

1 JON D. RUBIN, State Bar No. 196944
2 JONATHAN R. MARZ, State Bar No. 221188
3 VALERIE C. KINCAID, State Bar No. 231815
4 DIEPENBROCK HARRISON
5 A Professional Corporation
6 400 Capitol Mall, Suite 1800
7 Sacramento, CA 95814-4413
8 Telephone: (916) 492-5000
9 Facsimile: (916) 446-4535

10 Attorneys for California American
11 Water Company

2008 APR 22 11:40:00
Faint stamp and text in the upper right corner.

12 BEFORE THE CALIFORNIA
13 STATE WATER RESOURCES CONTROL BOARD

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

17 **MOTION BY CALIFORNIA AMERICAN
18 WATER COMPANY TO ENSURE DUE
19 PROCESS**

20 **I. Introduction**

21 NOTICE IS HEREBY GIVEN that California American Water Company ("CAW") hereby
22 moves the State Water Resources Control Board ("State Water Board") for an order demonstrating
23 that CAW will be afforded due process. CAW is before the State Water Board because
24 Mr. James W. Kassel and other State Water Board staff are seeking a cease and desist order against
25 CAW. The draft cease and desist order proposed by Mr. Kassel alleges CAW violated Condition 2
26 of State Water Board Order No. 95-10 ("Order 95-10"). It proposes a remedy that threatens the
27 economy of the Monterey Peninsula, and the health and safety of its residents. In part because Mr.
28 Kassel incorrectly concludes that the State Water Board should issue a cease and desist order
(incorrectly concludes that CAW violated Condition 2 of Order 95-10), and, to protect against the
inevitable harm to the Monterey Peninsula if the State Water Board were to issue the proposed
cease and desist order, CAW requested that the State Water Board conduct a formal hearing on that
issue.

///

1 When conducting such a hearing, the State Water Board must afford CAW its
2 constitutionally afforded due process protections. At this time, the structure of the proceeding gives
3 rise to concerns that such protections do not exist in this proceeding. CAW therefore requests the
4 State Water Board take the necessary steps to ensure CAW receives a fair hearing; one without the
5 appearance of bias. CAW recognizes that in order for the State Water Board to do that, it may be
6 required to disqualify members of the State Water Board staff from this proceeding.¹

7 **II. The Current Structure Of This Hearing May Cause The State Water Board To**
8 **Violate CAW's Due Process Protections**

9 **A. Due Process Protections Must Be Afforded In Administrative Adjudications**

10 The Constitutional provisions affording due process require administrative agencies to
11 provide a fair and impartial system for adjudicatory proceedings. (*Richardson v. Perales* (1971)
12 402 U.S. 389, 401 [due process protections apply to administrative proceedings]; *Haas v. County of*
13 *San Bernardino* (2002) 27 Cal.4th 1017, 1025 (“*Haas*”) [“Speaking of administrative hearings, and
14 articulating the procedural requirements “demanded by rudimentary due process” in that setting, the
15 court has said that, “of course an impartial decision maker is essential.”] (quoting *Goldberg v. Kelly*
16 (1970) 397 U.S. 254, 271).)

17 A hearing may run afoul of due process protections, not only if there is a showing of actual
18 bias but also when there is an *appearance* of bias. (*Morongo Band of Mission Indians v. State*
19 *Water Resources Control Board*, 153 Cal.App.4th 202, 210 (“*Morongo*”) [actual bias is no longer
20 the “touchstone for disqualification in administrative hearings.”]; *Haas*, p. 1029 [“We need find no
21 instance of actual judicial bias”]; *Nightlife Partners Ltd. v. City of Beverly Hills* (2003) 108
22 Cal.App.4th 81, 90 (“*Nightlife Partners*”) [“Just as in a judicial proceeding, due process in an
23 administrative hearing also demands an appearance of fairness and the absence of even a *probability*

24 _____
25 ¹ The State Water Board has the duty to demonstrate compliance with due process. (*Howitt v. Superior Court* (1992)
26 3 Cal.App.4th 1575, 1587.) Further, it would be a significant burden for CAW to serve discovery requests and depose
27 every staff member on the hearing team, the prosecutorial team, and all other potential participating staff. (*Ibid.* [“As a
28 practical matter, were the burden allocated otherwise, it would seldom if ever be possible” to prove due process was
violated.] Also, if CAW were to conduct discovery, it would run the risk of a greater level of enforcement. In its pre-
hearing brief, the prosecutorial team cautioned against delay; indicating that, if there were a delay in this proceeding, the
prosecutorial team may seek a greater level or alternative enforcement against CAW. Undoubtedly, the type of
discovery required to determine the role(s) of State Water Board staff would delay this proceeding.

1 of outside influence on the adjudication.”] (emphasis in original); *Yaqub v. Salinas Valley Memorial*
2 *Healthcare System* (2004) 122 Cal.App.4th 474, 486 [“The question is not whether the judge is
3 actually biased, but whether a person aware of the facts might reasonably entertain a doubt that the
4 judge would be able to act without integrity, impartiality and competency.”].) At a minimum, the
5 appearance of bias occurs when “advocacy and decision-making roles are combined.” (*Howitt v.*
6 *Superior Court* (1992) 3 Cal.App.4th 1575, 1585 (“*Howitt*”).) The prohibition on combining roles,
7 or “dual representation,” precludes a single person from serving advisory and prosecutorial
8 functions, particularly if the person holds those dual roles during the same time frame, even if the
9 matters are unrelated. (*Morongo*, p. 5 [“The fact that she wore a prosecutorial hat in one proceeding
10 and an advisory hat in another in the same time frame is sufficient” to establish a due process
11 violation.]; *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817 (“*Quintero*”) [in its
12 evaluation of the prosecutorial appearance of Halford, who had previously advised the Board on a
13 number of occasions, the court stated: “Here, there is no evidence that Halford acted as both the
14 Board’s legal advisor and in a prosecutorial function in this case. However, Halford’s other
15 interactions with the Board give the appearance of bias and unfairness and suggest the probability of
16 his influence on the Board.”]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage*
17 *Control Appeals Bd.* (2006) 40 Cal.4th 1, 5 (“*Quintanar*”) [“One fairness principle directs that in
18 adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision
19 maker or the decision maker's advisers in private. Another directs that the functions of prosecution
20 and adjudication be kept separate, carried out by distinct individuals.”].)

21 In addition to the appearance of bias, due process prohibits ex parte communications on
22 substantive issues between those who are prosecuting a claim and the decision-making body or its
23 advisors. (Govt. Code, 11430.10; *Quintanar*, p. 10 [“An agency prosecutor cannot secretly
24 communicate with the agency decision maker or the decision maker’s advisor about the substance
25 of the case prior to issuance of a final decision.”].) The purpose of restricting ex parte
26 communication is, in part, to allow administrative agencies to maintain internal adjudicative
27 proceedings, while ensuring the non-agency party receives a neutral and fair determination.
28 (*Quintanar*, p. 10 [“Procedural fairness does not mandate the dissolution of unitary agencies, but it

1 does require some internal separation between advocates and decision makers to preserve
2 neutrality.”]; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159 [“[T]he right of a
3 hearing before an administrative tribunal would be meaningless if the tribunal were permitted to
4 base its determination upon information received without the knowledge of the parties.”].) Unitary
5 administrative agencies must implement procedures to guarantee the prosecutorial and decision
6 making parties are sufficiently “screened” from each other. (*Howitt*, p. 1587 [“Performance of both
7 roles by the same [agency] is appropriate only if there are assurances that the advisor for the
8 decision maker is screened from any inappropriate contact with the advocate.”].) The party relying
9 on the method of separation has the burden of proving the advocate and decision makers are
10 sufficiently screened. (*Ibid.* [“The burden of providing such assurances must rest with the
11 [agency] performing the dual roles . . .”].) If properly implemented, internal screening procedures
12 should be evident. (*Ibid.* [“If the advisor has been screened, it should be relatively easy for
13 [agency] counsel to explain the screening procedures in effect.”].)

14 **B. Documents Prepared By The State Water Board Staff Raise Due Process**
15 **Concerns For CAW**

16 CAW is concerned that the structure of this proceeding violates due process because of an
17 appearance of bias.² CAW is also concerned that, because there is ambiguity as to the roles of
18 certain State Water Board staff, the prohibition on ex parte communications may not ensure CAW
19 receives a fair hearing.

20 On or about March 5, 2008, the State Water Board officially noticed this proceeding.
21 (CAW-0010 (Office Notice of Hearing).) In the notice, the State Water Board identified the staff
22 who were assigned to prosecute and the staff that would assist the Hearing Officers in deciding the
23 case. (*Id.*, p. 1.) However, prior to and since its receipt of the notice, CAW received at least two

24 _____
25 ² In its notice for this proceeding, the State Water Board makes clear that its rules against ex parte communications
26 apply to the prosecutorial team. (Exhibit CAW-0010, p. 3.) CAW recognizes that the prohibition against ex parte
27 communication helps provide due process protections. However, that prohibition, alone, does not ensure all due process
28 requirements are satisfied. Notwithstanding any ex parte rules, due process prohibits bias or the appearance of bias.
(*See Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.App.4th 1, 5
[“One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the
ultimate decision maker or the decision maker’s advisers in private. Another directs that the functions of prosecution
and adjudication be kept separate, carried out by distinct individuals.”].)

1 documents prepared by the State Water Board staff that raise due process concerns.

2 On January 15, 2008, Mr. Kassel notified CAW that he would pursue a cease and desist
3 order against CAW. (CAW-007 (Letter from James Kassel).) When Mr. Kassel sent that letter, he
4 provided copies to Mr. Thomas Howard, Chief Deputy Director of the State Water Board, Ms.
5 Victoria A. Whitney, Deputy Director for Water Rights, and Mr. Andy Sawyer, Assistant Chief
6 Counsel. (*Id.*, p. 2.)

7 On April 3, 2008, Charles Lindsay, Chief Hearings Unit for the State Water Board, Division
8 of Water Rights, sent an email regarding the status of a non-party entity in this proceeding. (Exhibit
9 CAW-0020 (Charles Lindsay e-mail).) Mr. Lindsey addressed this correspondence to the parties,
10 the non-party entities, and members of the hearing team. However, he also provided copies of the
11 correspondence to Ms. Whitney, Mr. Sawyer, and Mr. Les Grober, Supervisor for the Hearing &
12 Special Project Section of the State Water Board. (*Ibid.*) None of those staff members were
13 assigned to either the prosecutorial or hearing teams. (*See* Exhibit CAW-0010 (Official Notice of
14 Hearing), p. 3). Although this type of communication usually signals interest or involvement in a
15 matter, it is unclear what, if any, role these parties play in this proceeding. At a minimum, the
16 communications from Mr. Kassel and Mr. Lindsay give rise to an appearance of bias.

17 The inclusion of Mr. Howard, Ms. Whitney, Mr. Sawyer, and Mr. Grober in
18 communications related to this proceeding suggests there could be an unlawful mixing of advocacy
19 and decision-making roles. Mr. Howard, Ms. Whitney, Mr. Sawyer, and Mr. Grober serve the State
20 Water Board in various capacities. An appearance of bias will arise if any one of them concurrently
21 serves as a prosecutor and an advisor, even if proceedings are unrelated. The appearance of bias
22 may also exist if any one of the afore-mentioned staff historically held one role and in this
23 proceeding holds the other. The lack of disclosure regarding interested, but unassigned staff
24 members does not allow CAW to determine if an appearance of bias is avoided. To the contrary,
25 the communications received by CAW suggest otherwise.

26 ///

27 ///

28 ///

1 Furthermore, if Mr. Howard, Ms. Whitney, Mr. Sawyer, or Mr. Grober is involved in this
2 proceeding, it is not possible for CAW to ensure how its due process rights are protected through ex
3 parte communication rules. These State Water Board staff members were not designated in the
4 March 5, 2008 notice for this proceeding. As a result, the rules prohibiting against ex parte
5 communications do not explicitly apply to them. CAW believes Mr. Howard, Ms. Whitney, Mr.
6 Sawyer, or Mr. Grober each supervises State Water Board staff, including members of the
7 prosecutorial team and hearing team for this proceeding. If that belief is true, the circumstance
8 gives rise to serious due process concerns. The State Water Board has the burden of proving the
9 advocate and decision makers are sufficiently screened. At this time, it has not done that. Internal
10 screening procedures are not evident. As a result, the State Water Board must demonstrate to CAW
11 that the decision-makers have been and will continue to be screened from any inappropriate contact.

12 **C. Composition Of Prosecutorial Team May Violate Due Process**

13 Notwithstanding the arguments above, Mr. Kassel's membership on the prosecutorial team
14 may give rise to due process violations. For an extended period of time, Mr. Kassel appeared to
15 have a principle role in determining whether CAW was in compliance with Order 95-10. As an
16 example, on June 7, 2006, Mr. Kassel signed a letter written by Ms. Whitney and sent on behalf of
17 the State Water Board. The letter discussed CAW's compliance with Order 95-10. (Exhibit CAW-
18 021 (James Kassel Compliance Letter).) The letter expressed concern with the level of progress by
19 CAW and the Monterey Peninsula Water Management District in complying with Order 95-10.
20 (Exhibit CAW-021, p. 1 (James Kassel Compliance Letter).) The fact that Ms. Whitney and Mr.
21 Kassel apparently acted on behalf of the State Water Board not only suggests Mr. Kassel advised
22 the State Water Board, but the authority delegated to Mr. Kassel likely placed him directly in the
23 seat of the decision-maker (he expressed concern with CAW compliance efforts).³

24 At some time after signing the June 7, 2006 letter but before January 15, 2008, Mr. Kassel
25 (and possibly Ms. Whitney and other staff members) apparently switched roles, taking on a
26

27 ³ Other State Water Board staff may have a similar conflict as Mr. Kassel. The State Water Board must explain the
28 roles of all State Water Board staff who were identified as part of the prosecutorial team, part of the hearing team, or
identified in correspondence served in this proceeding.

1 prosecutorial function. He and other unknown staff of the State Water Board prepared and issued a
2 notice informing CAW that Mr. Kassel and other State Water Board staff would prosecute a cease
3 and desist order against CAW. (Exhibit CAW-007 (Letter from James Kassel), p. 1.)⁴ The State
4 Water Board recognized Mr. Kassel's new role as prosecutor in its March 5, 2008 official notice for
5 this proceeding. (Exhibit CAW-0010 (Office Notice of Hearing), p. 3.) There, the State Water
6 Board designated Mr. Kassel as a member of the prosecutorial team. (Exhibit CAW-0010 (Office
7 Notice of Hearing), p. 3.)

8 If the appearances above prove true, Mr. Kassel (and possibly other State Water Board staff)
9 as advisors to the decision-maker or directly as the decision-makers are precluded from acting and
10 subsequently from appearing before the State Water Board in a prosecutorial role. (*Quintero*, p. 816
11 ["An ongoing relationship with the Board is enough to show the probability of actual bias. It would
12 only be natural for the Board members who have looked to [Mr. Kassel] for advice and guidance, to
13 give more credence to his arguments."]; *Nightlife Partners*, p. 94 [determined an individual who
14 served as an advisor was prohibited from appearing before the Board in a prosecutorial role].) To
15 allow him or any other State Water Board staff member such dual representation in the same matter,
16 or on a matter involving substantially similar issues, would clearly violate CAW's due process.
17 (*Morongo*, p.5; *Quintero*, p. 817; *Quintanar*, p. 5.)

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 _____

27 ⁴ The fact that CAW is not aware of the staff members with whom Mr. Kassel work when preparing the notice and draft
28 cease and desist order provides an additional reason CAW is concerned that its due process rights have not been protected
in this proceeding.

1 **III. Conclusion**

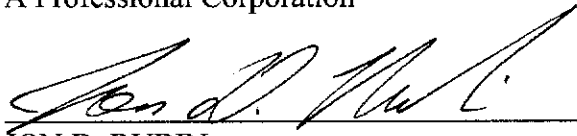
2 The State Water Board is required to conduct this proceeding in a manner that affords CAW
3 due process. Documents from the State Water Board and its staff raise serious concerns with the
4 ability of the State Water Board to meet that obligation. Therefore, CAW respectfully requests the
5 State Water Board demonstrate that CAW will be afforded due process. CAW recognizes to do
6 that, it may be necessary for the State Water Board to disqualify members of its staff from further
7 participation in this proceeding.

8 Dated: April 23, 2008

Respectfully submitted,

9
10 DIEPENBROCK HARRISON
A Professional Corporation

11
12 By


13 _____
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 April 23, 2008, I served a copy of the foregoing document following document entitled
5 **MOTION BY CALIFORNIA AMERICAN WATER COMPANY TO ENSURE DUE**
6 **PROCESS** on the following interested parties in the above-referenced case number to the
7 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."


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

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

22 **PERSONAL SERVICE**
23 via process server
24 via hand by

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

26 
27 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:

5 **Division of Ratepayer Advocates**
6 Andrew Ulmer
7 Division of Ratepayer Advocates
8 California Public Utilities Commission
9 505 Van Ness Avenue
10 San Francisco, CA 94102
11 (415) 703-2056
12 eau@cpuc.ca.gov

State Water Resources Control Board
Reed Sato
Water Rights Prosecution Team
1001 I Street
Sacramento, CA 95814
(916) 341-5889
rsato@waterboards.ca.gov

9 **Public Trust Alliance**
10 Michael Warburton
11 Resource Renewal Institute
12 Room 290, Building D
13 Fort Mason Center
14 San Francisco, CA 94123
15 Michael@rri.org

Sierra Club - Ventana Chapter
Laurens Silver
California Environmental Law Project
P.O. Box 667
Mill Valley, CA 94942
(415) 383-7734
larrysilver@earthlink.net
jgwill@dcn.davis.ca.us

13 **Carmel River Steelhead Association**
14 Michael B. Jackson
15 P.O. Box 207
16 Quincy, CA 95971
17 (530) 283-1007
18 mjatty@sbcglobal.net

California Sportfishing Protection Alliance
Michael B. Jackson
P. O. Box 207
Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

17 **City of Seaside**
18 Russell M. McGlothlin
19 Brownstein, Hyatt, Farber, Schreck
20 21 East Carrillo Street
21 Santa Barbara, CA 93101
22 (805) 963-7000
23 RMcGlothlin@BHFS.com

The Seaside Basin Watermaster
Russell M. McGlothlin
Brownstein, Hyatt, Farber, Schreck
21 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

21 **Pebble Beach Company**
22 Thomas H. Jamison
23 Fenton & Keller
24 P.O. Box 791
25 Monterey, CA 93942-0791
26 (831) 373-1241
27 TJamison@FentonKeller.com

National Marine Fisheries Service
Christopher Keifer
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
(562) 950-4076
christopher.keifer@noaa.gov

1 **Service by Electronic-Mail (Cont.):**

2 **Monterey County Hospitality Association**
3 Bob McKenzie
4 P.O. Box 223542
5 Carmel, CA 93922
6 (831) 626-8636
7 info@mcha.net
8 bobmck@mbay.net

**California Salmon and Steelhead
Association**
Bob Baiocchi
P.O. Box 1790
Graeagle, CA 96103
(530) 836-1115
rbaiocchi@gotsky.com

7 **Planning and Conservation League**
8 Jonas Minton
9 1107 9th Street, Suite 360
10 Sacramento, CA 95814
11 (916) 719-4049
12 jminton@pcl.org

11 **Service By Mail:**

12 **Monterey Peninsula Water Management
District**
13 David C. Laredo
14 De Lay & Laredo
15 606 Forest Avenue
16 Pacific Grove, CA 93950
17 (831) 646-1502

City of Sand City
James G. Reisinger, Jr.
Heisinger, Buck & Morris
P.O. Box 5427
Carmel, CA 93921
(831) 624-3891

16 **City of Carmel-by-the-Sea**
17 Donald G. Freeman
18 P.O. Box CC
19 Carmel-by-the-Sea, CA 93921
20 (831) 624-5339 ext. 11