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

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

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

2 This reply brief expands upon, and is to be read in conjunction with the Monterey
3 Peninsula Water Management District and Seaside Basin Watermaster Board’s Joint Closing
4 Brief. As detailed therein, the State Water Resources Control Board (“SWRCB” or “State Water
5 Board”) previously adopted Order No. WR 95-10¹ (“Order” or “Order 95-10”) concerning the
6 legal basis of California American Water’s (“Cal-Am” or “CAW”) right to divert water from the
7 Carmel River. James W. Kassel, the State Water Board Assistant Deputy Director for Water
8 Rights, thereafter issued a draft Cease and Desist Order (“draft CDO”) initiating further
9 compliance proceedings against CAW relating to its Carmel River water use. The CDO proposes
10 to ramp-down CAW diversions from the Carmel River to begin in Water Year (“WY”) 2009.²

11 Hearings on the CDO were held on June 19 – 20, July 23 – 25, and August 7 – 8, 2008.
12 Parties submitted concurrent closing briefs on October 9, 2008. The Monterey Peninsula Water
13 Management District (“MPWMD”) and the Seaside Basin Watermaster Board (“Watermaster”)
14 hereby submit this reply brief in response to the closing briefs submitted by other parties.

15 **ARGUMENT**

16 **I. The Prosecution Team Failed To Demonstrate That CAW Violated**
17 **Order 95-10, Condition 2, And/Or Water Code Section 1052.**

18 The State Water Board does not have sufficient evidence to support a finding that CAW
19 has violated Order 95-10, Condition 2, or Water Code section 1052. The evidence is
20 uncontroverted that CAW has diligently pursued an alternative water supply and at the same time
21 has met conservation goals since the issuance of Order 95-10.

22 The Division of Water Rights Prosecution Team (“Prosecution Team” or “Prosecution”)
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24 ¹ As set forth more fully in the Joint Closing Brief of the MPWMD and the Seaside Watermaster Board, the SWRCB
25 found CAW’s right to divert 3,376 afa from the Carmel River consists of 1,137 afa under pre-1914 appropriative rights, 60
26 afa under riparian rights, and 2,179 afa under License 11866 (Application 11674A). Petitions for Writ of Mandate
27 challenged Order 95-10 (*Monterey Peninsula Water Management District, California-American Water Company v. State*
28 *Water Resources Control Board*, Monterey County Superior Court Case No. M 40760.) To settle the litigation, the
SWRCB adopted Order WR 98-04 on February 19, 1998 amending Order 95-10. Further modification occurred on March
21, 2002, with the issuance of Order WRO 2002-0002. An earlier modification from April 18, 2001 was rescinded with
the 2002 order.

² The Prosecution Team suggests in its Closing Brief that the draft CDO be modified so required reductions can begin in
water year 2009 -2010.

1 contends that Order 95-10 is violated unless CAW diligently implements an alternative water
2 supply.³ This argument is without merit. The terms of the Order provide that CAW “shall
3 diligently implement one or more of the following *actions to terminate* its unlawful diversions
4 from the Carmel River . . .”⁴ (emphasis added.) Throughout the Order, the Board refers to a
5 requirement that CAW implement a plan to cease its diversions.⁵ The section of the Order titled
6 “Synopsis” directs CAW to implement measures to minimize harm to public trust resources.⁶
7 Several other sections provide that CAW “should be required to diligently develop and
8 implement a plan for obtaining water from the Carmel River or other sources consistent with
9 California water law.”⁷ Condition 2 requires CAW to diligently implement a plan to pursue
10 alternative sources of water supply. The Parties testified at length that CAW has diligently
11 complied with Condition 2. The Prosecution failed to present any evidence to the contrary.

12 Order 95-10 specifies conservation goals for CAW beginning in WY 1996.⁸ CAW
13 diversions have complied with those conservation goals for eleven of the past 12 years since the
14 adoption of the Order.⁹ CAW’s diversions from Carmel River sources have averaged 10,967
15 acre-feet of water per annum (“afa”). This is a reduction of 22% from pre-Order levels.¹⁰ The
16 Prosecution Team did not present any evidence that CAW failed to meet the conservation goals
17 set by the Order.

18 The Prosecution also failed to demonstrate that CAW violated Water Code Section 1052,
19 which provides that unauthorized diversion is a trespass. Order 95-10 establishes that CAW
20 possesses legal rights to withdraw 3,376 afa from the Carmel River. Recognizing the severe
21 impacts that immediate reductions to diversions would have on the community, Order 95-10
22 authorized CAW to continue to divert water in excess of its legal right, subject to specific
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24 ³ Prosecution Team’s Closing Brief, p. 5.

25 ⁴ Order, p. 40.

26 ⁵ *Id.*, Section 4.3, “Conclusions Regarding Cal-Am’s Claimed Water Rights,” pp. 24-25; Section 9.0, “Summary and
Conclusions,” pp. 38-39.

27 ⁶ *Id.*, Synopsis, p. 2.

28 ⁷ *Id.*, pp. 24-25, 38-39.

⁸ Exhibit MPWMD-1, p. 7 (Testimony of Darby Fuerst, Phase I); Exhibit MPWMD-DF2.

⁹ *Id.*, p. 8; Exhibit MPWMD-DF2.

¹⁰ *Id.*; Exhibit DF-2.

1 conditions in the Order. The Prosecution Team failed to present evidence to substantiate its
2 assertion that CAW violated these conditions. CAW's continued diversions are in compliance
3 in Order 95-10. Accordingly, no trespass could have occurred.

4
5 **II. Any Remedy For The Alleged Violations Must Balance The Interests
6 Of The Environment With Those Of The Community.**

7
8 **A. Appropriate Test**

9 The Prosecution alleges the proposed CDO is needed to protect public trust resources.¹¹ In
10 *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 446 (1983), the
11 California Supreme Court ruled the state has a duty to "balance the diverse interests" involved
12 when rendering water resource decisions, and to take into account public trust resources. *Id.* at
13 447. The Court noted, however, "as a matter of practical necessity, the state may have to approve
14 appropriations despite foreseeable harm to public trust uses." *Id.* at 446-447. The Court
15 recognized the need to divert water, even to the detriment of public trust resources,

16 "The population and economy of this state, depend upon the appropriation of vast
17 quantities of water for uses unrelated to in-stream trust values. California's
18 Constitution, its statutes, decisions and commentators all emphasize the need to
19 make efficient use of California's limited water resources: all recognize, at least
20 implicitly, that efficient use requires diverting water from in-stream uses. Now
21 that the economy and population centers of this state have developed in reliance
22 upon appropriated water, *it would be disingenuous to hold that such
23 appropriations are and have always been improper to the extent that they harm
24 public trust uses*, and can be justified upon theories of reliance or estoppel." *Id.*
25 at 446, (emphasis added).

26 "As a matter of practical necessity, the state may have to approve appropriations despite
27 foreseeable harm to public trust uses." *Id.* The State Water Board must strike a balance between
28 habitat and in-stream public trust values and the health, safety and welfare of the communities
served by CAW. The Prosecution Team's proposal ignores this balance.

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¹¹ Prosecution's Closing Brief, pp. 7 – 9.

1 **B. The Prosecution Bears The Burden Of Proving Its Proposed**
2 **Remedy Is Reasonable.**

3 The Prosecution Team concludes that its proposed remedy is reasonable and asserts that
4 other parties bear the burden to prove the CDO to be unreasonable.¹² This is not the proper legal
5 and evidentiary standard of proof. As stated in the MPWMD's Closing Brief, the Prosecution
6 bears the burden to prove its proposed remedy is reasonable. The Prosecution agrees that it holds
7 this burden, but then inexplicably contends the burden shifts to the parties asserting that the CDO
8 would have an unreasonable impact on public health and safety.¹³ The Prosecution claims that
9 other parties must prove their assertions by a preponderance of the evidence.¹⁴ The Prosecution
10 cites no legal basis for this contention. Neither statute nor case law support the contention that
11 the burden of proof regarding the reasonableness of the remedy shifts to CAW or the parties.
12 Simply stated, the burden of proof argument presented by the Prosecution is without merit. The
13 Prosecution bears the burden to prove the CDO is both warranted and reasonable.

14 **III. The Remedy Proposed By The Prosecution Team Is Not Reasonable.**

15 **A. Evidence Does Not Support A Finding By The State Water**
16 **Board That The Remedy Proposed By The Prosecution Team**
17 **Protects Public Trust Resources.**

18 The Prosecution failed to demonstrate that the CDO, as proposed, would benefit the
19 environment so as to justify the negative impacts on the health and safety of the community. In
20 fact, there has been substantial evidence to the contrary.

21 The Prosecution simply concludes its proposed CDO is reasonable.¹⁵ The Prosecution
22 contends a decrease in CAW diversions must mean more water, and more fish. However, the
23 Prosecution failed to provide any evidence to link its proposed reductions in water diversions to
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26 _____
27 ¹² *Id.*, p. 11.

28 ¹³ *Id.*, p. 2

¹⁴ *Id.*, p. 2.

¹⁵ *Id.*, p. 15.

1 increased surface flows usable by fish, wildlife or vegetation.¹⁶ The Prosecution's witnesses
2 lacked expertise and could not explain how modifications in CAW's extractions would affect
3 surface water flow. There was no credible evidence to explain the incremental effects of CAW
4 diversions on the Carmel River surface flows. No testimony was presented to quantify the length
5 of the stream bed that would remain wet, the additional days in which the river would flow, or
6 any other measure that would benefit the environment.

7 The Prosecution offered general statements about conditions affecting steelhead and
8 riparian habitat, but did not address the many, diverse factors which affect the abundance of
9 steelhead, including but not limited to third-party diversions, ocean conditions, natural disasters,
10 recreational fishing, natural predation and climate changes.¹⁷ The Prosecution acknowledged that
11 Order 95-10 identified certain negative effects of diversions, and set forth certain mitigations to
12 protect the resources, yet discounted testimony that such mitigations have helped improve
13 conditions.¹⁸

14 The magnitude and pace of its proposed diversion reductions significantly and adversely
15 impact the public, as set forth below, yet the Prosecution failed to demonstrate material
16 improvements to the riparian habitat would occur.

17
18 **B. The Prosecution Team's Proposal Jeopardizes Public Health
And Safety.**

19 The Prosecution Team was unable to present evidence that the CDO would preserve the
20 health and safety of the citizens of the Monterey Peninsula. In fact, the parties presented
21 substantial evidence to the contrary.¹⁹ The Prosecution Team's own witness testified that the
22 proposed diversion ramp-down jeopardizes public health and safety.²⁰

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¹⁶ Exhibit MPWMD-TC1, p. 12 (Testimony of Thomas Christensen, Phase II).

27 ¹⁷ Prosecution's Closing Brief, p.7; Hearing Transcript, Phase II, July 23, 2008, pp. 149 – 151.

28 ¹⁸ Prosecution's Closing Brief, pp. 7-8.

¹⁹ Hearing Transcript, Phase II, July 24, 2008, pp. 299-344; Hearing Transcript, Phase II, Volume IV, p. 1097.

²⁰ Hearing Transcript Phase II, July 23, 2008, pp. 56-57; Prosecution's Closing Brief, p. 12.

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1. The Prosecution Team’s Calculations Regarding The Amount Of Water Reasonably Necessary For The Monterey Peninsula Are Not Supportable.

The Prosecution Team contended that 75 gallons per person per day (“ppd”) is the amount of water reasonably necessary for “residential” use to satisfy public health and safety concerns.²¹ The Prosecution purported to base its calculations on Title 23, Section 697(b) of the California Code of Regulations.²² The MPWMD and other parties presented evidence that the residential water users in CAW’s main system already use less than that amount, averaging approximately 68 gallons ppd.²³ Thus, the area water use is well below the relevant standard set by state law.

The Prosecution calculated that 99 gallons ppd is needed for urban per capita use - which is all water use - including residential and other uses.²⁴ The Prosecution did not present evidence to support this calculation, but simply arrived at this figure by dividing the total water demand for WY 2007, 12,375 afa, by the population served, 111,500. Prosecution then illogically concludes that pursuant to the CDO, a reduction to 75 gallons ppd would be sufficient for all water uses. This conclusion conflicts with the Prosecution witness’s own testimony regarding the water reasonably necessary for residential uses. As support for its calculation, the Prosecution relies on testimony that CAW was able to reduce its per capita demand to 50 gallons ppd during the 1977-1978 drought periods.²⁵ During the hearings, however, in response to the Prosecution’s question as to how the 50 gallons ppd “drought” number was determined, Darby Fuerst testified that his understanding was that the number was based on CAW’s “physical ability to supply water,” and not on the quantity needed to meet minimum health and safety standards,²⁶

“Given the number of wells that they had and the water level in the aquifers from which those wells extracted from, as well as surface diversions which were occurring at that time, *this is the most water per person per day that could be*

²¹ *Id.*
²² Hearing Transcript Phase II, July 23, 2008, p. 55.
²³ Exhibit MPWMD-DF9A, p. 6 (Testimony of D. Fuerst, Phase II, July 23 – 25, 2008). Based on an average daily use of approximately 170 gallons per connection, and a census-weighted average of 2.54 residents per connection, daily residential use in the Monterey Peninsula area averages approximately 68 gallons ppd.
²⁴ Prosecution’s Closing Brief, p. 13.
²⁵ *Id.*; DF9A, p. 6.
²⁶ Hearing Transcript, Phase II, Volume IV, August 7, 2008, p. 1001.

1 *delivered without risking a service interruption.*²⁷ This number was only for
2 “single residential use.”²⁸ (emphasis added)

3 Mr. Fuerst testified that a reduction that would not jeopardize public health and safety would
4 “vary depending on the duration of that reduction. If it was for an indefinite amount of time, it
5 may be different than, for example, the 50 gallons per person per day that was imposed in 1977
6 for about 11 months because of that severe two-year drought.” Nonetheless, the Prosecution
7 contends that the community can “do it again” for a regulatory drought, with no finite duration –
8 even without any evidence regarding associated health and safety impacts. The Prosecution
9 asserts there is “no practical difference” between such a drought, which might span several years,
10 and a regulatory water shortage, which might be in place “forever.”²⁹ This raises the question of
11 sustainability – the Prosecution failed to prove that its proposed limit is viable as a regulatory
12 reduction.

13 The Prosecution’s argument is nonsensical – it contends, without any evidentiary support,
14 that the community should reduce its overall water use by approximately 25% *indefinitely*, even
15 if the reduction forces the available water to fall below the health and safety guidelines set by the
16 California Code of Regulations. And on what basis does the Prosecution support this assertion?
17 The singular fact that the community managed to reduce its use to a similar level on one prior,
18 limited occasion. The mandatory reductions set forth in the CDO would impose severe water
19 shortages throughout the CAW service area, and jeopardize health and safety. To comply with
20 the initial proposed 14 percent reduction in diversions, the average use would be reduced to 58
21 gallons ppd.³⁰ If development of replacement water were to be delayed beyond 2015, average
22 residential water use could decline to 32 gallons ppd.³¹ This amount is less than the 50 gallons
23 ppd drought level, and is half the amount that the Prosecution witness stated is “reasonably
24 necessary” for health and safety under state law.

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27 ²⁷ Phase II, Volume IV, August 7, 2008, p. 1001.

28 ²⁸ *Id.*

29 ²⁹ Mark Stretars, Hearing Transcript, Phase II, July 23, 2008, p. 107.

30 ³⁰ Exhibit MPWMD-DF9A, p. 6 (Testimony of D. Fuerst, Phase II, July 23 – 25, 2008).

31 ³¹ *Id.*

1 Further, the Prosecution failed to address water entitlements previously recognized by the
2 State Water Board. The Pebble Beach Company holds a vested property right and interest in
3 water entitlements from CAW in the amount of 380 afa. The State Water Board previously
4 stated that CAW's diversions from the Carmel River to serve this Entitlement are not subject to
5 the limits of Order 95-10.³² The State Board previously represented it "will use its enforcement
6 discretion to not penalize CAW for excess diversions from the Carmel River as long as their
7 diversions do not exceed 11,285 afa, plus the quantity of potable water provided to Pebble Beach
8 Company.³³ Despite such evidence, the Prosecution fails to address entitlements in its
9 calculations for reasonably necessary amounts of water for the community.

10
11 **2. The Prosecution Team Presented Flawed Calculations
12 Regarding Water Available To The Community.**

13 To determine water required for community's needs, the Prosecution simply multiplied
14 the estimated population (111,500 people) by its proposed "ration" of 75 gallons ppd. The
15 Prosecution thus determined 9,367 afa is the amount "necessary" for public health and safety
16 needs. To determine the ultimate limit on CAW diversions, the Prosecution subtracted the
17 amount of water assumed to be available from alternative sources of supply. For example, from
18 9,367 afa, the Prosecution subtracted 3,504 afa it deemed available from the Seaside
19 Groundwater Basin, 300 afa available from Sand City desalination, and 504 afa from
20 unaccounted-for losses. The Prosecution thus concludes CAW diversions from the Carmel River
21 can be limited to 5,014 afa.³⁴

22 The Prosecution's analysis is flawed. The amount available from Sand City desalination,
23 once built, decreases over time from 300 afa to 94 afa. Also, testimony indicates "unaccounted-
24 for losses" do not bear a one-to-one correspondence with added amounts of physical water. Most
25 importantly, the Prosecution completely discounts the Seaside Basin adjudication and the
26 mandated, progressive reductions that also affect the community's water supply. The synergistic

27 ³² See Footnote 2 of Order 95-10; Closing Brief of Pebble Beach Company.

28 ³³ Exhibit PBC-7, p. 2.

³⁴ Mark Stretars, Hearing Transcript, Phase II, July 23, 2008, p. 56.

1 effect of the CDO and the Seaside Basin adjudication would be unprecedented. Miraculously,
2 the Prosecution simply concludes the court-ordered reductions are “avoidable” in some instances
3 and as such, are not relevant.³⁵ The instances in which reductions are to be mandated, however,
4 require specific conditions to be met; namely, procurement of alternative sources of water
5 supply.³⁶ Amazingly, the Prosecution also fails to factor in that seawater intrusion would require
6 reduction or cessation of production from wells within the Seaside Basin, including CAW’s
7 largest production well.³⁷

8 The Prosecution fails to consider timelines within which alternative water supply projects
9 will or can be completed, and ignores reliability and variability for those sources.
10 Implementation of any alternative water supply source is a “project” under the California
11 Environmental Quality Act (“CEQA”), requiring environmental review.³⁸ The Prosecution
12 testified that the timeline for implementation of a water project is, in part, dependent upon
13 investigation of feasible alternatives to the project.³⁹ Nonetheless, the Prosecution has not shown
14 that feasible alternatives have been analyzed under CEQA. This underscores that the
15 Prosecution’s timeline is not reasonably achievable.

16
17 **C. An Unreasonable Remedy Cannot Be Cured By Allowing
Relief At A Later Date.**

18 The Prosecution justifies its unreasonable reduction schedule by offering that “if
19 circumstances beyond CAW’s control change, and compliance with the reduction schedule
20 becomes unattainable without endangering the health and safety of CAW’s customers,” then
21 CAW can simply seek relief from the Division of Water Rights.⁴⁰ This relief would be limited,
22 however, as CAW would be required to meet a four-part test that demonstrates: (1) an urgent
23 need for water; (2) water can be diverted without injury to any lawful user of water; (3) water
24 may be diverted and used without unreasonable effect upon fish, wildlife, or other instream
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26 ³⁵ Prosecution’s Closing Brief, p. 15.

27 ³⁶ *Id.*

28 ³⁷ Exhibit SBW-2, p. 3 (Declaration of Dewey Evans, Phase II).

³⁸ CEQA Guidelines 15378; Public Resources Code section 21000 et. seq.

³⁹ Mark Stretars, CDO Transcript Phase II, July 23, 2008, p. 97; CEQA Guidelines 15126.6.

⁴⁰ Prosecution’s Closing Brief, p. 17.

1 beneficial uses; and (4) the proposed diversion and use are in the public interest.⁴¹ “Urgent need”
2 is a high standard, and is defined as “a sudden, unexpected occurrence, involving a clear and
3 imminent danger, demanding immediate action to prevent or mitigate the loss of, or damage to
4 life, health, property, or essential public services.” This four-part test is illusory. It presents a
5 nearly impossible threshold for relief. Further, the Prosecution fails to provide an expedited
6 process to seek relief from the schedule.

7 The Prosecution asks the State Water Board to impose an untested and unsupported
8 remedy, without showing that the remedy is reasonable or sustainable. The Prosecution justifies
9 the remedy by claiming the burden should shift to the parties to demonstrate, by a preponderance
10 of evidence, that the remedy will have a negative impact on health and safety.⁴² The Prosecution
11 claims that CAW may later seek relief from the remedy provided it can demonstrate that the
12 community cannot comply with the CDO.

13 CAW does not use water, the community does. The State Water Board cannot impose
14 water reductions upon the community unless and until they are shown to be reasonable and
15 without adverse health and safety effects. The Prosecution’s proposed ramp-down is aggressive
16 and experimental. In fact, it is punitive. The ramp-down jeopardizes the public as it is well
17 below health and safety standards set by state law. The proposed option to seek modification at a
18 later date is not sufficient. The remedy imposed by the State Water Board must be reasonable in
19 the first instance, and the community should not be exposed to potential damage or loss of life, or
20 health in order to challenge the CDO.

21 **IV. Other Remedies Are More Appropriate.**

22 The parties testified that other remedies are more appropriate than the CDO. Regulatory
23 oversight of CAW can protect resources until an alternative water source is in place. The
24 Prosecution acknowledged that since the issuance of the Order, subsequent measures regarding
25 adjustments in diversions have been developed and implemented to mitigate impacts to the
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28 ⁴¹ *Id.*, p. 18.

⁴² *Id.*, p. 2.

1 steelhead. CAW's extractions are governed by a memorandum of agreement among the
2 MPWMD, the California Department of Fish and Game ("CDFG"), with participation by the
3 National Marine Fisheries Service ("NMFS").⁴³ CAW has also been required to develop a
4 quarterly water supply budget to specify the quantity of water it will produce each month, from
5 each production source, to meet customer demand and comply with regulatory constraints.⁴⁴

6 There are better means to protect the environment and minimize effects of diversions than
7 the ramp-down proposed in the CDO. The MPWMD set forth specific mitigation measures
8 available to protect public trust resources.⁴⁵ MPWMD staff testified that other mitigations can
9 benefit the Carmel River such as dredging of the Los Padres Reservoir ("LPR"), and expansion
10 of its Aquifer Storage and Recovery program ("ASR").⁴⁶ Such measures make water available
11 for focused use in the drier six months of the year, unlike cutbacks in CAW diversions and
12 consumer water consumption, which have to be distributed over the whole water year.⁴⁷
13 Furthermore, a number of "secondary actions" are available including re-diverted reductions,
14 release of bypass water from the Carmel Area Wastewater District Micro-filtration/Reverse
15 Osmosis process, and filtering and chilling intake water to the Sleepy Hollow Rearing Facility to
16 increase survival of rescued fish.⁴⁸

17 There is simply no need for urgent action manifested by an untested ramp-down, without
18 an alternative water source in place. These interim measures can provide a lifeline for public
19 trust resources.

20 CONCLUSION

21
22 The Prosecution Team failed to meet its burden to prove that CAW violated Order 95-10,
23 Condition 2, and/or Water Code Section 1052. Testimony showed that CAW has diligently

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25 ⁴³ Hearing Transcript Phase II, Volume IV, pp. 926-927.

26 ⁴⁴ These budgets are developed cooperatively by staff from CAW, MPWMD, California Department of Fish and Game
27 (CDFG), and National Marine Fisheries Service (NMFS), along with the United States Fish and Wildlife Service
28 ("USFWS"), and are approved by the MPWMD Board. Testimony of Darby Fuerst, Phase I, pp. 5, 9; Exhibit DF-4.

⁴⁵ *Id.* at 7; Exhibit MPWMD-DF11.

⁴⁶ Exhibit MPWMD-KU1, p. 7 (Testimony of Kevan Urquhart, Phase II).

⁴⁷ *Id.*

⁴⁸ *Id.* at pp. 12-13.

1 pursued alternative water supplies. CAW has consistently met the conservation goals specified
2 in the Order, averaging diversions of 10,967 afa during the past twelve years. No violation has
3 been established to warrant issuance of a CDO.

4 If issued, any CDO must balance the needs of the environment and the health and safety
5 needs of the community. The Prosecution failed to make a quantitative showing that the CDO
6 would significantly improve the environment for stream-dependent fish, wildlife or vegetation.
7 However, testimony demonstrates that the CDO would significantly and negatively impact the
8 health and safety of the community. The CDO proposes to reduce the community's water use to
9 a level well below that established by state law. The reduction is not based upon any evidence.
10 The community was able, more than thirty years ago, to reduce its water use to a similar level, for
11 a single eleven-month period in response to an extraordinary physical drought. There was no
12 evidence presented, however, that the community can now sustain such an extreme reduction, for
13 an unknown period of time. There was no analysis as to the health and safety impacts that may
14 result from such water restrictions.

15 As drafted, the amounts and timetable to reduce CAW's diversions from the Carmel River
16 are not realistic or achievable. The CDO imposes a series of significant ramp-downs without
17 considering that alternative water supply sources may not be available. Further, the CDO fails to
18 consider factors such as reliability and variability of alternate water sources, impending court-
19 ordered reductions of water from the Seaside Basin, or the continuing threat of seawater
20 intrusion. Lastly, better means are available to protect the environment and minimize the effects
21 of the CAW diversions.

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

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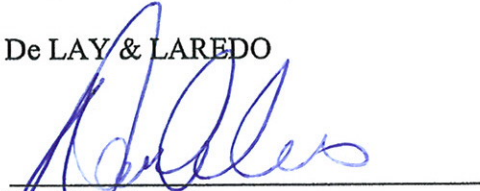
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Dated: November 7, 2008

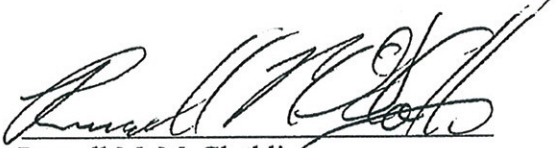
Respectfully submitted,

De LAY & LAREDO



David C. Laredo
General Counsel
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District

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Russell M. McGlothlin
Attorneys for
Seaside Basin Watermaster Board

1 PROOF OF SERVICE

2

3 I, Wanda Gooch, declare as follows:

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

- 7 • **REPLY BRIEF OF THE MONTEREY PENINSULA WATER MANAGEMENT**
8 **DISTRICT AND THE SEASIDE BASIN WATERMASTER BOARD**


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

11 *Please see attached list*

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

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

19 I declare under penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct and that this declaration was executed on November 7, 2008, at
Pacific Grove, California.

21
22 
23 _____
Wanda Gooch

CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
SERVICE LIST

Service by Electronic Mail:

California American Water
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Water Rights Prosecution Team
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rsato@waterboards.ca.gov

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Sierra Club – Ventana Chapter
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Calif. Sportfishing Protection Alliance
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Colton Hall
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Max Gomberg
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Service by U.S. Mail:

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