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# State Water Resources Control Board

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**Arnold Schwarzenegger**  
Governor

**MAY 29 2008**

To: Enclosed List of Participants

PROCEDURAL ISSUE INVOLVING CONSIDERATION OF A CEASE AND DESIST ORDER AGAINST CALIFORNIA AMERICAN WATER COMPANY: REQUEST BY THE CALIFORNIA AMERICAN WATER COMPANY FOR CLARIFICATION AND MOTION FOR TEMPORARY POSTPONEMENT OF PROCEEDINGS

On May 13, 2008, the State Water Resources Control Board (State Water Board or Board) issued rulings on procedural issues for the proceeding on a proposed Cease and Desist Order (CDO) against the California American Water Company (Cal Am or CAW). On May 21, 2008, Cal Am filed a request that the Board clarify its rulings, take official notice of certain documents and temporarily postpone the proceedings.

This letter will address the request for clarification and take official notice of certain documents. The hearing will not be postponed; it will commence on June 19, 2008 as set forth in the March 5, 2008 Notice of Hearing and as affirmed and modified in our May 13, 2008 rulings on procedural issues.

## 1.0 REQUEST FOR CLARIFICATION OF ISSUES

Cal Am requests clarification of the scope of the hearing and the basis for potential liability.

The Draft Cease and Desist Order alleges that Cal Am is making unauthorized diversion from the Carmel River and is in violation of Water Code section 1052. (See first paragraph in Draft CDO; Draft CDO findings 1 and 2.) Any unauthorized diversion and use of water is a trespass. (Water Code section 1052, subdivision (a).) The Draft Cease and Desist order also alleges that Cal Am is in violation of condition 2 of Order WR 95-10. (See Draft CDO finding 3.) Accordingly:

1. Cal Am may be subject to issuance of a Cease and Desist Order, as provided by Water Code section 1831, subdivision (d)(1), if Cal Am is in violation of Water Code section 1052.
2. Cal Am may be subject to the issuance of Cease and Desist Order pursuant to Water Code section 1831, subdivision (d)(3), for violation of condition 2 of Order WR 95-10.

A Cease and Desist Order may be issued on either ground.

Cal Am claims that the May 13, 2008 ruling could lead to five different interpretations as to how Cal Am may be found liable in this case.

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*It is unclear if the hearing officers define the question of liability as: (1) whether CAW is diverting more than 3,376 acre-feet per year, or (2) whether CAW is complying with Order 95-10, or (3) whether CAW is complying with condition 2 of Order 95-10, or (4) whether CAW is diverting more than 3,376 acre-feet per year and whether Cal is complying with all elements of Order 95-10, or (5) whether CAW is diverting more than 3,376 acre-feet per year and whether CAW is complying with condition 2 or Order 95-10. (Cal Am, Request for Clarification, P.4, line 22 - p.5, line 2)*

As discussed above, a Cease and Desist Order may be issued for (1) violation of section 1052; (2) violation of Order WR 95-10; or (3) both. To the extent that there is any lack of clarity, it concerns whether a Cease and Desist Order may be issued in this proceeding for violation of conditions in Order WR 95-10 other than condition 2. The Draft Cease and Desist Order specifically alleges violation of condition 2, and does not specifically allege violation of any other condition of Order WR 95-10. It should be recognized, however, that provisions of Order WR 95-10 other than condition 2 may be relevant to proof of whether Cal Am is violating condition 2 or Water Code section 1052. For example, as noted in our May 13, 2008 ruling, Order WR 95-10 determined that Cal Am's claimed riparian and pre-1914 rights to divert from the Carmel River amounted to 3,376 acre-feet per annum.

We also emphasize that our May 13, 2008, ruling was a ruling on procedural issues. We did not rule on the merits of any legal issues raised by the parties. We recognize that Cal Am contends that Board Order WR 95-10 authorizes it to divert water from the Carmel River in excess of its water rights and that it is only liable for a trespass if it is not complying with Order WR 95-10. (Cal Am Request for Clarification, p. 2, lines 8-23) We also recognize that the Prosecution Team rejects Cal Am's position that Order WR 95-10 authorizes Cal Am to divert water from the Carmel River in excess of its water rights. (Prosecution Team, Reply Prehearing Statement, p.3, line 19 - p.5, line 21) At the request of the parties, opportunity will be provided to further address this disagreement during the course of the hearing.

## **2.0 OFFICIAL NOTICE**

Cal Am requests that official notice be taken of:

1. certain documents filed with the Board and associated with earlier Board proceedings and with this proceeding,
2. orders adopted by the Board,
3. the proposed Cease and Desist Order,
4. the notice of hearing for this proceeding and an attachment to the notice concerning appearances in Board proceedings,
5. correspondence from a member of the hearing team, and
6. a petition for writ of mandate filed in the Monterey County Superior Court and an order of the court regarding the petition and, in a separate matter, a decision of the Monterey Superior Court.

Official notice may be taken of such papers.<sup>1</sup> (Cal. Code Regs., tit. 23, § 648.2; Evid. Code, § 452) Thus, official notice is taken of the following items filed with the State Water Board. To avoid confusion, we will identify the items to be officially noticed in the same manner as identified by Cal Am.

<u>Exhibit No.</u>	<u>Description</u>
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 Hearing
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, et al.</i> , Case No. 105610
CAW-0017	Order, <i>Monterey Peninsula Water Management District, et al. v. State Water Resources Control Board, et al.</i> , Case Nos. M33519, M33520 and 105610

We take official notice solely for the purposes of the rulings on the procedural matters considered in this letter and the previous letter issued by us on May 13, 2008. If a party seeks consideration of these items as part of the evidence for the Board's consideration of the issues in this, the party should make a separate request for official notice.

### **3.0 REQUEST FOR TEMPORARY POSPONEMENT IS DENIED**

Cal Am's request for a postponement is based on four factors.

*First, there is little time between the hearing officers' May 13, 2008 ruling and the June 6, 2008 deadline for submittal of testimony and exhibits. Second, as demonstrated above, CAW remains uncertain as to the scope of potential liability at issue in the proceeding. Third, CAW is considering the invitation by the hearing officers to stipulate to facts and the necessity to meet and confer with other parties to the proceeding on any proposed stipulation.<sup>2</sup>*

<sup>1</sup> Cal Am initially requested that official notice be taken of these papers in an April 9, 2008 filing with the Board. We inadvertently failed to take official notice of these papers in our May 13, 2008 rulings.

<sup>2</sup> Cal Am also requested postponement on the grounds that it was preparing a response to the request by Mr. Robert Baiocchi to testify by telephone on behalf of the California Salmon and Steelhead Association. Cal Am filed its response on May 23, 2008.

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This proceeding was initially noticed on March 5, 2008 for hearing on June 19, 2008. The notice stated that the key issues for the hearing would be: "Should the State Water Board adopt the Draft CDO? If the Draft CDO should be adopted, should any modifications be made to the measures in the draft order? What is the basis for each modification?" The Draft Cease and Desist Order alleges that Cal Am is making unauthorized diversion from the Carmel River and is in violation of Water Code section 1052. (See first paragraph in Draft CDO; Draft CDO findings 1 and 2.) The Draft Cease and Desist Order also alleges that Cal Am is diverting water in excess of the amount it is entitled to divert under its permitted and licensed water rights.<sup>3</sup> (Draft CDO, finding 1.) Finally, the Draft Cease and Desist Order alleges that Cal Am has not complied with Order WR 95-10. (Draft CDO, finding 3.)

On May 13, 2008, we issued our letter titled, "Rulings on Procedural Issues Involving the Consideration of a Cease and Desist Order Against California American Water Company for Unauthorized Diversion of Water from the Carmel River in Monterey County." In our letter, we restated the key hearing issue without change. (1.0 Hearing Issues.) However, under heading "3.0 The Hearing," we state that

*[t]he issues upon which evidence will be received will be taken in two phases:*

*During the first phase evidence may be presented addressing the issues of whether Cal Am is diverting water in violation of Water code section 1052 and whether Cal Am has complied with the requirements of Order 95-10 and amendments thereto.*

*During the second phase evidence may be presented as to what compliance measures and schedule of compliance should be included in any cease and desist order issued to Cal Am and how such an action may be most effectively and equitably implemented.*

These statements addressing the phases of the hearing did not and were not intended to change the issues before the Board. As can be seen from the key issues noticed for hearing on March 5, 2008 and reiterated on May 13, 2008, the fundamental issues that must be addressed by the Prosecution Team and Cal Am are unchanged. That Cal Am can identify different theories as to how Cal Am may be found liable in this case does not mean that it has not had fair notice and opportunity to prepare its response to the Draft Cease and Desist Order issued by the Prosecution Team. All of Cal Am's interpretations as to how it may be found liable arise out of the same basic facts and circumstances set forth in the Draft Cease and Desist Order.

Cal Am's request to postpone the hearing because it is considering whether to attempt to resolve some factual issues via a stipulation is unpersuasive. This matter was noticed for hearing over two and a half months ago, and Cal Am has had ample time to consider and to act on its consideration. Finally, Cal Am's request for postponement would have been more persuasive if the request had been joined by the Prosecution Team.

We find that the issues noticed for hearing are unchanged from the March 5, 2008 notice of hearing and that Cal Am has had fair notice of the issues and opportunity to prepare for the

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<sup>3</sup> These allegations can be two different ways of stating the same thing.

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hearing. We further find that Cal Am's request to postpone the hearing in order to consider whether to attempt to resolve certain facts through a stipulation is not justified in the absence of the Prosecution Team joining in the request. For the foregoing reasons, the request for postponement is denied.

Should you have further questions in this matter, please contact Paul Murphey; Division of Water rights Hearing Unit at (916) 341-5435 or [PMurphey@waterboards.ca.gov](mailto:PMurphey@waterboards.ca.gov); or Buck Taylor, Office of Chief Counsel at (916) 341-5595, or [BGTaylor@waterboards.ca.gov](mailto:BGTaylor@waterboards.ca.gov).

Sincerely,



Arthur G. Baggett, Jr.  
Board Member and  
Hearing Officer



Gary Wolf, P.E., Ph.D.  
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Enclosure

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