

1 David C. Laredo, CSBN 66532
Heidi A. Quinn, CSBN 180880
2 De LAY & LAREDO
Attorneys at Law
3 606 Forest Avenue
Pacific Grove, CA 93950-4221
4 Telephone: 831-646-1502
Facsimile: 831-646-0377
5 dave@laredolaw.net

6 Attorneys for MPWMD

7 Russell M. McGlothlin, CSBN 208826
Brownstein, Hyatt, Farber, Schreck
8 21 East Carrillo Street
Santa Barbara, CA 93101
9 Telephone: 805-963-7000
10 RMcGlothlin@BHFS.com

11 Attorneys for Seaside Basin Watermaster Board

12
13 **BEFORE THE STATE WATER**
14 **RESOURCES CONTROL BOARD**

15 In the Matter of the State Water Resources)
Control Board Hearing to Determine)
16 whether to Adopt a Draft Cease & Desist)
Order against California American Water)
17 Regarding its Diversion of Water from the) Carmel River in Monterey County
18 Carmel River in Monterey County under)
Order WR 95-10)
19 _____)

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22 **JOINT CLOSING BRIEF OF**
23 **THE MONTEREY PENINSULA WATER MANAGEMENT DISTRICT AND**
24 **THE SEASIDE BASIN WATERMASTER BOARD**
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1 INTRODUCTION

2 On July 6, 1995, the State Water Resources Control Board (SWRCB or State Water
3 Board) adopted Order No. WR 95-10¹ (Order or Order 95-10) regarding four complaints
4 concerning the legal basis of California-American Water Company (Cal-Am or CAW) for its
5 right to divert water from the Carmel River.²

6 By letter dated January 15, 2008, James W. Kassel, the State Water Board Assistant
7 Deputy Director for Water Rights, issued a draft Cease and Desist Order (CDO) by which the
8 State Water Board initiated further compliance proceedings against CAW relating to its Carmel
9 River water use.³ The CDO alleges that since 2000, CAW has illegally diverted at least 7,164
10 acre-feet annually (afa) from the Carmel River and that CAW's unauthorized diversions
11 continue to have adverse effects on the public trust resources of the Carmel River. The CDO
12 proposes a schedule to ramp-down CAW diversions from the Carmel River to begin in Water
13 Year (WY) 2009, which would take effect October 1, 2008.

14 On March 5, 2008, the State Water Board issued a formal Notice of Public Hearing,
15 Meeting to Receive Policy Statements and Pre-Hearing Conference on the CDO.⁴ The Notice
16 identified the key issues for this proceeding: "Should the State Water Board adopt the draft
17 CDO? If the draft CDO should be adopted, should any modifications be made to the measures

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19
20 ¹ The Order required, *inter alia*, California-American Water (CAW) to comply with specific conditions. The
21 SWRCB found CAW's rights to divert 3,376 afa from the Carmel River consisted of 1,137 afa under pre-1914
22 appropriative rights, 60 afa under riparian rights, and 2,179 afa under License 11866 (Application 11674A).
The Order contained findings that CAW diversions were having an adverse effect on: (a) the riparian corridor
of the river; (b) wildlife dependent upon instream flows and riparian habitat; and (c) steelhead which spawn in
the river.

23 Petitions for Writ of Mandate were filed challenging Order 95-10, *Monterey Peninsula Water Management*
24 *District, California-American Water Company v. State Water Resources Control Board*, Monterey County
25 Superior Court Case No. M 40760. As part of the litigation settlement, the SWRCB adopted Order WR 98-04
on February 19, 1998 amending Order 95-10. Further modification occurred on March 21, 2002, with the
issuance of Order WRO 2002-0002. An earlier modification from April 18, 2001 was rescinded with the 2002
order.

26 ² Exhibits CAW-1 through CAW-4 (Complaints).

27 ³ Exhibit CAW-7 (January 15, 2008 letter from James W. Kassel, SWRCB, to Kent Turner, entitled "Notice Of
28 Draft Cease And Desist Order Regarding The Continued Unauthorized Diversion Of Water From The Carmel
River In Monterey County").

⁴ Exhibit CAW-10 (Official Notice of Hearing).

1 in the draft order? What is the basis for each modification?”⁵ A total of 18 different parties
2 timely filed a Notice of Intent to Appear, including the Monterey Peninsula Water Management
3 District (Water Management District or MPWMD) and the Seaside Basin Watermaster Board
4 (Watermaster).

5 During the Pre-hearing Conference convened by Hearing Officers Arthur G. Baggett, Jr.,
6 and Gary Wolff⁶ on March 19, 2008, questions arose regarding the scope and procedure for this
7 proceeding. The parties submitted briefs on this matter. On May 13, 2008, the Hearing
8 Officers issued a Ruling that confirmed the key issue as set forth in the Notice, and declined to
9 enlarge the scope of hearing. The Officers also determined to receive evidence in two phases:
10 the first to address evidence regarding CAW’s unauthorized diversions; the second to focus on
11 compliance measures and/or a schedule of compliance to be included in a final CDO.

12 The Officers held hearings on the draft CDO on June 19 – 20, July 23 – 25, and August 7
13 – 8. At the conclusion of the hearings, the parties were requested to provide supplemental
14 briefing. In accord with such direction, MPWMD and the Watermaster hereby jointly submit
15 this closing brief.⁷

16 ARGUMENT

17 **I. MPWMD and the Watermaster Support CAW’s Contention That** 18 **the CDO Is Barred By Collateral Estoppel and Res Judicata.**

19
20 CAW argues that collateral estoppel and res judicata preclude issuance of a CDO, as
21 long as CAW is in compliance with Order 95-10. Collateral estoppel precludes a party from re-
22 litigating issues in a second proceeding that were litigated and determined in a prior
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24
25 ⁵ May 13, 2008 “Rulings on procedural issues involving the consideration of a Cease and Desist Order against
26 California-American Water (Cal Am) for Unauthorized diversion of water from the Carmel River in Monterey
County” (May 13, 2008 Ruling).

⁶ Hearing Officers Baggett and Wolff are also members of the State Water Board.

27 ⁷ Paul Murphey, Hearings Unit, Division of Water Rights, State Water Board, confirmed that the page limit for the
28 parties’ closing briefs, with the exception of CAW and the Prosecution, is 15 pages. If the parties wish to file joint
briefs, the page limit is additive. (Email from Paul Murphey, dated September 10, 2008.)

1 proceeding.⁸ Similarly, res judicata bars “maintenance of a second suit between the same
2 parties on the same cause of action.”⁹ Administrative agencies such as the State Water Board
3 are subject to these legal doctrines.¹⁰

4 CAW asserts that collateral estoppel and res judicata apply to this CDO proceeding.
5 Order 95-10 was based on complaints filed by a number of parties present in the CDO
6 proceedings.¹¹ The complaints alleged CAW was diverting water from the Carmel River
7 without authorization, resulting in adverse affects on public trust resources.¹² The State Water
8 Board issued Order 95-10 to define CAW’s water rights and identify the effects of CAW’s
9 continued diversions on other beneficial uses, including public trust resources.¹³ The manner in
10 which the State Water Board addressed the claims and issues in Order 95-10 was then reviewed
11 upon a petition for writ of mandate filed in the Monterey County Superior Court.¹⁴ Ultimately,
12 the parties to that civil action, which included Sierra Club, the Carmel River Steelhead
13 Association (CRSA), CAW, and the State Water Board, later agreed to dismiss the action with
14 prejudice.¹⁵

15 CAW argues the State Water Board addressed the allegations raised and made a
16 determination thereon in Order 95-10; therefore, that determination cannot be reconsidered in
17 the context of the CDO proceedings. Subject matter jurisdiction to address complaints with
18 Order 95-10 now rests with the California Superior Court.¹⁶ The claims and issues related to
19 CAW’s use of Carmel River water were previously adjudicated and Order 95-10 represents the
20 State Water Board’s final judgment on the merits. Any debate as the effect of Order 95-10
21 ended when the civil action was dismissed with prejudice.

22 ⁸ Exhibit CAW-15 (State Water Board Order No. WR-2006-0008-EXEC), p.6, quoting *Lucido v. Superior Court*, 51
23 Cal.3d. 335, 341 (1990)).

⁹ *Clark v. Leshner*, 46 Cal.2d 874, 880 (1956).

24 ¹⁰ Exhibit CAW-15 (Order 2006-0008-EXEC), p.7 (citing *People v. Sims*, 32 Cal.3d 468, 479 (1982), quoting *United*
25 *States v. Utah Construction Company*, 384 U.S. 394 (1966); see also Rest.2d, Judgments, § 83.)

¹¹ Exhibits CAW-1 (Carmel River Steelhead Association) through CAW-4 (Ventana Chapter of Sierra Club).

¹² *Id.*

26 ¹³ Order 95-10, pp. 39-40.

¹⁴ Exhibit CAW-16 (*Monterey Peninsula Water Management District, California-American Water Company v. State*
27 *Water Resources Control Board*, Monterey County Superior Court Case No. M 40760.)

¹⁵ Exhibit CAW-17 (Order, Cases Nos. M33519, M33520, and 105610).

28 ¹⁶ *Id.*, p. 8, ¶ 8.

1 MPWMD and the Watermaster support CAW's contention that the CDO cannot issue
2 simply because CAW diverts more water than permitted under its water rights. This issue has
3 previously been reviewed at length in an administrative hearing, adjudicated, determined on the
4 merits and then settled with prejudice. Review based on CAW diversions in excess of its
5 permitted rights amounts to an unlawful reopening of the very claims and issues settled by
6 Order 95-10.¹⁷ The State Water Board has no authority to attack a prior order through an
7 enforcement action.¹⁸

8
9 **II. The State Water Board Prosecution Team Bears the Burden of**
10 **Proving CAW Is In Violation of Order 95-10, Condition 2, and**
11 **Water Code Section 1052.**

12 The Prosecution Team for the State Water Board (Prosecution Team) alleges violations
13 of Order 95-10 and California Water Code section 1052. The Order, Water Code section 1052,
14 and Title 23 of the California Code of Regulations are each silent as to the burden of proof for
15 such allegations.

16 California case law establishes that, as in court proceedings, the moving party (the party
17 asserting the claim or making the charge) generally has the burden of proof in an administrative
18 hearing. *Brown v City of Los Angeles*, 102 Cal.App.4th 155, 175 (2002).¹⁹ In *City of*
19 *Brentwood v. Central Valley Regional Water Quality Control Board*, 123 Cal.App.4th 714
20 (2004), the court of appeals addressed the burden of proof for a violation of California Water
21 Code section 13385. Specifically, the court evaluated whether exceptions to liability set forth
22 in that Section are elements of the offense (the regional board's burden of proof), or whether
23 they are affirmative defenses (the city's burden of proof). *Id.* at 720. The discharger, rather
24 than the Board, bore the burden to prove that an exception to Section 13385 applied, as the

25 ¹⁷ *Id.*

26 ¹⁸ State Water Board Order No. WR 2007-0027-EXEC, p. 6 (revisiting an order through a later enforcement action
constitutes an "improper collateral attack."); *North Gualala Water Co. v. State Water Resources Control Bd.*, 139
27 Cal.App.4th 1577, 1607 (2006) (concluding that a water right permittee cannot accept permit conditions and then
wait two years to challenge the premise on which they were based. *See also*, Water Code §§ 1126(b), 1122.

28 ¹⁹ *See also Parker v. City of Fountain Valley*, 127 Cal.App.3d 99 (1981); *Pipkin v Board of Supervisors*, 82
Cal.App.3d 652 (1978).

1 exception was considered an affirmative defense. The party asserting the claim has the burden
2 of proof, including both the initial burden of going forward and the burden of persuasion by a
3 preponderance of the evidence. *McCoy v. Board of Retirement*, 183 Cal.App.3d 1044, 1051
4 (1986). Because administrative proceedings are civil in nature, the standard of proof used in
5 most cases is a preponderance of the evidence.²⁰ Preponderance of evidence usually means that
6 one body of evidence has more convincing force than the evidence opposed to it.²¹

7 Here, the Prosecution Team asserts CAW has violated Condition 2 of Order 95-10,
8 and/or diverted water in excess of its legal rights in violation of Water Code section 1052. As
9 the charging party, the Prosecution has the burden to prove liability for each element of the
10 alleged violations, as set forth in the Water Code and/or Order 95-10. The Prosecution bears
11 the burden of persuasion by a preponderance of the evidence. Accordingly, the Prosecution
12 must provide evidence of liability with more convincing force than the opposing evidence.

13 **III. The Prosecution Team Has Failed To Demonstrate CAW Violated** 14 **Order 95-10 or Water Code Section 1052.**

15 CAW has diligently pursued an alternative water supply and at the same time has met
16 conservation goals since the issuance of Order 95-10.

17 **A. CAW Has Met Conservation Goals Required by** 18 **Order 95-10.**

19 Order 95-10 specified conservation goals for CAW beginning in WY 1996, i.e., October
20 1, 1995 through September 30, 1996.²² CAW diversions have complied with the conservation
21 goals specified in Order 95-10 for eleven of the past 12 years since the adoption of Order 95-
22 10.²³ CAW's diversions from Carmel River sources during the specified period have ranged
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25 ²⁰ See Evid. Code § 115 (preponderance of evidence standard); *Hughes v. Board of Architectural Examiners*, 17
26 Cal.4th 763, 784 (1998), *Skelly v. State Personnel Bd.*, 15 Cal.3d 194 (1975) (dismissal of state-employed medical
27 consultant); *Gardner v. Commission on Prof. Competence*, 164 Cal.App.3d 1035, 1039 (1985) (dismissal of teacher);
28 *Perales v. Department of Human Resources Dev.*, 32 Cal.App.3d 332 (1973) (denial of unemployment benefits).

²¹ See 1 Witkin, *Evidence, Burden of Proof and Presumptions* §35 (4th ed 2000).

²² Exhibit MPWMD-1, p. 7 (Testimony of Darby Fuerst, Phase I); Exhibit MPWMD-DF2.

²³ *Id.*, p. 8; Exhibit MPWMD-DF2.

1 from 10,133 afa in WY 1998, to 12,847 afa in WY 1997, averaging 10,967.²⁴ During the past
2 12 years, CAW's diversions from Carmel River sources have actually been reduced an average
3 of 3,139 afa from the pre-Order 95-10 average of 14,106 afa.²⁵ This represents a 22% decrease
4 in CAW's diversions from the Carmel River.²⁶

5 MPWMD regulates CAW's water distribution systems and the water conservation
6 programs in the Monterey Peninsula area.²⁷ Under MPWMD Rules, CAW's main system is a
7 multi-source water distribution system. As such, CAW is required to develop a quarterly water
8 supply budget that specifies the quantity of water it will produce each month, from each
9 production source, to meet customer demand and comply with regulatory constraints.²⁸ The
10 budgets are designed to maximize the long-term production potential and protect the
11 environmental quality of the Carmel River and Seaside Groundwater Basins.²⁹ Based on the
12 amounts actually diverted, adjustments in production can be made to ensure CAW complies
13 with all regulatory and legal constraints.

14 MPWMD's Expanded Water Conservation and Standby Rationing Plan (Conservation
15 Plan) assists CAW in complying with Order 95-10.³⁰ Specifically, Water Conservation Stages
16 1 through 3 are designed to maintain CAW's diversions from the Carmel River below the
17 regulatory limit set by the Order.³¹ CAW has complied with the conservation goals specified in
18 Order 95-10 every year since the Conservation Plan was implemented in 1999.³²

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23 ²⁴ *Id.*; Exhibit DF-2.

24 ²⁵ *Id.*; Exhibit DF-2.

25 ²⁶ *Id.*; Exhibit DF-2.

26 ²⁷ *Id.* at 7.

27 ²⁸ These budgets are developed cooperatively by staff from CAW, MPWMD, California Department of Fish and
28 Game (CDFG), and National Marine Fisheries Service (NMFS) and are approved by the MPWMD Board. Testimony
of Darby Fuerst, Phase I, p. 5, 9; Exhibit DF-4.

²⁹ Exhibit MPWMD-1, p. 9 (Testimony of Darby Fuerst, Phase I).

³⁰ *Id.* at 10; Exhibit MPWMD-DF6.

³¹ *Id.*

³² *Id.* at 12.

1 **B. CAW Has Exercised Diligence in Meeting Condition 2 of**
2 **Order 95-10.**

3 The Prosecution asserts CAW has not complied with Condition 2 of Order 95-10
4 (Condition 2). The draft CDO provides,

5 “Condition 2 intended that Cal-Am would make one-for-one reductions in the
6 unlawful diversions from the Carmel River for water obtained *from other*
7 *sources, such as conservation. The current water management strategy used by*
8 *Cal-Am/MPWMD*, however, has not resulted in any significant reduction of
unlawful diversions from the Carmel River since 1998. Instead, it appears that
water savings resulting from conversation efforts have been redirected to
support marginal increases in development.”³³ (emphasis added).

9 Contrary to the assertions of the Prosecution, nowhere in Condition 2 of Order 95-10 does the
10 State Water Board require one-for-one reductions based upon conserved water. Such reductions
11 are only required for alternative sources of supply. Condition 2, as set forth in Order 95-10,
12 states,

13 “Cal-Am shall *diligently implement one or more of the following actions* to
14 terminate its unlawful diversions from the Carmel River: (1) obtain
15 appropriative permits for water being unlawfully diverted from the Carmel
16 river, (2) *obtain water from other sources of supply and make one-for-one*
17 *reductions in unlawful diversions from the Carmel River*, provided that water
18 pumped form the Seaside aquifer shall be governed by condition 4 of this
Order not this condition, and/or (3) contract with another agency having
appropriative rights to divert and use water from the Carmel River.”³⁴ (emphasis
added)

19 Further, the Prosecution is confused when it refers to “the current water management
20 strategy used by *Cal-AM/MPWMD*.”³⁵ (emphasis added) MPWMD is an independent special
21 district, a public agency created by the California Legislature (Statutes of 1977, Chapter 527, as
22 amended, found at West’s Water Code Appendix, Sec. 118-1, *et. seq.*) Order 95-10 does not
23 impose duties upon MPWMD. More importantly, the Order does not impair the authority of
24 MPWMD as a co-regulator of CAW. MPWMD has exercised its sovereign discretion in setting
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26 _____
27 ³³ Cease and Desist Order WR 2008-00XX-DWR, p. 5.

³⁴ Order 95-10, p. 40; Exhibit PBC-MS4.

28 ³⁵ Cease and Desist Order WR 2008-00XX-DWR, p. 5.

1 the water management strategy and water supply budget required of CAW.³⁶ CAW has met
2 those requirements.³⁷

3 Condition 2 requires CAW to “diligently implement one or more” actions, but it is
4 important to note that neither the Order nor the draft CDO defines the terms “diligence” or
5 “diligently implement.” A definition of diligence is not provided in the applicable Water Code,
6 or Title 23 of the California Code of Regulations. California case law emphasizes that
7 “diligence” is a relative term, the definition of which is dependent upon the fact of each case.
8 The appellate court has observed, “[d]iligence’ has been said to be incapable of exact
9 definition because it is a relative term, and therefore, in defining it, recourse must be had to the
10 particular circumstances of each case in which the question of whether it was used arises.”³⁸

11 The Prosecution claims CAW has not been diligent in its efforts to pursue alternative
12 supply projects to reduce reliance upon the Carmel River. Despite this assertion, the
13 Prosecution fails to identify any circumstance for which CAW has failed to use diligence. The
14 Prosecution did not present evidence that other water supply alternatives exist, or that CAW’s
15 efforts to obtain water were deficient. The Prosecution’s assertion is a bald-faced conclusion.
16 The Prosecution fails to recognize the considerable efforts that have been made by CAW to
17 comply with Order 95-10.³⁹ Such efforts must be evaluated in light of the particular
18 circumstances underlying this proceeding.

19 MPWMD witnesses testified regarding CAW’s actions to develop new sources of
20 supply to replace existing supplies that are being diverted without valid water rights (Carmel
21

22 ³⁶ Exhibit MPWMD-1, pp. 5, 9 (Testimony of Darby Fuerst, Phase I).

23 ³⁷ *Id.* at 8.

24 ³⁸ *Shivers v. Palmer*, 59 Cal.App.2d 572, 580-581, (1943), citing *Parker v. So. Pacific Co.*, 204 Cal. 609, 618 (1928).

25 ³⁹ Testimony of Darby Fuerst, Phase I, p. 13. In November 1996, CAW submitted Application No. 30644 to
26 appropriate 36,130 afy from the Carmel River for municipal, irrigation, and fish and wildlife purposes. 11,330 afy would
27 be by direct diversion and 24,800 afy would be diversion to storage in a proposed 24,000 af Carmel River Reservoir. In
28 January 1998, CAW submitted Application No. 30715 for 16.1 cubic feet per second (cfs) of direct diversion between
January 1 and April 30, for 3,900 afy for municipal use. In February 1998, CAW submitted Application Nos. 30215A
and 30215B. Both of these applications were based on Application No. 30215 that CAW filed in May 1992 for direct
diversion of 30,178 afy for municipal and irrigation uses. Specifically, Application No. 30215A was for 4.1 cfs of direct
diversion from January 1 - December 31, for 2,964 afy for municipal use. Application No. 30215B was for 40 cfs of
direct diversion from January 1 - December 31, for 27,729 afy for municipal use and 5 cfs of direct diversion from May 1
- October 31, for 60 afy for irrigation use. Each of these applications is pending action by the State Water Board.

1 River supplies) and existing supplies that are being diverted and that are scheduled for
2 reduction by court action (Seaside Groundwater Basin supplies).⁴⁰ CAW and District staff
3 testified extensively to CAW's diligent pursuit of these actions.⁴¹

4 CAW submitted four applications to obtain appropriate permits to lawfully divert
5 water from the Carmel River.⁴² MPWMD provided technical assistance to CAW on elements
6 of the proposed Coastal Water Project (CWP).⁴³ MPWMD staff designed, constructed, and
7 operates the Seaside Basin Aquifer Storage Recovery (ASR) Test Program and the Phase 1
8 ASR Project, in consultation and cooperation with CAW.⁴⁴ In November 2007, the State Water
9 Board issued Water Right Permit 20808A jointly to MPWMD and CAW to enable Phase 1 of
10 the ASR project. This project has a long-term average yield of 920 afa.⁴⁵

11 In November 2007, the City of Sand City (Sand City) began to implement the Brackish
12 Water Desalination Project (Sand City desalination facility), which has a long-term yield of
13 300 afa.⁴⁶ CAW signed an agreement with Sand City to purchase water from the desalination
14 facility, which is under construction and expected to be completed in 2009.⁴⁷

15 CAW has diligently pursued a number of other alternative water supply projects which
16
17

18 ⁴⁰ Exhibit MPWMD-1, p. 7 (Testimony of Darby Fuerst, Phase I).

19 ⁴¹ *Id.* at pp. 13-16; Exhibit CAW-29, pp. 2-5 (Testimony of Kent Turner).

20 ⁴² Exhibit MPWMD-1, p. 13 (Testimony of Darby Fuerst, Phase I). In November 1996, CAW submitted Application
21 No. 30644 to appropriate 36,130 afy from the Carmel River for municipal, irrigation, and fish and wildlife purposes.
22 11,330 afy would be by direct diversion and 24,800 afy would be diversion to storage in a proposed 24,000 af Carmel
23 River Reservoir. In January 1998, CAW submitted Application No. 30715 for 16.1 cubic feet per second (cfs) of direct
24 diversion between January 1 and April 30, for 3,900 afy for municipal use. In February 1998, CAW submitted
25 Application Nos. 30215A and 30215B. Both of these applications were based on Application No. 30215 that CAW filed
26 in May 1992 for direct diversion of 30,178 afy for municipal and irrigation uses. Specifically, Application No. 30215A
27 was for 4.1 cfs of direct diversion from January 1 - December 31, for 2,964 afy for municipal use. Application No.
28 30215B was for 40 cfs of direct diversion from January 1 - December 31, for 27,729 afy for municipal use and 5 cfs of
direct diversion from May 1 - October 31, for 60 afy for irrigation use. Each of these applications is pending action by
the SWRCB.

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ MPWMD's Opening Brief Regarding Scope of Proceedings, p. 5.

⁴⁶ Exhibit MPWMD-1, p. 14 (Testimony of Darby Fuerst, Phase I).

⁴⁷ *Id.* Under this agreement, CAW would purchase the entire yield from the facility and deliver approximately 94 afy to
existing CAW customers in Sand City and initially deliver approximately 206 afy to customers in its main system outside
Sand City. Under this arrangement, CAW's unlawful diversions from the Carmel River will potentially be reduced by
300 afy. Over time, as buildout served by the desalination facility occurs in the Sand City area, the reduction in unlawful
diversions will decrease to 94 afy.

1 did not come to fruition.⁴⁸ In November 1996, CAW submitted an application to amend its
2 water distribution system to construct and operate the proposed Carmel River Dam and
3 Reservoir Project.⁴⁹ A Draft Supplemental Environmental Impact Report on the Project was
4 prepared by the District and circulated for public review in November 1998. Ultimately, the
5 Project was denied in August 2003. CAW has since proposed to develop the CWP.⁵⁰ CAW
6 submitted an application for a Certificate of Public Convenience and Necessity (CPCN) to the
7 California Public Utilities Commission (CPUC) in September 2004 to construct and operate the
8 CWP.⁵¹ As lead agency under CEQA, the CPUC is preparing an Environmental Impact Report
9 for the CWP, which is scheduled to be released for comment by the end of 2008.⁵²

10 In sum, CAW has diligently pursued alternative water supply projects in compliance
11 with Order 95-10. CAW and District staff testified extensively to CAW's pursuit of these
12 actions. The Prosecution has failed to support its conclusion that CAW's actions have not been
13 diligent in light of the particular circumstances.

14
15 **IV. The CDO Must Balance Environmental Needs With The Health And
16 Safety Needs Of The Community.**

17 The Prosecution asserts CAW "has the burden of demonstrating that the remedy
18 proposed by the Prosecution Team or as adopted by the State Water Board is unreasonable,
19 arbitrary, and capricious."⁵³ There is no basis for this assertion. Indeed, as discussed above,
20 because the Prosecution team is the moving party, it bears the burden of establishing the

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22 ⁴⁸ Exhibit CAW-29, pp. 2 - 5 (Testimony of Kent Turner.)

23 ⁴⁹ Exhibit MPWMD-1, p. 14 (Testimony of Darby Fuerst, Phase I). This project centered on a new 24,000 af reservoir
on the Carmel River mainstem, immediately below the existing Los Padres Reservoir.

24 ⁵⁰ As proposed, the CWP included a seawater desalination plant at Moss Landing and groundwater banking in the
Seaside area that would yield a total of 10,730 afa.

25 ⁵¹ Exhibit MPWMD-1, p. 15 (Testimony of Darby Fuerst, Phase I).

26 ⁵² In a presentation to the MPWMD Board of Directors (page 11 of March 27, 2008 presentation titled "Update of
Projected Water Supply Needs and Solutions," Exhibit MPWMD-AB4), CAW states an anticipated final
27 construction date for the CWP of July 2015. This schedule indicates a Draft EIR was anticipated to be released in
July 2008. However, at the June 4, 2008 meeting of the group known as the Regional Plenary Oversight Group
(REPOG), or the Water for Monterey County Coalition, it was stated that the Draft EIR is expected to issue at the
end of 2008 or the beginning of 2009. (Exhibit MPWMD-AB1, p. 6)

28 ⁵³ Reed Sato, CDO Phase II Hearing Transcript, 7.23.08, pg. 16, line 30.

1 reasonableness of its proposal. In the Hearing Officers' May 13, 2008 Ruling, they state,

2 "In considering what remedy to impose in an enforcement proceeding, the State
3 Water Board is not limited by the recommendations of the prosecution team.
4 (See State Water Board Order WR 2008-0015 at p. 6 [in proceeding on
5 administrative civil liability complaint, State Water Board *may set civil liability*
6 *higher or lower than the amount advocated by the prosecution team*].) . . . But
7 consistent with the hearing notice, and depending on the evidence presented, the
8 State Water Board may consider including in a cease and desist order
9 requirements such as a ban on new service connections, a ban on increased
10 water deliveries to existing service addresses, a ban or limit on landscape
11 irrigation, additional water conservation measures, alternative water supplies, or
12 measures to protect public trust resources during any period of continued
13 unauthorized diversions, that are not included in the proposed cease and desist
14 order." (emphasis added).

15 Overwhelming evidence defines the fundamental problem addressing water resource
16 issues in the Monterey Peninsula area: not enough water for people; not enough water for fish
17 and wildlife; and not enough water for stream-dependent vegetation. The State Water Board
18 must balance the needs of the environment with the health and safety requirements of the
19 community. The Court of Appeal has recognized that application of the public trust doctrine
20 requires a balancing test by the State Water Board. *State Water Resources Control Bd. Cases*,
21 136 Cal.App.4th 674, 778 (2006). In that decision, the court upheld the State Water Resources
22 Control Board actions, stating "it was for Board in its discretion and judgment *to balance all*
23 *competing interests* in adopting water quality objectives and formulating a program of
24 implementation to achieve those objectives." *Id.* at 778. The State Water Board must fairly
25 balance these interests.

26 The Prosecution failed to show that the CDO will significantly improve the environment
27 for stream-dependent fish, wildlife or vegetation so as to justify threatened detrimental impacts
28 to the health and safety of the community.

29 **A. The Prosecution Has Made No Quantitative Showing That**
30 **The Proposed CDO Will Benefit The Fishery.**

31 The Prosecution failed to demonstrate that the CDO will benefit the fishery. In fact,
32 there has been substantial evidence to the contrary.

1 The Prosecution Team failed to evaluate whether or not the proposed water supply
2 ramp-down will significantly benefit to fish, wildlife or stream-dependent vegetation. The
3 Prosecution asks the Hearing Officers to assume a pumping reduction will increase surface
4 water. Yet, the Prosecution presented no evidence to link its proposed reductions in water
5 diversions to increased surface flows usable by fish, wildlife or vegetation. The amount of
6 increased streamflow in the Carmel River that the proposed water restrictions may provide has
7 not been quantified.⁵⁴ There was no testimony to quantify the length of the stream bed that
8 would remain wet, the additional days in which the river would flow, or any other measure of
9 environmental benefit. Without a detailed groundwater and surface water model to predict
10 aquifer response based on a phased cutback in water diversion, one cannot assess the net
11 benefit to vegetation that such cutbacks may have.⁵⁵ For example, although a phased cutback
12 may improve vegetation potential in eroded sections of the lower Carmel River, MPWMD has
13 a program to plant and irrigate these areas to help prevent erosion and improve habitat.⁵⁶
14 Additionally, a phased cutback intended to benefit vegetation may actually reduce rescue and
15 relocation of tadpoles in the lower river.⁵⁷

16 To comply with the magnitude of the proposed ramp-down, it may be necessary to
17 distribute the reductions over the course of a water year, rather than focus them during the
18 Carmel River's low-flow season when they might be most beneficial.⁵⁸ During much of the
19 year, the River is already dry, and even moderate reductions in diversion from wells when the
20 riverbed is dry will be insufficient to re-water it, and thus would not create any new habitat for
21 aquatic life.⁵⁹ Reductions that rewet additional segments of the river for only a portion of the
22 water year will result in negligible benefits.⁶⁰ Further, less draconian mitigations can easily
23 achieve the same or enhanced environmental benefit.

24
25 ⁵⁴ Exhibit MPWMD-TC1, p. 12 (Testimony of Thomas Christensen, Phase II).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 13.

⁵⁸ Exhibit MPWMD-KU1, p. 7 (Testimony of Kevan Urquhart, Phase II).

⁵⁹ *Id.*; MPWMD-KU7A – MPWMD- KU7C.

⁶⁰ Exhibit MPWMD-KU1, p. 11 (Testimony of Kevan Urquhart, Phase II).

1 The Prosecution failed to demonstrate the proposed reduction schedule is beneficial or
2 realistically achievable in the timeframe proposed. Additionally, reduction phases dilute any
3 benefits that may be conferred upon fish, wildlife or vegetation. Simply stated, the Prosecution
4 failed to meet its burden to show any statistical or factual correlation between CAW
5 groundwater pumping and Carmel River surface flow. Without such a link, there is no
6 evidentiary support to compel CAW to reduce diversions from the Carmel River Alluvial
7 Aquifer. The State Water Board has no evidence of environmental benefit to balance against
8 the demonstrated threat to health and safety.

9
10 **B. Preservation Of The Environment Cannot Jeopardize Public
11 Health And Safety.**

12 Evidence was presented that the draft CDO will jeopardize the health and safety of the
13 citizens of the Monterey Peninsula.⁶¹ CAW, as a regulated water utility, must meet the water
14 needs of the community in accord with its existing commitments and obligations. The State
15 Water Board does not have the legal authority to mandate CAW to reduce specific types of
16 water use.⁶² The amounts and timetable for reductions in CAW's diversions from the Carmel
17 River must be realistic and achievable, and must not jeopardize the public health and safety of
18 the community.

19 **1. The Prosecution's Calculations for Reasonably
20 Necessary Water Use Fail to Account for Commercial
21 or Industrial Uses.**

22 The Prosecution testified that 75 gallons per person per day (ppd) is the reasonable
23 quantity of water needed for domestic residential use to satisfy public health and safety
24 concerns.⁶³ The Prosecution's testimony as to the basis for its calculations for this health
25 threshold relied on Title 23, Section 697(b), as well as discussions with the California

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27 ⁶¹ Hearing Transcript, Phase II, July 24, 2008, p. 299-344; Hearing Transcript, Phase II, Volume IV, p. 1097.

⁶² Exhibit CAW-29, pp. 2-5 (Testimony of Kent Turner).

⁶³ Mark Stretars, CDO Transcripts Phase II, July 23, 2008, pp. 56-57

1 Department of Health Services and the Monterey County Department of Health.⁶⁴

2 The Prosecution testified that approximately 60 percent of water use is residential,
3 leaving approximately 40 percent for non-residential.⁶⁵ The assertion that commercial and
4 industrial and all other uses are imbedded within the 75 gallons ppd standard was not
5 substantiated by any legal authority or expert testimony.⁶⁶ Regardless, the Prosecution witness
6 confirmed his understanding,

7 “the residential population of the area works within that community, and
8 therefore the reliance on the -- the quantities used in the household are used at
9 the businesses away from that spot would to some extent comply within that
whole graph.”⁶⁷

10 The witness did not go as far to suggest that 75 gallons ppd has to be reduced by 40 percent,
11 stating that “there are other uses out there, primarily irrigation, within that constraint, that 40
12 percent, that needs to be looked at seriously by -- when we start talking about health and safety
13 aspects.”⁶⁸

14 Using a population of 111,500 people and 75 gallons ppd, the Prosecution calculated
15 that 9,367 afa is necessary for CAW’s domestic use and to meet public and health and safety
16 needs. Subtracting 3,504 afa available from Seaside Groundwater Basin (Basin), 300 afa
17 available from the Sand City desalination facility, and the 504 afa from unaccounted-for losses,
18 the Prosecution witness testified that the total CAW diversion needed from the Carmel River
19 would be approximately 5,014 afa, which was less than the “50 percent reduction level of 5,642
20 acre foot as defined in the draft CDO.”⁶⁹ He further testified that this reduction “does not
21 include the additional 920-acre foot from the ASR project that would provide additional further
22 health and safety requirements.”⁷⁰

23 The Prosecution’s calculation of the community’s health and safety needs is inaccurate

24
25 ⁶⁴ *Id.* at 55.

26 ⁶⁵ *Id.* at 109.

27 ⁶⁶ *Id.* at pp. 109-110.

28 ⁶⁷ *Id.* at 110.

⁶⁸ *Id.* at 111.

⁶⁹ *Id.* at 56.

⁷⁰ *Id.*

1 and flawed. Title 23 section 697 sets forth 75 gallons ppd as “reasonably necessary” for
2 residential use.⁷¹ The plain language of Title 23, Section 697, includes increments of water for
3 other non-residential water needs.⁷² Per capita water use on the Monterey Peninsula is already
4 below the 75 gallons ppd standard that the Prosecution witness stated was reasonably needed
5 for domestic use.⁷³

6 MPWMD and other parties presented evidence that the residential water users in
7 CAW’s main system are among the most frugal in California.⁷⁴ Based on an average daily use
8 of approximately 170 gallons per connection, and a census-weighted average of 2.54 residents
9 per connection, daily residential use in the Monterey Peninsula area averages approximately 68
10 gallons ppd.⁷⁵ In order to comply with the initial proposed 14 percent reduction in diversions,
11 this average use would be reduced to 58 gallons ppd.⁷⁶ In WY 2015, when 6,896 afa may need
12 to be conserved, a 47 percent reduction in diversions could be required.⁷⁷ If development of
13 replacement water supplies is delayed beyond 2015, average residential water use could be
14 limited to approximately 32 gallons ppd.⁷⁸ This amount of use is less than the 50 gallons ppd
15 that was used in the Monterey Peninsula area during the severe 1976-1977 drought period.
16 This amount is half the amount the Prosecution Team calculates as “reasonably necessary” for
17 health and safety based upon state law.

18 While the community has effectively reduced water use to low levels in response to a
19 physical drought, the Prosecution Team failed to introduce evidence that a water use reduction
20 of the magnitude it seeks can be reasonably achieved due to a regulatory restriction. The

21
22 ⁷¹ Section 697(b) provides that the “amount of water considered reasonably necessary for certain uses when the
23 appropriation will be by direct diversion shall be determined in the following manner: “Domestic Use. Allowances
24 for domestic use are variable, depending upon the character of the place of use, method of use, character of use and
25 availability of water.” Quantities considered reasonable for fully-plumbed homes are 55 to 75 gallons per day per
26 person.

27 ⁷² Section 697 also provides separate water allocations for Resorts, Motels, and Camp Grounds; as well as irrigation
28 for Lawn, Garden, Orchard and Grounds; for Livestock such as cows, horses, goats, hogs and poultry, and for
stockwatering use. See 23 C.C.R. section 697.

⁷³ Mark Stretars, CDO Transcripts Phase II, July 23, 2008, p. 56.

⁷⁴ Exhibit MPWMD-DF9A, p. 6 (Testimony of D. Fuerst, Phase II, July 23 – 25, 2008).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

1 Prosecution Team failed to show its proposed diversion ramp-down can meet the health and
2 safety needs of the community.

3 4 **2. The Prosecution's Calculations Regarding the Availability of Alternative Water Sources Are Flawed.**

5 The Prosecution's analysis of the amount of water available from alternative sources is
6 inaccurate. The proposed reduction schedule for CAW's diversions from the Carmel River do
7 not take into account reductions that CAW will be required to make to its diversions from the
8 Coastal Subareas of the Seaside Groundwater Basin as a result of the adjudication.⁷⁹ Pursuant
9 to that decision, the Watermaster, composed of representatives of CAW, MPWMD, the Cities
10 of Seaside, Monterey, Del Rey Oaks, and Sand City, Monterey County, and several private
11 landowners, oversees management of the Basin.

12 The Judgment limited rights to produce groundwater from the Basin⁸⁰ and implemented
13 a physical solution for the perpetual management and protection of the Basin. The estimated
14 Natural Safe Yield of the Basin is roughly 3,000 afa. The decision authorized an initial
15 "Operating Yield" of 5,600 afa, which represents the maximum quantity of groundwater that
16 may be produced cumulatively from the Basin by all groundwater rights holders.⁸¹ Unless new
17 water supplies can be developed for Basin replenishment, the Watermaster anticipates the
18 municipal water supply from the Basin will be reduced by consecutive and compounded ten
19 percent (10%) reductions every three years, commencing in 2009, until the Operating Yield is
20 equivalent to the Natural Safe Yield.

21 The vast majority of the Standard Production Allocation (SPA) groundwater rights are
22 held by CAW and Seaside to serve municipal customers.⁸² CAW's share of the operating yield
23

24 ⁷⁹ This decision by the Monterey County Superior Court (*California-American Water v. City of Seaside et al.*, Case
25 No. M66343) requires that the initial "Operating Yield" for the Coastal and Inland Subareas of the basin be
decreased by ten percent every three years until the "Natural Safe Yield" of the basin is reached.

26 ⁸⁰ The Judgment sets forth two types of groundwater rights: Standard Production Allocation (SPA) and Alternative
Production Allocation (APA). There are only a few parties holding SPA, with the majority held by CAW. SPA
27 rights holders bear all reductions associated with the triennial 10 percent reductions to the Operating Yield.

⁸¹ Exhibit SBW-1, p. 3 (Declaration of Ralph Rubio, Phase II).

28 ⁸² *Id.* at pp. 2 -3.

1 for the Coastal Subareas of the Basin could be reduced by 313 afa in WY 2009⁸³ and 417 afa in
2 WY 2010 and WY 2011.⁸⁴ Similar reductions could also occur in WY 2012, WY 2015, WY
3 2018, and WY 2021, and would be cumulative. If the CDO is adopted as drafted and the Basin
4 reductions occur as scheduled, CAW, in WY 2009, will need to reduce its Carmel River
5 diversions by 1,693 afa and its diversions from the Coastal Subareas of the Basin by 313 afa,
6 for a total required reduction of 2,006 afa.⁸⁵ This equates to an approximate fourteen percent
7 (14%) reduction in CAW's currently allowed diversion limit of 14,789 afa⁸⁶ for its main
8 system. The Prosecution Team has failed to present evidence as to how this level of additional
9 water conservation could be achieved without affecting public health and safety.

10 Furthermore, the Basin has persisted in a state of overdraft for many years.⁸⁷ Although
11 no seawater has been detected in the two main potable water production aquifers of the Basin's
12 Coastal Subareas, all of the Watermaster's hydrogeologic consultants agree that seawater
13 intrusion is a serious threat.⁸⁸ The threat is most significant in the northern Coastal Subarea
14 where water tables are as much as fifty (50) feet below sea level in the pumping depression just
15 inland from the coast.⁸⁹ The potential timing of seawater intrusion is not known, but it is likely
16 that production from wells within the Basin, including production from CAW's largest
17 production well, the Peralta Well, will have to be substantially reduced or ceased in the event
18 seawater intrusion is detected.⁹⁰ This threat is not factored into the Prosecution's
19 recommended action.

20 The Prosecution also neglects to consider the timelines within which alternative water
21 supply projects will be complete, or the reliability and variability of those sources. The
22

23 ⁸³ The reduction shown for WY 2009 is less than the reductions shown for WYs 2010 and 2011 because the
24 reduction in WY 2009 does not begin until January 1, 2009, and only applies to the last nine months of this water
year. The reductions for WYs 2010 and 2011 begin on October 1 and apply to all 12 months of these water years.

⁸⁴ Exhibit MPWMD-DF9A, p. 5 (Testimony of D. Fuerst, Phase II, July 23 – 25, 2008).

⁸⁵ *Id.*

⁸⁶ This diversion limit applies to CAW's main system in WY 2007 and is based on a limit of 11,285 afy from Carmel
26 River sources and a limit of 3,504 afy from sources in the Coastal Subareas of the Seaside Groundwater Basin.

⁸⁷ Exhibit SBW-2, p. 2 (Declaration of Dewey Evans, Phase II).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 3; Watermaster's Interim Seawater Intrusion Contingency Plan.

1 Prosecution's witness confirmed that the time required to implement a water project such as the
2 CWP is, in part, dependent upon completion of the California Environmental Quality Act
3 (CEQA) process. This, in turn, is dependent upon permits being obtained by Lead and
4 Responsible Agencies.⁹¹ Yet, the Prosecution Team witness stated that the "competitive
5 evaluation relative to things required in the PUC [Public Utilities Commission], required by
6 law, would slow down the process" unless "the State Water Board requires action by a date
7 certain."⁹² This statement demonstrates the Prosecution Team's misunderstanding as to the
8 laws with which proponents of alternative water sources are bound. Any water supply project
9 meets the definition of a "project" under CEQA⁹³ and requires environmental review.⁹⁴ The
10 CEQA process requires investigation of "a range of reasonable alternatives to the project, or to
11 the location of the project."⁹⁵ Although the Prosecution acknowledged compliance with CEQA
12 would "slow down the process" unless the State Board "requires action," it failed to provide
13 any fact or law to support this "pie-in-the-sky" perspective. Ignoring legal mandates is wishful
14 thinking. If the Prosecution Team had a valid basis to enable this shortcut, it forgot to present
15 testimony as to how this "shortcut" may lawfully be accomplished.

16 The Prosecution asserts CAW "needs to increase the ASR system capacity to produce
17 the full authorized amount" and "develop Phase 2 of the ASR production."⁹⁶ Upon questioning
18 by the District, however, the Prosecution witness admitted he was not aware of how much
19 water was presently in storage, and that, although 920 afa is an *average* yield for the project,
20 there will be seasonal variation, and variation from year to year.⁹⁷ In fact, the variable yield
21 means that in some years no supply whatsoever will be available from ASR.⁹⁸

22 The Prosecution testified that CAW's unaccounted-for losses "could simply be reduced
23

24 ⁹¹ Mark Stretars, CDO Transcript Phase II, July 23, 2008, p. 97.

25 ⁹² *Id.* at 96-97.

26 ⁹³ CEQA Guidelines 15378.

27 ⁹⁴ Public Resources Code section 21000 et. seq.

28 ⁹⁵ CEQA Guidelines 15126.6.

⁹⁶ Mark Stretars, CDO Transcript Phase II, July 23, 2008, p. 55.

⁹⁷ *Id.* at 92.

⁹⁸ *Id.* at 103.

1 to the seven percent level prescribed in the District’s Conservation Plan.” The Prosecution
2 Team calculated the savings amount to 549 afa, which would then yield 1769 afa of “new water
3 or savings.”⁹⁹ Under cross-examination, however, the Prosecution witness stated he was aware
4 that “not all reductions in unaccounted-for water will actually result in water savings” and that
5 he could not estimate the actual savings.¹⁰⁰ For example, if unaccounted-for water was actually
6 unmetered sales because of faulty meters, correcting those meters would simply increase water
7 sales but would not result in conservation.¹⁰¹ The Prosecution failed to quantify what portion
8 of unaccounted for water can be saved, what activities are needed to cause those savings, and
9 what costs or timeline applies to those savings. In sum, it is speculation, without evidentiary
10 support, to assume that conserved water will be available to satisfy public health and safety
11 needs.

12 Regarding the Sand City desalination facility, the Prosecution witness admitted the
13 project was not operational, but stated he “believed” it might be by the time the CDO would
14 issue.¹⁰² He presented no evidence to support this belief. He also admitted that he had made a
15 mathematical error in his calculations, and that “upon full implementation and operation” of the
16 desal plant, only 94 afa and not 300, would be available to CAW.¹⁰³

17 The Prosecution admits its proposed reductions, from 10,978 afa to 3,376 afa “is very
18 extreme for a community,”¹⁰⁴ testifying,

19 “We’re talking about a difference of about 7,000 acre feet. From that
20 standpoint, we recognize that would be, you know, a total shock to the
21 community and everybody else, but *to legally, properly serve that community,*
that’s what you would have to drop to.” (emphasis added).¹⁰⁵

22 Despite the inaccuracies and inconsistencies pointed out during cross-examination, the witness
23 testified that the amount of the proposed “reduction amount is *easily covered* under the new

24 _____
25 ⁹⁹ *Id.* at 54.

26 ¹⁰⁰ *Id.*

27 ¹⁰¹ *Id.* at 102.

28 ¹⁰² *Id.* at pp. 94-95.

¹⁰³ *Id.* at 95.

¹⁰⁴ *Id.* at 104.

¹⁰⁵ *Id.*

1 sources and savings that occur.”¹⁰⁶ (emphasis added). The Prosecution did not provide any
2 factual basis to demonstrate how this quantity of water could “properly serve the community.”

3 As proposed, the draft CDO does nothing to address problems resulting from the water
4 shortage. The draft CDO cannot end the chronic water shortage on the Monterey Peninsula.
5 The CDO imposes significant ramp-down without regard to fact that alternative water supply
6 sources will not be available for some time, and that there are issues of variability and
7 reliability. The Prosecution Team failed to show that measures to reduce water use are
8 realistically achievable without adversely affecting health and safety on the Monterey
9 Peninsula.

11 **C. The Draft CDO Mandates Community Compliance with a 12 Regulatory Drought.**

13 The CDO proposes to phase in additional limits upon community water use. As stated
14 above, these limits, in combination with the restrictions specified in the Basin adjudication,
15 would ultimately require rationing of municipal water use at the sixty percent (60%) level,
16 based on diversion amounts in 1995.¹⁰⁷ This is an unfair, unrealistic and arbitrary mandate.

17 The CDO incorporates, and the Prosecution Team advocates, an aggressive ramp-down
18 schedule. This schedule is prima facie evidence that the entire proposed reduction cannot be
19 immediately achieved. Implicit in the ramp-down is a tacit acknowledgement that time is
20 needed to implement the conservation goal; it cannot be achieved overnight. Measures need to
21 be devised and implemented over time to cause the reduction. The Prosecution’s phased
22 approach misleads because it offers the veneer of a finely-calibrated program, providing the
23 inference that some quantitative analysis might show the phased reductions to be reasonable
24 and achievable. This is false. The phased approach is a “shell game” that obscures the fact that
25

27 ¹⁰⁶ *Id.* at 54.

28 ¹⁰⁷ MPWMD’s Opening Brief Regarding Scope of Proceedings, p. 7.

1 the Prosecution Team failed to provide any quantitative analysis, and failed to contemplate the
2 health and safety needs of the community. No facts support the ramp-down phases. There is
3 no rational basis to quantify the amount of each ramp-down step, or the timing for its
4 imposition.

5 The Prosecution arbitrarily concluded there was “no practical difference” between a
6 drought, where there is a limited amount of water physically available for diversion, and a
7 water shortage where there is an ample supply of real water for which there is no legal right for
8 its diversion.¹⁰⁸ The Prosecution’s witness conceded that a three-year span was the longest
9 period of time for which he was aware of a drought, with attendant rationing.¹⁰⁹ By contrast,
10 and with no recognized difference or analysis, the Prosecution concluded that rationing in a
11 regulatory drought might be in place “forever.”¹¹⁰ This position is shocking and unsupportable.

12 It is difficult enough to motivate water users to reduce consumption during a physical
13 water shortage for a finite timeframe; the ability to sustain this level of reduction by mandatory
14 rationing for a never-ending period in response to a regulatory restriction is unprecedented and
15 untested. CAW does not use water, the community does. Rationing is complex. The
16 Prosecution Team failed to show that rationing at this level, for this reason and for a permanent
17 duration is achievable. No evidence exists that the community can or will reduce to the level
18 shown in the draft CDO as demanded by the Prosecution.
19
20
21

22 **V. Remedies Other Than the CDO Can And Should Be Adopted.**

23 MPWMD and the Watermaster do not believe a CDO is warranted or legally justified.
24 Assuming *arguendo* that a CDO will nonetheless issue, the State Water Board, in considering
25 what remedy to impose in an enforcement proceeding, should reject the request of the
26

27 ¹⁰⁸ Mark Stretars, CDO Transcript Phase II, July 23, 2008, p. 105.

¹⁰⁹ *Id.*

28 ¹¹⁰ *Id.* at 107.

1 Prosecution Team, and instead consider alternatives that do not place the community at risk.¹¹¹
2 During the hearings, testimony supported remedies that can and should be adopted.¹¹²

3 Due to the uncertainty in estimating further conservation savings and the availability of
4 replacement water supplies, any reduction schedule will jeopardize public health and safety.
5 Instead, the State Water Board should require CAW to complete specific tasks in compliance
6 with a clear schedule, in lieu of any production ramp-down. Tasks could include tying
7 production limits to real alternative water supply projects, appropriately tailored to CPUC and
8 CEQA requirements. For example, in WY 2009, reductions in CAW's diversions from the
9 Carmel River may be tied to implementation of the Sand City desalination facility, operation of
10 CAW's and MPWMD's Joint Phase 1 ASR Project, or completion of the advanced treatment
11 component of the Carmel Area Wastewater District/Pebble Beach Community Service District
12 (CAWD/PBCSD) Wastewater Reclamation Project. However, this water may not be available
13 in future years.¹¹³

14 There are better means to protect the environment and minimize the effects of the CAW
15 diversions than a ramp-down schedule. MPWMD set forth nine specific mitigation measures to
16 protect public trust resources.¹¹⁴ These measures are based on recommendations by NMFS
17 and the Carmel River Watershed Conservancy (CRWC).¹¹⁵ MPWMD staff testified that other
18 mitigations can benefit aquatic resources of the Carmel River such as dredging of the Los
19 Padres Reservoir (LPR), and expansion of ASR.¹¹⁶ Such measures make water available for
20 focused use in the drier six months of the year, unlike cutbacks in CAW diversions and
21 consumer water consumption, which have to be distributed over the whole water year.¹¹⁷ A
22 number of "secondary actions" are available including re-diverted reductions, release of bypass
23

24 ¹¹¹ (See State Water Board Order WR 2008-0015 at p. 6 [in proceeding on administrative civil liability complaint,
25 State Water Board may set civil liability higher or lower than the amount advocated by the prosecution team].)

¹¹² Exhibits MPWMD-DF9A, MPWMD-KU1.

¹¹³ Exhibit MPWMD-DF9A, p. 6 (Testimony of D. Fuerst, Phase II, July 23 – 25, 2008).

¹¹⁴ *Id.* at 7; Exhibit MPWMD-DF11.

¹¹⁵ *Id.*

¹¹⁶ Exhibit MPWMD-KU1, p. 7 (Testimony of Kevan Urquhart, Phase II).

¹¹⁷ *Id.*

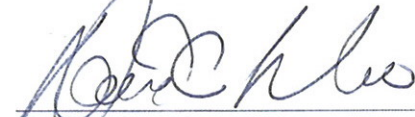
1 reliability or variability of the alternative water sources, the impending mandatory reductions of
2 the Basin, or the continuing threat of seawater intrusion. Lastly, there are better means to protect
3 the environment and minimize the effects of the CAW diversions than to impose a ramp-down
4 schedule.

5 For these reasons, the State Water Board should deny the Prosecution Team's request and
6 refuse to issue the CDO.

7 Dated: October 8, 2008

8
9 Respectfully submitted,

10 De LAY & LAREDO

11 

12 David C. Laredo
13 General Counsel
14 Monterey Peninsula Water Management
District

15 Brownstein, Hyatt, Farber, Schreck

16
17 

18 Russell M. McGlothlin
19 Attorneys for
20 Seaside Basin Watermaster Board

21
22 U:\General (NEW)\MPWMD - Main\SWRCB - Cease & Desist Order\Working Draft - Post Hearing Brief to SWRCB v2.doc

1 **PROOF OF SERVICE**

2

3 I, Wanda Gooch, declare as follows:

4 I am employed in the City of Pacific Grove and County of Monterey, California. I
5 am over the age of eighteen years, and not a party to the within cause; my business address is DE
6 LAY & LAREDO, 606 Forest Avenue, Pacific Grove, California 93950. On October 8, 2008, I
7 served the within:

- 8 • **JOINT CLOSING BRIEF OF THE MONTEREY PENINSULA WTER
9 MANAGEMENT DISTRICT AND THE SEASIDE BASIN WATERMASTER
10 BOARD**

11 on the interested parties in this action by placing a true copy thereof in a sealed envelope,
12 addressed as follows:

13 *Please see attached list*

14 (BY E-MAIL SERVICE) By transmitting such documents electronically from De
15 Lay & Laredo, Pacific Grove, California, to the electronic mail addresses list above. I am
16 readily familiar with the practice of De Lay & Laredo for transmitting documents by
17 electronic mail, said practice being that in the ordinary course of business, such electronic
18 mail is transmitted immediately after such document has been tendered for filing.

19 (BY MAIL) By placing such envelope, with postage thereon fully prepaid for first
20 class mail, for collection and mailing at De Lay & Laredo, Pacific Grove, California
21 following ordinary business practice. I am readily familiar with the practice being that in
22 the ordinary course of business, correspondence is deposited in the United States Postal
23 Service the same day as it is placed for collection.

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct and that this declaration was executed on October 8, 2008, at Pacific
26 Grove, California.

27
28

Wanda Gooch

CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
SERVICE LIST

Service by Electronic Mail:

California American Water
Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
(916) 492-5000
jrubin@diepenbrock.com

State Water Resources Control Board
Reed Sato
Water Rights Prosecution Team
1001 I Street
Sacramento, CA 95814
(916) 341-5889
rsato@waterboards.ca.gov

Public Trust Alliance
Michael Warburton
Resource Renewal Institute
Room 290, Building D
Fort Mason Center
San Francisco, CA 94123
Michael@rri.org

Sierra Club – Ventana Chapter
Laurens Silver
California Environmental Law Project
P.O. Box 667
Mill Valley, CA 94942
(415) 383-7734
larrysilver@earthlink.net
lgwill@dcn.davis.ca.us

Carmel River Steelhead Association
Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

Calif. Sportfishing Protection Alliance
Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

City of Seaside
Russell M. McGlothlin
Brownstein, Hyatt, Farber, Schreck
21 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

The Seaside Basin Watermaster
Russell M. McGlothlin
Brownstein, Hyatt, Farber, Schreck
21 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

Monterey Peninsula Water Management
District
David C. Laredo
De Lay & Laredo
606 Forest Avenue
Pacific Grove, CA 93950
(831) 646-1502
dave@laredolaw.net

City of Sand City
James G. Heisinger, Jr.
Heisinger, Buck & Morris
P.O. Box 5427
Carmel, CA 93921
(831) 624-3891
hbm@carmellaw.com

Pebble Beach Company
Thomas H. Jamison
Fenton & Keller
P.O. Box 791
Monterey, CA 93942-0791
(831) 373-1241
TJamison@FentonKeller.com

City of Monterey
Fred Meurer, City Manager
Colton Hall
Monterey, CA 93940
(831) 646-3886
meurer@ci.monterey.ca.us

Monterey County Hospitality Association
Bob McKenzie
P.O. Box 223542
Carmel, CA 93922
(831) 626-8636
info@mcha.net
bobmck@mbay.net

California Salmon and Steelhead Association
Bob Baiocchi
P.O. Box 1790
Graeagle, CA 96103
(530) 836-1115
rbaiocchi@gotsky.com

Planning and Conservation League
Jonas Minton
1107 9th Street, Suite 360
Sacramento, CA 95814
(916) 719-4049
jminton@pcl.org

National Marine Fisheries Service
Christopher Keifer
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
(562) 950-4076
christopher.keifer@noaa.gov

Division of Ratepayer Advocates
Max Gomberg
505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-2056
mzx@cpuc.ca.gov

Service by U.S. Mail:

City of Carmel-by-the-Sea
Donald G. Freeman
P.O. Box CC
Carmel-by-the-Sea, CA 93921
(831) 624-5339 EXT. 11