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10 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

11 **IN THE MATTER OF WHETHER THE**
12 **DRAFT CEASE AND DESIST ORDER**
13 **CONCERNING CALIFORNIA AMERICAN**
14 **WATER'S DIVERSION FROM THE**
15 **CARMEL RIVER SHOULD BE ISSUED**

CITY OF SEASIDE'S REPLY BRIEF

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1 **I. INTRODUCTION**

2 The water supply problems in the Monterey Peninsula are complex, and have for many years
3 been mired in political controversy. The failures of the New Los Padres Dam Project in 1995 and
4 the Carmel River Dam Project in 2003 are prime examples. Fortunately, the Coastal Water Project
5 (“CWP”) now provides strong prospects for a comprehensive solution. Within the next few
6 months, the California Public Utilities Commission will issue a draft Environmental Impact Report
7 for the CWP, which will include evaluations of a Moss Landing Desalinization option, a North
8 Marina Slant Well Desalinization option, and a “Regional Plan” involving a suite of local projects.
9 (Exhibit CAW-30, Phase I, Direct Testimony of Tom Bunosky, pp. 7-8.) Moreover, the scope and
10 depth of cooperation among the participants in the Regional Plenary Oversight Group or “REPOG”
11 (now Water for Monterey County Coalition) in developing the Regional Plan is an unprecedented
12 improvement upon the region’s history of water conflicts.

13 The frustration of the Division of Water Rights and the environmental community over
14 California American Water’s (“Cal Am”) continued unauthorized diversions from the Carmel River
15 is also understandable. Still, any interim order by the State Water Resources Control Board must be
16 supported by evidence in the record and be practical. In its Closing Brief, the Prosecution attempts
17 to justify the draft CDO by belittling the evidence of economic and social consequences presented
18 by the City and others, and by proffering an erroneous and dubious evaluation of water supplies and
19 demands in the interim period before the CWP yields a comprehensive solution. As discussed in
20 the City of Seaside’s (“City”) Closing Brief, the Prosecution failed to satisfy its initial burden of
21 proof to show that Cal Am has violated Order 95-10 or Water Code 1052. Issuance of a Cease and
22 Desist Order (“CDO”) in this hearing is therefore unwarranted. Even if it had satisfied its initial
23 burden to show that a CDO was warranted, the Prosecution failed to establish that the draft CDO is
24 a reasonable remedy.

25 Although the City maintains that an issuance of a CDO is not warranted upon the evidence
26 in the record, if the Board concludes otherwise, the City respectfully urges the Board to be a voice
27 of reason. The Board should balance the competing public interests of riparian habitat on the
28 Carmel River with the social needs of the community. The City and the MPWMD have proposed

1 balanced alternative solutions that could achieve material improvements for the Carmel River
2 steelhead habitat without imposing draconian impacts upon the community. Any order from this
3 Board should take a similar balanced remedy rather than the harsh, one-sided approach set forth in
4 the draft CDO.

5 **II. THE PROSECUTION'S DISCOUNTING OF THE CITY'S ECONOMIC IMPACT**
6 **ANALYSIS IS INCORRECT AND IRRESPONSIBLE**

7 In Phase II, the City introduced an economic impact analysis, principally authored by David
8 Zhender, a land use economist with the firm Economic Planning Systems. (Exhibit Seaside-8,
9 Curriculum Vitae for David Zehnder, p. 1.) The analysis evaluates the potential economic impacts
10 that could result if the draft CDO were implemented and the CDO resulted in a moratorium on new
11 water supply connections within the City.¹ The Prosecution discounts Mr. Zehnder's findings as
12 speculative, exaggerated, and based upon an unrealistic worst case scenario. (Prosecution's Closing
13 Brief, at 19.) Such characterization is incorrect and reckless.

14 The Prosecution contends that the analysis improperly assumes that the CDO will result in a
15 moratorium, thereby assuming a worst case scenario and an exaggerated result. (Prosecution's
16 Closing Brief, at 19.) The City instructed Mr. Zhender to assume that a moratorium would be
17 imposed because this is the City's primary concern with respect to the draft CDO (Exhibit Seaside-
18 4, Phase II, Direct Testimony of Ray Corbuz, pp. 3-4.). The City's concern is justified. The
19 MPWMD's Expanded Water Conservation and Standby Water Rationing Plan provides for the
20 imposition of a moratorium to achieve 20 percent reductions in stage five of the rationing plan.
21 (MPWMD Ordinance-92, p. 24.) When combined with mandatory reductions required by the
22 Seaside Groundwater Basin, Adjudication, the draft CDO would require a total system reduction of
23 21 percent by 2012, necessitating imposition of a moratorium. (Exhibit MPWMD DF-2, Phase II,
24 Direct Testimony of Darby Fuerst, p. 1.) Moreover, the Prosecution itself suggests that a
25 moratorium will be necessary, and even lays out the legal justification for Cal-Am to impose one.
26 (Prosecution's Closing Brief, at 21.) Thus by its own arguments the Prosecution demonstrates that

27 _____
28 ¹ The City is presently processing plans for 15 infill development projects that are scheduled to receive water from the
City's small remaining water supply (roughly 56 acre-feet) authorized by the MPWMD's water allocation program.

1 it was reasonable for Mr. Zehnder to evaluate the economic impacts based upon the assumption of a
2 moratorium being imposed.

3 Mr. Zhender also acknowledged that there are many factors other than unavailable water
4 supply that could prevent realization of the infill development projects currently being planned.
5 (Exhibit Seaside-9, Phase II, Direct Testimony of David Zehnder, p. 3.) . Such is the nature of urban
6 development. These uncertainties do not detract from the significance of the economic impact
7 analysis and the implication for this hearing. The economic analysis concludes that the
8 consequences of the issuance of the draft CDO could be lost general fund revenue of *up to* \$2.7
9 million and *up to* 2500 jobs (including permanent and temporary jobs). Such results would of
10 course be less severe if the full scale of the planned in-fill development is not achieved for other
11 reasons; Mr. Zhender's report acknowledges the same. (*Id.*, at 13.) But this belies the point. Even
12 if the ultimate impacts were only half of the report's conditional estimate (i.e., the CDO caused the
13 loss of roughly \$1.3 million in City revenue, and 1250 jobs), the fiscal impacts are significant for a
14 city of this size, which is still recovering from the economic dislocation caused by the closure of
15 Fort Ord. The Prosecution's flippant disregard for these potential impacts reveals that its thirst for
16 victory outweighs any consideration of the community and a prudent balancing of competing public
17 interests.

18 **III. THE PROSECUTION'S EVALUATION OF WATER SUPPLY AND DEMAND IS**
19 **INCORRECT**

20 The Prosecution improperly concludes that implementation of the Draft CDO will not
21 adversely impact community health and safety. This conclusion is based on two false assumptions:
22 (1) current per capita water use affords surplus that could be safely reduced; and (2) anticipated
23 water supply projects will generate water supplies in the amounts and on the schedule anticipated.

24 **A. The Prosecution Misapplies Section 697 subd. (b) of the California Code of**
25 **Regulations in Evaluating Minimum Water Supply for Health and Safety**

26 The Prosecution calculates that current urban per capita use on the Peninsula is 99 gallons
27 per person per day (gppd), a figure that incorporates all uses, including domestic, commercial and
28

1 industrial.² It then cites section 697 subd. (b) of the California Code of Regulations (“CCR”),
2 which sets forth a domestic supply range of 55 to 75 gppd as reasonably sufficient to satisfy health
3 and safety requirements. Comparing these figures (99 gppd and 75 gppd), the Prosecution
4 concludes there is surplus per capita water being used that could be reduced without harm to health
5 and safety. This conclusion is wrong because it conflates the CCR’s estimate for reasonable
6 domestic use with total use.

7 In fact, current domestic use on the Peninsula is approximately 68 gppd, not 99 gppd.³
8 Cutting total use down from 99 gppd to 75 gppd will severely impact domestic supply, reducing it
9 by as much as 24 gppd to 44 gppd, well under the reasonable domestic supply range defined in the
10 CCR. This amount is even lower than the 50 gppd to which the community was physically
11 restricted during the severe drought of 1976-1977. The Prosecution claims that this amount was
12 sufficient to maintain the health and safety of the community, but presents no evidence to support
13 this assertion. (Prosecution’s Closing Brief, at 13.) It cites to Exhibit MPMWD-DF9A at page 6,
14 lines 3-12, but this testimony simply notes that 50 gppd was available during the drought. It says
15 nothing about whether this amount was sufficient to maintain health and safety.

16 **B. The Prosecution Ignores the Facts in Deriving its Projections for Near-Term**
17 **Water Supplies**

18 In its Closing Brief, the Prosecution includes a discussion of potential new interim water
19 supplies that it anticipates will be available to offset reductions required by the draft CDO.
20 (Prosecution Closing Brief at pp. 14-17; Exhibit “A.”) Unfortunately, there is significant
21 uncertainty concerning whether these anticipated new water supplies will develop in the quantities
22 projected. For example, the Prosecution’s water supply calculations project that Cal-Am will
23 receive 300 acre feet per year (“afy”) from the Sand City desalination project for the next 10 years,
24 and 920 afy from the Aquifer Storage and Recovery (“ASR”) project through 2017, at which point
25 it expands to 1,920 afy. (Prosecution Closing Brief, Exhibit A.) However, Cal-Am is only assured

26 ² The Prosecution Team reached this figure by dividing total WY 2007 demand by total population. (Prosecution
27 Team’s Closing Brief, p. 12.)

28 ³ Exhibit MPWMD-DF9A, p. 6 (Testimony of D. Fuerst, Phase II, July 23-25, 2008). Based on an average daily use of
170 gallons per day per domestic connection, and an average of 2.54 residents per connection, daily domestic use on the
Peninsula averages 68 gppd.

1 a supply of 94 afy from Sand City. The rest of the 300 afy of potential allocation is dependent on
2 Sand City's demand, which is expected to increase annually. As Sand City's demands increases,
3 Cal-Am's allocation from this project will decrease. Supply from the ASR project is also uncertain
4 as it depends upon hydrological conditions on the Carmel River. As a result, this supply could fall
5 short of the anticipated 920 afy of additional yield if a sustained dry period occurred.

6 The Prosecution dismisses out of hand, and does not include in its calculations the
7 reductions to Cal Am's Seaside Basin supply as required by the Seaside Basin Adjudication.
8 (Prosecution's Closing Brief, p. 15.) It further ignores entirely the ongoing risk that saltwater
9 intrusion into the Basin could substantially reduce Cal Am's supply from the Basin.

10 Furthermore, the Prosecution falsely assumes that improvements on Cal Am's "unaccounted
11 for losses" will bear a one-to-one correspondence with additional water supplies despite testimony
12 to the contrary. (Hearing Transcript, Phase I, Friday June 20, 2008, p. 444, lines 9-17.) In light of
13 these uncertainties, there is a substantial risk that Cal Am's total available supplies could fall
14 significantly short of the Prosecution's projections. The result would be a level of supply below
15 even the per capita quantity that the Prosecution unreasonably recommends based upon its
16 erroneous evaluation of per capita water use.

17 As discussed in the City's Closing Brief, the Prosecution bears the burden of presenting
18 evidence of the reasonableness of the CDO. (See *McCoy v. Board of Retirement* (1986) 183
19 Cal.App.3d 1044, 1051 [the party asserting the affirmative at an administrative hearing has the
20 burden of proof, including both the initial burden of going forward and the burden of persuasion by
21 a preponderance of the evidence].) Having failed to submit competent evidence to demonstrate as
22 much, the Prosecution has failed to satisfy its burden.

23 **IV. THE PROSECUTION PRESENTED NO EVIDENCE THAT INITIAL**
24 **REDUCTIONS WILL BENEFIT THE ENVIRONMENT**

25 The Prosecution also failed to introduce evidence to support its assertion that incremental
26 decreases in diversions will improve steelhead habitat. Rather, the Prosecution simply posits that
27 reduced diversions equate to more water within the Carmel River, which will benefit the steelhead.
28 (Prosecution's Closing Brief, p. 10.) The Prosecution failed to provide any credible evidence as to

1 how much water would be required to keep a certain amount of stream bed wetted throughout the
2 year. Absent such evidence, the reduction scheme proposed in the Draft CDO lacks any rational
3 basis.

4 Moreover, the Prosecution ignored testimony from the MPWMD’s biologist, Kevan
5 Urquhart, that the draft CDO’s initial reductions are probably not enough to re-water significant
6 amounts of habitat year-round, and thus “may serve no more than a policy/disciplinary benefit for
7 the Board, and not much of an ecological one for the river and its aquatic life...”. (Exhibit
8 MPWMD-KU1, Direct Testimony of Kevan Urquhart, Phase II, p. 6.) Where the Prosecution does
9 cite Mr. Urquhart, it takes his testimony out of context to imply that *any* reduction in diversions will
10 improve steelhead populations. (See e.g., Prosecution Closing Brief, at 10 [“To the extent that the
11 final CDO could keep any significant amount of additional stream habitat wetted throughout the
12 summer and fall, it would likely result in additional fall production of juvenile steelhead for the
13 watershed as a whole.”].) However, when read in context, Mr. Urquhart’s testimony is far more
14 constrained, stating that at least 35 percent to 50 percent reductions to Cal Am’s diversions would
15 be required before significant improvements to the riparian habitat could be reasonably anticipated
16 (Hearing Transcript, Phase II Friday July 25, 2008, pp. 15-21; Exhibit PhaseII, MPWMD-KU-1,
17 Direct Testimony of Kevan Urquhart, p. 5.)

18 **V. CONCLUSION**

19 All parties desire an end to Cal-Am’s unauthorized diversions, recovery of the steelhead and
20 its habitat, and a thriving Monterey community. The Draft CDO is not the way to achieve this
21 common goal. The draft CDO will likely only result in minimal, if any, habitat benefits for several
22 years. However, it would immediately result in severe economic and social impacts to the
23 community. In short, the draft CDO represents an unbalanced penalty upon the community that will
24 not serve the public interest.

25 In its Closing Brief, the Prosecution appeals to a punitive approach to “incentivize” Cal-Am
26 to achieve a comprehensive solution and eliminate its unauthorized diversions. (Prosecution’s
27 Closing Brief, p. 24.) No additional incentive is necessary; the community fundamentally
28 understands that the status quo cannot persist. With a draft EIR on the Coastal Water Project to be

1 released soon, and unprecedented cooperation among the Water for Monterey Coalition, the
2 prospects for a solution are strong. The Prosecution's hard-line strategy will only lead to more
3 litigation, more squandered resources, and more wasted time. A far better approach would be for
4 the Board to assist in the solution. As discussed in the City's Closing Brief, the Division of Water
5 Rights could take a leading role to help facilitate the success of the CWP. The City respectfully
6 urges the Board to join the community in pursuit of a solution rather than imposing the arbitrary and
7 imprudent penalty embodied in the draft CDO.

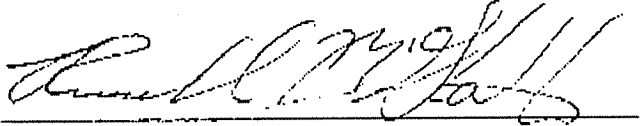
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Respectfully submitted,

Dated: November 9, 2008

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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ss

I am employed by Brownstein Hyatt Farber Schreck n in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 East Carrillo Street, Santa Barbara, California 93101. On November 10, 2008, I served the within documents:

CITY OF SEASIDE’S REPLY BRIEF



By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Barbara, addressed as set forth below.



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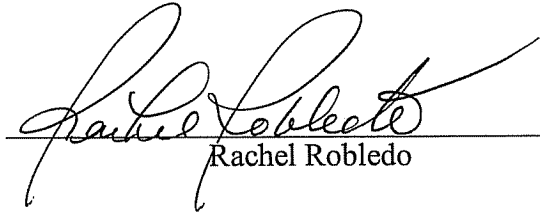


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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 10, 2008, at Santa Barbara, California.



Rachel Robledo

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