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8 BEFORE THE CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

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

**LIMITED OBJECTION BY  
CALIFORNIA AMERICAN WATER  
COMPANY TO THE REQUEST OF  
CALIFORNIA SALMON AND  
STEELHEAD ASSOCIATION TO  
PARTICIPATE TELEPHONICALLY**

14 **I. Introduction**

15 NOTICE IS HEREBY GIVEN that California American Water Company ("CAW") objects  
16 to the request of California Salmon and Steelhead Association ("CSSA") to participate by telephone  
17 in all aspects of this proceeding, including making opening and closing statements, motions,  
18 objections, examining witnesses, and cross-examining witnesses. That request presents a  
19 considerable demand, particularly given CSSA's limited interest in this proceeding. CSSA was not  
20 thrust into this proceeding; it voluntarily sought to intervene.

21 Allowing telephonic participation by CSSA invites logistical complications that create  
22 unique appeal risks. By dividing the proceeding so some participants are in one location, and other  
23 participants are in another location, the danger of procedural and transcription errors and omissions  
24 increases significantly. As an illustration, a reconsideration or appeal could lie from a claim of an  
25 unrecorded objection, even if none was ever made. For these and other reasons stated below, CSSA  
26 should not be allowed to participate in all aspects of this proceeding by telephone.

27 Notwithstanding, Mr. Baiocchi and the hearing officers indicated that CSSA might only seek  
28 to have Mr. Baiocchi testify and be available for cross-examination by telephone, and that CSSA

1 would otherwise be represented by a person who would appear in person at the hearing. (See,  
2 respectively, March 19, 2008 Pre-Hearing Conference and the Hearing Officer's May 16, 2008  
3 letter). If that more accurately reflects CSSA's request, then CAW might be willing to forego its  
4 current objections. However, before CAW is able to do that, it will be necessary for CAW to  
5 review Mr. Baiocchi's testimony.

6 A review is necessary to determine whether Mr. Baiocchi's testimony is necessary to the  
7 proceeding, would be duplicative of the testimony of the four other witnesses identified in CSSA's  
8 Notice of Intent to Appear ("NOI"), or could be presented by one of CSSA's other witnesses.  
9 Understanding the scope of Mr. Baiocchi's testimony would also allow CAW to determine the  
10 extent, it would be prejudiced, if at all, by not having the ability cross-examine and impeach the  
11 witness with the same efficacy as if he were testifying in person. In short, only a review of Mr.  
12 Baiocchi's testimony will allow CAW (and the State Water Board) to balance the extent of harm  
13 CAW, possibly others might, and the hearing process may suffer against the "indispensable" nature  
14 of Mr. Baiocchi's testimony. For these reasons, CAW respectfully reserves its right to object to the  
15 request for telephonic testimony, if that is the request CSSA is making, until after CSSA files Mr.  
16 Baiocchi's written testimony.

## 17 **II. Background**

18 On or about March 12, 2008, CSSA filed a NOI in this proceeding. The NOI identified five  
19 individuals whose testimony CSSA intends to introduce. (CSSA NOI, p. 1.) According to the NOI,  
20 the testimony will last a minimum of three hours on direct examination and will cover the following  
21 topics:

- 22 • Carmel River Steelhead Resources;
- 23 • California Steelhead Resources;
- 24 • Carmel River Steelhead Discovery;
- 25 • Carmel River Steelhead; and
- 26 • Carmel River Steelhead.

27 (*Ibid.*) The NOI indicates that Mr. Baiocchi's testimony will address "Carmel River Steelhead  
28 Discovery." (*Ibid.*)

1 The NOI declared CSSA's intention to participate in the proceeding telephonically and  
2 potentially through the presentation of live witnesses. (*Ibid.*) At the March 19, 2008, pre-hearing  
3 conference, Mr. Baiocchi appeared by telephone on behalf of CSSA. Mr. Baiocchi asked the  
4 hearing officers to consider allowing "disabled people to testify at the hearing without being  
5 present." (Exhibit CAW-018 (Certified Pre-hearing Conference Transcript ("Pre-hearing  
6 Transcript"), p. 31, ln. 22 to p. 32, ln. 7.) Thereafter, on May 16, 2008, the hearing officers issued a  
7 letter that indicated their tentative inclination to allow Mr. Baiocchi to testify via telephone. The  
8 hearing officers suggested, if there was objection to allowing telephonic testimony, a "deposition"  
9 could provide an alternate means for obtaining Mr. Baiocchi's testimony.<sup>1</sup> But the full extent of  
10 CSSA's request was revealed a few days later when, on or around May 20, 2008, CSSA filed and  
11 served a response to the hearing officers' May 16 letter. In the May 20 letter, CSSA expressed its  
12 intention not only to have Mr. Baiocchi testify via telephone, but to have Mr. Baiocchi participate in  
13 all aspects of the proceeding by telephone, including making opening and closing statements,  
14 motions, objections and cross-examining witnesses. Such activities go far beyond the submission-  
15 of-testimony-by-telephone request that Mr. Baiocchi raised on behalf of CSSA at the March 19,  
16 2008, pre-hearing conference and which the hearing officers' May 16 letter contemplated. This  
17 objection follows.

### 18 **III. Legal Argument**

19 Allowing telephonic participation for all aspects of the proceeding will undermine the fair  
20 and orderly nature required by the State Water Board's rules and procedures. (23 Cal. Code Regs. §  
21 648 *et seq.*) CSSA's broad request to participate in the proceeding entirely by telephone is therefore  
22 anything but benign.

#### 23 **A. CSSA's Telephonic Participation in the Proceeding Cannot be Allowed Because of the** 24 **Nature of the Proceeding and the Unique Appeal Risks.**

25 In California civil proceedings, telephonic appearances are allowed only for "appropriate  
26 conferences, hearings, and proceedings." (Cal. Code Civ. Proc. § 367.5(a) (emphasis added); Cal.  
27

28 <sup>1</sup> See sections III.A and III.C, *infra.*, for concerns CAW has with participation by deposition.

1 Rules of Court, Rule 3.670(a) (emphasis added).) Absent a specific order to the contrary, “personal  
2 appearance is required . . . [at] trials and hearings at which witnesses are expected to testify.” (Cal.  
3 Rules of Court, Rule 3.670(d); see Cal. Code Civ. Proc. § 367.5(b).) These rules establish the  
4 presumption and general principle in California that telephonic appearances are not allowed at  
5 testimonial and evidentiary proceedings like the forthcoming one. CSSA was granted the  
6 opportunity to participate in the proceeding, and it must therefore comply with the appearance rules  
7 applicable to this proceeding.<sup>2</sup>

8 Furthermore, allowing participation in the core proceeding from a remote location sets the  
9 proceeding up for unnecessary appellate issues. If a party participates telephonically, that  
10 necessarily means the record on the proceeding will be created from information from two wholly  
11 separate locations – the hearing officers, parties, other participants, and court reporter in one area,  
12 and the out-of-area participant in another. That arrangement creates opportunity for procedural and  
13 transcription errors and omissions that would not exist if everyone were in the same location.  
14 Opportunities to object could be missed. So, too, could the introduction or use of important  
15 evidence. A simple technical difficulty could beget a procedural nightmare. The reconsideration  
16 and court “appeal” risks are simply too high to permit CSSA’s participation by telephone.

17 **B. Assuming, *Arguendo*, that CSSA is Only Requesting Mr. Baiocchi Testify by**  
18 **Telephone, Fairness Requires that Telephonic Testimony be Contingent Upon the**  
19 **Necessity of the Testimony and Burden Testifying by Telephone Causes To Others.**

20 In proceedings where witnesses are expected to testify and evidence is expected to be  
21 submitted – including State Water Board proceedings – parties are entitled to controvert the  
22 evidence offered against them. California Government Code section 11513, incorporated into the  
23 State Water Board’s rules and regulations, provides that:

24 ///

25 <sup>2</sup> CSSA’s reference to the Americans with Disabilities Act (“ADA”) in support of its request is unavailing. Assuming  
26 Mr. Baiocchi’s medical condition affords him protections under the ADA, that law does not require “modifications  
27 [that] would fundamentally alter the nature of [a public agency’s] service, program, or activity . . . .” (United States  
28 Department of Justice, American with Disabilities Act: Title II Technical Assistance Manual, Sec. II-3.6100, available  
at <http://www.ada.gov/taman2.html>, as of May 21, 2008.) Instead, the ADA requires a public entity to “reasonably  
modify its policies, practices, or procedures to avoid discrimination.” A public entity “must maintain in working order  
equipment and features of facilities that are required to provide ready access to individuals with disabilities.” (*Id.* at  
Sec. II-3.10000.)

1 Each party shall have these rights: to call and examine witnesses, to introduce  
2 exhibits; to cross-examine opposing witnesses on any matter relevant to the issues  
3 even though that matter was not covered in the direct examination; to impeach  
4 any witness regardless of which party first called him or her to testify; and to rebut  
5 the evidence against him or her.

6 (Cal. Gov. Code § 11513(b); 23 Cal. Code Regs. § 648(b).) But allowing CSSA's witnesses to  
7 testify telephonically will deny CAW the ability to cross-examine the witnesses as if they were  
8 present at the hearing. For instance, CAW, the other party and participants, and the State Water  
9 Board could not ascertain whether CSSA's witnesses' testimony was theirs alone, which is  
10 something they would be able to determine in an open proceeding. Nor would CAW be able to use  
11 documentary evidence for effective cross-examination; CAW would not be able to direct the  
12 attention of CSSA's witness to specific evidence like it could if they were present, and CAW could  
13 not rely on any rebuttal or other evidence that CSSA's witnesses might not have at their immediate  
14 disposal. These are just a few scenarios that underscore a need to be able to confront adversaries in  
15 person. CAW will be stripped of rights under the State Water Board's rules and regulations if  
16 CSSA's witnesses are allowed to testify from afar. The extent of harm that CAW would suffer as a  
17 result of its loss of those rights cannot be determined until CSSA submits the testimony of Mr.  
18 Baiocchi.

19 Likewise, the importance of Mr. Baiocchi's testimony cannot be determined until it is filed.  
20 CSSA's NOI indicates that Mr. Baiocchi is one of five individuals who will testify on one of two  
21 general subjects: California Steelhead and Carmel River Steelhead. At this point, CAW cannot  
22 determine if Mr. Baiocchi's testimony would be unique in any respect from the testimony of  
23 CSSA's other witnesses. In addition, CAW cannot determine if Mr. Baiocchi's testimony can be  
24 absorbed and presented by one of the other CSSA witnesses who presumably can travel to  
25 Sacramento to testify in person. Without being able to answer these questions, as well as others, the  
26 probative value of the testimony cannot be weighed against the loss of rights CAW would suffer by  
27 not having Mr. Baiocchi present for testimony or cross examination.

27 ///

28 ///

1 **C. There are Insufficient Details Regarding the Alternatively Proposed “Deposition”**  
2 **Process to Enable CAW to Assess and Comment on its Propriety.**

3 Assuming it is necessary to the proceeding, the hearing officers’ May 16 letter suggested a  
4 “deposition” could be used to obtain Mr. Baiocchi’s testimony. It is uncertain, however, how a  
5 traditional deposition would achieve the same function as a State Water Board hearing, where the  
6 hearing officers and hearing team are among those who have the opportunity to question witnesses.  
7 It is equally uncertain when the proposed deposition would occur. Should it take place after the  
8 hearing has begun? Should it take place at CSSA’s normal time to address the State Water Board?  
9 (23 Cal. Code Regs., § 648.5.) Should the deposition be allowed to take place before the hearing  
10 commences even if the deposition involves evidence that the State Water Board may later exclude?

11 Furthermore, whether the suggested deposition would lead to the establishment of a satellite  
12 proceeding where the parties, other participating entities, the hearing team, and the hearing officers  
13 are involved, or whether the intention is a traditional deposition, the costs to participate in the event  
14 could be substantial. As an example, according to mapping web sites, Graeagle, California, the  
15 mailing city for Mr. Baiocchi, is approximately 150 miles from downtown Sacramento, and would  
16 take nearly three hours to reach by car (six hours round trip). Who would bear the travel costs (no  
17 less the costs for the forum at which the deposition would occur, the reporter, etc.)? These  
18 questions have not yet been answered. (Even more have yet to be posed.) Ultimately, these  
19 presently unaddressed issues render CAW unable to acquiesce or object to the use of a deposition to  
20 obtain Mr. Baiocchi’s testimony.

21 **IV. Conclusion**

22 CSSA is a voluntary participant in this proceeding and has control over who will represent  
23 its interests. It is wrong, therefore, for an organization in CSSA’s position to require the proceeding  
24 be tailored around its specific needs, when the requested accommodations will prejudice the real  
25 parties to the proceeding. Remote participation in all aspects of the proceeding is fraught with risk.  
26 CAW is sympathetic to Mr. Baiocchi’s medical condition, but CAW cannot be compelled to forfeit  
27 its rights. Accordingly, the hearing officers should refuse CSSA’s request to participate in all  
28 aspects of this proceeding by telephone.

1 Further, if the hearing officers consider a more narrow request – whether Mr. Baiocchi could  
2 testify by telephone – for the reasons stated above, they should defer a decision until CSSA submits  
3 Mr. Baiocchi’s written testimony. Information currently before the State Water Board fails to  
4 support a decision by the hearing officers to grant such a requested. If the hearing officers agree to  
5 defer a decision, CAW respectfully requests the opportunity to raise objections to the submitted  
6 testimony prior to a final ruling on the issue.

7 Dated: May 23, 2008

Respectfully submitted,

8 DIEPENBROCK HARRISON  
9 A Professional Corporation

10 By



11 JON D. RUBIN

Attorneys for California-American Water Company

**PROOF OF SERVICE**

1 I declare as follows:

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

4 On May 23, 2008, I served a copy of the foregoing document entitled **LIMITED**  
5 **OBJECTION BY CALIFORNIA AMERICAN WATER COMPANY TO THE REQUEST**  
6 **OF CALIFORNIA SALMON AND STEELHEAD ASSOCIATION TO PARTICIPATE**  
7 **TELEPHONICALLY** on the following interested parties in the above-referenced case number to  
8 the following:

9 See Attached Service List of Participants

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

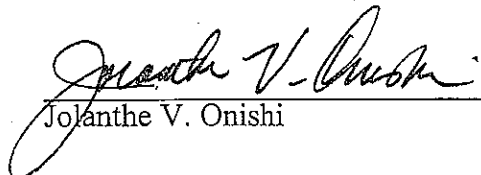
13  **ELECTRONIC MAIL**  
14 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the  
15 electronic mail transfer system in place at Diepenbrock Harrison, originating from the  
16 undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail  
17 address(es) indicated in the attached Service List of Participants and noted by "Service by  
18 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.  
21  A true and correct copy was also forwarded by regular U.S. Mail by following  
22 ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for  
23 collection and mailing with the United States Postal Service where it would be deposited  
24 for first-class delivery, postage fully prepaid, in the United States Postal Service that  
25 same day in the ordinary course of business.

21  **BY OVERNIGHT DELIVERY**  
22  Federal Express  Golden State Overnight  
23 Depositing copies of the above documents in a box or other facility regularly maintained  
24 by Federal Express, or Golden State Overnight, in an envelope or package designated by  
25 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 May 23, 2008, at Sacramento,  
27 California.

  
\_\_\_\_\_  
Jolanthe V. Onishi



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

4 Service by Electronic Mail:

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