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9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

BRIEF RE SCOPE OF HEARING ON
BEHALF OF CITY OF SEASIDE AND
SEASIDE BASIN WATERMASTER

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16 **I. BACKGROUND AND INTRODUCTION**

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18 On January 15, 2008, the State Water Resources Control Board's ("SWRCB") Division of
19 Water Rights issued a draft Cease and Desist Order ("CDO") requiring California American Water
20 ("Cal AM") to cease and desist from diverting water from the Carmel River in excess of its legal
21 rights as determined in SWRCB WR Order 95-10. The draft CDO, if implemented as drafted,
22 would require Cal Am to reduce its unauthorized diversions from the Carmel River over a seven
23 year schedule, including a 15 percent reduction for the 2008-2009 water year and a 50 percent
24 reduction, or 5,642 acre-feet per year, by 2014.

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26 On February 4, 2008, Cal Am requested a hearing on the draft CDO. The SWRCB then
27 established a schedule for (a) filing notices of intent to appear as a full party, (b) a pre-hearing
28 procedural conference held on March 19, 2008, (c) an opportunity for public policy statements with

1 respect to the draft CDO to be held on April 1, 2008, and (d) a two-day hearing that was previously
2 scheduled for June 19 and 20, 2008.

3 The City of Seaside (“Seaside”) and the Seaside Basin Watermaster (“Watermaster”) filed a
4 notice of intent to appear as a full party, and was represented by this office at the pre-hearing
5 procedural conference held on March 19, 2008. At the pre-conference hearing, the California Sport
6 Fishing Alliance and the Sierra Club, Ventana Chapter, argued that the hearing should be expanded
7 to reopen SWRCB WR-Order 95-10. In response, the SWRCB hearing officer ordered the parties
8 to submit briefs concerning the appropriate scope of the forthcoming hearing. The hearing officer
9 also postponed the hearing to a future date after June 20, 2008. This brief is submitted by Seaside
10 and Watermaster with respect to the scope of the hearing.

11 **II. THE HEARING SHOULD BE LIMITED TO THE NOTICED MATTER OF**
12 **WHETHER THE DRAFT CDO SHOULD BE ISSUED, BUT SHOULD BE BIFURCATED**
13 **INTO LAIBILITY AND REMEDY PHASES**

14 **A. Hearing Scope**

15 The hearing should be limited to the noticed question of whether the draft CDO should be
16 issued as drafted. This is the only issue that was noticed, and it is the only matter that is appropriate
17 for the SWRCB to address at this time. The unfortunate facts are that Cal Am is currently confined
18 to two primary sources of water for the Monterey Peninsula: the Carmel River and the Seaside
19 Groundwater Basin. Cal Am’s ability to extract groundwater from the Seaside Basin is constrained
20 by the Seaside Groundwater Basin Adjudication, which will be the subject of testimony at the
21 hearing. Thus, until a new source of water becomes available, Cal Am must continue to rely on
22 unauthorized diversions from the Carmel River to satisfy the water demands of the Monterey
23 Peninsula.
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26 All parties would surely prefer that Cal Am, in conjunction with the California Public
27 Utilities Commission, had long ago perfected a new water supply project that would allow it to
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1 serve the water needs of the Monterey Peninsula without reliance upon unauthorized diversions
2 from the Carmel River. However, for various reasons that will be addressed at the hearing, a new
3 water project has yet to be completed. However, several projects are currently being planned.
4 Depending upon the provision of the CDO, if one is issued, the SWRCB can positively influence
5 the effort to secure new water supplies.
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7 Given these circumstances, the issues appropriate for the SWRCB to address at this time are:

8 (a) whether Cal Am's failure to complete a new water supply project to date amounts to a violation
9 of the provisions of SWRCB Order 95-10, and if so, (b) what is the appropriate remedy to address
10 the violation, if one is found. In the remedy context, the SWRCB will consider all aspects of the
11 public interest, including the impacts of continued unauthorized diversion upon fish, wildlife, and
12 other public trust resources, as well as the economic, social, and community impacts of an
13 immediate reduction in annual diversions from the Carmel River by Cal Am.
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16 Expanding the hearing would not further serve the public interest because all relevant public
17 interest considerations will already be evaluated in the context of the liability and remedy aspects of
18 the hearing on the draft CDO. However, expanding the hearing would likely cause unnecessary
19 complexity and harm to the public interest. Such complexity would distract attention by Cal Am
20 and the other Monterey Peninsula stakeholders away from the ongoing efforts to obtain a new water
21 supply that will allow Cal Am to permanently eliminate its unauthorized diversions from the
22 Carmel River. This hearing process would thus become a liability with regard to the development
23 of solutions for the Monterey Peninsula. An expansion of the hearing beyond the noticed issue
24 would also cause unnecessary expense to Cal Am, and thus its ratepayers, and the other
25 participating parties. If Cal Am is in violation of Order 95-10, then the only relevant question is
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1 how best to remedy the situation. Expanding the scope and complexity of the hearing will do
2 nothing to aid in a resolution of this basic question.

3 **B. The Hearing Should be Bifurcated into a Liability Phase and a Remedy Phase**
4 **to Render the Hearing Process More Efficient**

5 The noticed issue of whether the draft CDO should be issued involves two sub-matters that
6 should be bifurcated into separate hearing phases: (a) a “liability” phase concerning whether the
7 actions or omissions of Cal Am have resulted in a violation of the provisions of SWRCB WR Order
8 95-10 such that issuance of a CDO is appropriate; and (b) if a violation is in fact found, a “remedy”
9 phase concerning the appropriate provisions for the CDO, including whether immediate reductions
10 of Cal Am’s diversions from the Carmel River are prudent and consistent with the public interest.
11 The matter of liability is an issue best addressed by the Division of Water Right’s prosecution team
12 and Cal Am. Indeed, many parties, including the City of Seaside, would likely not call witnesses to
13 provide testimony during this initial phase because the matter is particular to, and best addressed by
14 Cal Am and the Division of Water Rights. On the other hand, most parties will likely desire to
15 submit testimony with respect to the appropriate remedial provisions of any CDO to be issued.

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17 If no liability were found in the first phase such that the issuance of a CDO was not deemed
18 necessary at this time, then the second phase could be avoided all together saving considerable time
19 and financial resources for the SWRCB and the participating parties. Moreover, even if liability
20 were found in the first phase and the second phase did proceed, efficiencies would result from
21 establishing a clear delineation of the purpose of the testimony provided in each of the respective
22 phases. For these reasons, the public interest will be served by bifurcating the hearing as suggested.
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26 Respectfully submitted,

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28 **BROWNSTEIN, HYATT, FARBER, SCHRECK**

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DATED: March 12, 2008

By _____
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Complainant City of Seaside

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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COUNTY OF)
SANTA BARBARA

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 March 12, 2008, I served the within documents:

CITY OF SEASIDE’S BRIEF RE SCOPE OF HEARING

- 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.
- By e-mailing the document listed above to all parties listed on the Proof of Service attached on the Service List below.
- By sending a true copy of the above document to the parties as set forth on the service list at the fax numbers indicated. The facsimile machine used complied with CRC Rule 2003(3), and the transmission was reported as complete and without error. Pursuant to CRC Rule 2005(i), a transmission confirmation report was properly issued by the transmitting facsimile machine, stating the time and date of such transmission.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with 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 postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 12, 2008, at Santa Barbara, California.

Rachel Robledo

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Judge Roger D. Randall

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