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4 **BEFORE THE STATE WATER**
5 **RESOURCES CONTROL BOARD**
6

7 In the Matter of the State Water Resources)
8 Control Board (State Water Board))
9 Hearing to Determine whether to Adopt a)
10 Draft Cease & Desist Order against)
11 California American Water Regarding its)
12 Diversion of Water from the Carmel River)
13 in Monterey County under Order WR 95-10)
14)

Hearing Date: June 19 & 20, 2008

Carmel River in Monterey County

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16 **REPLY BRIEF OF**
17 **MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**
18 **ADDRESSING THE SCOPE OF PROCEEDINGS**
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1 **REPLY BRIEF OF**
2 **MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**
3 **ADDRESSING THE SCOPE OF PROCEEDINGS**

4 **INTRODUCTION**

5 This Reply Brief of the Monterey Peninsula Water Management District (Water
6 Management District) is submitted to the State Water Resources Control Board (SWRCB) to
7 supplement the earlier comments of the Water Management District, dated April 8, 2008, that
8 address the scope of these proceedings.

9 This brief does not address substantive issues relating to the scope of proceedings, but
10 instead raises procedural due process concerns regarding dates for submission of testimony and
11 exhibits, and dates for the proposed evidentiary hearing.

12 **DATES ASSOCIATED WITH THE PROPOSED**
13 **CEASE AND DESIST HEARING MUST BE MODIFIED**

14 Dates originally calendared by the SWRCB in this proceeding require all Parties to
15 prepare and file testimony and exhibits with the SWRCB on May 30, 2008. The dates for the
16 hearing have been set for June 19 and 20, 2008. All dates were promulgated by the Cease and
17 Desist (CDO) Hearing Notice issued on March 5, 2008. The Hearing Notice also set the date
18 for a Pre-Hearing Conference that was held on March 19, 2008.

19 The calendared dates have failed to contemplate the extraordinary process that has since
20 been required by the SWRCB Hearing Officers, calling for separate briefing schedules to
21 address the scope of these proceedings. Additionally, questions as to the status of Parties who
22 did not appear or participate in the March 19, 2008, Pre-Hearing Conference have been raised.
23 It is anticipated that the many issues related to the scope of this proceeding, and the Parties to
24 it, shall not be determined until the SWRCB Hearing Officers issue their written ruling.

25 As originally calendared, all Parties were granted seventy-three (73) days between the
26 March 19, 2008, Pre-Hearing Conference and May 30, 2008, to prepare and file testimony and

1 exhibits with the SWRCB, and to serve those documents on opposing Parties. Thereafter, the
2 original calendar allowed all Parties twenty (20) days to review filed testimony and exhibits,
3 and to prepare for the evidentiary proceedings.

4 It is anticipated that the written ruling of the SWRCB Hearing Officers clarifying the
5 scope and Parties to this proceeding will be issued on or about May 8, 2008. This date – if the
6 May 30, 2008, filing date is not extended – affords the Parties only twenty-two (22) days to
7 prepare, file and serve all testimony and exhibits. Such an abbreviated schedule is unfair and
8 imposes administrative burdens on the SWRCB and all Parties.

9 Due to the controversy regarding the scope of these proceedings, Parties have deferred
10 retention of expert witnesses and delayed delegation of tasks to staff members. Parties have
11 not been able to prepare scopes of work or estimate retainer contract costs without clarification
12 as to the scope of these proceedings. Testimony in this proceeding will be technical, will
13 require detailed data analysis, calls for operation and perhaps programming of a sophisticated
14 ground and surface water computer simulation model, and requires preparation of detailed
15 tables, charts and graphs. The number of witnesses and the breadth of their testimony shall
16 also be influenced by the number and identity of Parties allowed to participate in these
17 proceedings.

18 The original schedule fairly accommodated the complex tasks attendant to preparing for
19 the CDO proceeding. Seventy-three (73) days from the date the scope of the proceeding is
20 determined allows sufficient time to prepare, file and serve testimony and exhibits. This period
21 also allows public agency counsel adequate time to confer with their client boards. Twenty
22 (20) days also affords sufficient time to review and exhibits filed by other Parties, and to
23 prepare for the evidentiary proceedings.

24 For the reasons stated, the Water Management District asks that the deadline to file and
25 serve testimony in this matter be vacated, and in its place, a new filing date be set which allows
26 at least seventy-three (73) days from the date the scope of the proceeding is determined. The
Water Management District further requests that the first day of hearings in this matter be set to

1 convene not sooner than twenty (20) days after the date by which Parties are required to file
2 and serve testimony and exhibits.

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4 **SUFFICIENT TIME MUST BE ALLOWED**
5 **FOR A FAIR CDO HEARING**

6 The hearing in this matter was set for only two (2) days, June 19 and 20, 2008, by the
7 CDO Hearing Notice issued on March 5, 2008. Issues at stake in this proceeding are complex,
8 affect unique species and habitat, affect the water supply of historic communities and
9 approximately 112,000 persons who reside within them, and may adversely affect their health,
10 safety and welfare. Fines may result, that if warranted, may not be borne by investor owners of
11 the privately held water utility, California American Water, but may instead be passed through
12 to the rate-paying public.

13 It appears, based upon the March 19, 2008, Pre-Hearing Conference, and as represented
14 by the Hearing Officers at the Public Participation session held on April 1, 2008, that at least
15 eighteen (18) participants seek recognition as full Parties to this important proceeding.
16 Additionally, later appearing persons or organizations also seek full Party status¹. It is not
17 surprising so many seek recognition as full Parties given the broad ranging consequences that
18 may flow from this hearing.

19 Based upon the witness list submitted on timely-filed Notices of Intent to Appear, the
20 eighteen Parties plan to collectively call at least seventy-five (75) witnesses. Although eighty-
21 four witnesses were in fact named, nine names appear to be duplicates as each was listed by
22 more than one Party.

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25 ¹ By e-mail dated April 15, 2008, SWRCB staff member Paul Murphey forwarded the Notice of Intent
26 to Appear of George Riley, dated April 9, 2008, that had been submitted to the Division of Water
Rights. The Brief submitted by the City of Seaside also incorporates the request of the City of Del Rey
Oaks to participate in this proceeding as a full Party.

1 Sufficient time must be allowed for the Parties to have a fair hearing of these issues.
2 Parties were encouraged to defer public comments at the April 1, 2008 public hearing in this
3 matter, based upon the SWRCB Hearing Officer's statement that they would have an
4 opportunity to make opening statements at the hearing. The hearing schedule must
5 accommodate time for each Party to exercise this right.

6 Sufficient time must be afforded for witnesses to provide direct testimony and to enable
7 fair cross-examination by opposing Parties. Time available for cross-examination should be
8 based, in part, upon the number of direct witnesses sponsored by each Party.

9 It is respectfully suggested that these proceedings shall require more than two (2) days
10 of hearing time. The hearing calendar must ensure that sufficient time is allowed for a full and
11 fair hearing on these important issues.

12 13 CONCLUSION

14 The Water Management District, in its Opening Brief, asked the SWRCB to expand the
15 scope of these proceedings (a) to consider the limited water supplies now available to the
16 Monterey Peninsula due to the Seaside Basin Adjudication, (b) to consider whether measures to
17 reduce water use are realistically achievable without adversely affecting health and safety on
18 the Monterey Peninsula, (c) to consider whether the water diversion ramp-down proposed in
19 the CDO will provide significant benefit to stream-dependent fish, wildlife and vegetation, and
20 (d) to address the manner and timing in which CAW shall be required to develop replacement
21 sources of water. The Water Management District now renews those requests.

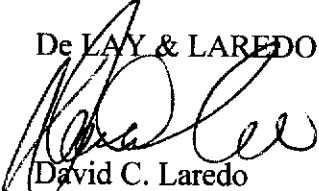
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23 In addition, for the reasons stated in this Reply Brief, the Water Management District
24 asks that the deadline to file and serve testimony in this matter be vacated, and in its place, a
25 new filing date be set which allows at least seventy-three (73) days from the date the scope of
26 the proceeding is determined. The Water Management District further requests that the first

1 day of hearings in this matter be set to convene not sooner than twenty (20) days after the date
2 by which Parties are required to file and serve testimony and exhibits.

3 Finally, the Water Management District asks that the SWRCB set a hearing that
4 sufficiently allows witnesses to testify and enables their fair cross-examination. The planned
5 two (2) day hearing is not adequate for these purposes given the gravity of the issues and their
6 consequences, the number of Parties and the many witnesses that are likely to be called. The
7 SWRCB must provide a full and fair hearing on these important issues.

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9 Respectfully submitted,

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11 Dated: April 21, 2008

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13 De LAY & LAREDO

14 David C. Laredo
15 General Counsel
16 Monterey Peninsula Water Management
17 District