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7 STATE OF CALIFORNIA

8 STATE WATER RESOURCES CONTROL BOARD

9 In the Matter of the Draft Cease and Desist Order)
10 Against California American Water Company For) Closing Brief
11 Its Unlawful Diversions From The Carmel River)
12 _____)

13 **I. Introduction**

14 All too often, science cannot “prove” the relationship between human action and environmental harm
15 until irreparable harm has been done. Even then, entities benefitting from the status quo may continue to
16 argue in the face of overwhelming evidence. Therefore, the Public Trust Alliance strongly disputes any
17 suggestion that the Board should hold off enforcement of Order 95-10 yet again in a quest for greater
18 scientific certainty. There is no legal requirement to further quantify benefits and burdens, and the
19 hearing procedure should not become a forum to attain rights at unnecessary public cost to a river and its
20 ecology, but rather a public decision about application of the law. Facilitating a healthy approach to the future could
21 lead into the application of the public trust doctrine and precautionary principle, as described below.

22 **II. Framework for Remedy**

23 Any remedy fashioned by the Board must comply with Endangered Species Act (“ESA”), regardless
24 of the needs and demands of water users. See *In re Bay-Delta Programmatic Environmental Impact*
25 *Report*, 43 Cal.4th 1143, 1168; 77 Cal.Rptr.3d 578, 597 (2008); *Center for Biological Diversity, Inc. v.*
FPL Group, Inc., --- Cal.Rptr.3d ----, 2008 WL 4255789, 08 Cal. Daily Op. Serv. 12,362, at *6 (Cal App.

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1 Dist. 1, 2008) (Public trust doctrine requires public agencies to consider protection and preservation of
2 wildlife, and contours of that duty are defined by statute). See also, *Williamson v. Lee Optical*, 348 U.S.
3 483, 487, 75 S.Ct. 461 (1955), *rehearing denied*, 349 U.S. 925 (1955) (It is the job of the Legislature, not
4 the courts, to balance competing interests); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272
5 (S.D. NY 2005) (Decision that unknown future environmental harms outweigh known current economic
6 harms is a decision of the “transcendently legislative nature” best left to Congress); *California Trout, Inc.*
7 *v. Superior Court*, 218 Cal.App.3d 187, 201; 266 Cal.Rptr. 788, 795-96 (1990) (specific statutory
8 requirements (e.g., Cal. Water Code 5946) take precedence over Board’s general authority to balance
9 competing interests in water). The ESA determines the degree of certainty and quantification and the
10 appropriate balance between economic interests and species survival. The duty to comply with the ESA
11 is nondiscretionary; therefore, it would be pointless and inappropriate for the Board to join in any party’s
12 effort to weigh the costs and benefits of doing so.

13 The need to comply with both the ESA and western water law presents a potential problem for the
14 Board.¹ One perceptive commentator notes: “In many ways, the ESA is the mirror image of western
15 water law. The ESA protects endangered species with limited consideration of economic impacts;
16 western water law protects economic water users with very limited consideration of environmental
17 impacts. Neither the ESA nor western water law gives much regard to equity arguments, and neither
18 offers a balancing test for making decisions.” Reed D. Benson, *Giving Suckers (and Salmon) an Even*
19 *Break: Klamath Water Basin Water and the Endangered Species Act*, 15 Tul. Envtl. L.J. 197, 237 (2002).

20 The absence of a balancing principle appears to conflict with the Board’s historical mission: “to balance
21 competing demands on our water resources.”² However, there is legal guidance: The Board’s limited
22 authority to exercise discretion or balance interests in this circumstance is governed by the precautionary
23 principle and public trust doctrine.

24 ¹ Entities that divert water without a permit and in violation of orders have a particularly limited claim on the
25 Board’s discretion, inasmuch as they do not have a recognized water right under appropriative water rights law.

² SWRCB, History of the Water Boards,
http://www.waterboards.ca.gov/about_us/water_boards_structure/history.shtml.

1 **III. Balancing Under the Public Trust Doctrine**

2 *National Audubon Soc'y v. Superior Ct. Of Alpine Cty.*, 33 Cal. 3d 419, 446, 454-55; 189 Cal. Rptr.
3 346; 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) made an influential statement about
4 administrative balancing of competing demands for water: “The state has an affirmative duty to take the
5 public trust into account in the planning and allocation of water resources, and to protect public trust uses
6 whenever feasible.”³ Cases applying *National Audubon* have found that public benefits produced by the
7 private use of water for “economic development” may “figure into” the balancing of competing interests
8 in water, but such use is not a protected “trust purpose.” If the public trust is to retain any meaning and
9 effect, it must recognize long-term public rights as separate from, and superior to, the prevailing private
10 interests in the resources at any given time. *In re Water Use Permit Applications*, 94 Hawai'i 97, 138; 9
11 P.3d 409, 450 (Haw. 2000)⁴, *aff'd in part vacated in part (other grounds) by In re Water Use Permit*
12 *Applications*, 105 Haw. 1, 93 P.3d 643 (Haw. 2004).

13 California cases applying *National Audubon* have recognized ESA primacy in any balancing process.
14 *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th 1143,
15 1168; 184 P.3d 709 (2008) stated that endangered species laws mandated restoration of the Bay-Delta
16 ecosystem restoration, thereby subordinating interests in water exports. Nevertheless, the court’s remedy
17 effectively balanced “the competing demands of fishery, restoration and recovery needs with the need to
18 improve supply reliability and quality for water users” by incorporating administrative innovations
19 developed by the parties. *Id.* at 1173-74. Such innovations included the Environmental Water Account
20 and the “flexible management of water operations.” Innovation is needed in the Carmel River matter,
21 and the approach that comes closest to meeting this standard is the citizen/ratepayer-driven REPOG. This
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24 ³ The court also stated that the balancing of community water demands and ecological values under the public trust
25 doctrine may fall peculiarly within the Board’s unique experience and expertise in balancing all of the various
competing interests to reach “a fair and reasonable resolution.”

⁴ (Rejecting the argument that the “‘public interest’ advanced by the trust is the sum of competing private interests”
and that the “rhetorical distinction between ‘public trust’ and ‘private gain’ is a false dichotomy.”)

1 type of approach is a better basis for identifying cost-effective innovations to meet ESA and citizen needs
2 than is the Cal Am position, which is profit-driven and notable for its lack of concessions.

3 Even without the ESA issue, there are limits to the requirement to balance interests under the public
4 trust doctrine. A Washington court noted that in “the inevitable search for accommodation,” some “types
5 of encroachments upon public trust properties go ‘too far’ to win judicial acceptance.” *Citizens for*
6 *Responsible Wildlife Management v. State*, 124 Wash.App. 566, 577; 103 P.3d 203, 208-09 (Wash.App.
7 Div. 2, 2004). In that circumstance, the balancing of competing commercial interests must give way to
8 the people's sovereign duty to hold the public property in trust. *Id.* The court cited the “classical test” of
9 *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892): Has there been
10 a substantial impairment of the public uses? In answering this question, a court should focus on the
11 damage to public trust resources rather than the guilty parties’ justifications for the damage and must
12 consider future generations’ interests in the public trust resources.

13 **IV. Precautionary Principle**

14 A precautionary approach is implicit in the “trust” concept underlying the public trust doctrine.⁵
15 Trustees managing public resources are held to a high standard of prudent management to preserve the
16 value of trust assets for present and future generations.⁶ This standard can be met with the precautionary
17 principle. An increasingly pervasive feature of international law, the precautionary principle states:
18 “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be
19 used as a reason for postponing cost-effective measures to prevent environmental degradation.” *See, e.g.,*

20 ⁵ The public trust doctrine is frequently analogized to common law trust principles, which include duties to preserve
21 trust property, act in good faith, and manage the trust property prudently, protecting the productive capacity of trust
22 assets, the people’s natural resources. *See*, Restatement (Second) of Trusts §§ 3, 170, 176, 230; Restatement (Third)
of Trusts § 227 (Prudent Investor Rule). *See also*, *People v. California Fish Company*, 166 Cal. 576, 597; 138 P. 79
(1913) (Implied powers of the state as trustee are commensurate with the duties of the trust and enable trustee to do
everything necessary to the execution and administration of the trust).

23 ⁶ Although courts respond with deference to agency expertise in cases brought under administrative procedure acts,
24 in actions they are less deferential in challenges brought under the trust doctrines, responding to a trustee’s asserted
25 expertise by “requiring a higher level of performance.” Jon A. Souder & Sally K. Fairfax, *Arbitrary Administrators,*
Capricious Bureaucrats and Prudent Trustees: Does It Matter in the Review of Timber Salvage Sales?, 18 PUB.
LAND & RESOURCES L. REV. 165, 170-71(1997), citing Prudent Investor Rule. “In administrative law, there is a
presumption that the agency has made a decision based on its experience and the challenger must demonstrate
otherwise. In trust law, the trustee is required to demonstrate that she is acting prudently.”

1 Rio Declaration on Environment and Development, Principle 15, June 14, 1992, U.N. Conference on
2 Env't & Dev., U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874, 879 (1992)⁷; *see also*,
3 Preamble to The Montreal Protocol on Substances that Deplete the Ozone Layer, *reprinted in* 26 I.L.M.
4 1550, *entered into force*, January 1, 1989: "Parties to this protocol... determined to protect the ozone layer
5 by taking precautionary measures..."

6 A precautionary approach has been incorporated in U.S. law on an ad hoc basis, frequently using
7 alternative phrases such as "risk aversion" and "margin of safety" or special standards of proof. For
8 example, the ESA's "best scientific data" standard incorporates the precautionary principle by authorizing
9 action when information is incomplete and requiring the agency assessing the data to give the benefit of
10 the doubt to endangered or threatened wildlife.⁸ The ESA is one of a set of U.S. environmental laws for
11 which the courts have recognized a precautionary purpose, including the National Environmental Policy
12 Act, the Clean Air Act, the Clean Water Act, Safe Drinking Water Act, Resource Conservation and
13 Recovery Act, the Comprehensive Environmental Response Compensation and Liability Act, and the Oil
14 Pollution Act. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178-88, 98 S.Ct. 2279 (1978);
15 *Reserve Mining Co. v. EPA*, 514 F.2d 492, 528, 536 (8th Cir.1975), *order modified by, Reserve Min. Co.*
16 *v. Lord*, 529 F.2d 181 (8th Cir. 1976) *Opinion Supplemented by, U.S. v. Reserve Min. Co.*, 423 F.Supp.
17 759 (D.Minn. 1976) ([Where hazards can be measured only in the most general terms, and serious
18 consequences could result], "[a] court is not powerless to act. . . ."); *Ethyl Corp. v. EPA*, 541 F.2d 1, 24-
19 25 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976); *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130,
20 1152-58 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980); *United States v. A&N Cleaners &*
21 *Launderers*, 854 F.Supp. 229, 237-39 (S.D.N.Y. 1994). *See also, American Lung Ass'n v. EPA*, 134 F.3d
22 388, 389, 328 U.S.App.D.C. 232, 233 (D.C. Cir. 1998) (based on "endangerment" findings, EPA must act

23 ⁷ Risk managers have formulated an alternate definition: The precautionary principle recognizes the fundamental
24 role of uncertainty in policy making and attempts to shift the burden of ignorance towards precaution rather than
inaction. Society for Risk Analysis, 1999 Annual Meeting: Past President's Message: Risk Analysis Under Fire,
reported in Risk Newsletter, Vol. 20 No. 1 (2000) at p. 3, <http://www.sra.org/newsletter/news0200.pdf>.

25 ⁸ H.R. Rep. 96-697, p. 12 (1979). *See also*, FWS/NMFS ENDANGERED SPECIES CONSULTATION HANDBOOK 1-7,
available at http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf.

1 preventively to minimize the risk of harm); H.R. Rep. No. 95-294, at 49 (1977) (House Report for 1977
2 Clean Air Act amendments, stating that one of the legislation's purposes is "(t)o emphasize the preventive
3 or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before
4 it occurs. . .").

5 In addition to their precautionary purpose, these statutes serve another purpose that benefits the
6 public: they are catalysts, forcing companies to take action despite the (frequently overstated) economic
7 risk. See *Union Elec. Co. v. EPA*, 427 U.S. 246, 269, 96 S.Ct. 2518, 2531 (1976),), *rehearing denied*, 429
8 U.S. 873 (1976) ("Congress considered those risks in passing the 1970 Amendments and decided that the
9 dangers posed by uncontrolled air pollution made them worth taking."); *American Petroleum Inst. v.*
10 *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. den.*, 455 U.S. 1034 (1982) (Act expressly designed to
11 force regulated sources to develop pollution control devices that might at the time appear to be
12 economically or technologically infeasible"); *Ethyl Corp. v. EPA*, 541 F.2d 1, 14, 176 U.S.App.D.C. 373,
13 386 (D.C. Cir. 1976). See also, *City of Arcadia v. State Water Resources Control Bd.*, 135 Cal.App.4th
14 1392, 1404-05; 38 Cal.Rptr.3d 373, 380 (2006) (A TMDL requires a "margin of safety" which takes into
15 account any lack of knowledge concerning the relationship between effluent limitations and water
16 quality).⁹ See also, *Whitman v. American Trucking Associations*, 531 U.S. 457, 465 et seq., 121 S.Ct. 903
17 (2001) (margin-of-safety language in Clean Air Act provision directing EPA to set National Ambient Air
18 Quality Standards did not authorize consideration of implementation costs).

19 The United States and its individual states apply the precautionary principle often in the context of
20 managing natural resources—for example, to the management of fish populations even in the absence of
21 ESA protection. See, e.g., United Nations Agreement on Straddling Stocks and Highly Migratory Fish
22 Stocks, art. 6.2, *reprinted in* 34 I.L.M. 1542 (*entered into force*, 11 December 2001) (requiring states to
23 be more cautious when information is uncertain, unreliable or inadequate; stating that absence of adequate

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25 ⁹ See also, Staff Report, Proposed Revisions to Section 303(d) List and Priorities for Development of Total
Maximum Daily Loads (TMDLs) for the San Francisco Bay Region 12 (Nov. 14, 2001), *available at*
<http://www.swrcb.ca.gov/tmdl/docs/segments/region2/303drb22.pdf>.

1 scientific information shall not be used as a reason for postponing or failing to take conservation and
2 management measures). The National Marine Fisheries Service has adopted a “risk averse” policy.
3 Strategic Plan for the National Marine Fisheries Service—Goals and Objectives (June 1, 1991).¹⁰ The
4 plan requires NMFS to reduce the risk of overfishing by making management decisions that err toward
5 the conservation of the fishery resource.

6 As to actions at the state level, see, e.g., *Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho*, 42
7 F.3d 1278, 1283 (9th Cir. 1994) (Decided prior to listing under ESA: court found that “conservation
8 necessity” addressed in the state’s statutory authority to manage fish and wildlife was the preservation of
9 reasonable margin of safety between existing level of salmon stocks and imminence of extinction). In
10 accord, *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir.1983); *United States v. Washington*, 520 F.2d
11 676, 686 (9th Cir.1975) (conservation means “insuring optimum escapement for the perpetuation of the
12 run”), *cert. denied*, 423 U.S. 1086 (1976), *rehearing denied*, 424 U.S. 978 (1976). See also, *Mont. Env'tl.*
13 *Info. Ctr. v. Dep't of Env'tl. Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, 1249 (Mont. 1999)
14 (Applying a state constitutional right to a clean environment: “[o]ur constitution does not require that
15 dead fish float on the surface of our state's rivers and streams before its farsighted environmental
16 protections can be invoked.”)

17 Forward-looking policies have applied both the public trust doctrine and the precautionary principle
18 in the context of managing groundwater that is hydrologically connected to surface waters. In
19 formulating the Great Lakes Compact, the International Joint Commission (“IJC”) stated: “....The
20 precautionary principle dictates that removals should not be authorized unless it can be shown, with
21 confidence, that they will not adversely affect the integrity of the Great Lakes Basin ecosystem.”¹¹
22 Relevant case law includes *In re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (Hawai'i
23 2000)(Waiahole I). In this decision, the Hawaiian Supreme Court endorsed a regulatory agency’s use of

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25 ¹⁰ See <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/policies/01-104.pdf>.

¹¹ Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States
(2000), <http://www.ijc.org/php/publications/html/finalreport.html>.

1 precautionary principles to allocate instream flows in the absence of scientific certainty in the data. The
2 Court affirmed the Commission's conclusion that, "at minimum, the absence of firm scientific proof
3 should not tie the Commission's hands in adopting reasonable measures designed to further the public
4 interest." *Id.* at 155, 9 P.3d at 467. The court reasoned that the public trust required the Commission to
5 take precautionary action: Where scientific evidence is preliminary and not yet conclusive regarding the
6 management of fresh water resources which are part of the public trust, it is prudent to adopt
7 "precautionary principles" in protecting the resource. That is, where there are present or potential threats
8 of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures
9 to prevent environmental degradation. 94 Haw. at 154, 9 P.3d at 466; see also, Joseph Sax, *Managing*
10 *Hawai'i's Public Trust Doctrine*, 24 HAW. L. REV. 21, 33 (2001) (explaining that California court
11 decisions have used "judicial oversight" such as the precautionary principle as part of their public trust
12 analysis). Where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing
13 presumptions that also protect the resource. *In re Water Use Permit Applications*, 94 Haw. at 159.

14 Some of the cases invoking the precautionary principle stand as landmarks in jurisprudence. The
15 lodestar majority opinion of *Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1, 25-29 (D.C. Cir.),
16 *cert. denied*, 426 U.S. 941 (1976) upheld EPA's authority under the Clean Air Act, to regulate in the face
17 of scientific uncertainty. In this seminal case, which led to the successful regulation of lead, the court
18 noted that "Questions involving the environment are particularly prone to uncertainty. ... [R]egulators
19 entrusted with the enforcement of [environment-related] laws have not ... been endowed with a prescience
20 that removes all doubt from their decision-making. Rather, speculation, conflicts in evidence, and
21 theoretical extrapolation typify their every action. Yet, the statutes -- and common sense -- demand
22 regulatory action to prevent harm, even if the regulator is less than certain that the harm is otherwise
23 inevitable."

24 In *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975) (en banc), the court discussed balancing
25 in a context where the environmental harm was far less clear than it is in the Carmel River ecosystem. In

1 “striking a balance between unpredictable health effects and . . . clearly predictable social and economic
2 consequences,” the court declined to order the closure of a plant because the plant owners had drastically
3 changed their position as to what they could “afford” to spend to fix the problem. A substantial factor in
4 the company’s change of position were prior court rulings that concluded that the company was “reluctant
5 to curtail their discharge until the latest possible moment, presumably in order to prolong the profitability
6 of the present discharge.” See lower court decision: *U.S. v. Reserve Min. Co.*, 380 F.Supp. 11, 19
7 (D.C.Minn. 1974).

8 V. Certainty and Quantification

9 A rigorous process for gathering and evaluating information underlies the decisions to list Carmel
10 River species as endangered or threatened and to designate the Carmel River as critical habitat—a process
11 based on the “best scientific data” available.¹² This process provides the Board with ample basis for
12 administrative certainty and carries more weight and reflects more objectivity than the testimony of
13 business owners and City officials about potential economic impacts of water supply reductions.

14 It is not incumbent upon the Board to improve upon the “best scientific data” that the ESA listing
15 agencies relied upon. The “best scientific data” standard is not a standard of absolute certainty.

16 *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-680 (D. D.C. 1997). It demands use of “the best
17 scientific . . . data available, not the best scientific data possible.” *Building Industry Ass’n of Sup. Cal. v.*

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19 ¹² Section 4(b) (16 U.S.C. §1533(b)) provides that listing of an endangered or threatened shall be based solely on the
20 best scientific data available. Section 1533(b)(B)(2) requires the Secretary to designate critical habitat on the basis
21 of the best scientific data available and after taking into consideration the economic impact, impact on national
22 security, and any other relevant impact of specifying any particular area as critical habitat. Additional guidance
23 appears in the FWS and NMFS Interagency Cooperative Policy on Information Standards under the ESA (59 *Fed.*
24 *Reg.* 34271, July 1, 1994). Under this policy, FWS and NMFS receive and use information from a wide variety of
25 sources, ranging from the informal — oral, traditional, or anecdotal — to peer-reviewed scientific studies. Agency
biologists review and evaluate all information impartially to ensure that any information used by the agencies to
implement ESA is “reliable, credible, and represents the best scientific and commercial data available.” Agency
managers in turn review the biologists’ work to verify and assure the quality of the science used to establish official
positions, decisions, and actions. A companion document, the Interagency Cooperative Policy for Peer Review in
Endangered Species Act Activities (59 *Fed. Reg.* 34270, July 1, 1994), notes that, in addition to the public
comments received on proposed listing rules and draft recovery plans, the Services must formally solicit expert
opinions and peer review to ensure the best biological and commercial information. For listing decisions, the
agencies solicit the expert opinions of three specialists and summarize these in the record of final decision. Special
independent peer review can be used to reduce or resolve an unacceptable level of scientific uncertainty.

1 *Norton*, 247 F. 3d 1241, 1246-1267, 345 U.S.App.D.C. 426, 431 et. seq. (D.C. Cir. 2001), *cert. denied*
2 534 U.S. 1108 (2002); in accord, *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir.
3 (Cal.) 2006) (The best available data requirement “merely prohibits [an agency] from disregarding
4 available scientific evidence that is in some way better than the evidence [it] relies on). While the
5 standard requires more than mere speculation, *Arizona Cattle Growers Association v. United States Fish*
6 *and Wildlife Service*, 273 F. 3d 1229 (9th Cir. 2001), it is sufficient to consider the relevant facts and
7 articulate a rational connection between these facts and choices made. *Pacific Coast Federation of*
8 *Fishermen’s Associations, Inc. v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001). Considering the relevant
9 facts means that the agency cannot ignore available biological information, *Connor v. Burford*, 848 F. 2d
10 1441, 1453-54 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), especially the most current information.
11 *Southwest Center for Biological Diversity v. Babbitt*, 926 F. Supp. 920, 927 (D.C. Ariz. 1996).

12 A similar standard of scientific certainty applies under the public trust doctrine. The lack of full
13 scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the
14 Commission's affirmative duty to protect such purposes wherever feasible. *In re Water Use Permit*
15 *Applications*, 94 Haw. 97, 9 P.3d 409 (2000). See also, *Marcon v. Dep't of Env'tl. Resources*, 76 Pa.
16 Commw. 56, 60, 462 A.2d 969, 971 (1983) (once any likelihood of environmental harm is shown, burden
17 of proof is on party wishing to use waters to demonstrate resources will not be impaired). In accord,
18 *Dep't. of Env'tl. Resources v. Pennsylvania Public Utility Comm.*, 18 Pa. Commw. 558, 567, 335 A.2d
19 860, 865 (1975) , *order aff'd*, 374 A.2d 693 (1977); *Shokal v. Dunn*, , 109 Idaho 330, 339; 707 P.2d 441,
20 450 (1985); *Superior Public Rights, Inc. v. Dep't. of Natural Resources*, 80 Mich. App. 72, 79, 263
21 N.W.2d 290, 293 (1977).

22 Under the public trust doctrine, the public value of public trust waters or natural resources is
23 presumed. The public value of trust resources is quantifiable, as evidenced by multiple statutes
24 quantifying natural resource damage as the cost of restoring the damaged natural resource. See, e.g., 33
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1 U.S.C. 1321(f)(4)¹³; Section 301(c)(2) of CERCLA (42 U.S.C. 9651(c)(2)), authorizing trustee to recover
2 natural resources damages considering, but not limited to, “replacement value, use value and the ability of
3 the ecosystem to recover” and 43 C.F.R. §§ 11.81-11.84, establishing methodology for setting cost-of-
4 restoration damages. See also, *Puerto Rico v. S. S. Zoe Colocotroni*, 628 F.2d 652, 675 (1st Cir. 1980),
5 *cert denied*, 450 U.S. 912 (1981); *Feather River Lumber Co. v. United States*, 30 F.2d 642, 644 (9th Cir.
6 1929) (applying cost-of-restoration damages). After the Santa Barbara oil spill, California placed specific
7 values on hundreds of species. *Hazardous and Toxic Waste Disposal Field Hearings: Joint Hearings*
8 *Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on*
9 *Environment and Public Works*, 96th Cong., 1st Sess. 316-53 (1979) (statement of Edwin J. Dubiel, Calif.
10 Deputy Atty General). If multiple parties contribute to the damage, it is possible to quantify their
11 proportionate contribution.

12 In addition, the existence value of the Carmel River natural resources for future generations should
13 weigh heavily in the public trust balancing process, including those values that have not been balanced
14 under the ESA. Moreover, the theory of intrinsic value recognizes that natural resources may have value
15 independent of humans, based on their status as natural creatures or objects.

16 VI. Argument of George Riley

17 Joseph Sax has described the public trust doctrine as a vehicle for private citizens who “have begun to
18 take the initiative themselves in protecting the public interest” and “a name courts give to their concerns
19 about the insufficiencies of the democratic process.”¹⁴ Thus, it is appropriate that the Board take notice of
20 the arguments of citizens. As suggested by the Board during the hearing process, the Public Trust

21 ¹³ In reliance upon our national policy regarding the critical importance of restoring chemical, physical, and
22 biological integrity to our waters, courts have authorized a restoration remedy even under statutory provisions that
23 do not expressly authorize this remedy. See *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166
24 (D. Mass. 1986), *aff’d*, 826 F.2d 1151, 1161 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) (farming corporation
converted a wetland into farmland, without obtaining the required Clean Water Act permit; appellate court rejected
developer’s argument that “since it got away with these violations for eight years, the Corps is equitably foreclosed
from [asserting jurisdiction once it discovered illegal nature of the activities].)

25 ¹⁴ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH.
LAW. REV. 471, 521 (1970). See also, *Zack’s v. City of Sausalito*, 165 Cal.App.4th 1163, 1188-89; 81 Cal.Rptr.3d
797 (2008), (noting the importance of applying democratic procedures to decisions affecting the public trust).

1 Alliance adopts the arguments of citizen activist George Riley in its brief and incorporates them in its
2 brief in furtherance of citizen participation and in support of the argument that a strong CDO has an
3 action-forcing quality akin to version of precautionary principle incorporated in U.S. environmental
4 statutes.

5 “SWRCB can accomplish its mission and engage the best and widest thinking with the pressure
6 created via CDO. Not only is a CDO justified from testimony, a modified CDO accomplishes more.
7 SWRCB has an opportunity to protect the public trust, bring revival to the Carmel River, engage the
8 wider community in resolving the water deficiency, foster alternatives that have softer environmental
9 footprints and reduced costs, and see steady progress to fulfill Order 95-10.

10 “As a ratepayer, I have two fundamental interests: participation and expenses. To the extent
11 SWRCB can be fair to ratepayers and to public trust obligations, SWRCB should issue a modified CDO
12 to accomplish several goals. To the maximum extent possible the CDO should encourage the wider
13 community of interests and agencies to participate, and through such participation, the best mix of
14 affordable remedies should emerge. A modified CDO will assure actions on many fronts, and will likely
15 avoid a most regrettable penalty on CAW that could be passed on to ratepayers. We need pressure to
16 perform, and then performance. We do not need penalties that CAW might avoid, and that could become
17 new costs to consumers.

18 “A Workable Remedy—Effect vs. penalty.

19 “Obviously SWRCB expects compliance, but the punitive impacts are serious. The community
20 carrying on as usual may be penalized because the purveyor, CAW, continued pumping. If CAW over
21 pumped, can CAW be reprimanded or penalized as a corporate entity, but without the option of passing
22 financial penalties on to consumers? If so, then so be it. If not, then the community of consumers will be
23 penalized for CAW behavior. However, a modified CDO can force everyone to see the problem clearly,
24 and to join in various ways and approaches to a solution.

1 "A workable CDO looks like this: 15% reduction in production effective a date certain in 2009,
2 but about 6 months after the decision. Further 3% to 5% reductions staged in 2-3-year increments, all
3 until new supplies or practices are operating to maintain production at the authorized level.

4 "A 15% first step will not severely disrupt local practices, but it will put water supply and
5 conservation on everyone's front burner. 15% is doable for these reasons:

6 "George Riley heard CAW official Tom Bonofsky state in a public meeting (MPWMD 3/27/08) that
7 CAW can get to the 20% reduction stated in the DCDO without undermining the way of life and the
8 economics on the Peninsula. This was confirmed in The Monterey Herald, pA1 (3/31/08), "...company
9 officials said compliance with the water board wouldn't be very difficult during the first four years when
10 the 15 percent to 20 percent reductions would be required." CAW announced in December 2007 that
11 20% of residential users consume 46% of residential water (publicized in Carmel Pine Cone).¹⁵ This user
12 group (20% of residential customers) is the subject of specific review by CAW, with significant
13 reductions expected by CAW.

14 "No new conservation measures or options have been initiated in years. New attention via a CDO
15 demand should produce new interest and new levels of conservation. The additional staged reductions of
16 3-5% would continue the pressure for performance.

17 "Evidence of Pressure Working Prior to issuance of Draft CDO:

18 "1) Both Ralph Rubio and Dewey Evans, testifying for the Seaside Basin Watermaster Adjudication
19 on 7/24/08, stated it was a good example of cities and others working cooperatively together. This was a
20 wonderful observation, but the driving force for the 'cooperation' was pressure from the Superior Court
21 order.

22 "2) The REPOG alternative with its widespread agency and community participation was described
23 by Steve Kasower on 7/23/08. This arose partly in response to CAW's desal plans and the pressure of the
24 CPUC timeline to address it.

25 ¹⁵ Kelly Nix, *Cal Am's plea: Stop using so much water!*, CARMEL PINE CONE p. 1 and 20A (12/28/07),
<http://www.pineconearchive.com/071228PCA.pdf>.

1 “3) For 7 years there was considerable activity by CAW and MPWMD following the issuance of
2 Order 95-10. But beginning in 2002 the cities, with American Water in support, began to undercut the
3 MPWMD with a no confidence election (Measure B—Should the MPWMD be dissolved?” The wider
4 community interest in the water supply problem was effectively hushed at that point, and CAW had the
5 field to itself. And the pace for a new supply was totally in the hands of CAW, and the pace was slow.
6 Little pressure translates to slow pace.

7 “Pressure under recent SWRCB actions:

8 “1) The inquiry by SWRCB in 2007 of efforts toward a new water supply led to CAW rushing to
9 conclude an agreement with the City of Sand City. This is a high cost component (estimated \$3500AFY)
10 and reflects the disadvantages of fast track decisions by a monopoly. These costs will be borne by
11 ratepayers, but it reflects the weak diligence by CAW, the rush to show progress, and the limited access
12 by the public to participate and raise questions.

13 “2) The SWRCB Draft CDO stimulated other efforts. It added perspective to the REPOG activities
14 and emphasized the urgency to stay within targeted timelines.

15 “3) It also stimulated the MPWMD to resurrect its proposed project called “95-10 desal”. It is
16 currently under active planning and review.

17 “The underlying purpose of my ratepayer point of view is to encourage the SWRCB to issue a
18 modified Cease and Desist Order that has maximum effect for finding ways to offset over pumping by
19 CAW. A 15% instant reduction has impact, and can be achieved. A slow incremental reduction in
20 succeeding years will continue the pressure (and the reduced draw on the Carmel River), yet allows for a
21 range of cost effective options to be pursued. My greatest fear is that CAW will feel free to pursue any
22 remedy, regardless of cost, if the SWRCB forces out any other options. The best hope for a fair cost and
23 agreeable remedy is for a modified CDO that allows for a variety of approaches, all in a timely manner.”

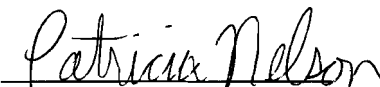
24 **VII. Conclusion**

1 Scientific certainty and quantification of biological and economic impacts are part of the process of
2 “risk assessment.” This quantification of risk, harm and benefit does play an important role in informing
3 decision making, but it cannot answer policy questions, such as how much harm the people should
4 tolerate or how much money should be spent (and by whom) to reduce a risk or repair a harm. Such
5 policy decisions, which are encompassed in the Endangered Species Act and also encompass the Board’s
6 task of formulating a remedy for the continued delay in achieving compliance with Condition 2 of Order
7 95-10, are “risk management” decisions that follow in part from the “risk assessment” process underlying
8 the ESA and in part from the requirements of the public trust doctrine. The precautionary principle is a
9 risk management tool—a highly useful one that places quantification in the larger perspective of policy.

10 Regardless of which administrative technique it adopts, the public trust doctrine does not permit the
11 Board to favor Cal-Am’s or the Cities’ interest in economic development over the need to establish an
12 ecosystem that meets the needs of protected species. We respectfully request that the Board give its
13 primary attention to the Carmel River ecology and the concerns of engaged citizens such as George Riley,
14 who is quoted above. This entire issue was pushed onto the Board’s agenda by a 1989 complaint signed
15 by more than 10,000 residents of the Monterey Peninsula. AR 11674 A&B, Oct. 30, 1989 letter from
16 Mark L. Stretars to Larry Foy, General Manager of Cal Am. Citizens have continued to involve
17 themselves in efforts to obtain accountability for the water company that is supposed to serve their
18 interests. In the best participatory traditions of the public trust doctrine, these citizens clearly care about
19 both the environmental and financial costs of using the Carmel River in an unsustainable way.

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21 Respectfully submitted,

22
23 Dated this Oct. 8, 2008



24 Michael Warburton
25 Patricia Nelson, for
The Public Trust Alliance