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10 Attorneys for the Water Rights Prosecution Team

11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12 In the matter of ) PREHEARING STATEMENT FROM THE  
13 ) WATER RIGHTS PROSECUTION TEAM  
14 **California American Water Company** )  
15 **Cease and Desist Order Hearing** )  
16 \_\_\_\_\_ )

17 This case is about California American Water Company's (Cal-Am) illegal diversion of  
18 water from the Carmel River and the serious adverse environmental and public trust impacts  
19 resulting from that diversion. The illegality of Cal-Am's diversion cannot be seriously disputed.  
20 Instead, the primary issue requiring resolution is the appropriate schedule for ending Cal-Am's  
21 illegal diversions weighing the demonstrable impacts to fisheries and environmental well-being of  
22 the Carmel River against the public health, safety, and economic concerns for Monterey County  
23 residents who have come to rely on the illegally-obtained water. Against this backdrop for this  
24 enforcement action, the Prosecution Team offers the following comments related to the issues  
25 before the State Water Board and the appropriate hearing procedures.

26 **CAL-AM'S COMPLIANCE WITH ORDER 95-10 IS NOT DISPOSITIVE OF WHETHER THE CDO**  
27 **MAY BE ISSUED --- THE PROPOSED CDO ARISES FROM CAL-AM'S UNAUTHORIZED**  
28 **DIVERSION OF WATER AS ALREADY DETERMINED BY ORDER 95-10 AND AS WILL BE**  
**FURTHER DEMONSTRATED BY THE PROSECUTION TEAM FOR THE YEARS FOLLOWING**  
**THE ISSUANCE OF 95-10.**

The proposed CDO is based on Cal-Am's continued illegal diversion of water. Based on the plain language of the proposed CDO, Cal-Am's compliance or good faith efforts to comply with Order 95-10 does not preclude issuance of the proposed CDO or any other enforcement action based on the continued illegal diversion of water from the Carmel River. While the

1 proposed CDO includes a finding of noncompliance with Condition 2 of Order 95-10, the  
2 underlying basis for the CDO is the continued illegal diversion from the Carmel River.

3 Cal-Am's alleged compliance arguments (which the Prosecution Team disputes), at  
4 best, would be relevant to considerations to assess the appropriate penalty for either the illegal  
5 diversions from the Carmel River by Cal-Am and/or noncompliance with Order 95-10. However,  
6 such remedies are not before the State Board at this time, and, therefore, are largely immaterial  
7 to the ultimate issue of whether there is a legal basis for the issuance of the proposed CDO. The  
8 Prosecution Team, however, recognizes that some information regarding Cal-Am's compliance  
9 with Order 95-10 may be relevant to evaluate the reasonableness of any injunctive remedy  
10 imposed.

11 The Prosecution Team requests that the Hearing Officer issue a ruling stating that a  
12 CDO in this proceeding may be issued based rests on the illegal diversions of Carmel River water  
13 by Cal-Am regardless of Cal-Am's compliance, good faith or otherwise, with Order 95-10. Such a  
14 ruling will greatly simplify the matters at issue in this proceeding and will allow the parties and  
15 participants to focus on the relevant issue in this case --- the appropriate actions, and timing  
16 thereof, to conclusively end the illegal diversion and protect the resources of the Carmel River.

17 **CAL-AM'S LIABILITY FOR ILLEGAL DIVERSIONS FROM THE CARMEL RIVER CAN BE**  
18 **READILY ESTABLISHED AND IS NOT REASONABLY IN DISPUTE, THEREFORE, THERE IS**  
19 **NO NEED TO BIFURCATE THE PROCEEDINGS INTO A LIABILITY AND REMEDY PHASES.**

20 In its oral statements at the Pre-Hearing Conference, Cal-Am suggested that the  
21 hearing might be bifurcated to address liability and remedy in separate phases. Presumably, in  
22 some enforcement proceedings, bifurcation may be appropriate to enhance the efficiency of the  
23 hearing and streamline the presentation of evidence as to each of the two phases. This is not the  
24 appropriate case. The Prosecution Team opposes any attempt to bifurcate this matter as  
25 unnecessary. As stated above, we believe that the existence of continuous illegal diversions is  
26 not at issue and is easily established both as matter of res judicata and with undisputed evidence  
27 about Cal-Am's recent diversion activities. As a result, the hearing should be primarily focused on  
28 the remedy proposed by Prosecution Team and any appropriate modifications suggested by the  
other parties or participants in the hearing.

1 **CONSIDERATION OF THE PROPOSED CDO SHOULD NOT BE DELAYED BECAUSE OF**  
2 **EXISTING UNCERTAINTY IN DEVELOPMENT OF ALTERNATIVES THAT COULD AFFECT**  
3 **CAL-AM'S OPTIONS TO END ITS ILLEGAL DIVERSION.**

4 The proposed CDO already anticipates that Cal-Am will rely on a phased approach to  
5 addressing its illegal diversions and, therefore, the fact that certain options are not fully developed  
6 or finally approved by other agencies with jurisdiction over Cal-Am (such as the CEQA review  
7 process being undertaken by the California Public Utilities Commission for the proposed  
8 desalination project at Moss Landing) does not materially affect the requirements of the proposed  
9 CDO. As contemplated by the proposed CDO, there is no single method to achieve the  
10 reductions required by the order. Any legal means, or a combination of legal means, at Cal-Am's  
11 disposal would satisfy the requirements.

12 If there is a substantial delay in consideration of the proposed CDO to accommodate other  
13 proceedings or other agency reviews, the Prosecution Team reserves its right to amend the draft  
14 CDO and/or to propose additional enforcement actions including but not limited to referral to the  
15 California Attorney General's Office for civil liability pursuant to Water Code section 1052(c),  
16 Business and Professions Code section 17200 et seq., or any other applicable statutes for the  
17 continuing illegal diversions by Cal-Am.

18 **OPENING STATEMENTS BY THE PROSECUTION TEAM AND CAL-AM SHOULD BE**  
19 **PERMITTED UP TO 20 MINUTES. OTHER INTERESTED PARTICIPANTS SHOULD BE**  
20 **LIMITED TO A SHORTER AMOUNT OF TIME FOR OPENING STATEMENTS SUCH AS 10**  
21 **MINUTES.**

22 There are two principal parties to this action --- the Prosecution Team and Cal-Am. The rest of  
23 the participants will provide information generally supportive of one of those parties, although  
24 there may be differences between the participants and the two main parties regarding the nature  
25 and scope of the remedies. Therefore, the Prosecution Team believes that there should be a  
26 tiered system with regard to both opening and closing statements so that the Prosecution Team  
27 and Cal-Am receive more time to make their presentations than the other participants. Interested  
28 parties with similar views should be encouraged to consolidate their statements and their  
evidence.

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1 **THE HEARING OFFICER SHOULD CLARIFY THE HEARING DATE(S)**

2 At the initial Pre-Hearing Conference on March 19, 2008, Hearing Officer Baggett  
3 stated that because of the pre-hearing briefing schedule, the original hearing date of June 19,  
4 2008 would be moved to a later date as would the dates for evidentiary submissions. Some  
5 parties and participants have likely scheduled other activities based on that statement. At the  
6 meeting to receive public policy statements in Monterey, California on April 1, 2008, the  
7 Prosecution Team understands that Hearing Officer Baggett stated that the hearing would go  
8 forward on June 19, 2008. For the benefit of the parties preparing their evidentiary submissions,  
9 we request that the Hearing Officer clarify the hearing date(s) and the evidentiary submission  
10 dates for the proposed CDO as soon as possible and, if necessary, prior to any other rulings on  
11 the substantial issues raised by the parties or participants.

12 We note that while this enforcement action is not noticed pursuant Water Code  
13 section 1055, which governs the imposition of administrative civil liability, the consideration of the  
14 proposed CDO does not affect the State Water Board's right to consider the imposition of  
15 administrative civil liability or to refer the illegal diversion to the Attorney General's Office in a  
16 separate proceeding.

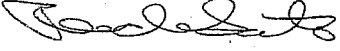
17 **FACTUAL STIPULATIONS SHOULD BE ENCOURAGED TO STREAMLINE THESE**  
18 **PROCEEDINGS.**

19 As it appears that there will be some delay in the actual hearing date, the Prosecution  
20 Team believes that the case will be well-served if the parties and participants are requested to  
21 exchange proposed factual stipulations in advance of the hearing and report to the Hearing  
22 Officers the facts for which there are no material disputes so that oral presentations at hearing  
23 can be tailored to address the disputed facts. Even in a case such as this one, where the  
24 underlying illegality of the diversion has been determined and the continuing nature of the illegal  
25 diversion should not be in controversy, there are still opportunities for the parties and participants  
26 to find common ground so that the hearing can concentrate on the disputed issues. The  
27 Prosecution Team invites comments from the other parties on this issue and will make a concrete

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1 proposal for a time-schedule as part of its reply brief after it has an opportunity to consult with  
2 other counsel.

3 Respectfully submitted,

4  
5  4/8/08

6 REED SATO  
7 Attorney for the Water Rights Prosecution Team  
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1 **PROOF OF SERVICE**

2 I, Debbie Matulis, declare that I am over 18 years of age and not a party to the within action. I  
3 am employed in Sacramento County at 1001 I Street, 16<sup>th</sup> Floor, Sacramento, California 95814. My  
4 mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within  
5 document:

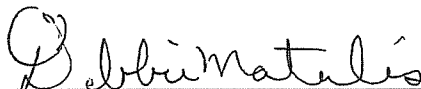
6 CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER  
7 JUNE 19, 2008 HEARING

8 PREHEARING STATEMENT FROM  
9 THE WATER RIGHTS PROSECUTION TEAM

10

11 X	<b>BY ELECTRONIC MAIL:</b> I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the person(s) as shown on attached list.
12	
13 X	<b>BY FIRST CLASS MAIL TO ALL PARTIES LISTED:</b> I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service by placing a true copy thereof in separate, sealed envelopes. See attached parties list.
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19 I certify and declare under penalty of perjury under the laws of the State of California that the  
20 foregoing is true and correct and that this document was executed on April 9, 2008 at Sacramento,  
21 California.

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23   
24 \_\_\_\_\_  
Debbie Matulis

**CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER  
JUNE 19, 2008 HEARING**

**SERVICE LIST OF PARTICIPANTS  
(March 14, 2008)**

**(PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS  
AND OTHER DOCUMENTS.)**

**(Note: The participants whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)**

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**LIST OF PARTICIPANTS MAKING POLICY STATEMENTS ONLY  
(DO NOT SERVE THE FOLLOWING PARTICIPANTS WITH WRITTEN TESTIMONY, EXHIBITS  
AND OTHER DOCUMENTS)**

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