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Secretary for  
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# State Water Resources Control Board

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**Arnold Schwarzenegger**  
Governor

May 30, 2008

VIA ELECTRONIC MAIL

To: Enclosed List of Participants

PROCEDURAL ISSUE INVOLVING CONSIDERATION OF A CEASE AND DESIST ORDER AGAINST CALIFORNIA AMERICAN WATER (CAL AM): REQUEST BY ROBERT BAIOCCHI TO TESTIFY IN THE PENDING PROCEEDING BY TELEPHONE

On May 16, 2008, the State Water Resources Control Board (State Water Board) responded to Mr. Robert Baiocchi's claim that he is disabled, and requested during the March 19, 2008 Pre-Hearing Conference, to testify by telephone. Among other matters, the letter stated that Mr. Baiocchi must support his request to testify by telephone by submitting "...a declaration to the State Water Resources Control Board describing the nature and extent of his disability and explain why the disability precludes travel and testimony in Sacramento."

On May 20, 2008, Mr. Baiocchi submitted a declaration in support of his request to testify by telephone. Further, on May 20, 2008, Mr. Baiocchi submitted a letter making it clear that, as a disabled person, he wished to represent the California Salmon and Steelhead Association (CSSA), as if he were counsel, by telephone in the hearing scheduled for June 19 and 20 and for July 23, 24 and 25, 2008. Mr. Baiocchi, bases his request on the Americans with Disabilities Act (ADA).

Mr. Baiocchi's declaration states in pertinent part: "*I am disabled and cannot travel to Sacramento to testify. My disability is the loss of my bladder and one kidney, et al, due to cancer. I have problem traveling long distances. I live about 4 hours driving time from Sacramento or 8 hours round trip. I am 77 years of age.*" The declaration included no other factual recitals explaining why the absence of a kidney or a bladder precludes travel and testimony in Sacramento, and no recitals supporting the statement that he has difficulty traveling long distances.

The Public Trust Alliance (Alliance) filed a paper requesting the State Water Board to accommodate Mr. Baiocchi's request. It appears that the Alliance takes it as a given that Mr. Baiocchi is disabled and should be accommodated.

Cal Am filed a limited objection to Mr. Baiocchi's participation by telephone. Cal Am makes a number of points. Among other matters Cal Am states:

*CSSA was not thrust into this proceeding; it voluntarily sought to intervene.*

*A review is necessary to determine whether Mr. Baiocchi's testimony is necessary to the proceeding, would be duplicative of the testimony of four other witnesses identified in the CSSA's Notice of Intent to Appear (NOI), or could be represented by one of CSSA's other witnesses.*

**California Environmental Protection Agency**

Cal Am does not explain why a person with a disability that otherwise qualifies for accommodation under the ADA would not be entitled to accommodation simply because that person is participating voluntarily or that person's contribution allegedly would be cumulative of other participants' contributions.

Cal Am also argues that:

*[A]llowing CSSA's witnesses to testify telephonically will deny CAW<sup>1</sup> the ability to cross-examine the witnesses as if they were present at the hearing. ...Nor would CAW be able to use documentary evidence for effective cross examination; CAW would not be able to direct the attention of CSSA's witness to specific evidence like it could if they were present, and CAW could not rely on any rebuttal or other evidence that CSSA's witnesses might not have at their immediate disposal. These are just a few scenarios that underscore a need to be able to confront adversaries in person. CAW will be stripped of rights under the State Water Boards rules and regulation if CSSA's witnesses are allowed to testify from afar.*

Cal Am did not provide any convincing reasons why these objections could not be obviated by taking a deposition. Instead, Cal Am expresses concerns about the location and timing of the deposition, and who should bear the expense of the court reporter.

Our decision on Mr. Baiocchi's request to testify and participate in the hearing by telephone will not turn on Cal Am's objection. Rather, our decision will turn on whether Mr. Baiocchi's declaration establishes that he has a qualifying disability within the meaning of the ADA. To qualify under for a disability under Title II of the ADA, an individual must have an impairment that substantially limits a major life activity. (24 U.S.C. § 12102(2)(A).) Thus, a person must satisfy two criteria to have a qualified disability. First a person must establish that he or she has a physical or mental impairment; and second, the person must demonstrate that the impairment substantially limits a major life activity (*Toyota Motor Mfg. v. Williams* (2002) 534 U.S. 184, 195.)

Mr. Baiocchi's declaration failed to explain why his disability precludes travel and testimony in Sacramento and does not contain facts that demonstrate that his impairment substantially limits a major life activity. We find the declaration is insufficient to support a finding that he is disabled within the meaning of the ADA and should be permitted to testify by telephone or by deposition or to act as counsel for a five-day hearing by telephone. Indeed, the declaration does not contain facts sufficient to support a finding that Mr. Baiocchi is entitled to be treated differently than any other witness or person representing a party or participant in this proceeding

We will provide Mr. Baiocchi with another opportunity to file a declaration that may support his request to testify without having to travel to Sacramento. If the new declaration adequately supports his statement that he is unable to travel and testify in Sacramento, we will permit him to offer his written testimony by deposition in the same manner as occurs in civil proceedings. Mr. Baiocchi's proposed written testimony must be filed by the deadline set in the hearing notice – **12 noon Friday, June 6, 2008** for phase one and **12 noon Wednesday, July 9, 2008** for phase two – and any declaration must be filed no later than **12 noon on Tuesday, June 3, 2008**. If the declaration provides sufficient information to establish a qualifying disability, Mr. Baiocchi's deposition shall be noticed as soon as reasonably possible.

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<sup>1</sup> CAW means Cal Am.

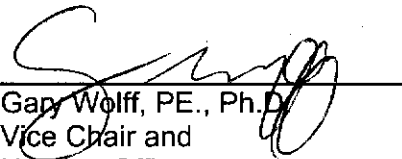
We will also authorize Mr. Baiocchi to make a written opening statement and closing statement on behalf of his organization, unless CSSA has another representative who takes that role during the hearing.

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; or Buck Taylor, Office of Chief Counsel at (916) 341-5595, or BGTaylor@waterboards.ca.gov.

Sincerely,



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



Gary Wolff, PE., Ph.D.  
Vice Chair and  
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**CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER**  
**JUNE 19, 2008 HEARING**  
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**Service by Electronic Mail**

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