testimony of Kevan Urquhart, Phase II, p. 6.)

9 Although the reductions to Cal Am's diversions required by the draft CDO will
10 likely not afford material improvements to the riparian habitat in the near term, such reductions
11 would result in severe social and fiscal impacts to the Monterey Peninsula communities, as
12 explained in greater detail below. If the Board decides to issue a CDO, the order should be
13 designed to achieve improvements to the Carmel River riparian habitat without causing undue
14 hardship to the community.

15 **IV. ALTERNATIVE REMEDIES ARE AVAILABLE TO BALANCE THE INTERESTS** 16 **OF THE RIVER'S RIPARIAN HABITAT AND THE COMMUNITY'S WELL BEING**

17 Alternative provisions could be included in a remedy to achieve improvements for the
18 Carmel River's riparian habitat, and progress toward reductions in diversions, while avoiding undue
19 burden to the communities served by Cal Am. Conceptual provisions could include the following:

20 1. Conservation. Cal Am and the MPWMD could coordinate to develop a
21 comprehensive water conservation and rationing contingency plan to improve upon the significant
22 conservation that Cal Am has already put into effect. Input and analysis from Cal Am, the
23 MPWMD, and the Division of Water Rights could be included in developing the plan. Cal Am
24 would then be required to implement the plan.

25 2. Reductions Equivalent to Interim Water Supply Projects. Cal Am could be required
26 to maximize the quantity of water available from interim water supply projects (e.g., Seaside Basin
27 ASR Program and Sand City Desalinization Project) to meet the service area's demands. As real
28

1 “wet” water is produced from these projects and to the extent that the water is available, Cal Am
2 could further reduce annual diversions from the Carmel River below the present limit of 11,285 afy.
3 Such reductions would occur so long as sufficient supplies were available from all of Cal Am’s
4 water supply sources, including the Seaside Basin, to meet the service area’s water demands.

5 3. Interim Riparian Habitat Mitigation Measures. Cal Am and the MPWMD could
6 coordinate with the California Department of Fish & Game and National Marine Fisheries Service
7 (“NMFS”) to refine the priority list of projects, set forth in Exhibit MPWMD-DF11, that may be
8 implemented to reduce the water supply impacts to the steelhead fishery and to other aquatic
9 resources of the Carmel River resulting from Cal Am’s diversions. Such list of interim mitigation
10 projects would need to be coordinated with NMFS to work congruently with, and not conflict with,
11 the projects that will be required of Cal Am pursuant to Cal Am’s settlement agreement with
12 NMFS. Cal Am could be required to provide reasonable annual funding to implement projects on
13 the priority list developed.

14 4. Coastal Water Project. There is a striking need for the Division of Water Rights to
15 coordinate with Cal Am and the rest of the Monterey water community to refine and promote the
16 Coastal Water Project (“Project”) as the ultimate solution to the Carmel River diversions. The
17 Division of Water Rights could be instructed to appoint a representative to work with the California
18 Public Utilities Commission (“CPUC”), the Water for Monterey County Coalition, and the various
19 stakeholders to ensure that the most feasible, cost-effective, and expeditious suite of alternatives is
20 chosen to comprise the Project, and then to actively participate in the planning process to implement
21 the Project. Indeed, the Division could take a leading role to help facilitate the success of the
22 Project as it is processed through the various regulatory agencies for which approvals will be
23 required (e.g., CPUC, Coastal Commission, and Department of Public Health). During the
24 development of the Coastal Water Project, Cal Am and the Division’s appointed representative
25 could be required to submit annual updates to the Board concerning the progress and status of the
26 Project. Once the Project is completed, Cal Am would be required to eliminate all diversions from
27 the Carmel River in excess of 3,376 afy.
28

1 **V. THE PUBLIC TRUST DOCTRINE REQUIRES A “BALANCING” OF DIVERSE**
2 **PUBLIC INTERESTS**

3 In its landmark *Audubon* opinion, the California Supreme Court ruled that the State has an
4 affirmative duty to take public trust considerations into account in the planning and allocation of
5 water resources, and to protect public trust uses whenever feasible. (*National Audubon Society v.*
6 *Superior Court of Alpine County* (1983) 33 Cal.3d 419, 446.) However, the doctrine does not
7 require that the state choose any particular public interest over another. Rather, the state’s duty is to
8 “balance the diverse interests” involved when rendering water resource decisions, and “to preserve,
9 so far as *consistent with the public interest*, the uses protected by the trust.” (*Id* at 447.)

10 The current situation is unique in that the balancing of interests does not center on an
11 otherwise authorized appropriation, as was the case in *Audubon*, but rather how long and in what
12 scope will the Board allow the community to continue to rely upon Cal Am’s diversions from the
13 Carmel River while Cal Am pursues other alternatives. The public trust doctrine nonetheless
14 requires balancing of the various, diverse, and competing public interests involved. (*National*
15 *Audubon*, at 447.) The Board must strike a balance between habitat and in-stream public trust
16 values and the welfare of the communities served by Cal-Am. The magnitude and pace of the
17 reductions required by the draft CDO would result in significant adverse impacts on the
18 communities served by Cal Am, but would not achieve material improvements to the riparian
19 habitat. In balancing the various public interests at issues, if the Board does issue an CDO, it should
20 adopt remedies similar to the conceptual provisions described above, which could achieve
21 improvement for the River’s riparian habitat and progress toward diversion reductions without
22 imposing an overbearing burden on the community served by Cal Am.

23 **VI. THE DRAFT CDO WOULD SEVERELY IMPAIR THE CITY’S WELL BEING**

24 The mandatory reductions set forth in the draft CDO would result in severe water shortages
25 for the Cal Am service area. (*See* Phase II Transcript, pp. 363:18-364:1; 397:20-398:3; 399:19-
26 400:10; 406:25-408:11; 442:19-444:3; 444:9-22; 444:25-445:23; 446:2-20; 464:1-16; 466: 14-25;
27 467 1-14; 804: 19-24.) Such mandatory reduction would also force the adoption of a moratorium
28 on new water service connections pursuant to the MPWMD’s Expanded Water Conservation and

1 Standby Rationing Plan. Although a moratorium may seem appropriate in light of Cal Am’s
2 continued diversions in excess of its legal right, it is not an appropriate remedy given the substantial
3 hardship that a moratorium would cause to the community, and the negligible benefit that a
4 moratorium would achieve for the River’s riparian habitat.

5 **A. There is Already a “Managed Moratorium” in Effect**

6 Pursuant to the MPWMD’s Water Allocation Program, which governs all distributions of
7 water within Cal Am’s service area, the maximum quantity of water that can be used to support new
8 water service connections with Cal Am’s service area is *only* 119.328 acre-feet. (Seaside Exhibit 5,
9 MPWMD, Monthly Allocation Report.) To put this quantity in perspective, this amount is *less than*
10 *one percent* of the quantity of water served within the Cal Am Service area on average over the past
11 five years. Beyond this small quantity, no additional water may be allocated for new water service
12 connections. Thus, there is effectively already a “*managed moratorium*” currently in effect within
13 the Cal Am service area.

14 The MPWMD Allocation Program was adopted by the MPWMD to establish and limit the
15 quantity of water that each jurisdiction served by Cal Am could allocate for new water service
16 connections. (Seaside Exhibit 4, Decl. of Ray Corpuz [“Corpuz Decl.”], 2:7-17.) Furthermore, all
17 water supplies committed to the allocation program were made before Order WR 95-10 was issued.
18 This includes the most recent allocation of 308 acre-feet, which was made in 1993 in association
19 with the completion of Cal Am’s Peralta Well in the Seaside Groundwater Basin. (*Id.*) All
20 determinations concerning whether to assign a portion of a jurisdiction’s water allocation to support
21 a new water service connection are made by the individual jurisdiction. (*Id* at 2:18-26.)

22 **B. Eliminating this Small Amount of Water Would Disproportionately and**
23 **Inequitably Impact the City of Seaside**

24 Of the 119.328 acre-feet of total quantity remaining for future allocation from the Allocation
25 Program, the City is entitled to 56.514 acre-feet. (Seaside Exhibit 5, MPWMD, Monthly Allocation
26 Report.) The City holds roughly half of the remaining allocation, and far more than any of the other
27 jurisdictions, because it has exercised restraint in assigning its allocation for new development.
28 (Corpuz Decl., 3:5-8.) The City’s restraint also reflects the fact that it experienced over a decade of

1 financial adversity following the closure of the Fort Ord Army Base in 1993, and has just recently
2 realized the opportunity for more substantial, high-value development within the City. (Seaside
3 Exhibit 1, Decl. of Mayor, Ralph Rubio, 2:5-18.)

4 **C. The City Will Lose Up to \$2.7 Million in City Revenue and Approximately 2,520**
5 **Jobs if a CDO is Issued that Results in a Moratorium on the Use of the Water Remaining in**
6 **the MPWMD Water Allocation Program**

7 Most of the other jurisdictions served by Cal Am have already assigned the majority of the
8 water allocated to them to support new development within their respective jurisdictions. These
9 jurisdictions are now enjoying the benefits of such development, including higher tax revenue, job
10 creation, and community redevelopment. The City is poised to achieve similar benefits from
11 modest infill development within its boundaries. However, this development is dependent upon the
12 56.514 afy remaining within the City's allocation.

13 The City has fifteen projects planned for development within the next two years that are
14 dependent on the City's allocation. (Corpus Dec., 3:22-24; Seaside Exhibit 6.) To quantify the
15 value of this development, the City retained David Zehnder, an economist with Economic Planning
16 Systems, Inc., to evaluate the financial impacts that would result if the City were unable to proceed
17 with its planned development projects because of a moratorium. Mr. Zehnder determined that an
18 inability to proceed with this future development would result in a loss of up to \$2.7 million in the
19 City's future general fund revenue (9% of the City's anticipated 2012 revenue), and that the City
20 would forego the creation of approximately 900 new long-term jobs and 1,620 one-time jobs
21 associated with the construction of these projects. (Seaside Exhibit 7, Decl. of David Zehnder, 3:1-
22 5.) Additional impacts would include the City's inability to satisfy its state-imposed housing
23 element, failure to achieve targeted new affordable housing units, and failure to achieve
24 redevelopment goals set forth in the City's General Plan in order to help revitalize the economic,
25 social, cultural, and recreational attributes of the City's downtown corridor. (*Id* at 3:5-9.)

26 These significant adverse impacts to the City would be disproportionate and inequitable in
27 comparison to the impacts on other jurisdictions served by Cal Am. The City's neighboring
28 jurisdictions have already assigned the majority of their allocation for new service connections. The

1 City's campaign to overcome the economic dislocation that resulted from the Fort Ord Base closure
2 is only now beginning to result in emerging high-value development prospects. A moratorium
3 would eviscerate these opportunities.

4 The City is also financially disadvantaged in comparison to its neighboring jurisdictions on
5 the Monterey Peninsula. (Corpuz Decl. 4:19-28 [explaining that the median household income in
6 the City is 16 percent less than that of the City of Monterey and 29 percent less than that of Carmel-
7 by-the-Sea, and the City has roughly twice the percentage of households living in poverty than in
8 Monterey and Carmel-by-the-Sea.]) Accordingly, the disproportionate effects of a moratorium
9 would cause the greatest harm to those that can least afford it. In sum, the issuance of a CDO that
10 results in a moratorium would establish a substantial barrier to the City's effort to turn the corner
11 from the Fort Ord Base closure and improve the quality and social integrity of the community that
12 resides within the City.

13 VII. CONCLUSION

14 Issuance of a CDO is not warranted because the Prosecution did not submit evidence to
15 satisfy its burden to establish by a preponderance of the evidence that Cal Am has violated the
16 conditions set forth in Order 95-10, or Water Code Section 1052. To the contrary, the evidence
17 submitted by Cal Am and the MPWMD shows that Cal Am has exercised diligence in pursuing new
18 water supplies to allow it to eliminate its diversions from the Carmel River in excess of its legal right.

19 If, despite the lack of showing of a violation, the State Board decides to issue a CDO, it should
20 not adopt the draft CDO. As explained above, the substantial reductions proposed by the draft CDO
21 would cause severe adverse hardship to the City and the other communities served by Cal Am, but
22 would likely not achieve the intended benefits for the Carmel River's riparian habitat. Alternative
23 remedies could be implemented that would offer greater benefits for the riparian habitat and progress
24 toward workable solutions without imposing undue pain and hardship upon the community.

25 The City further urges the Board to consider the likely impacts that adoption of the draft CDO
26 would cause to the City and its efforts to heal the economic and social challenges it faces. Notably, the
27 City's economic consultant testified that the draft CDO could eliminate \$2.7 million from the City's
28 future general fund revenue (roughly 10% of its future budgeted revenue) and the loss of roughly 2,600

1 full-time and temporary jobs, among other social and community consequences.

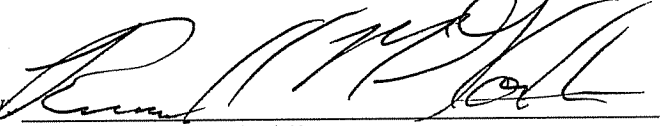
2 The current undertakings to develop the Coastal Water Project, which is wholly independent
3 from the Carmel River, appear to hold greater promise for success than prior efforts. The City urges the
4 Board to allow adequate time for this effort to succeed and to avoid interim remedies that would
5 severely harm the social and economic well being of the local community.

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Respectfully submitted,

Dated: October 9, 2008

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By 

Russell M. McGlothlin
Michael T. Fife
Attorneys for Defendant and Cross
Complainant City of Seaside

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF)
SANTA BARBARA

ss

I am employed by Brownstein Hyatt Farber Schreck n in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 East Carrillo Street, Santa Barbara, California 93101. On October 9, 2008, I served the within documents:

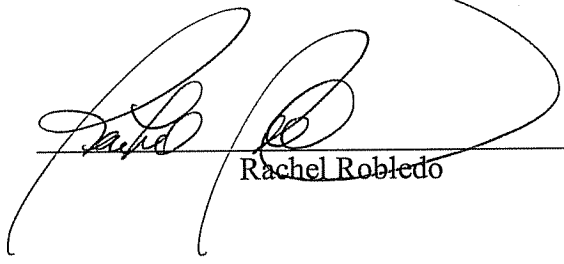
CITY OF SEASIDE’S BRIEF RE SCOPE OF HEARING

- By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Barbara, addressed as set forth below.
- By e-mailing the document listed above to all parties listed on the Proof of Service attached on the Service List below.
- By sending a true copy of the above document to the parties as set forth on the service list at the fax numbers indicated. The facsimile machine used complied with CRC Rule 2003(3), and the transmission was reported as complete and without error. Pursuant to CRC Rule 2005(i), a transmission confirmation report was properly issued by the transmitting facsimile machine, stating the time and date of such transmission.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 9, 2008, at Santa Barbara, California.



Rachel Robledo

SERVICE LIST

1
2
3 **California American Water**
Jon D. Rubin
Diepenbrock Harrison
4 400 Capitol Mall, Suite 1800
Sacramento, California 95814
5 jrubin@diepenbrock.com

6 **Public Trust Alliance**
Michael Warburton
7 Resource Renewal Institute
Room 290, Building D
8 Fort Mason Center
San Francisco, California 94123
9 Michael@rri.org

10 **Carmel River Steelhead Association**
Michael B. Jackson
11 P.O. Box 207
Quincy, California 95971
12 mjatty@sbglobal.net

13 **City of Sand City**
James G. Heisinger, Jr.
14 Heisinger, Buck & Morris
P.O. Box 5427
15 Carmel, California 93921

16 **Pebble Beach Company**
Thomas H. Jamison
17 Fenton & Keller
P.O. Box 791
18 Monterey, California 93942-0791
19 TJamison@FentonKeller.com

20 **California Salmon and Steelhead Assoc**
Bob Baiocchi
P.O. Box 1790
21 Graeagle, California 96103
rbaiocchi@gotsky.com

22 **National Marine Fisheries Service**
23 Christopher Keifer
501 W. Ocean Blvd., Suite 4470
24 Long Beach, California 90802
Christopher.keifer@noaa.gov

State Water Resources Control Board
Reed Sato
Water Rights Prosecution Team
1001 I Street
Sacramento, California 95814
rsato@waterboards.ca.gov

Sierra Club – Ventana Chapter
Laurens Silver
California Environmental Law Project
P.P. Box 667
Mill Valley, California 94942
larrysilver@earthlink.net

Monterey Peninsula Water Management District
David C. Laredo
De La & Laredo
606 Forest Avenue
Pacific Grove, California 93950

City of Carmel-by-the-Sea
Donald G. Freeman, Esq.
P.O. Box CC
Carmel-by-the-Sea, California 93921

Monterey County Hospitality Association
Bob McKenzie
P.O. Box 223542
Carmel, California 93922
info@mcha.net
bobmck@mbay.net

Jonas Minton
1107 9th Street, Suite 360
Sacramento, California 95814
jminton@pcl.org

California Public Utilities Commission
Andrew Ulmer
505 Van Ness Avenue
San Francisco, California 94102
eau@cpuc.ca.gov

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2 **LIST OF PARTICIPANTS MAKING POLICY STATEMENTS ONLY.**

3 **(DO NOT SERVE THE FOLLOWING PARTICIPANTS WITH WRITTEN TESTIMONY,**
4 **EXHIBITS AND OTHER DOCUMENTS)**

5
6 City of Monterey
7 Fed Meurer, City Manager
8 Colton Hall
9 Monterey, California 93940
10 meurer@ci.monterey.ca.us
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28