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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In the matter of)
California American Water Company) REPLY PREHEARING STATEMENT FROM
Cease and Desist Order Hearing) THE WATER RIGHTS PROSECUTION
TEAM

I. THE FOCUS OF THE HEARING SHOULD BE ON CAL-AM'S CONTINUED UNLAWFUL DIVERSION OF WATER FROM THE CARMEL RIVER SINCE THE ISSUANCE OF ORDER 95-10

In its Pre-Hearing Brief, California American Water Company (Cal-Am) attempts to reframe the scope of hearing as being limited to the single issue of whether it has violated Condition 2 of Order 95-10. (Cal-Am Pre-Hearing Brief, page 7, line 19.) The violation of Condition 2 is not what the draft Cease and Desist Order (CDO) relies upon although the violation of Condition 2 is one of the bases for the action. Neither the CDO nor the hearing notice limit the issues before the State Water Resources Control Board (Board or State Water Board) to the extent that Cal-Am claims. The primary issue before the Board in this proceeding is whether the Board should adopt the proposed CDO, which is based on Cal-Am's continued unauthorized diversion of water from the Carmel River.

A. The Notice of Draft Cease and Desist Order (CDO) provides Cal-Am with sufficient notice that the hearing will concern its continued unlawful diversion of water from the Carmel River.

Water Code section 1834 requires a notice of CDO to "contain a statement of facts and information that would tend to show the proscribed action." The Notice of the Draft CDO

1 satisfies the requirements of Section 1834 by providing a factual background on Cal-Am's
2 diversions from the Carmel River in excess of its legal right, an explanation of how Order 95-10
3 provided a framework to addressing Cal-Am's unlawful diversions based on information available
4 at that time, and the identification of the basis for the issuance of the CDO due to a violation or
5 threatened violation of unauthorized diversion or use under Water Code section 1052.
6 Specifically, the Notice states that the draft CDO "requires Cal-Am to cease and desist from
7 diverting and using water in excess of its legal rights, or comply with the constraints of the
8 enclosed CDO within the specified time schedules. If Cal-Am disagrees with the facts or time
9 schedules for the corrective actions set forth in the enclosed draft CDO, Cal-Am may request a
10 hearing...." (Notice of Draft Cease and Desist Order, in letter from James Kassel, January 15,
11 2008.) Implicit in the Notice is the fact that Cal-Am can request a hearing if it disagrees with the
12 proposed findings in the Order.

13 The Draft CDO itself makes similar statements of fact and information showing that
14 the proscribed action will be based on Cal-Am's violation or threatened violation of unauthorized
15 diversion and use of water pursuant to Section 1052. (Draft CDO, page 1.) Furthermore, the
16 proposed findings are not limited to whether Cal-Am has complied with condition 2 of the Order
17 but also address Cal-Am's illegal diversions (Finding No. 1) and the adverse effects from the
18 unlawful diversions (Finding No. 2). Cal-Am's contention that it does not have notice of the full
19 scope of the matters at issue in this proceeding is simply not credible.

20 The Prosecution Team recognizes that some information regarding Cal-Am's
21 compliance with Condition 2 of Order 95-10 may be relevant to the noticed issue of Cal-Am's
22 continued unlawful diversion. However, its compliance (or lack thereof) with Order 95-10 is
23 relevant only to the extent of evaluating whether the terms of Draft CDO are sufficient and
24 reasonable, not whether there is legal exposure of Cal-Am to a CDO.

25 For example, proposed evidence regarding Cal-Am's effort to comply with Order 95-
26 10 through projects like the Aquifer Storage and Recovery (ASR) project or the Moss Landing
27 desalination plant may be relevant to determine whether the proposed reduction time schedule in
28 the Draft CDO is reasonable, but such evidence is not dispositive of whether the CDO may be
issued in the first instance. Regardless of whether Cal-Am has attempted to comply with
Condition 2 of Order 95-10 and perfect its water rights, Cal-Am can not rebut the plain fact that it

1 continues to illegally divert water from the Carmel River in violation of California law.

2 **B. Evidence provided by interested parties regarding impacts to threatened species of**
3 **steelhead fish, harm to habitat, and harm to public trust resources is relevant to the**
4 **noticed issue, but this evidence should be limited to aiding in the determination of**
5 **the proposed time schedule's reasonableness.**

6 In the State Water Board's Official Notice of Public Hearing, the background
7 information frames the underlying purpose of issuing the CDO as requiring Cal-Am to "cease and
8 desist from diverting water from the Carmel River in excess of its legal rights by reducing its
9 unlawful diversions pursuant to a [reduction] schedule set forth in the CDO." (Official Notice of
10 Public Hearing, page 2.) The key issue is whether the State Water Board should adopt the Draft
11 CDO (the reduction time schedule to terminate Cal-Am's continued unlawful diversions), whether
12 modifications should be made, and if so, identifying the basis for each modification. (Official
13 Notice of Public Hearing, page 3.)

14 The Prosecution Team recognizes that other interested parties wish to address the
15 continual effects of Cal-Am's diversions on public trust resources by conducting a full evidentiary
16 hearing on new information regarding biological impacts. The Prosecution Team views these
17 issues as relevant to the scope of the CDO. As such, the Prosecution recognizes the relevance
18 of this information but does not see that a reopening of Order 95-10 (to the extent that any of the
19 parties is making such a proposal) is necessary or appropriate to the consideration of such
20 information.

21 **II. ORDER 95-10 SHOULD NOT BE VIEWED OR INTERPRETED AS A PERMIT**
22 **AUTHORIZING CAL-AM TO CONTINUE TO DIVERT WATER IN EXCESS OF ITS ACTUAL**
23 **LEGAL RIGHT SO LONG AS THE THIRTEEN CONDITIONS ARE SATISFIED.**

24 Cal-Am's Pre-Hearing Brief interprets Order 95-10 as a permit authorizing it to divert
25 up to 14,106 afa, an amount in excess of its actual legal right so long as the conditions in Order
26 95-10 are satisfied. (Cal-Am Prehearing Brief, page 4, lines 6-14.) If this is truly Cal-Am's legal
27 contention, not simple posturing, then it is not surprising that Cal-Am has failed address its
28 diversions with more urgency or that the Prosecution Team must advocate for additional
enforcement action to force an end to Cal-Am illegal diversions. Cal-Am's interpretation is wholly
unfounded.

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1 **A. The procedural posture of Order 95-10 indicates that the legal effect of the Order is**
2 **more akin to an interim solution to assist in terminating unlawful diversions rather**
3 **than conditionally permitting the unlawful diversions.**

4 In Order 95-10, Section 8.0, the Board identified the three enforcement options
5 available to it in response to the unlawful diversion and use of water. Since the original
6 proceeding was not noticed under any of the available enforcement options, it was unable to issue
7 an ACL or a CDO. If the original proceeding had been noticed under Water Code section 1825 et
8 seq., the Board would have been able to directly adopt a CDO because, at that time, Cal-Am was
9 diverting water in excess of the quantity authorized by permit or license. (Order 95-10 page 37.)
10 Additionally, the Board could have referred the matter to the Attorney General's Office under
11 Water Code section 1052 for injunctive relief or administrative civil liability. In lieu of this option,
12 the Board decided to suspend the referral if Cal-Am took certain actions set forth in Order 95-10.

13 The Board stated that its primary concern should be the adoption of an order which,
14 *until a legal supply of water can be developed or obtained*, would require Cal-Am to minimize its
15 diversions, mitigate the environmental effects of diversion, and prepare a plan to perfect its legal
16 rights to water from the Carmel River. (Order 95-10, page 38, emphasis added.) This statement
17 demonstrates that the diversions from the Carmel River were characterized by the Board as
18 unlawful.

19 The Board also recognized that Cal-Am could not significantly reduce its extraction in
20 a short period of time because of the public health and safety concerns involved. (Order 95-10,
21 page 37.) Order 95-10 was the mechanism adopted, in lieu of punitive enforcement options, to
22 assist Cal-Am in significantly reducing and terminating its unlawful diversions over a more gradual
23 period to avoid significant impacts to public health.

24 The overarching purpose of the Order 95-10 was to gradually reduce Cal-Am's illegal
25 diversions from the Carmel River and find alternative legal sources of water in a manner that
26 would benefit public trust resources and have the least adverse impact on public health and
27 safety. The Prosecution Team recognizes that this process takes time, but Cal-Am has had 13
28 years since the issuance of Order 95-10 to timely terminate its unlawful diversions. Cal-Am is not
 insulated from liability for its unlawful diversions even if it made good faith attempts to comply with
 the conditions in the Order over the past 13 years. If Order 95-10 "authorized" illegal diversions

1 from the Carmel River so long as Cal-Am diligently pursued additional permits or alternative
2 sources of water, Cal-Am could theoretically divert water for an unspecified amount of time while
3 waiting for approval of alternative sources of water, regardless of the adverse environmental
4 impacts or the decimation of the fishery and habitat in the Carmel River. Such an interpretation is
5 untenable as it would leave public resources unprotected and the public without any legal
6 recourse to remedy the continued unlawful diversions.

7 **B. The statutory requirements in Water Code section 1375 for issuance of a water
8 rights permit have not been satisfied by Cal-Am for diversions from the Carmel
9 River.**

10 Order 95-10 cannot be viewed as a permit authorizing the continued unlawful
11 diversion of water because specific requirements regarding the issuance of a permit to
12 appropriate water have not been satisfied. Water Code section 1375 establishes a specific
13 process for obtaining a water rights permit. Before a permit may be issued, there must be an
14 applicant, the application must contain specific information required by statute, the intended use
15 must be beneficial, there must be unappropriated water available, and all fees must be paid.
(Water Code, § 1375 subdiv. (a) thru (e).)

16 Cal-Am previously applied with the Division of Water Rights for additional water rights
17 permits, but those permits were not approved. In 1996, Cal-Am submitted Application number
18 A030644 for approval to obtain rights to 36,130 afa. In 1998, Cal-Am submitted three applications
19 to obtain additional rights, A030215A for 2,964afa, A030215B for 27,789 afa, and A030715 for
20 3,900 afa respectively. This demonstrates that Cal-Am is aware of the specific procedures in
21 place for obtaining additional appropriative rights. Cal-Am cannot reasonably believe or credibly
22 contend that Order 95-10 substitutes for this statutorily-required process.

23 **III. A FULL HEARING ON CAL-AM'S LIABILITY IS NOT NEEDED BECAUSE THE ISSUE OF
24 ITS CONTINUED UNLAWFUL DIVERSIONS CAN BE ESTABLISHED. THEREFORE,
25 BIFURCATING THE HEARING INTO TWO PHASES, LIABILITY AND REMEDY, IS
26 UNWARRANTED IN THE PRESENT CASE.**

27 **A. Cal-Am's continued unlawful diversions are readily established.**

28 Cal-Am continues to divert water in excess of its actual legal right. At the time of
Order 95-10, Cal-Am was diverting approximately 14,106 afa from the Carmel River. (Order 95-
10, page 6 fn. 1) The Order also determined that Cal-Am had legal rights to divert 3,376 afa.

1 (Order 95-10, page 25.) This indicated that Cal-Am was illegally diverting about 10,730 afa from
2 the Carmel River or its underflow without a valid basis of right. (Order 95-10, page 39.) In 1998,
3 Cal-Am reduced its diversions from 14,106 afa to 11,285 afa reflecting a 20 percent reduction as
4 required by Condition 3(b) of Order 95-10. (Order 95-10, page 41.) The State Water Board
5 issued water right Permit 20808A for the development of the ASR project granting Cal-Am an
6 additional diversion about for up to 2,426 afa from the Carmel River in times of excess flows. All
7 together, Cal-Am's legal right to divert from the Carmel River amounts to a total not to exceed
8 5,802 afa. However, Cal-Am continues to unlawfully divert water in excess of this amount.

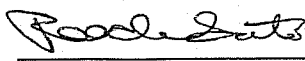
9 Since Cal-Am's liability can be easily shown, bifurcating the hearing into two phases
10 is not needed. Rather, the hearing's focus should be primarily devoted to assessing the
11 reasonableness of the remedy --- whether the proposed time schedule in the Draft CDO reflects a
12 balance between the preservation of public trust resources and adequately serving the needs of
13 Cal-Am constituents.

14 **B. Addressing the reasonableness of the remedy embodied in the Draft CDO is the
15 crux of this proceeding.**

16 While considering the reasonableness of the remedy, interested parties will be able to
17 present evidence and testimony on issues such as [1] the continued biological impacts to
18 steelhead (California Salmon and Steelhead Association Pre-Hearing Brief, page 3 para. 14),
19 [2] harm to the surrounding habitat (*Id.*), [3] impacts on public trust resources (Public Trust
20 Alliance Pre-Hearing Brief, page 2.), [4] violations of the Endangered Species Act Section 9
(Sierra Club Pre-Hearing Brief, page 4.), and [5] Cal-Am's efforts to develop alternative sources of
21 water and perfect its water rights.

22 In reviewing the submitted Pre-Hearing Briefs of all interested parties, many parties
23 share similar interests and will likely present similar evidence and testimony. The Prosecution
24 Team reiterates its request to have interested parties with similar views consolidate their
25 statements and evidence to the extent they are relevant to assessing the reasonableness of the
26 proposed remedy.

27 Respectfully submitted,

28  4/23/08

REED SATO
Attorney for the Water Rights Prosecution Team

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, 16th 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:

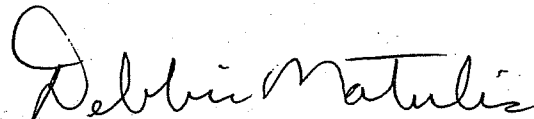
6 CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
7 JUNE 19, 2008 HEARING

8 **REPLY PREHEARING STATEMENT FROM**
9 **THE WATER RIGHTS PROSECUTION TEAM**

10

11 X	BY ELECTRONIC MAIL: 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	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: 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 23, 2008 at Sacramento,
21 California.

22 

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
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