I. BACKGROUND AND INTRODUCTION

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

On February 4, 2008, Cal Am requested a hearing on the draft CDO. The SWRCB then established a schedule for (a) filing notices of intent to appear as a full party, (b) a pre-hearing procedural conference held on March 19, 2008, (c) an opportunity for public policy statements with
The City of Seaside (“Seaside”) and the Seaside Basin Watermaster (“Watermaster”) filed a notice of intent to appear as a full party, and was represented by this office at the pre-hearing procedural conference held on March 19, 2008. At the pre-conference hearing, the California Sport Fishing Alliance and the Sierra Club, Ventana Chapter, argued that the hearing should be expanded to reopen SWRCB WR-Order 95-10. In response, the SWRCB hearing officer ordered the parties to submit briefs concerning the appropriate scope of the forthcoming hearing. The hearing officer also postponed the hearing to a future date after June 20, 2008. This brief is submitted by Seaside and Watermaster with respect to the scope of the hearing.

II. THE HEARING SHOULD BE LIMITED TO THE NOTICED MATTER OF WHETHER THE DRAFT CDO SHOULD BE ISSUED, BUT SHOULD BE BIFURCATED INTO LIABILITY AND REMEDY PHASES

A. Hearing Scope

The hearing should be limited to the noticed question of whether the draft CDO should be issued as drafted. This is the only issue that was noticed, and it is the only matter that is appropriate for the SWRCB to address at this time. The unfortunate facts are that Cal Am is currently confined to two primary sources of water for the Monterey Peninsula: the Carmel River and the Seaside Groundwater Basin. Cal Am’s ability to extract groundwater from the Seaside Basin is constrained by the Seaside Groundwater Basin Adjudication, which will be the subject of testimony at the hearing. Thus, until a new source of water becomes available, Cal Am must continue to rely on unauthorized diversions from the Carmel River to satisfy the water demands of the Monterey Peninsula.

All parties would surely prefer that Cal Am, in conjunction with the California Public Utilities Commission, had long ago perfected a new water supply project that would allow it to
serve the water needs of the Monterey Peninsula without reliance upon unauthorized diversions from the Carmel River. However, for various reasons that will be addressed at the hearing, a new water project has yet to be completed. However, several projects are currently being planned. Depending upon the provision of the CDO, if one is issued, the SWRCB can positively influence the effort to secure new water supplies.

Given these circumstances, the issues appropriate for the SWRCB to address at this time are: (a) whether Cal Am’s failure to complete a new water supply project to date amounts to a violation of the provisions of SWRCB Order 95-10, and if so, (b) what is the appropriate remedy to address the violation, if one is found. In the remedy context, the SWRCB will consider all aspects of the public interest, including the impacts of continued unauthorized diversion upon fish, wildlife, and other public trust resources, as well as the economic, social, and community impacts of an immediate reduction in annual diversions from the Carmel River by Cal Am.

Expanding the hearing would not further serve the public interest because all relevant public interest considerations will already be evaluated in the context of the liability and remedy aspects of the hearing on the draft CDO. However, expanding the hearing would likely cause unnecessary complexity and harm to the public interest. Such complexity would distract attention by Cal Am and the other Monterey Peninsula stakeholders away from the ongoing efforts to obtain a new water supply that will allow Cal Am to permanently eliminate its unauthorized diversions from the Carmel River. This hearing process would thus become a liability with regard to the development of solutions for the Monterey Peninsula. An expansion of the hearing beyond the noticed issue would also cause unnecessary expense to Cal Am, and thus its ratepayers, and the other participating parties. If Cal Am is in violation of Order 95-10, then the only relevant question is
how best to remedy the situation. Expanding the scope and complexity of the hearing will do nothing to aid in a resolution of this basic question.

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

The noticed issue of whether the draft CDO should be issued involves two sub-matters that should be bifurcated into separate hearing phases: (a) a “liability” phase concerning whether the actions or omissions of Cal Am have resulted in a violation of the provisions of SWRCB WR Order 95-10 such that issuance of a CDO is appropriate; and (b) if a violation is in fact found, a “remedy” phase concerning the appropriate provisions for the CDO, including whether immediate reductions of Cal Am’s diversions from the Carmel River are prudent and consistent with the public interest.

The matter of liability is an issue best addressed by the Division of Water Right’s prosecution team and Cal Am. Indeed, many parties, including the City of Seaside, would likely not call witnesses to provide testimony during this initial phase because the matter is particular to, and best addressed by Cal Am and the Division of Water Rights. On the other hand, most parties will likely desire to submit testimony with respect to the appropriate remedial provisions of any CDO to be issued.

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

Respectfully submitted,

BROWNSTEIN, HYATT, FARBER, SCHRECK

City of Seaside’s Brief re Scope of Hearing
DATED: March 12, 2008

By ________________________________
Russell M. McGlothlin
Attorneys for Defendant and Cross-Complainant City of Seaside
PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF
SANTA BARBARA

I am employed by Brownstein Hyatt Farber Schreck 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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