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BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

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

**CALIFORNIA AMERICAN WATER
REQUEST FOR CLARIFICATION AND
MOTION FOR TEMPORARY
POSTPONEMENT OF PROCEEDINGS**

I. INTRODUCTION

California American Water (“CAW”) seeks clarification from the State Water Resources Control Board (“State Water Board”) hearing officers on the Rulings on Procedural Issues Involving the Consideration of a Cease and Desist Order issued in this matter on May 13, 2008 (“May 13 Ruling”).¹ CAW seeks clarification of the May 13 Ruling regarding both scope of the hearing and the basis for potential liability. CAW appreciates that the May 13 Ruling resolved some of the issues pertaining to scope and liability. CAW seeks further clarification to resolve certain seemingly conflicting statements made in that Ruling.

In addition, CAW seeks a ruling on its request that the hearing officers take official notice of specified documents. The May 13 Ruling does not address all of the documents for which CAW

¹ Nothing in this request should be construed as a waiver by CAW of its right to request reconsideration or otherwise object to the May 13 Ruling. CAW specifically reserves its right to raise objections to the May 13 Ruling at a later time.

1 requested official notice. CAW therefore requests the hearing officers rule on those documents for
2 which CAW requested official notice, but were not addressed in the May 13 Ruling.

3 Finally, CAW moves the hearing officers for a temporary postponement of the proceeding.
4 There were approximately three weeks between the issuance of the May 13 Ruling and the date by
5 which testimony and exhibits must be filed. The May 13 Ruling did not definitively resolve CAW's
6 uncertainty as to the scope of liability in this proceeding, and CAW has since prepared this request
7 for additional clarification. The very need for the initial briefing on procedural issues and further
8 clarification of those issues demonstrates the intricate nature of this proceeding. Further, as
9 suggested by the hearing officers, CAW is now reviewing and considering what facts, if any, may
10 be part of a stipulation, and will necessarily need to meet and confer with the other parties to this
11 proceeding regarding any proposed stipulation. CAW is also preparing a response to California
12 Salmon and Steelhead Association's request to allow Mr. Baiocchi to testify by phone. Under these
13 circumstances, CAW believes it would be appropriate and therefore moves the hearing officers for a
14 postponement of all dates (filing and hearing) set for this proceeding for a period of approximately
15 four (4) weeks.

16 **II. REQUEST FOR CLARIFICATION**

17 **A. The May 13 Ruling Does Not Clearly Define The Issue Of Liability**

18 The May 13 Ruling contains confusing and conflicting statements regarding the issue of
19 liability. As a result, the scope of liability remains obscure. (See May 13 Ruling, § 2.0.)

20 In section 2.0 of the May 13 Ruling, the hearing officers question CAW's position on
21 liability, stating that while Order 95-10 established CAW's water rights to 3,376 afa, CAW claims
22 that Order 95-10 "somehow authorizes Cal Am to divert a much larger amount, up to 11,285 afa."
23 The hearing officers then question whether CAW contends that Order 95-10 is a "water right
24 permit" or "an interim physical solution." Without resolving this uncertainty, the hearing officers
25 determine that CAW is raising a legal argument, and appear to conclude CAW is subject to liability
26 for trespass under Water Code section 1052, regardless of its compliance with the pre-existing
27 Order 95-10, but then appear to rely on the water rights established under Order 95-10 as a basis for

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1 liability under Water Code section 1052.² As explained further below, this conclusion is not
2 consistent with other statements made in the May 13 Ruling.

3 To make clear CAW's position, CAW understands the State Water Board is able to issue a
4 cease and desist order for violations of Water Code section 1052. Under section 1052, a diversion
5 or use of water is a trespass if it is not "authorized." (Water Code, § 1052.) Authorization can
6 come from any action undertaken pursuant to Division 2 of the Water Code (section 1000 *et seq.*).
7 (*Id.*)

8 It should be beyond reasonable debate that, through Order 95-10 and not through the
9 issuance of a permit, the State Water Board authorized diversions as an interim physical solution.
10 In that Order, the State Water Board authorized CAW to divert no more than 14,106 acre-feet per
11 year, subject to CAW satisfying the conditions established therein. (Order 95-10, Condition 1
12 (prohibiting diversion in excess of 14,106 acre-feet).) The State Water Board explained why it
13 needed to authorize diversions up to 14,106 acre-feet per year, writing:

14 In the short term, Cal-Am cannot significantly reduce its extraction from the wells
15 along the Carmel River. As previously stated, most of Cal-Am's supply is obtained
16 from the Carmel River and most of that supply is provided by the wells along the
17 river. The people and businesses on the Monterey Peninsula must continue to be
served water from the Carmel River in order to protect public health and safety.

18 (Order 95-10, p. 37.) It is for these reasons, CAW argued in its briefs on procedural issues that
19 Order 95-10 serves as a physical solution, albeit an interim physical solution. (CAW Pre-Hearing
20 Brief on Procedural Matters, 4:14-17, 12:14-21; CAW Opposition to Pre-Hearing Briefs, 4:23-6:11,
21 9:16-17.) It is also for these reasons, CAW's position is that CAW is liable for a trespass (or
22 threatening to commit a trespass) only if it has not complied (or is threatening not to comply) with
23 Order 95-10. (CAW Opposition to Pre-Hearing Briefs, 4:15-22, 6:11-22.)

24 The conflicting statements in the May 13 Ruling create additional ambiguity regarding the
25 scope of liability. For example, section 1.1 of the May 13 Ruling states:

26 ///

27 _____
28 ² Depending on how the hearing officers' rule on the request for clarification of the issue of liability, they may also
need to clarify statements in the May 13 Ruling addressing the issue of remedy. (*See, e.g.*, §§ 1.2, 2.0.)

1 The notice of proposed cease and desist order and accompanying draft cease and
2 desist order allege that Cal Am is diverting water from the Carmel River in excess of
3 its rights, as recognized in State Water Board Order WR 95-10, to divert 3,376 afa in
violation of Water Code section 1052, and that Cal Am is diverting water in
violation of condition 2 of Order WR 95-10.

4 (May 13 Ruling, § 1.1, p. 1 (emphasis added).) From that statement, it would appear the issue of
5 liability involves two questions: whether CAW diverts more water than 3,376 acre-feet per year
6 and whether CAW is in compliance with condition 2 of Order WR 95-10.

7 Section 3.1 also appears to identify two questions for the issue of liability, albeit slightly
8 different than the questions identified in section 1.1. In section 3.1, it states:

9 Only evidence will be accepted that tends to prove that Cal Am is or is not in
10 violation of Water Code section 1052 and has or has not complied with the
requirements of Order WR 95-10, and amendments thereto.

11 (May 13 Ruling, § 3.1, p. 3 (emphasis added).) From this statement, the issue of liability would
12 appear to hinge on both the violation of Water Code section 1052 and whether a violation of any
13 element of Order 95-10 can be established (not just condition 2).³

14 The statements in sections 1.1 and 3.1 both appear to conflict with the statements in section
15 2.0. Section 2.0 provides:

16 If Cal Am and the prosecution team are willing to stipulate to the amount of Cal
17 Am's diversions, and assuming the stipulated amount exceeds 3,376 afa, the need for
18 a hearing on whether a violation has occurred would be obviated, and the hearing
could proceed directly to what remedy may be appropriate.

19 (May 13 Ruling, § 2.0, p. 3.) From that statement, the hearing officers appear to indicate the issue
20 of liability involves only one question: whether CAW is diverting more than 3,376 acre-feet of
21 water from the Carmel River per year.

22 As can be seen, the May 13 Ruling could lead to five different interpretations. It is unclear
23 if the hearing officers define the question of liability as: (1) whether CAW is diverting more than
24 3,376 acre-feet per year, or (2) whether CAW is complying with Order 95-10, or (3) whether CAW
25 is complying with condition 2 of Order 95-10, or (4) whether CAW is diverting more than 3,376
26 acre-feet per year and whether CAW is complying with all elements of Order 95-10, or (5) whether

27 _____
28 ³ The amendments to Order 95-10 do not address Condition 2 to Order 95-10. They address Conditions 4, 5, and 6.

1 CAW is diverting more than 3,376 acre-feet per year and whether CAW is complying with
2 condition 2 of Order 95-10. There is additional ambiguity in the May 13 Ruling when viewed in
3 light of CAW's position on the relationship between Order 95-10 and a finding of trespass; CAW
4 cannot commit a trespass for its Carmel River diversions if CAW is in compliance with Order 95-
5 10, as amended.

6 For these reasons, CAW respectfully requests that the hearing officers clarify their ruling on
7 the scope of liability.

8 **B. The Hearing Officers Should Clarify Their Decision On The Requests For**
9 **Official Notice**

10 On April 9, 2008, and April 23, 2008, CAW requested that the hearing officers take official
11 notice of nineteen (19) documents. The May 13 Ruling reflects a determination on only two of
12 those documents. (See May 13 Ruling, § 8.0, p. 6.) Accordingly, CAW respectfully requests a
13 ruling by the hearing officers on the remaining seventeen documents for which CAW requested the
14 hearing officers take official notice. Attached as Exhibit A is a list of the seventeen documents for
15 which this request seeks clarification of official notice.

16 **III. MOTION FOR TEMPORARY POSTPONEMENT OF PROCEEDINGS**

17 CAW requests a short postponement of the proceedings. The request is based on four
18 factors. First, there is little time between the hearing officers' May 13 Ruling and the June 6
19 deadline for submittal of testimony and exhibits. Second, as demonstrated above, CAW remains
20 uncertain as to the scope of potential liability at issue in this proceeding. Third, CAW is
21 considering the invitation by the hearing officers to stipulate to facts and the necessity to meet and
22 confer with other parties to the proceeding on any proposed stipulation. Finally, CAW is preparing
23 a response to California Salmon and Steelhead Association's request to allow Mr. Baiocchi to
24 testify by phone.

25 Additional time will allow the hearing officers to address the uncertainties identified above,
26 provide CAW and other participants adequate time to prepare for the hearing with a more clear
27 understanding of the liability phase, and provide CAW adequate time to consider potential facts to
28 which it can stipulate, while preparing a response to California Salmon and Steelhead Association's

1 request. Under these circumstances, a short postponement is appropriate. Accordingly, CAW
2 respectfully requests that the State Water Board temporarily postpone all dates set for this
3 proceeding for a period of approximately four (4) weeks.

4 Dated: May 21, 2008

Respectfully submitted,

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DIEPENBROCK HARRISON
A Professional Corporation

By 
VALERIE C. KINCAID
Attorneys for California American Water Company

EXHIBIT A

EXHIBIT A
Outstanding Items For Official Notice

Exhibit No.	Description
CAW-001	State Water Board Complaint, filed by Steelhead Association
CAW-002	State Water Board Complaint, filed by Resident's Water Committee
CAW-003	State Water Board Complaint filed by California Department of Parks and Recreation
CAW-004	State Water Board Complaint, filed by Ventana Chapter of the Sierra Club
CAW-005	Decision, <i>California American Water v. City of Seaside et al.</i> , Case No. M66343
CAW-006	State Water Board Order No. WR 2001-04-DWR
CAW-007	Notice of Draft Cease and Desist Order, January 15, 2008
CAW-008	Letter from Jon D. Rubin, dated February 4, 2008
CAW-009	Letter from Charles L. Lindsay, dated February 22, 2008
CAW-0010	Official Notice of Hearing, dated March 5, 2008
CAW-0011	Information Regarding Appearance at Water Rights Hearings
CAW-0012	State Water Board Order No. WR 99-012
CAW-0013	State Water Board Order No. WR 78-17
CAW-0014	State Water Board Order No. WR 97-02
CAW-0015	State Water Board Order No. WR 2006-0008-EXEC
CAW-0016	Second Amended Petition for Writ of Mandate, <i>Sierra Club, et al. v. State Water Resources Control Board</i> , Case No. 105610
CAW-0017	Order, <i>Monterey Peninsula Water Management District, et al. v. State Water Resources Control Board, et al.</i> , Cases Nos. M33519, M33520 and 105610

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 21, 2008, I served a copy of the foregoing document following document entitled
5 **CALIFORNIA AMERICAN WATER REQUEST FOR CLARIFICATION AND MOTION**
6 **FOR TEMPORARY POSTPONEMENT OF PROCEEDINGS** on the following interested
7 parties in the above-referenced case number to the 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."

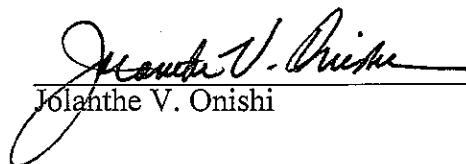
15 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above. The
16 facsimile machine I used complied with California Rules of Court, rule 2003 and no error
17 was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I
18 caused the machine to print a transmission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

19 **BY OVERNIGHT DELIVERY**
20 Federal Express Golden State Overnight
21 Depositing copies of the above documents in a box or other facility regularly maintained
22 by Federal Express, or Golden State Overnight, in an envelope or package designated by
23 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 May 21, 2008, at Sacramento,
26 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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13 **Carmel River Steelhead Association**
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