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7 **STATE OF CALIFORNIA**

8 **STATE WATER RESOURCES CONTROL BOARD**

9 In the Matter of:

10 Unauthorized Diversion of Water
by the California American Water Company,
11 d.b.a. California American Water;
draft Cease and Desist Order WR 2008-00XX-DWR;
12 Carmel River, Monterey County, California

REPLY BRIEF OF
THE NATIONAL MARINE
FISHERIES SERVICE
(NOAA FISHERIES)

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16 This matter concerns a proposed action by the State Water Resources Control Board
17 (SWRCB or Board) to issue a Cease and Desist Order (CDO) requiring the California American
18 Water Company (CalAm) to make substantial reductions in its unauthorized diversions of water from
19 the Carmel River, located in Monterey County, California.

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21 On March 5, 2008, the Board issued a Notice of Public Hearing, Meeting to Receive Public
22 Policy Statements and Pre-Hearing Conference (Notice of Public Hearing) in this matter. On March
23 13, 2008, counsel for National Marine Fisheries Service (NMFS)¹ timely filed a Notice of Intent to
24 Appear in this proceeding before the Board. A pre-hearing conference of all parties was conducted
25 on March 19, 2008. NMFS appeared by telephone through the under-signed agency counsel. During

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27 ¹ NMFS' interest in this matter stems from the presence of anadromous fish species in the
28 Carmel River, which include a distinct population segment of *Onchorynchus mykiss*, specifically,
South-Central California Coast (SCCC) steelhead. SCCC steelhead are a species of anadromous
fish under NOAA's care and jurisdiction that is listed as a threatened species pursuant to the ESA.
50 C.F.R. 223.102.

1 the pre-hearing conference, and in a subsequent letter to all participants dated March 21, 2008, the
2 Board's hearing officer requested that all parties file pre-hearing briefs to identify issues in dispute
3 to be decided at the hearing in this matter. Initial briefs were requested to be filed by not later than
4 April 9, 2008, and reply briefs by not later than 5:00 p.m. on April 23, 2008. This NMFS reply brief
5 is therefore timely filed.

6 The Notice of Public Hearing issued on March 5, at page 3, identified three "key issues" to
7 be decided in this proceeding:

- 8 1) Should the State Water Board adopt the draft CDO?
- 9 2) If the draft CDO should be adopted, should any modifications be
10 made to the measures in the draft order?
- 11 3) What is the basis for each modification?

12 According to the CDO, these issues will be decided by the Board based on four proposed
13 findings of fact, which may be summarized as follows:

- 14 1. Since 2000, CalAm has committed a continuing trespass in violation
15 of California Water Code section 1052 by illegally diverting at least
16 7,164 acre feet per year (afa) of water from the Carmel River.
- 17 2. CalAm's unauthorized diversions continue to adversely affect public
18 trust resources (including SCCC steelhead) and should therefore be
19 reduced.
- 20 3. CalAm is in violation of condition 2 of the Board's Order 95-10 by
21 its failure to terminate its unlawful diversion from the Carmel River
22 during the 12-plus years that have elapsed since the Order was
23 adopted on July 6, 1995.
- 24 4. CalAm's failure to date to cease its unauthorized diversions, together
25 with continued increased demand for water within the CalAm service
26 area, demonstrates a substantial risk that CalAm will continue to
27 illegally divert water from the Carmel River indefinitely unless the
28 Board takes enforcement action.

1 (CDO, p. 5).

2 As stated in its initial brief in this matter, NMFS supports action by the Board to adopt the
3 draft CDO, subject to certain modifications generally described in NMFS' initial brief that NMFS
4 expects will help to ensure that the water diversion reductions required under the CDO are
5 implemented in a manner that will be most beneficial to ESA-listed SCCC steelhead.

6 NMFS generally agrees with the Water Rights Prosecution Team (Prosecution Brief, pp. 1-2),
7 and Sierra Club (Sierra Club Brief, p. 2), that CalAm's degree of compliance with Order 95-10, good
8 faith or otherwise, is not dispositive of whether the CDO may be issued, or whether the Board may
9 take any other enforcement action against CalAm. As noted above, CalAm's compliance with Order
10 95-10 is only one of four bases for the proposed CDO. In NMFS' understanding of the proposed
11 CDO, a showing by CalAm that it has made diligent, good faith efforts to comply with condition 2
12 of Order 95-10 would not preclude the Board from issuing the CDO in order to prevent a continuing
13 trespass under State law and continuing harm to public trust resources, including SCCC steelhead,
14 caused by CalAm's continued illegal diversions from the Carmel River.²

15 In addition, after carefully considering the arguments made by CalAm and City of Seaside,
16 et al., for bifurcating the hearing, NMFS concurs with the Prosecution Team (Prosecution Brief, pp.
17 2), that bifurcating the hearing to separately address liability and remedy is unnecessary. NMFS
18 believes the Board's purposes and the public interest will be better served by focusing primarily on
19 the remedy phase and developing a final CDO that addresses the proposed Board findings regarding
20 CalAm's past and continuing illegal water diversions on the Carmel River. NMFS believes that
21 bifurcation will result in inefficient use of public resources, since the Board, parties, and participants
22 will most likely be compelled to mobilize the same resources and call many of the same witnesses
23 to Sacramento twice. NMFS also believes that at least some of the four proposed findings of fact
24 which are the basis of the CDO are res judicata as to CalAm, such as the fact that CalAm's

27 ² NOAA agrees with the City of Seaside, et al. (Seaside Brief, p. 3), that issuance of the CDO
28 could positively influence local efforts to secure new water sources for CalAm's customers.

1 continuing illegal diversions harm public trust resources,³ which further calls into question the need
2 for a separate fact-finding phase of this hearing.

3 In the event that the Board elects to bifurcate this proceeding, NMFS hereby reserves its right
4 to offer statements, testimony and other evidence relevant to the protection of SCCC steelhead as
5 may be necessary in both the liability phase and remedy phase.

6 Finally, NMFS takes this opportunity to respectfully request that the Board issue an order
7 instructing CalAm, if it has not already done so, to file with the Chief, Division of Water Rights, the
8 2007 water year, fourth quarter report of CalAm's water diversions in the Carmel basin, as required
9 by condition 13.a. of Order 95-10.

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11 Respectfully submitted,

12
13 /s/ Christopher Keifer

14 Christopher Keifer
15 National Oceanic and Atmospheric Administration
16 Office of General Counsel, Southwest Region

17 Dated: April 23, 2008

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³CalAm apparently agrees on this point. See CalAm Pre-Hearing Brief, at pp. 11-13.