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BEFORE THE CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Draft Cease and Desist Order  
No. 2008-00XX-DWR Against California  
American Water Company

**CALIFORNIA AMERICAN WATER  
OPPOSITION TO PRE-HEARING BRIEFS**

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1 **I. Introduction**

2 None of the briefs filed with the State Water Resources Control Board ("State Water  
3 Board") provide a compelling argument to support a change in the scope of this proceeding.  
4 Neither the prosecutorial team nor any of the non-party entities provide the State Water Board with  
5 a reasonable explanation why the scope of this hearing should be narrower or broader than the  
6 existing issue – whether California American Water Company ("CAW") has violated Condition 2 to  
7 State Water Board No. 95-10 ("Order 95-10").

8 The State Water Board prosecutorial team ("prosecutorial team") advances the incongruous  
9 argument that the State Water Board need only conduct a hearing on what remedy should it include  
10 in a cease and desist order. That argument completely ignores CAW's due process rights, the Water  
11 Code, and Order 95-10. The prosecution team has not even submitted evidence to support their  
12 allegations, much less allowed CAW to refute them. The State Water Board therefore needs to  
13 conduct this proceeding in a manner that addresses the question of liability.

14 Certain non-party entities advocate for an expanded scope. They contend that mere  
15 reference to the terms "public resources" or "public trust" in documents prepared by the prosecution  
16 team turns this proceeding into a public trust proceeding. They rely upon an incomplete read of the  
17 notice documents, ignore the principles of *res judicata* and *collateral estoppel*, the physical solution  
18 Order 95-10 imposed, to wit:

19 [T]he adoption of an order which, until a legal supply of water can be developed or  
20 obtained, will require Cal-Am [to]: (1) minimize its diversions from the Carmel  
21 River, (2) mitigate the environmental effects of its diversions, and (3) prepare a plan  
22 setting forth: (a) specific actions to develop or obtain a legal supply of water and (b)  
the dates specific actions will have occurred so that progress on the plan can be  
objectively monitored.

23 (Staff Exhibit 2 (Order 95-10), p. 38.

24 When the notice documents for this proceeding are read in total and in historical context, the  
25 sole issue before the State Water Board is exactly as Hearing Officer Art Baggett stated at the pre-  
26 hearing conference - CAW's compliance with Order 95-10.

27 The prosecution team and non-party entities raise additional issues in their pre-hearing  
28 briefs, which include: (1) the level of participation by non-party entities, (2) the utility of

1 bifurcation, (3) the potential ramifications if this proceeding were delayed, and (4) information  
2 presented without proper evidentiary foundation or to advance non-procedural related issues.

3 As explained in detail below, at this time, the State Water Board should not allow any of the  
4 non-party entities to participate in this proceeding. Either they have no protectable interest, or have  
5 a protectable interest but any benefit gained from their involvement here is outweighed by the  
6 prejudice intervention would cause to the prosecutorial team and CAW.

7 Further, given the scope of this proceeding, the State Water Board and the hearing process  
8 would benefit from bifurcating this proceeding into two phases: a liability phase and a remedy  
9 phase. Neither the prosecutorial team nor any non-party entities advance an argument that warrants  
10 a contrary result.

11 Next, the prosecutorial team includes in its pre-hearing brief a section on the potential  
12 ramifications if this proceeding is delayed. CAW found that section perplexing since CAW is not  
13 seeking, and CAW is not aware of any non-party entity that seeks, to unnecessarily delay or  
14 expedite this proceeding. CAW has full faith the State Water Board will establish a process for this  
15 proceeding that is protective of CAW's due process rights and will result in an orderly and efficient  
16 resolution of the issue(s).

17 Finally, many of the non-party entities that filed pre-hearing briefs advance arguments that:  
18 (1) exceed the limited authority provided by the State Water Board, which permitted the filing of  
19 briefs on procedural issues, and (2) presented information without proper evidentiary foundation.  
20 For that reason, CAW files concurrently herewith a motion to strike.

21 **II. The State Water Board Must Maintain The Scope Of The Hearing**

22 At the March 19, 2008 pre-hearing conference, Hearing Officer Baggett correctly noted the  
23 unambiguous language of the draft CDO, its cover letter, and the notice of hearing characterize this  
24 proceeding as a formal hearing to consider an alleged violation of Order 95-10. None of the pre-  
25 hearing briefs refuted the Hearing Officer's statement. Indeed, the history underlying this  
26 proceeding, including Order 95-10 require the scope be focused on Order 95-10 compliance.

27 The prosecutorial team argues that the scope of this proceeding must be narrowed, alleging  
28 that there is no issue of liability and thus the State Water Board need only consider what remedial

1 order the State Water Board should issue. (Prosecutorial Team Pre-hearing Brief, pp. 1-2.) The  
2 Sierra Club, California Sportfishing Protection Alliance (“CalSPA”), Carmel River Steelhead  
3 Association (“Carmel Steelhead Association”), California Salmon and Steelhead Association, and  
4 the Public Trust Alliance all argue for a substantially expanded hearing; they desire a public trust  
5 proceeding.. (Sierra Club Pre-hearing Brief, pp. 1-7; Carmel Steelhead Association Pre-hearing  
6 Brief,<sup>1</sup> p. 2; California Salmon and Steelhead Association Pre-hearing Brief, pp. 2-4, 5; Public Trust  
7 Alliance Pre-hearing Brief, pp. 3-7.) The arguments for a limited scope and for an expanded scope  
8 are founded on either legally unsupported or an ignorance of the circumstances.

9           **A.     The Prosecutorial Team’s Position That The Scope Of This Hearing Must**  
10           **Be Limited Is Based On The Illogical Premise That There Is No Issue Of**  
11           **Liability**

12           The prosecutorial team advocates for a limited scope for this proceeding. The prosecutorial  
13 team believes that there is no question whether a cease and desist order should issue, and therefore  
14 the State Water Board should bypass the liability phase of the hearing and need only focus the  
15 proceeding on the issue of remedy. (Prosecutorial Team Pre-hearing Brief, p. 1.) For the reasons  
16 stated in the pre-hearing brief filed by CAW on April 9, 2008 and herein, the State Water Board  
17 cannot eliminate the determination of liability.

18           **1.     If The State Water Board Were To Exclude From This Proceeding The**  
19           **Question Of Whether A Cease And Desist Order Should Issue, The State**  
20           **Water Board Would Violate The Due Process Rights Of CAW**

21           Fundamental to this proceeding are the conflicting beliefs of the prosecutorial team and  
22 CAW regarding CAW’s compliance with Order 95-10. The prosecutorial team presented its  
23 position in the draft cease and desist order, the cover letter, and in its pre-hearing brief. (Exhibit  
24 CAW-007 (Letter from James Kassel), p. 1; Staff Exhibit 7 (Draft CDO), p. 5; Prosecutorial Team  
25 Pre-hearing Brief, p. 1.) CAW objected to an enforcement action quickly and clearly. (Exhibit  
26 CAW-008 (Letter from Jon D. Rubin).) In its request for hearing, CAW wrote:

27           It is beyond reasonable dispute that CAW is meeting the terms and conditions of  
28           Order 95-10. The Draft CDO fails to present evidence that warrants a different  
              conclusion. . . . In addition, the Draft CDO proposes a schedule for “compliance” . .

<sup>1</sup> The Carmel Steelhead Association and CalSPA filed a joint Pre-hearing Brief. CAW refers herein to that joint brief as  
“Carmel River Steelhead Association Pre-hearing Brief.”

1 . . . Again, the Draft CDO also fails to present evidence to support its unworkable,  
2 proposed schedule. . . . Accordingly, if the State Water Board staff maintains its  
3 effort to impose the Draft CDO, CAW respectfully requests, pursuant to California  
Water Code section 1834, that the State Water Board schedule a hearing on the  
matter.

4 (Exhibit CAW-008 (Letter from Jon D. Rubin), p. 2.) At this stage in the proceeding, the State  
5 Water Board should no more accept the position of the prosecutorial team than the position of  
6 CAW. In fact, to accept either position would violate due process.

7 The rights of CAW at issue in this proceeding are fundamental. Both the California Water  
8 Code and principles of due process require the State Water Board to allow CAW an opportunity to  
9 be heard and to offer evidence in support of their positions. (Water Code § 1834(b); *Eshelman v.*  
10 *Eshelman* (1955) 133 Cal.App.2d 376.) The request by the prosecutorial team to avoid adjudication  
11 of liability would deprive CAW of those rights. The State Water Board must afford CAW a full and  
12 fair hearing on that issue.

13 **2. The Prosecutorial Team's Presumption That CAW Is Illegally**  
14 **Diverting Water Is Unsupported By Law And Ignores Order 95-10**

15 Surprisingly, in what appears to be a disregard for the Water Code and Order 95-10, the  
16 prosecutorial team contends, albeit without any evidence or legal support, that CAW can be subject  
17 to enforcement even if CAW complies with Order 95-10. (Prosecutorial Team Pre-hearing Brief,  
18 p. 1.) The State Water Board can issue a cease and desist order when it finds based on admissible  
19 evidence that one of the circumstances in subdivision (d) of Water Code section 1831 exists. The  
20 draft cease and desist order, cover letter, and prosecutorial team's pre-hearing brief all contend that  
21 CAW's continued diversions above 3,376 acre-feet per year are both a trespass and a violation of  
22 Order 95-10. That simply is not the case.

23 Order 95-10 is a "physical solution." "A 'physical solution' involves the application of  
24 general equitable principles to achieve practical allocation of water to competing interests so that a  
25 reasonable accommodation of demands upon a water source can be achieved." (*Imperial Irrigation*  
26 *Dist. v. State Wat. Res. Control Bd.* (1990) 225 Cal. App. 3d 548, 572 citing *Hutchins*, the  
27 California Law of Water Rights (1956) 351-354.) The California Supreme Court explained:

28 ///



1 With the small quantity of water available in this stream in the summer months, the  
2 trial court should thoroughly investigate the possibility of some such physical  
3 solution, before granting an injunction that may be ruinous to either or both parties.  
4 It must be remembered that in this type of case the trial court is sitting as a court of  
5 equity, and as such, possesses broad powers to see that justice is done in the case.  
6 The state has a definite interest in seeing that none of the valuable waters from any of  
7 the streams of the state should go to waste. Each case must turn on its own facts, and  
8 the power of the court extends to working out a fair and just solution, if one can be  
9 worked out, of those facts.

6 (*Rancho Santa Margarita v. Vail* (1938) 11 Cal. 2d 501, 560-61 (the Supreme Court supporting the  
7 application of a physical solution to resolve dispute involving users of surface water).) The State  
8 Water Board, through Order 95-10, struck that type of balance, implementing a practical allocation  
9 of water based on competing interests. (Staff Exhibit 2 (Order 95-10), pp. 38-44.)

10 Put most simply, the State Water Board authorized CAW to continue diversions up to  
11 14,106 acre-feet of water in exchange for CAW's performance of mitigation measures (many of  
12 which were proposed by the same non-party entities currently involve in this proceeding).<sup>2</sup> (Staff  
13 Exhibit 2 (Order 95-10), pp. 40-44.)

14 The State Water Board developed its equitable solution based, in part, on the following  
15 findings of fact:

- 16 ▪ The State Water Board staff had repeatedly told CAW that its diversions were not  
17 subject to the Board's jurisdiction. (Staff Exhibit 2 (Order 95-10), p. 38.)
- 18 ▪ [T]he total quantity of water which Cal-Am is presently using under legal rights is  
19 3,376 afa." (Staff Exhibit 2 (Order 95-10), p. 25.)
- 20 ▪ "Cal-Am is diverting about 10,730 afa from the Carmel River or its underflow  
21 without a valid basis of right." (Staff Exhibit 2 (Order 95-10), p. 25.)
- 22 ▪ "Cal-Am diversions have historically had an adverse effect on: (1) the riparian  
23 corridor along the river below RM 18.5, (2) wildlife which depends on riparian  
24 habitat, and (3) steelhead and other fish which inhabit the river." (Staff Exhibit 2  
25 (Order 95-10), p. 28.)

26  
27 <sup>2</sup> One of the terms and conditions requires CAW to implement conservation measures that have a goal of achieving 20  
28 percent conservation. (Order 95-10, pp. 40-41.) CAW is achieving that goal, and, as a result, is limiting its diversions  
of Carmel River water to no more than 11,285 acre-feet (20 percent of 14,106 acre-feet).

- 1           ▪       “Cal-Am cannot significantly reduce its extraction from the wells along the Carmel  
2 River. As previously stated, most of Cal-Am’s supply is provided by the wells along  
3 the river. The people and businesses on the Monterey Peninsula must continue to be  
4 served water from the Carmel River in order to protect public health and safety.”  
5 (Staff Exhibit 2 (Order 95-10), p. 37.)
- 6           ▪       “Cal-Am should be required to implement interim measures . . . In addition, Cal-Am  
7 should be required to implement other mitigation measures. Cal-Am should be  
8 required to mitigate the effect of its diversions until such time as it is able to obtain  
9 water from the Carmel River or other sources consistent with California water law.”  
10 (Staff Exhibit 2 (Order 95-10), p. 39.)

11           The above findings can only be interpreted as imposing a physical solution that allows CAW  
12 to continue to divert in excess of its water rights while it secures a new water source, (Staff Exhibit  
13 2 (Order 95-10), p. 40), provided CAW complies with those other terms and conditions imposed on  
14 it. (Staff Exhibit 2 (Order 95-10), pp. 40-44.) To find otherwise would make meaningless the  
15 practical allocation struck by the State Water Board in Order 95-10. Taking enforcement action  
16 against diverters who are not in violation of a State Water Board crafted physical solution would  
17 undermine the efficacy of the State Water Board adjudicative system. There would be no incentive  
18 to comply with a similar State Water Board order, if, at any time and without regard for compliance  
19 with the underlying order, the regulated entity or entities could be subject to an additional  
20 enforcement action. For these reasons, if the prosecutorial team believes CAW should be subject to  
21 a cease and desist order, the prosecutorial team must prove that CAW has not complied with Order  
22 95-10.

23           **B.       There Is No Reasonable Basis Advanced To Support Scope Expansion**

24           As noted previously, this proceeding has so far focused on a single issue – CAW’s  
25 compliance with Order 95-10. Nonetheless, the Sierra Club, the CalSPA, the Carmel Steelhead  
26 Association, California Salmon and Steelhead Association, and the Public Trust Alliance advance  
27 three claims to support their argument that this proceeding should be expanded. (Sierra Club Pre-  
28 hearing Brief, pp. 1-7; Carmel Steelhead Association Pre-hearing Brief, p. 2; California Salmon and

1 Steelhead Association Pre-hearing Brief, pp. 2-4, 5; Public Trust Alliance Pre-hearing Brief, pp. 3-  
2 7.) They argue that the State Water Board should balance again CAW's diversions of water from  
3 the Carmel River with potential impacts to public trust resources because: (1) the State Water  
4 Board has noticed this proceeding as such a public trust proceeding, (Sierra Club Pre-hearing Brief,  
5 pp. 1-7; Carmel Steelhead Association Pre-hearing Brief, p. 2; California Salmon and Steelhead  
6 Association Pre-hearing Brief, pp. 2-4, 5; Public Trust Alliance Pre-hearing Brief, pp. 3-7), (2) the  
7 State Water Board has the duty to re-evaluate the same public trust considerations made when it  
8 issued Order 95-10 (Sierra Club Pre-hearing Brief, pp. 1-7; Carmel Steelhead Association Pre-  
9 hearing Brief, p. 2; California Salmon and Steelhead Association Pre-hearing Brief, pp. 2-4, 5;  
10 Public Trust Alliance Pre-hearing Brief, pp. 3-7), and (3) the State Water Board simply has the  
11 authority to conduct such balancing. (Sierra Club Pre-hearing Brief, pp. 1-7; Carmel Steelhead  
12 Association Pre-hearing Brief, p. 2; California Salmon and Steelhead Association Pre-hearing Brief,  
13 pp. 2-4, 5; Public Trust Alliance Pre-hearing Brief, pp. 3-7.) None of those arguments support an  
14 expansion of the existing scope of this proceeding.

15 **1. The State Water Board Has Not Noticed A Public Trust Proceeding**

16 The Sierra Club and the Public Trust Alliance apparently disagree with the Hearing Officer  
17 and assert that this proceeding has been noticed as a public trust proceeding. (Sierra Club Pre-  
18 hearing Brief, pp. 1-7; Public Trust Alliance Pre-hearing Brief, pp. 3-7.) Those assertions are based  
19 on an incomplete read of the notice documents.

20 The Sierra Club relies upon Mr. Kassel's allegation that "Cal-Am's continued illegal  
21 diversions are causing continued harm to public resources of the Carmel River." (See Sierra Club  
22 Pre-hearing Brief, p. 2. See also Exhibit CAW-007 (Letter from James Kassel), p.1.) The Public  
23 Trust Alliance relies upon statements contained in the notice documents. The first statement is  
24 included in the proposed cease and desist order, and provides: "Cal-Am's unauthorized diversions  
25 continue to have adverse effects on the public trust resources on the Carmel River and should be  
26 reduced." (Public Trust Alliance Pre-hearing Brief, pp.1-2 (quoting Staff Exhibit 7 (Draft CDO), p.  
27 5).) The second statement is part of the Official Notice of Hearing. It states: "The draft CDO  
28 alleges that since 2000, CAW has illegally diverted at least 7,164 afa from the Carmel River and

1 that CAW's unauthorized diversions continue to have adverse effects on the public trust resources  
2 on the river." (Exhibit CAW-010 (Official Notice of Hearing), p. 2.) The Sierra Club's and Public  
3 Trust Alliance's reliance on the above-referenced sentences to support an argument that this is a  
4 public trust proceeding is misplaced.

5 The mere mention of "public resources" or the "public trust" does not notice a larger-scoped  
6 proceeding or cause the State Water Board to re-open issues previously adjudicated. The claim that  
7 a public trust proceeding is noticed ignores the context in which the sentences were written. The  
8 references to "public resources" and "public trust" must be read in context.

9 For example, Mr. Kassel references "public resources" after presenting his position on  
10 CAW's compliance with Order 95-10. He wrote:

11 Division staff determined that in the twelve years since Order 95-10 was adopted,  
12 Cal-Am has not complied with Condition 2 of that Order. Condition 2 requires Cal-  
13 Am to terminate its unauthorized diversions from the Carmel River. Since 1995,  
14 Cal-Am has annually diverted approximately 7,150 acre-feet from the Carmel River  
in excess of the legitimate water right amount recognized by the State Water Board  
in Order 95-10.

15 (Exhibit CAW-007 (Letter from James Kassel), p.1.) These statements are followed by Mr. Kassel  
16 writing: "Cal-Am's continued illegal diversions are causing continued harm to public resources of  
17 the Carmel River." Exhibit CAW-007 (Letter from James Kassel), p.1.)

18 The paragraph, when read in total, is structured in an "*if, then*" fashion. This interpretation  
19 is support by Order 95-10 findings. In Order 95-10, the State Water Board determined CAW's  
20 continued diversion of water from the Carmel River would affect fish and wildlife, unless CAW  
21 implemented the required mitigation measures. Thus, *if* CAW fails to satisfy Order 95-10  
22 mitigation, *then* public trust resources would be harmed. References to "public resources" or  
23 "public trust" in the draft cease and desist order and the Official Notice of Hearing are made within  
24 the same context as the references to those terms made by Mr. Kassel.<sup>3</sup> (Staff Exhibit 7 (Draft  
25 CDO); Exhibit CAW-010 (Official Notice of Hearing).) The Sierra Club and Public Trust Alliance  
26 have simply been misled by their isolated read of sentences in the relevant documents. They cannot

27 \_\_\_\_\_  
28 <sup>3</sup> As explained in detail above, the same is true with regard to statements of trespass. If CAW is complying with Order  
95-10, then it is diverting water with authority from the State Water Board.

1 be read to notify CAW that this proceeding will be one based on the public trust doctrine.

2 The Sierra Club also relies upon the first paragraph of the draft order proposed by  
3 Mr. Kassel to support its position. (Sierra Club Pre-hearing Brief, p. 2-4.) That paragraph explains:

4 The State Water Resources Control Board (State Water Board) is authorized under  
5 Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring  
6 California American Water (Cal-Am) to make further reductions in its unauthorized  
7 diversions from the Carmel River. The State Water Board issued Order WR 95-10  
8 (Order 95-10) in 1995, determining that a substantial portion of the diversions made  
9 from the Carmel River by Cal-Am is unauthorized. At that time, the State Water  
10 Board deferred enforcement action and instead established water conservation goals  
11 and other actions Cal-Am could take to reduce the effects of its diversions as it  
12 sought to obtain an adequate legal water supply. In the twelve years since Order 95-  
13 10 was adopted, Cal-Am has not terminated its unlawful diversions from the Carmel  
14 River. Therefore, the State Water Board is authorized to issue a CDO in accordance  
15 with Water Code section 1831(d). . . .

16 (Staff Exhibit 7 (Draft CDO), p. 1.)

17 This paragraph, however, provides no indication that the State Water Board would conduct a  
18 proceeding balancing between the diversions of Carmel River water and impacts of those diversions  
19 on public trust resources. (Staff Exhibit 7 (Draft CDO), p. 1.) It simply reflects the disputed  
20 positions of the prosecutorial team and CAW.

21 As explained in detail above, in Order 95-10, the State Water Board decided a practical  
22 allocation of water based on competing interests. (Staff Exhibit 2 (Order 95-10), pp. 38-44.) The  
23 State Water Board authorized CAW to continue diversions in excess of its water rights in exchange  
24 for CAW's performance of mitigation measures. (Staff Exhibit 2 (Order 95-10), pp. 40-41.) The  
25 Sierra Club participated in the proceedings that lead to Order 95-10, the litigation that followed, and  
26 the settlement reached by those litigating Order 95-10. (CAW Pre-hearing Brief, pp. 10-14.) The  
27 Sierra Club appears to be using general language to take a second bite at Order 95-10.

28 **2. No Evidence Supports The Assertion That Changed Circumstance  
Justify Re-Evaluation Of Impact To Public Trust Resources**

29 The California Salmon and Steelhead Association requests an expansion of this hearing,  
30 asserting there is a need to "re-open[] and amend[] Board Order 95-10." (California Salmon and  
31 Steelhead Association Pre-hearing Brief, p. 4.) Specifically, the California Salmon and Steelhead  
32 Association asserts:

1 New pertinent information since Board Order 95-10 regarding the harm and damages  
2 to threatened steelhead species and their critical habitat in the Carmel River resulting  
3 from unauthorized diversion and use of the state's water by the California American  
Water Company, and also the authorized pumping and use of the Carmel River by  
other parties.

4 (California Salmon and Steelhead Association Pre-hearing Brief, p. 3.) The California Salmon and  
5 Steelhead Association also posits:

6 The Board hearing must not be limited to 1994 because of new information. All up  
7 to date evidence (documents) through the year 2008 must be allowed into the hearing  
records by the Board for the re-opening of Board Order 95-10 . . .”

8 (California Salmon and Steelhead Association Pre-hearing Brief, p. 4.)

9 Common sense, principles underlying the Water Code, and the principles underlying  
10 doctrines of *res judicata* and *collateral estoppel* demand that the State Water Board not re-open  
11 Order 95-10 based on the mere circumstance of new data. Clearly, the development of data since  
12 the issuance of an order justified reopening of the order, the State Water Board would have been  
13 required to reopen Order 95-10 almost immediately after it was issued. Data are collected on a  
14 regular basis.

15 Further, if new data alone justified reopening decisions or orders, the time limitations  
16 imposed for petitions for reconsideration and the statute of limitations for filing petitions for writ of  
17 mandamus would be meaningless. (See Water Code §§ 1122, 1123, 1124, 1126; 23 Cal. Code  
18 Regs. § 768, 769.) Instead of filing petitions, an unhappy participant could simply seek to move the  
19 State Water Board to re-open the settled matter as quickly as it could develop or acquire new data.

20 Finally, for the reasons stated in CAW's Pre-hearing Brief, if new data alone were sufficient  
21 to reconsider a final decision or order, particularly after an order is litigated and settled with  
22 prejudice, the bar against re-litigating the same issues or claims imposed by the doctrines of *res*  
23 *judicata* and *collateral estoppel* would be meaningless. (See CAW Pre-Hearing Brief, pp. 10-14.)  
24 Again, in circumstances when those doctrines apply, a participant would be able to avoid their  
25 application by seeking reconsideration by the State Water Board simply by presenting data  
26 developed since the order issued.

27 Moreover, the data – in the form of the California Salmon and Steelhead Association's  
28 “submitted references” -- cannot be deemed sufficient to support an expansion of this hearing. As

1 explained in CAW's motion to strike, the California Salmon and Steelhead Association has not  
2 provided an adequate basis for the State Water Board to rely upon any of the documents cited as  
3 "submitted references." Also, even if it were adequate, the California Salmon and Steelhead  
4 Association has provided no specific references to any data that reveals effects of CAW's diversions  
5 that were not previously considered by the State Water Board in Order 95-10.

6 The person or entity advancing an argument maintains the burden to support the argument,  
7 with appropriate references, which includes something more than simply attaching documents to a  
8 pleading or through a general reference. (See Cal. Rules of Court, Rule 15(a); *People v. Woods*  
9 (1968) 280 Cal.App.2d 728, 731.) Others cannot be expected to undertake an independent search of  
10 the record for support for the argument. See *McCosker v. McCosker* (1954) 122 Cal.App.2d 498,  
11 500; *People v. Sanchez* (1922) 57 Cal.App. 133, 134.) The State Water Board, CAW, the  
12 prosecutorial team, and other non-party entity cannot be expected to do what the California Salmon  
13 and Steelhead Association was unwilling or unable to do. They should not have to sift through and  
14 compare all of the information in the "submitted references" and the record for Order 95-10.

15 Like the Sierra Club, the Public Trust Alliance claims changes since 1995 require the State  
16 Water Board to revisit Order 95-10. In its brief, the Public Trust Alliance states:

17 A crisis has developed and deepened in the Carmel watershed in the 13 years since  
18 the Board issued Order 95-10, requiring expeditious action within a relatively  
19 comprehensive legal framework. Bob Baiocchi describes clearly the effects on the  
20 Carmel River public trust resources . . . The urgency of the situation is an  
21 indispensable consideration in determining the adequacy of measures outlined in the  
22 Draft Cease and Desist Order. The Board should not permit any party to narrow the  
23 scope of the hearing so as to exclude the knowledge and full consideration of this  
24 crisis.

25 (Public Trust Alliance Pre-hearing Brief, p. 3.) This rhetoric from the Public Trust Alliance and the  
26 conclusions of Mr. Baiocchi, however, are not sufficient to justify an expansion. Once again, there  
27 is no basis to support a finding that any action by CAW has caused a "crisis" or an urgent  
28 "situation."

Both the California Salmon and Steelhead Association and the Public Trust Alliance believe  
an expansion of this proceeding is also required because the National Marine Fisheries Service  
listed the steelhead as threatened under the federal Endangered Species Act. (California Salmon

1 and Steelhead Association Pre-hearing Brief, p. 1; Public Trust Alliance Pre-hearing Brief, p. 2.)  
2 The listing of the steelhead as threatened is a regulatory action that does not warrant an expansion of  
3 this proceeding. Through Order 95-10, the State Water Board imposed terms and conditions  
4 intended to ensure CAW mitigated the effects of its continued diversion of water. (Staff Exhibit 2  
5 (Order 95-10), pp. 40-44.) Whether CAW has implemented the mitigation measures required under  
6 Order 95-10 may be one of the issues addressed in this hearing. Compliance with the federal  
7 Endangered Species Act is simply outside the jurisdiction of the State Water Board.

8 Finally, the Sierra Club suggests that the State Water Board should expand this hearing to  
9 address "continuing harm (since 1995)." (Sierra Club Pre-hearing Brief, p. 3.) In support, the  
10 Sierra Club quotes paragraph 8 of the draft cease and desist order. (Sierra Club Pre-hearing Brief,  
11 pp. 3.) There, the draft cease and desist order alleges that CAW is pumping water from a  
12 subterranean stream, which impacts fishery resources. (Sierra Club Pre-hearing Brief, pp. 3.) The  
13 Sierra Club raises nothing new. Once again, the manner in which CAW appropriates Carmel River  
14 water, its availability, and the impacts of CAW's diversions on fish and wildlife were all issues  
15 considered by the State Water Board during the hearing leading to and in Order 95-10. (Staff  
16 Exhibit 2 (Order 95-10), pp. 14-29.) The time for the Sierra Club to challenge Order 95-10 has long  
17 past. The only issue that should be before the State Water Board is CAW's compliance with Order  
18 95-10.

19 **3. The State Water Board Has The Authority, But Not The Duty To Re-**  
20 **Balance The Public Trust Resources**

21 The Sierra Club, the California Salmon and Steelhead Association, the Public Trust  
22 Alliance, and the Carmel Steelhead Association seemingly argue that the State Water Board must  
23 conduct a public trust proceeding because the State Water Board has the continuing authority to  
24 evaluate the effects of water diversions on public trust resources.<sup>4</sup> (Sierra Club Pre-hearing Brief, p.  
25 5; California Salmon and Steelhead Association Pre-hearing Brief, p. 1; Public Trust Alliance Pre-  
26

27 <sup>4</sup> As authority to support the State Water Board's consideration of impacts to public trust resources, non-party entities  
28 cite California Fish and Game Code section 5937, California Constitution Article X, Section 2 and/or *National Audubon Soc'y v. Superior Court of Alpine City* (1983) 33 Cal.3d 419.



1 hearing Brief, p. 4; Carmel Steelhead Association Pre-hearing Brief, p. 2.) CAW does not dispute  
2 the well-established legal principle that allows the State Water Board to maintain jurisdiction over  
3 authorized water diversions to consider the impact of the water diversions on public trust resources.  
4 However, having continued jurisdiction does not per se notice this hearing as a public trust  
5 proceeding.

6 For the reasons presented in CAW's Pre-hearing Brief and herein, this hearing is currently  
7 focused on whether CAW has violated Order 95-10. The circumstances now before the State Water  
8 Board cannot justify a separate public trust proceeding. When it issued Order 95-10, the State  
9 Water Board balanced CAW's diversions from the Carmel River against the effects of those  
10 diversions on public trust resources. (Staff Exhibit 2 (Order 95-10), pp. 40-44.) Through Order 95-  
11 10 and the resulting settlement of litigation (arguably resolved as late as 2002, when the State Water  
12 Board issued Order 2002-02 (State Exhibit 5), the State Water Board and the others involved  
13 (including the Sierra Club and the Carmel Steelhead Association) reached an agreement that CAW  
14 would be authorized to continue its diversions up to 14,106 acre-feet per year; provided that CAW  
15 diligently pursues alternative water supplies and implements mitigation measures. (Staff Exhibit 2  
16 (Order 95-10); Staff Exhibit 4 (Order 98-04); Staff Exhibit 5 (Order 2002-02).) Accordingly, the  
17 only appropriate question at this time is whether CAW has complied with Order 95-10.

18 **III. The State Water Board Should Exclude Non-Party Entities From This Proceeding**

19 **A. Status Of Non-Party Participation**

20 A number of non-party entities erroneously claim they have been granted status to  
21 participate in this proceeding. (Sierra Club Pre-hearing Brief, p. 1 ["As a party to the above-matter,  
22 Sierra Club submits this letter-brief . . ."]; California Salmon and Steelhead Association Pre-hearing  
23 Brief, p. 1 ["We have standing before the Board regarding Board Order 95-10 because of our joint  
24 ownership of said people's public trust steelhead assets of the Carmel River"].) Other non-party  
25 entities request they be allowed to intervene. (Division of Ratepayer Advocates Pre-hearing Brief,  
26 cover page ["DRA respectfully requests to be reinstated as a Participant to be Served with Written  
27 Testimony, Exhibits and Other Documents"]; City of Seaside Pre-hearing Brief, p. 1 ["Del Rey  
28 Oaks intends to request permission to submit a late notice of intent to appear as a party at the

1 hearing”].) The State Water Board has yet to grant any non-party entity status as an interested  
2 participant or participating party, other than to CAW and the prosecutorial team. (Exhibit CAW-  
3 011 (Information Regarding Appearance at Water Rights Hearings), p. 1.) At this time, CAW  
4 opposes the participation of all non-party entities.

5 The State Water Board has broad discretion whether to grant a non-party entity status as an  
6 interested participant or participating party. (Cal. Code of Regs, tit. 23, § 648.1 [“The criteria and  
7 procedures applicable to participation in a Board adjudicative proceeding as an interested person  
8 may be established in the hearing notice or by the presiding officer”].) However, the State Water  
9 Board should not grant an entity status as “interested” or otherwise allow intervention if: (1) the  
10 nonparty lacks a direct and immediate interest in the action, (2) the intervention will enlarge the  
11 issues in the litigation, or (3) the reasons for the intervention do not outweigh any opposition by the  
12 parties presently in the action. (Government Code § 11440.50 (made applicable through section  
13 648 to Title 23 of the California Code of Regulations.) (*See also Truck Ins. Exchange v. Superior*  
14 *Court* (1997) 60 Cal. App. 4th 342, 346; *Reliance Insurance Co. v. Superior Court* (2000) 84 Cal.  
15 App. 4th 383, 386.) Here, the facts require the State Water Board to deny all non-party entities the  
16 ability to participate in this proceeding.

17 **B. Non-Party Entities Should Not Participate In This Proceeding To Address**  
18 **Either Liability Or Remedy**

19 The non-party entities that filed notices of intent to appear are unable to demonstrate they  
20 have a direct or immediate interest in the question of liability, or, if they have such an interest, their  
21 reasons for seeking to intervene are outweighed by the prejudice that the intervention will cause to  
22 CAW. The non-party entities offer nothing more than what could be presented by either the  
23 prosecutorial team or CAW.

24 In this proceeding, the State Water Board, CAW, and the prosecutorial team are the only  
25 entities that have a direct or immediate interest in CAW’s compliance with Order 95-10. The non-  
26 party entities have not and are likely unable to prove they have a protectable interest related to  
27 CAW’s compliance with Order 95-10. The prosecutorial team is best situated to argue that CAW  
28 has not complied with Condition 2 of Order 95-10, and CAW is best situated to defend itself.

1 As to remedy, some non-party entities may have an interest in the potential remedies if the  
2 State Water Board finds CAW liable. Assuming *arguendo*, an interest in public trust resources  
3 were sufficient to allow participation, the prosecutorial team will present evidence on that issue. In  
4 particular, the prosecutorial team must be able to explain why it believes the remedy it seeks will  
5 protect trust resources. The prosecutorial team has identified two experts to presumably testify on  
6 the issue: Mr. Mark Stretars and Ms. Joyce Ambroseo. (Notice of Intent to Appear filed by the  
7 Prosecutorial Team.)

8 Non-party entities should concede the prosecutorial team is best suited to present evidence  
9 on what is the appropriate remedy. As stated by the Public Trust Alliance in its pre-hearing brief,  
10 “[i]n addressing the implications of an agency’s role as the trustee of natural resources and  
11 environmental values . . . it necessarily follows that the agency must act with diligence fairness and  
12 faithfulness to protect this particular public interest.” (Public Trust Alliance Prehearing Brief, p. 7.)  
13 Indeed, a presumption exists that the prosecutorial team will adequately advocate for the interests  
14 the State Water Board has a duty to protect. (*Forest Conservation Council v. United States Forest*  
15 *Service* (1995 9th Cir.) 66 F.3d 1489, 1499 (quoting *Pennsylvania v. Rizzo* (1976 3rd Cir.) 530 F.2d  
16 501, 505).)

17 Likewise, assuming *arguendo* an interest in the impacts of a remedy on the community were  
18 sufficient to allow participation, CAW is well situated to present evidence on those impacts. It will  
19 defend against the draft cease and desist order, including the interests of residents and businesses  
20 that depend on the water delivered by CAW. CAW and the local community share the goal of  
21 establishing a reliable water supply at the most reasonable prices available. If a remedy phase is  
22 held, CAW will coordinate with community leaders when developing its testimony.

23 Possibly more important, if the State Water Board were to allow non-party entities to  
24 participate in this proceeding, the proceeding will expand exponentially. The amount of evidence,  
25 number of witnesses, and post-hearing briefs would likely increase significantly. (See Notices of  
26 Intent to Appear.) As an example, non-party entities propose to present approximately 25 hours of  
27 testimony. (*Ibid.*) This testimony time does not include time for cross examination or rebuttal  
28 testimony. Allowing such participation would be a significant departure from the current structure

1 of the proceeding, which is composed of only two parties.

2 This type of gross expansion would likely occur even if the State Water Board were able to  
3 issue an order requiring collaboration by those with common positions or otherwise limiting their  
4 participation. The resulting change in the proceeding could impair the orderly conduct of the  
5 proceeding and would increase the burden on CAW and the prosecutorial team. The potential for  
6 this unbalanced burden is simply not worth the risk when weighed against any potential or limited  
7 interests of the non-party entities.<sup>5</sup>

8 For the above stated reasons, the interests of the non-party entities will be represented by  
9 CAW and the prosecutorial team. Therefore, given the limited or lack of significant benefit non-  
10 party entities would contribute, the State Water Board must find that their interest(s) do not  
11 outweigh the burden their participation would impose on CAW, the prosecutorial team, and the  
12 State Water Board.

13 **IV. Bifurcation Is Appropriate**

14 The prosecutorial team recognizes the utility of bifurcation, stating “bifurcation may be  
15 appropriate to enhance the efficiency of the hearing and streamline the presentation of evidence as  
16 to each of the two phases.” (Prosecutorial Team Pre-hearing Brief, p. 2.)<sup>6</sup> Nonetheless, the  
17 prosecutorial team opposes bifurcation on the sole ground that it is unnecessary. (Prosecutorial  
18 Team Pre-hearing Brief, p. 2.) That opposition is based on the prosecutorial team’s improper  
19 assumption that this proceeding should not concern a question of liability. (Prosecutorial Team Pre-  
20 hearing Brief, p. 2.)

21 Clearly, and as explained in detail above, CAW believes the State Water Board should not  
22 issue a cease and desist order. This proceeding necessarily requires a determination of liability and,  
23 depending on how the question of liability is resolved, may require a determination on remedy. As

24 \_\_\_\_\_  
25 <sup>5</sup> If the State Water Board nonetheless decided to allow non-party entities to participate in this proceeding, the State  
26 Water Board must exercise to the maximum extent practicable its authority under section 11440.50 of the Government  
27 Code. The State Water Board should limit involvement by non-party entities to specific issues, limit their involvement  
28 to presentation of a case in chief (no cross examination or rebuttal), require combined presentations, and exclude them  
from any settlement negotiations that might be pursued.

<sup>6</sup> The Sierra Club is the only non-party entity that also opposes bifurcation. The Sierra Club provides nothing to support  
its position. (Sierra Club Pre-hearing Brief, p. 7.)

1 that is the case, the only reasonable read of the prosecutorial team's pre-hearing brief is that it  
2 recognizes bifurcation would assist the State Water Board in conducting an expeditious hearing and  
3 maintaining a clear record in this proceeding. As such, CAW does not believe there is real  
4 opposition to bifurcation, given the existing scope of this proceeding.

5 **V. Statements By The Prosecutorial Team Regarding Delay Are Perplexing**

6 In its pre-hearing brief, the prosecutorial team writes:

7 If there is substantial delay in consideration of the proposed CDO to accommodate  
8 other proceedings or other agency reviews, the Prosecutorial team reserves its right  
9 to amend the draft CDO and/or to propose additional enforcement actions including  
10 but not limited to referral to the California Attorney General's Office for civil  
liability pursuant to Water Code section 1052(c), Business and Professions Code  
section 17200 et seq., or any other applicable statutes . . .

11 (Prosecutorial Team Pre-hearing Brief, p. 3.) These statements by the prosecutorial team are  
12 particularly perplexing to CAW.

13 First, the statements are of concern to CAW because they could be read as a warning; that if  
14 the prosecutorial team does not believe this proceeding is progressing as it desires, it will present  
15 new charges against CAW. CAW assumes the prosecutorial team did not intend the statements to  
16 be read in that manner. Indeed, if that were the intent, at a minimum, the attorneys on the  
17 prosecutorial team would run afoul of California Rules Professional Conduct, Rule 5-100.

18 Second, CAW has not advanced any position or argument to unnecessarily affect this  
19 proceeding, nor does CAW believe the prosecutorial team or any of the non-party entities has done  
20 so – in fact, CAW believes that bifurcation will expedite the proceeding by focusing testimony on  
21 CAW's conduct in the first instance. CAW has full faith the State Water Board will establish a  
22 process for this proceeding that will protect CAW's due process rights and result in an orderly  
23 resolution of the issue(s).

24 Third, if the proceeding is delayed to accommodate other proceedings or other agency  
25 reviews, the delay would result from a decision by the State Water Board. Why the prosecutorial  
26 team would modify the draft cease and desist order or seek additional enforcement actions against  
27 CAW makes little sense. The prosecutorial team suggests a circumstance when it would seek  
28 increased "penalties" against CAW. However, those circumstances would exist because of an

1 action by the State Water Board, and it would be the State Water Board that addresses the proposed  
2 increase in "penalties." (See Cal. Wat. Code, §§ 1052, 1845.)

3 Finally, the prosecutorial team is proceeding to hearing based on the notice and draft cease  
4 and desist order. Any change at this point or later in this proceeding could violate CAW's due  
5 process rights. CAW does not consider the "reserved rights" to be sufficient to allow a change in  
6 this proceeding. CAW objects to the statement on the basis that it is not adequate notice of some  
7 potential future change in this proceeding.

8 **VI. Briefs Filed By Non-Party Entities Include Augments and Information That Must Be**  
9 **Stricken From The Record For This Proceeding**

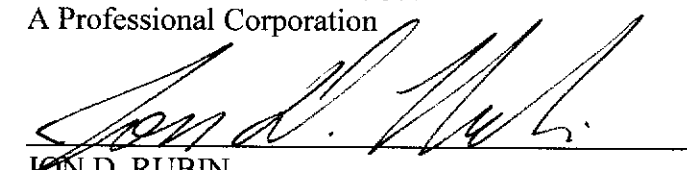
10 Through the pre-hearing briefing, the Hearing Officers authorized all parties and non-party  
11 entities to present their respective positions on procedural issues. (Exhibit CAW-018 (Prehearing  
12 Transcript), p. 43:23-44:11.) Despite what appeared to CAW to be clear direction, a number of  
13 non-party entities filed briefs that far exceeded what could be considered relevant to procedural  
14 issues. At this point in the proceeding – particularly when the State Water Board has not ruled on  
15 the status of the non-party entities and has not issued a ruling on procedural issues – irrelevant  
16 argument and unsupported or inadequately supported assertions must not be considered. CAW has  
17 thus filed concurrently herewith a motion to strike. CAW respectfully requests that the State Water  
18 Board decide that motion at or before the time it issues a decision on procedural issues.

19 Dated: April 23, 2008

Respectfully submitted,

DIEPENBROCK HARRISON  
A Professional Corporation

20  
21  
22 By

  
23 JON D. RUBIN  
24 Attorneys for California-American Water Company

1 **PROOF OF SERVICE**

2 I declare as follows:

3 I am over 18 years of age and not a party to the within action; my business address is 400  
4 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

5 On April 23, 2008, I served a copy of the foregoing document following document entitled  
6 **CALIFORNIA AMERICAN WATER OPPOSITION TO PRE-HEARING BRIEFS** on the  
7 following interested parties in the above-referenced case number to the following:

8 See Attached Service List of Participants

9  **BY MAIL**

10 By following ordinary business practice, placing a true copy thereof enclosed in a sealed  
11 envelope, for collection and mailing with the United States Postal Service where it would  
12 be deposited for first class delivery, postage fully prepaid, in the United States Postal  
13 Service that same day in the ordinary course of business as indicated in the attached  
14 Service List of Participants and noted as "Service by Mail."

12  **ELECTRONIC MAIL**

13 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the  
14 electronic mail transfer system in place at Diepenbrock Harrison, originating from the  
15 undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail  
16 address(es) indicated in the attached Service List of Participants and noted by "Service by  
17 Electronic Mail."

16  **BY FACSIMILE** at \_\_\_\_\_ a.m./p.m. to the fax number(s) listed above. The  
17 facsimile machine I used complied with California Rules of Court, rule 2003 and no error  
18 was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I  
19 caused the machine to print a transmission record of the transmission, a copy of which is  
20 attached to this declaration.

18  A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business  
19 practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the  
20 United States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in  
21 the United States Postal Service that same day in the ordinary course of business.

20  **BY OVERNIGHT DELIVERY**

21  Federal Express  Golden State Overnight  
22 Depositing copies of the above documents in a box or other facility regularly maintained  
23 by Federal Express, or Golden State Overnight, in an envelope or package designated by  
24 Federal Express or Golden State Overnight with delivery fees paid or provided for.

23  **PERSONAL SERVICE**

24  via process server  
25  via hand by

25 I certify under penalty of perjury under the laws of the State of California that the foregoing  
26 is true and correct and that this declaration was executed on April 23, 2008, at Sacramento,  
27 California.

28   
Jolanthe V. Onishi

1 CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER  
2 JUNE 19, 2008 HEARING  
3 SERVICE LIST OF PARTICIPANTS

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