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7
8 BEFORE THE CALIFORNIA
9 STATE WATER RESOURCES CONTROL BOARD
10

11 In the Matter of Draft Cease and Desist Order No.
12 2008-00XX-DWR Against California American
Water Company

**CALIFORNIA AMERICAN WATER
COMPANY'S REPLY BRIEF**

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1 **I. INTRODUCTION**

2 In Order 95-10, the State Water Resources Control Board (“Board”) determined California
3 American Water Company (“CAW”) could extract more water than permitted under the water
4 rights it holds. In exchange for that authorization, the Board ordered CAW to diligently pursue
5 alternative supplies, increase its effort to encourage water conservation, and to mitigate for its
6 impacts on public trust resources. Now, the Board’s prosecution team now asks the Board to issue
7 a cease and desist order based upon a claim CAW has committed a trespass pursuant to section
8 1052 of the Water Code, irrespective of CAW’s compliance with Order 95-10. In its closing brief,
9 the prosecution team explains its motive for the request: “Order 95-10 is no longer relevant to the
10 situation on the Monterey Peninsula.” (PT brief, p. 4:22-23 [emphasis added].) The prosecution
11 team makes that judgment call notwithstanding the fact it is not the prosecution team’s to make, and
12 notwithstanding the Hearing Officers’ prior instruction that this is not the forum to revisit Order 95-
13 10. (Prehearing Transcript, p. 27:16; May 13, 2008 Ruling, p. 4.) The arguments of the
14 prosecution team must be viewed in light of its nefarious and defiant desire to reopen Order 95-10.

15 It appears beyond reasonable dispute that the draft cease and desist order proposed by the
16 prosecution team presents two bases for liability: (1) an alleged violation of condition 2 of Order
17 95-10, and (2) an alleged trespass by CAW. (See Exhibit SWRCB 7 and the March 13, 2008,
18 March 29, 2008 and May 29, 2008 rulings.) However, when due respect is given to Order 95-10,
19 the Hearing Officers’ prior rulings, legal principles, and the evidence, a single issue emerges as the
20 basis for liability – CAW’s compliance with condition 2 of Order 95-10. From there, a single
21 interpretation of condition 2’s requirement surfaces – CAW must diligently pursue alternative water
22 supplies.

23 In its closing brief, the prosecution team concedes it has the burden of proving CAW is
24 liable, and it must meet that burden by a preponderance of evidence. The prosecution team,
25 however, falls far short of proving its case. In fact, the prosecution team and others that endorse the
26 issuance of the draft cease and desist order did not introduce any evidence showing, and, thus not
27 unexpectedly, failed to present any argument in their closing briefs demonstrating a lack of
28 diligence by CAW.

1 Instead of proving their case on liability, the prosecution team and others argue the Board
2 should find CAW liable because it extracts Carmel River water without a permit or license. That
3 position forces the prosecution team and others to ignore the delicate balance previously struck in
4 Order 95-10, and well-established legal principles. The prosecution team and others robotically
5 repeat their static, pre-hearing position, without citing supporting evidence in the record and
6 without addressing the challenges thereto. This approach certainly does not satisfy the burden of
7 proof needed for the Board to find CAW liable and thus subject to a cease and desist order.

8 Likewise, the prosecution team concedes it maintains the burden of proving its remedy will
9 protect trust resources and public health and safety. The prosecution team and others, however, do
10 not provide evidence that the changes proposed in the draft cease and desist order are needed to
11 mitigate for harm caused by CAW, much less provide any protection to public trust resources. No
12 one presented credible evidence demonstrating the proposed changes in CAW extractions (again
13 subsurface) would increase the amount of surface water in the Carmel River. Nor was anyone able
14 to present credible evidence that the proposed changes in CAW extractions will improve the
15 riparian corridor, population of steelhead, or the population of wildlife.

16 In opposite of what is required to meet its burden of proof, the prosecution team relies upon
17 on gross statements, which have no bearing on the impact the proposed remedy will have on trust
18 resources. The prosecution team alleges its proposed remedy is simply “the most obvious” and
19 “will likely result” in increased steelhead abundance. (PT brief, p. 10:9-14.) The prosecution
20 team’s burden cannot be met by statements of what appears “obvious” or what the prosecution team
21 believes is “likely” to result. The Board needs more. The prosecution team and others do not
22 provide it. These types of unsupported assertions, without more, amount to conjecture and cannot
23 be the basis for the Board’s issuance of a cease and desist order.

24 The prosecution team and others also dismiss with little to no credible evidence the
25 significant impacts of its proposed remedy on CAW and the community. They rely upon the
26 testimony of an engineer who has no municipal experience, no experience operating water utilities,
27 and who, not surprisingly given his lack of experience in the area, makes a number of improper
28 assumptions. The prosecution team’s closing brief does not address those failures. Instead of

1 clarifying and correcting, the prosecution team simply repeats the witness' mistakes. No one
2 favoring the issuance of the proposed cease and desist can reasonably refute the glaring evidence
3 presented by those who have expertise, who consistently and unanimously conclude, consistent
4 with the Board's own conclusion in Order 95-10, the remedy proposed by the prosecution team and
5 others will jeopardize public health and safety.

6 In sum, without proving liability by a preponderance of the evidence, there is no violation to
7 remedy. Without proving by a preponderance of the evidence the remedy protects trust resources
8 and public health and safety, the Board may not adopt the prosecution team's proposed remedy.
9 Here, the prosecution team failed on all required showings. The Board is not justified in taking
10 action against CAW.

11 **II. THE PROSECUTION TEAM FAILED TO PROVE CAW LIABILITY**

12 All parties recognize the prosecution team's draft cease and desist order proposes liability
13 based on either a violation of condition 2 of Order 95-10 or an independent finding of trespass.
14 CAW's closing brief clearly sets forth the legal and practical reasons it cannot be liable under either
15 of these allegations. The prosecution team's closing brief advances arguments attempting to force
16 the opposite conclusion. However, these arguments are not supported with persuasive legal citation
17 or evidence.

18 **A. The Board Can Only Find CAW Liable If It Determines CAW Has Violated** 19 **Condition 2 Of Order 95-10**

20 In its closing brief, CAW clearly explains the legal and practical limits on trespass
21 prosecution in the current proceeding. Trespass turns on authorization of water use, Order 95-10
22 provides that authorization, and therefore trespass is precluded, unless it can be proven CAW
23 violated Order 95-10. (CAW brief, pp. 4:26-5:12.) CAW supports its legal interpretation with
24 citation to the operative sections in Order 95-10, the non-operative sections in Order 95-10, Board
25 action since issuance of Order 95-10, and rules of law, equity, and practicality. (*Id.*, p. 10:21-17:5.)
26 In addition to those points, CAW's interpretation is consistent with the rules for trespass on land.
27 (*Civic W. Corp. v. Zila Indus., Inc.* (1977) 66 Cal.App.3d 1, 16-17 [consent precludes prosecution
28 of trespass]; *Duval v. Rowell* (1954) 124 Cal.App.2d 897 [trespass cannot survive consent to enter

1 land, even if consent is only implied].)

2 The prosecution team's closing brief alleges an independent trespass action may be enforced
3 without regard for CAW's compliance with Order 95-10. (PT brief, p. 6:4-7:3.) To support its
4 position, the prosecution team depends on incorrect assumptions, and a single, distinguishable case
5 to ultimately mount an unlawful collateral attack on Order 95-10. (*Id.*, pp. 3:18-6:3.)

6 The prosecution team claims, incorrectly, that CAW asserts authority to extract more than
7 the approximate 3,376 acre-feet of rights identified in Order 95-10 based on a "new" water right.
8 (*Id.*, p. 3, 18-21.) The prosecution team alleges CAW is liable for trespass because it extracts water
9 without first obtaining a permit or license for the "new" water right, pursuant to Water Code section
10 1225. (*Id.*, p. 3:11-12.) In this regard, the prosecution team makes a mistake.

11 The prosecution team improperly reads Water Code section 1052, the section that prohibits
12 trespass on the waters of the State. The language of the Water Code states trespass is the "diversion
13 or use of water in a manner other than as authorized by Division 2 of the Water Code." (Water
14 Code, § 1052.) Nothing in the statutory language confines the authorization to that obtained
15 pursuant to section 1225. And, indeed, it is CAW's position it is authorized by Order 95-10, not
16 section 1225; or a water right permit, to extract more than the approximate 3,376 acre-feet
17 identified in Order 95-10. (CAW brief, pp. 4:27-5:11; CAW Opposition to Pre-Hearing Briefs, pp.
18 4:23-6:15 [discussing CAW's water authorization comes in the form of a physical solution].) The
19 authorization comes directly by order of the Board. (Order 95-10, p. 40 [limiting CAW extractions
20 to less than 14,106 acre-feet].) Rather than explain its strained position and respond to the
21 arguments posed by CAW, the prosecution team relies upon a single, distinguishable case.

22 The prosecution team and others offer *People v. Shirokow* (1980) 26 Cal.3d 301
23 ("*Shirokow*"). In *Shirokow*, the court considered whether and to what extent the State must
24 recognize prescriptive water rights. (*Shirokow*, p. 303-04.) The Court explained:

25 It has long been debated whether the Water Code's comprehensive scheme for the
26 granting of appropriative rights by the board (§ 1200 et seq.) precludes the
27 acquisition of prescriptive rights in circumstances such as these in which a
28 nonriparian user asserts rights in water based on adverse use initiated after the
enactment of the code.

1 (*Id.*, p. 304.) The debate resolved by *Shirokow* is very different than the debate now before the
2 Board. *Shirokow* did not involve water use governed by a Board order, nor does CAW claim a
3 water right to extractions in excess of 3,376 acre feet per year. Those differences render *Shirokow*
4 inapplicable to the present matter. It cannot and does not support allegations advanced by the
5 prosecution team and others.

6 Another flaw in the prosecution team's trespass theory is found in its own remedy, which
7 conflicts with its interpretation of trespass under Water Code 1052 and its argument in support a
8 cease and desist order. The prosecution team argues CAW is liable, per se, for trespass when it
9 extracts more water than allowed under its water rights. (PT brief, p. 3:1-3.) At the same time, the
10 prosecution team proposes a remedy in response to CAW's alleged violations based on step
11 reductions in CAW extractions -- reductions that never reduce CAW extractions to 3,376 acre-feet
12 per year. Thus, while the prosecution team implicitly argues that the Board does not have the
13 authority to authorize extractions as it did in Order 95-10, its remedy would have the Board repeat
14 that same alleged error here. In this manner, it is clear the prosecution team does not want to
15 remedy the alleged trespass violation, but only wishes to re-write Order 95-10.

16 The prosecution team also argues Order 95-10 only *defers*, but does "not abdicate,
17 enforcement against California American Water Company (Cal-Am) for violation of Water Code
18 section 1052." (PT brief, p. 1:4-6.) CAW agrees and never argues the Board relinquished its ability
19 to pursue an enforcement action against CAW. CAW argues the Board's intent was to defer
20 enforcement action unless and until Order 95-10 has been violated. The prosecution team and
21 others arbitrarily argue now is the time to end Order 95-10's deferral. They never explain why
22 now. Why not five years ago or five years from now? They also never explain how their argument
23 can be reconciled with Order 95-10, in which the Board stated enforcement action would result
24 from a "violation of [the] conditions [of Order 95-10]." (Order 95-10, p. 45.)

25 Hence, what emerges from the prosecution team's trespass argument, when the thin veil it
26 presents is lifted, is a clear attempt by the prosecution team to collaterally attack Order 95-10. As
27 previously noted, the foundation of the prosecution team's trespass claim is a belief that trespass
28 results from post-1914 appropriation of water unless Board issues a permit or license for the use.

1 The interpretation ignores the reality that, in Order 95-10, the Board ordered implementation of a
2 physical solution, founded on CAW extracting water in excess of its water rights while alternative
3 supplies are procured; a reality recognized by the prosecution team's witnesses and reflected in the
4 remedy now proposed by the prosecution team. (*See, e.g.*, Ex. SWRCB 2(a) [letter from Ms.
5 Mrwoka stating "Cal-Am is required to restrict total diversions from the Carmel River to no more
6 than 11,285 af"].) For the prosecution team to now argue the Board is not empowered to issue a
7 physical solution which allows, on an interim basis, water use without a permit or license is a direct
8 challenge to the authority of the Board to issue Order 95-10. Not only does such a challenge exceed
9 the scope of this proceeding, but the time to raise that challenge has long since passed. The
10 prosecution team's effort is barred by time and procedure. (*See e.g.*, Water Code § 11261; CAW
11 brief, p. 9 fn 12.)

12 Perhaps realizing the weakness of its position, the prosecution team alleges the Hearing
13 Officers previously determined, in their May 2008 ruling, CAW may be liable for trespass,
14 notwithstanding its compliance with Order 95-10. (PT brief, p. 6:7-10.) This allegation is
15 misleading and without merit. In the May 29, 2008, ruling the Hearing Officers recite the two,
16 potential "causes of action" for this proceeding; a trespass action under Water Code section 1052
17 and a violation of condition 2 of Order 95-10. The Hearing Officers, however, were careful to state
18 they were not making a determination on whether a trespass action could be advanced
19 independently of compliance with Order 95-10. (May 29, 2008 ruling, p. 2.) The Board must
20 ignore the prosecution team's attempt to find a ruling where there was none.

21 In sum, neither the prosecution team nor any other participant in this proceeding advances
22 an argument that would allow the Board to find CAW liable for trespass. Liability in this
23 proceeding must be based on CAW's compliance with condition 2 of Order 95-10.

24 **B. CAW Has Complied With Condition 2 Of Order 95-10**

25 **1. Condition 2 Of Order 95-10 Requires CAW To Diligently Pursue**
26 **Alternative Water Supplies.**

27 One of the fundamental points on which the prosecution team and CAW differ is the
28 meaning and requirement of condition 2. CAW does not argue condition 2 of Order 95-10 requires

1 “diligent pursuit of implementation”, as some might suggest. It argues Order 95-10 requires CAW
2 to diligently pursue, or maintain a consistent effort to obtain alternative water supplies. The
3 argument is supported by the plain words of condition 2, other language of Order 95-10, the actions
4 of the Board since 1995, and general principles of administrative law. Contrary to the position of
5 the prosecution team and others, condition 2 cannot be interpreted to require CAW to terminate
6 extractions of more than the approximate 3,376 acre-feet of rights identified in Order 95-10.

7 As explained in more detail in CAW’s closing brief, based on the plain meaning of the
8 words in condition 2, the Board must interpret it to compel CAW to maintain a consistent effort, the
9 purpose of which is to obtain alternative water supplies. (CAW brief, pp. 10:21-12:13.) That
10 interpretation is consistent with section 8.0 of Order 95-10, in which the Board stated it requires
11 CAW to “develop and diligently pursue a plan for obtaining water from the Carmel River or other
12 sources consistent with California Water law.” (Order 95-10, p. 37) That interpretation is also
13 consistent with previous Board determinations regarding diligence, and the evidence presented in
14 this proceeding, including the testimony of the prosecution team witnesses.¹

15 The prosecution team and others ignore the evidence above, alleging the Board “clearly
16 intended Cal-Am to *terminate* its unlawful diversions through one or more of the specified actions,
17 not merely diligent pursue [sic] of alternate water supplies or diligently pursue a plan to obtain
18 alternate water supplies.” (PT brief, p. 5:16-19 (emphasis in original).) Nowhere in the record do
19 the prosecution team and others explain why the Hearing Officers should transcend traditional rules
20 of interpretation and attribute key language no meaning. They do not explain why the Hearing
21 Officers should ignore the language “diligently implement.” They do not explain why “to
22 terminate,” an adverb phrase which does not modify the actions listed in Condition 2, should be
23
24

25 ¹ Board Decision No. A 1149 D 430 (1938); Ex. SWRCB 8-2 (a) (“Order 95-10 requires Cal-Am to diligently
26 pursue a legal water supply.”); PT-8, p. 2 (“The S[tate] W[ater] B[oard] has withheld enforcement action provided Cal-
27 Am adhered to the terms of Order 95-10 and was diligently pursuing water rights for its diversions.”; HT1, p. 136:9-14
28 [Mr. Rubin: “The State Board explained condition 2 in Order 95-10 as a requirement that California American Water
develops and diligently pursues a plan for obtaining water from the Carmel River or from other sources consistent with
California water law; is that correct?” Ms. Mrowka: “Yes.”], 138:12-17 [Mr. Rubin: “Are you aware that the Division
of Water Rights has also expressed the position that in order to comply with Condition 2 of Order 95-10 California
American Water is to diligently pursue a legal water supply?” Mrs. Mrowka: “Yes.”].)

1 interpreted to replace the active verb phrase “diligently implement.”² Nor do they explain when
2 CAW became non-compliant – when CAW’s failure to “terminate” amounted to a violation of
3 Order 95-10.

4 The prosecution team and others also fail to reconcile their positions with prior Board
5 actions related to CAW’s use of Carmel River water.³ Before the draft cease and desist order
6 issued, the only enforcement action taken by the Board was in response to CAW’s alleged inability
7 to meet the conservation goal of 11,285 acre-feet. (Ex. PT-4.) The Board has never taken or
8 threaten to take action in response to CAW diversions over 3,376 acre-feet, although CAW, in all
9 years since of Order 95-10, extracted in excess of 10,000 acre-feet of Carmel River water. In fact,
10 throughout the 13 years since it issued Order 95-10, the Board knew CAW has been extracting
11 Carmel River water in excess of the amount allowed under its water rights. (Ex. PT-15.) It did not
12 simply defer enforcement. It consistently validated such extractions.⁴

13 The contradictions presented by the position of the prosecution team and others continue. In
14 its closing brief, the prosecution team concedes it is impossible for CAW to terminate extractions
15 that exceed 3,376 acre-feet. (PT brief, p. 2:2-3 [“as all the Parties have acknowledged, it is
16 practically impossible to require Cal-Am to cease its illegal diversions immediately”].) In Order

17
18 ² It should be noted that neither the prosecution team nor other parties that support the issuance of the cease and
19 desist order briefed the issue of “diligence.” In particular, absent from any closing brief is support for a position
20 advanced by the Carmel River Steelhead Association – that, as a matter of law, the level of diligence increase based on
21 the state of public trust resources. (HT1, p. 188:21-190:13.)

22 ³ A natural question one might ask, left unanswered by the prosecution team, is: How could have the Board ordered,
23 through condition 2 of Order 95-10, CAW to terminate extractions that exceed 3,376 acre-feet of water, when the Board
24 clearly ordered, through condition 3, CAW to cease and desist from extracting more than 14,106 acre-feet of water?
25 Why would the Board not simply order CAW to cease and desist extractions in excess of 3,376 acre-feet?

26 ⁴ Ex. SWRCB 8-2(d), p. 1 (“Cal-Am provided records to document that it produced a total of 10,025 afa for the
27 1994-1995 water year . . . The available data indicates that Cal-Am operated within the production cap specified in
28 Order 95-10.”); Ex. SWRCB 8-2(f), p. 2 (“Condition 3(b) limits the quantity of water which Cal-Am can pump from the
Carmel River system to 11,990 acre-feet (af) during the 1996 water year and 11,285 af during subsequent water
years.”); Ex. SWRCB 8-2(g), p. 1 (“Order 95-10 sets the 1996-97 water year diversion limitation at 11,285 af.”); Ex.
SWRCB 8-2(h), p. 2 (“In the quarterly submittal, Cal-Am established diversion goals for the Carmel River wells, and
identified the quantity of water that can be pumped monthly in order to meet the 11,285 afa goal established in Order
95-10.”); Ex. SWRCB 8-2(i), p. 1 (“Cal-Am documented that it has complied with the 11,285 acre-feet (af) per annum
water conservation goal in Order 95-10.”); Ex. SWRCB 8-2(l), p. 1 (“The California-American Water Company
extracted a total of 10,739 acre-feet (af) from the Carmel River, or 4.8 percent less than the 11,285 af goal established
in Order 95-10.”); Ex. SWRCB 8-2(p) (“The submittal documents that the California-American Water Company has
complied with the requirements of Order 95-10 for the 2004-2005 water year, including the 11,285 acre-feet annual
diversion limit.”); Ex. SWRCB 8-2(s) (“The report states that Cal-Am complied with the diversion limits of Order 95-
10. The Division concurs that Cal-Am complied with the 11,285 acre-feet (af) diversion limit.”)

1 95-10, the Board also concluded such a termination would jeopardize public health or safety.
2 (Order 95-10, p. 37.)

3 Notwithstanding, the prosecution team and others maintain their position that condition 2 of
4 Order 95-10 compels termination.

5 The prosecution team and others fail to square its acknowledgement and the finding by the
6 Board with their interpretation of condition 2. The unresolved contradictions suggest that not even
7 the proponents of the cease and desist order believe condition 2 of Order 95-10 requires termination
8 of CAW's unpermitted or unlicensed extractions, without available alternatives supplies. Maybe
9 they are just searching for an argument to support their belief: "Order 95-10 is no longer relevant to
10 the situation on the Monterey Peninsula"? (PT Brief, p. 4:22-23.)

11 **2. CAW Has Diligently Pursued Alternative Water Supplies**

12 The prosecution team recognizes it has the burden of proving liability. In the current matter
13 and for the reasons explained above, the burden requires the prosecution team prove, by a
14 preponderance of the evidence, CAW has not complied with condition 2 of Order 95-10 – that it has
15 not been diligent in its pursuit of alternative water supplies. The prosecution team and others offer
16 little on the issue.

17 The evidence in the record reflects that, at all times since Order 95-10 issued, CAW has
18 been pursuing alternative water supplies. CAW has developed plans of action and has been
19 implementing those plans. CAW submitted 28 pages of testimony, called four witnesses, and
20 dedicated a substantial portion of its closing brief to demonstrate those points. (Exhibits CAW-029,
21 030, 031, 032, 037; CAW brief, p. 12:15-15:9.) No party or participant to this proceeding has
22 disputed the plans and CAW's actions have resulted in success. The fact that the success has left
23 CAW continuing to extract Carmel River water pursuant to authority granted by Order 95-10 is not
24 the result of a lack of diligence on CAW's part.

25 As CAW explained previously, CAW has been forced to pursue various plans and actions
26 since the Board issued Order 95-10. Each of these plans of action have necessarily progressed.
27 Initially, the major focus of CAW efforts was on the New Los Padres Dam Project. (Ex. CAW-029,
28 p. 2:22-25; Ex. CAW-031, p. 1:20-25; Ex. CAW-032, pp. 1:28-2:7.) That project, however, was

1 defeated by voters. (Ex. CAW-029, p. 2:24-25.) CAW then directed its efforts to the Carmel River
2 Dam and Reservoir project. (Ex. CAW-029, p. 2:23-28; Ex. CAW-031, p. 1:23-28; Ex. CAW-032,
3 p. 2:5-8; HT1, pp. 270:3-271:3.) That project was affected by the California Legislature, through
4 Assembly Bill 1182, and the California Public Utilities Commission ("CPUC"), which required
5 CAW to consider alternatives. (Ex. CAW-029, p. 2:23-28; Ex. CAW-030, p. 2:15-18; Ex. CAW-
6 032, pp. 2:26-3:2.) The National Marine Fisheries Service ("NMFS") and Monterey Peninsula
7 Water Management District ("MPWMD") ultimately caused an end to what was then serious
8 consideration of the Carmel River Dam and Reservoir project, when the NMFS officially opposed
9 and MPWMD requested CAW withdraw its application for the Carmel River Dam and Reservoir
10 project. (Ex. CAW 32, pp. 4:12-16, 5:3-5.)

11 From the mandate of the California Legislature and the CPUC, CAW began to seriously
12 consider what is now commonly referred to as the Coastal Water Project. (Ex. CAW-031, p. 2:8-9;
13 Ex. CAW-032, p. 5:14-20.) CAW has been conducting extensive public outreach, (Ex. CAW-030,
14 pp. 2:25-3:24), developing and assisting with the development of required environmental
15 documentation, (Ex. CAW-029, p. 3:13-14; Ex. CAW-032, p. 6:12-15; Ex. CAW-032B; Ex. CAW-
16 030, p. 4:3-4; Ex. CAW-032, p. 6:17-19; Ex. CAW-029, p. 3:15-16; Ex. CAW-032, p. 6:22-23), and
17 obtaining permits for and constructing a pilot project. (Ex. CAW-030, pp. 6:18-7:11; Ex. CAW-
18 032, p. 7:1-5.) As a result of those efforts, CAW has invested millions of dollars and thousands of
19 hours. (Ex. CAW-031, pp. 2:22-3:9; CAW-031C.)

20 The larger projects discussed above are not the extent of CAW's actions. Throughout the
21 period since Order 95-10 issued, CAW pursued parallel actions that could provide and in several
22 instances provided alternative water supplies. (See Ex. CAW-029, p. 3:17-24; Ex. CAW-030, pp.
23 1:24-2:12; Ex. CAW-030, p. 2:7-13; Ex. CAW-029, pp. 4:24-5:8; Ex. CAW-029, pp. 3:25-4:12;
24 HT1, pp. 404:21-405:4; Ex. CAW-029, pp. 4:13-5:23.)

25 The prosecution team and others present no witnesses and elicited no testimony from
26 witnesses of other parties or participants that refute the evidence outlined above; evidence which
27 shows CAW has been implementing actions since Order 95-10 issued. Instead of challenging that
28 undisputed showing, some suggest or imply CAW has not been diligent because those actions have

1 not been “fully implemented.”

2 The suggestions or implications are not explained. Presumably they are not explained
3 because they can be summarily dismissed. The suggestions or implications ignore three important
4 facts.

5 First, as explained above, the process to obtain alternative water supplies has been affected
6 by actions outside of CAW’s control. Decisions by the voters on the Monterey Peninsula, the
7 California Legislature, the CPUC, the NMFS, and MPWMD have caused CAW to shift its plans for
8 action. Notwithstanding, CAW has responded to each shift as quickly as possible. The evidence
9 reflects the fact that CAW has been implementing and continues to implement actions to obtain
10 alternative water supplies. Delay caused by the shifts cannot reasonably be attributed to a lack of
11 diligence by CAW. It cannot result in the issuance of a cease and desist order against CAW.

12 Second, the process of reducing unpermitted/unlicensed extractions necessarily takes time.
13 Because public agencies are often or always involved, there are time consuming requirements to
14 comply with environmental laws and obtain needed approvals. For example, CAW is now pursuing
15 the Coastal Water Project, as well as other projects or arrangements that would result in alternative
16 water supplies. Those actions are being implemented. It just takes time to complete the
17 documentation required by the California Environmental Quality Act. CAW cannot control the
18 time it takes each of the participating public agencies.⁵

19 Third, the position that CAW has not been diligent because its implementation is not yet
20 “complete” cannot be reconciled with the Board communications since Order 95-10 issued. The
21 Board frequently and consistently communicated to CAW that CAW remained in compliance with
22 Order 95-10.⁶ These communications did not condition compliance on full implementation – the
23

24 ⁵ It has been suggested CAW could have more readily implemented other projects presented in the CPUC’s
25 environmental impact report or CAW’s proponent’s environmental assessment. However, no evidence has been
26 provided which supports those statements. The fact is, CAW has considered a significant number of actions that could
provide alternative water supplies, and virtually all of them require environmental review, decisions by public entities,
etc. all of which present scheduling challenges.

27 ⁶ See e.g., SWRCB Exhibit 8-2(p), (“The submittal documents that the California-American Water Company has
28 complied with the requirements of Order WR 95-10 for the 2004-2005 water year”); Exhibit SWRCB 8-2(q), (“Thank
you for continuing to comply with Order WR 95-10 If there had been violation noted, the Division would have
promptly advised Cal-Am in order to ensure that the violation was timely addressed”).

1 message was clear: CAW was compliant with Order 95-10 because it was implementing actions,
2 despite the fact that some of those actions ceased (for the reasons described above), some actions
3 were ongoing, and CAW continued to extract Carmel River water in excess of the approximate
4 3,376 acre-feet of rights identified in Order 95-10. The communications are consistent with
5 testimony from the prosecution team's own witnesses, Ms. Mrowka, Mr. Stretars, and Mr. Collins,
6 who each concede Order 95-10 does not require CAW to terminate extractions over the rights
7 identified in Order 95-10.⁷ The only contradiction is presented by the prosecution team's current
8 position on paper.

9 In sum, there is no evidence demonstrating CAW lacks diligence in its pursuit of alternative
10 water supplies. The evidence proves just the opposite. Thus, prosecution team has not satisfied its
11 burden of proof and the Board must find CAW remains in compliance with Order 95-10. The
12 inability of the prosecution team to prove liability requires the Board deny the proposed cease and
13 desist order and uphold CAW's current level of extractions, as constrained by Order 95-10.

14
15 **III. THE PROSECUTION TEAM HAS FAILED TO PRESENT SUFFICIENT**
16 **EVIDENCE TO SUPPORT ITS PROPOSED REMEDY**

17 As is the case with liability, the prosecution team has the burden of proving by a
18 preponderance of the evidence its proposed remedy benefits public trust resources and protects
19 public health and safety. (*See, e.g.*, PT brief, p. 2:20-28.) The prosecution team failed to provide
20 the needed evidence.

21 **A. The Prosecution Team Fails To Demonstrate The Proposed Remedy Will**
22 **Benefit Public Resources**

23 During the proceeding, CAW elicited and in its closing brief CAW explains evidence that

24 ⁷ The Board consistently declared CAW in compliance with Order 95-10 despite CAW not having completed
25 actions that caused CAW to extract the quantity of water allowed under its water rights. (*See e.g.*, Exhibit SWRCB 8-
26 2(a)-(x).) Also; the witnesses for the prosecution team acknowledged the right accorded to CAW under Order 95-10 to
27 extract more water than allowed under its water rights, yet remain in compliance with Order 95-10. (*See e.g.*, HT2, p.
28 179:22-180:4 [Mr. Rubin: "Though you would agree the State Water Resources Control Board contemplated that for
some period after the issuance of Order 95-10 California American Water would continue to extract more than 3,367
acre feet from the Carmel River." Mr. Stretars: "Yes, I agree to that. There was no limitation set on that."; HT1, p.
63:16-25 [Mr. Rubin: "Assuming your opinion is correct, does Order 95-10 establish a date by which California
American Water must terminate diversions in excess of 3,376 acre feet per year?" Mr. Collins: "No".])

1 the existing regulatory oversight of CAW is sufficient to protect public trust resources, during the
2 interim period CAW continues to diligently pursue alternative water supplies. (Order 95-10;
3 Exhibit MPWMD-1, pp. 13:26-14:9; Exhibit MPWMD-1, p. 8:21-24; Ex. PT 47; Ex. PT 48.) The
4 oversight by the Board, California Department of Fish and Game, NMFS, and United States Fish
5 and Wildlife Service, among other agencies, has resulted in significant, documented improvements
6 in fish and wildlife resources and Carmel River riparian habitat. (HT2, pp. 125:1-10, 614:21-24,
7 764:18-21, 780:6-16.)

8 Conversely, the prosecution team and others provide little explanation as to why the
9 proposed remedy is needed. They do not explain how the additional reductions in CAW's
10 extractions will cause any improvements. They ignore substantial portions of evidence presented
11 during the hearing. Instead, they advance general statements about historic trends and rely on
12 unsupported assertions.

13 For example, the prosecution team alleges: "[f]urther adjustments in the form of cutbacks in
14 diversions are needed in order to protect the beneficial uses of the Carmel River." (PT brief,
15 p. 9:17-20.) Similarly, it claims: "[t]he proposed reductions in diversions in the Draft CDO
16 accomplish the goal of surface flow enhancement in order to rewater critical portions of the Carmel
17 River." (*Id.*, p. 10:15-16.) The prosecution team also draws conclusions that CAW extractions
18 have caused riparian vegetation die off, sedimentation, and bank hardening. (*Id.*, p. 8:6-10.) All of
19 those allegations and conclusions are general, without regard for changes that have occurred since
20 Order 95-10 issued, and without regard for the specific remedy proposed.

21 Presumably, the prosecution team and others do not make a better offering because the
22 record is lacking. No qualified witness explained how the proposed reductions in extractions
23 (subsurface) could affect surface water flows. While several witnesses offered their opinions on the
24 effect of the proposed remedy on surface water flows, those opinions were not expert opinions nor
25 were they based on any reliable information. (HT2, pp. 707:17-709:18.) As a fisheries biologist,
26 Ms. Ambrosius did provide testimony of fishery issues. (Exhibit PT-38.) However, she is not
27
28

1 qualified to address the surface water/groundwater interactions of the Carmel River.⁸

2 Further, even if the proposed remedy could affect surface water flows, no one submitted
3 evidence to support a conclusion that the alleged additional surface water flows will benefit fish,
4 wildlife, or riparian habitat. Indeed, despite recognizing the importance of statistics to understand
5 the relationships between trust resources and the factors that affect them, (*see, e.g.*, HT2, p. 151), no
6 witness established such a relationship for the Carmel River or relied upon a previously established
7 relationship to support testimony. (*Id.*) Thus, the Board has no evidence that explains the effect, if
8 any, the proposed, further reductions in CAW's extractions might have on Carmel River surface
9 flows, fish, wildlife or riparian habitat. (*Id.*, pp. 152:14-19, 707:17-23, 114:25-115:15.)⁹

10 The general allegations and conclusions, aside from failing to be tailored to the proposed
11 remedy, belie the fact that abundance of steelhead is affected by numerous factors, most of which
12 are unrelated to CAW's diversions from the Carmel River and that, even if there were some
13 marginal benefit from reducing extractions, that benefit could be compromised by increases in
14 third-party diversions. (*Id.*, pp. 149:9-151:8, 633:9-22, 707:3-9.)

15 In its closing brief, the prosecution team, likely recognizing the deficiency, mistakenly relies
16 on MPWMD testimony to support its position that the proposed cease and desist order "could keep
17 any significant amount of additional stream habitat wetted throughout the summer and fall", (PT
18 brief, p. 10:11-13), and therefore "would likely result in additional fall protection of juvenile
19 steelhead for the watershed as a whole." (*Id.*, p. 10:13-14.) The statements by the prosecution team
20 cannot be given any weight. The MPWMD testimony that forms the foundation for the prosecution
21 team's statements comes from Mr. Urquhart, who conceded that his testimony would not withstand
22 peer review and that "more rigorous methodologies would be more appropriate." (HT2, p. 785.) In
23

24 ⁸ Even the general, substantive testimony provided by the prosecution team's witness on fishery issues – Ms.
25 Ambrosius – was surprising. For example, the West Coast Salmon Biological Review Team prepared an updated status
26 of Federally Listed ESUs of West Coast Salmon and Steelhead. (Exhibit CAW-39.) In that report, a group of scientists
27 raised doubt with information relied upon by Ms. Ambrosius in her written testimony and noted "three new significant
pieces of information", which Ms. Ambrosius was apparently unaware of when she testified. (See Exhibit CAW-39,
pp. 109- 110; HT2, pp. 134:17-142:18.) To the extent the Board relies on Ms. Ambrosius' testimony, it must be given
little weight due to her failure to consider new, relevant information.

28 ⁹ Mr. Fife asks if there is anything in Ms. Ambrosius' testimony which quantifies the reduction of diversions on
public trust resources, to which Ms. Ambrosius responds: "I do not explicitly get to that." (HT2, p. 115:14-15)

1 its closing brief, the Sierra Club explains why the Board cannot rely on Mr. Urquhart's estimates.
2 (Sierra Club brief, pp. 4:17-6:14.) The Sierra Club writes: "Kevin Urquhart's calculations . . . lack
3 foundation, since Mr. Urquhart has no qualifications as a hydrologist, and such calculations are
4 clearly properly performed only by a hydrologist." (*Id.*)

5 In the end, the prosecution team appears to concede there is little if any evidence to support
6 its proposed remedy. The prosecution team admits its proposed remedy is based on what it believes
7 is "most obvious", (PT brief, p. 10:9-10), and a "basic premise", (*id.*, p. 9:25-10), and that the
8 remedy it proposes cannot be supported by scientific evidence that shows benefit to public trust
9 resources. (*Id.*, p. 9:25-10:1 ["data does not exist to show the exact number of fish that decreasing
10 diversions will yield"].) This candor is refreshing, but is not enough to establish, by a
11 preponderance of the evidence, that resources will actually benefit from the reduced extractions
12 proposed by the prosecution team. The community on the Monterey Peninsula should not suffer
13 because of unsupported beliefs.

14 **B. The Board Cannot Adopt The Proposed Remedy Because Compliance Would**
15 **Be Outside Of CAW's Complete Control**

16 At a minimum, if the Board issues a cease and desist order, the cease and desist order must
17 be implementable by the entity against which it issues. (Order No. WQ 83-1, p. 67 [refusing to
18 issue an order that was "not achievable"]; Board Decision 1633, p. 41 [refusing to issue a Board
19 determination which would require a city to take responsibility for an action it did "not have the
20 authority to implement"].) In this case, the prosecution team's proposed remedy fails, as it cannot
21 be unilaterally implemented by CAW.

22 Through submitted testimony and arguments in pleadings, most parties in this proceeding
23 recognize CAW will not be able to carry out the proposed remedy by itself. (*See, e.g.*, Planning and
24 Conservation League brief, p. 1 [the draft CDO "cannot be carried out solely by California
25 American Water Company"]; MPWMD brief, p. 6:5-13; PTA brief, p. 12:12-14.) In its closing
26 brief, the prosecution team initially alleges CAW has unilateral power to respond to the extraction
27 limitations in the proposed cease and desist order. (PT brief, pp. 21:5-22:27.) However, the
28 prosecution team later concedes CAW does not.

1 For example, the prosecution team cites Public Utilities Code section 2708. The prosecution
2 team insinuates that section is an extension of power and supports the prosecution team's statement
3 that CAW can refuse to serve new water users where adding the new connection(s) would impair
4 CAW's ability to serve existing water users. (*Id.*, p. 21:12-15.) But later in its closing brief, the
5 prosecution team recognizes section 2708 acts as a limitation – CAW cannot refuse service unless
6 and until the CPUC approves such action. (*Id.*, p. 22:19-23 [“If Cal-Am can demonstrate to the
7 CPUC that its available water supply is inadequate to meet the demands of new and/or existing
8 customers and that additional conservation incentives, connection restrictions and/or curtailments
9 are necessary to meet the terms of a State Water Board imposed CDP, then the CPUC should
10 approve such measures” (emphasis added)].)

11 Likewise, the prosecution team references Water Code sections 350 through 358 as
12 regulations through which CAW may declare a water shortage emergency and impose moratoriums.
13 (*Id.*, p. 21:18-23.) Although initially characterized to imply CAW would be able to do this on its
14 own, the prosecution team later concedes CAW does not have the power to declare a water
15 shortage, but must depend on MPWMD for that declaration. (*Id.*, p. 22:24-27.)

16 In addition to regulatory constraints, the prosecution team recognizes CAW is limited by the
17 court-ordered restraint in the form of the Seaside Basin adjudication. Although the prosecution
18 team suggests that “reduction in pumping imposed by [the Seaside Basin adjudication] are [sic]
19 avoidable,” it concedes that CAW itself is unable to avoid the adjudicated reductions and such
20 avoidance is dependent on action by a third-party - the Watermaster. (*Id.*, p. 15:7-23.)

21 In the end, the prosecution team concedes the remedy it proposes cannot be unilaterally
22 implemented by CAW. That concession presents a fatal flaw with its remedy, precluding the Board
23 from adopting it.

24 **C. The Prosecution Team Remedy Does Not Protect Public Health and Safety**

25 The prosecution team understands it has the burden to prove by a preponderance of the
26 evidence that the remedy it proposes is “reasonable”, (PT brief, p. 11:14-20), and posits a remedy is
27 reasonable if it does not adversely impact public health and safety. (*Id.*, pp. 11:26-12:1.) Despite
28 making those statements, the prosecution team does not make the necessary showing. The

1 prosecution team remedy does not prove it will avoid jeopardy to public health and safety.

2 The prosecution team continues to rely on calculations made by Mr. Stretars to support its
3 position that the reductions in extractions proposed in the draft cease and desist order will not
4 jeopardize public health and safety. The prosecution team's reliance on Mr. Stretars and his
5 testimony is a serious flaw. Mr. Stretars is not qualified to testify or express his opinions on the
6 level of water shortages CAW's customers can withstand. Although CAW respects Mr. Stretars'
7 skills as an engineer for the Board, he has no municipal experience and no experience operating
8 water utilities. Mr. Stretars' has no practical understanding of the existing water supply limitations
9 facing the Monterey Peninsula or the effect of further water supply limitation on CAW's
10 distribution system.¹⁰ Thus, the Board cannot give any weight to the conclusions rendered by Mr.
11 Stretars' on the issue of remedy and its effect on public health and safety.

12 Juxtaposed against Mr. Stretars' testimony is the uniform testimony from representatives for
13 the municipalities on the Monterey Peninsula and from CAW presents unwavering testimony that
14 the proposed cease and desist order will have significant and adverse impacts on their communities.
15 (HT2, pp. 363:18-364:1, 406:25-408:11, 444:25-445:23, 464:1-12, 467:1-14, 444:9-22, 399:19-
16 400:10, 442:19-444:3, 466:14-25, 397:17-398:3, 446:2-20, 464:13-16, 804:19-24.) In addition,
17 CAW witnesses also explain how the proposed reductions in extractions would jeopardize the
18 ability of CAW to deliver water to its customers. (*Id.*, pp. 167:19-23, 1261:18-22; CAW-037, pp.
19 3:28-4:14.)

20 The prosecution team disregards those concerns by arguing its proposed remedy can be
21 carried out through reduction in unaccounted for losses, implementation of conservation, and water
22 available from new water supplies. (PT brief, pp. 14:16-16:16; Exhibit PT-49, pp. 4-6.) That
23 argument fails for at least three reasons, and therefore the Board has no basis to dismiss the
24 concerns expressed by representatives for the municipalities on the Monterey Peninsula and from
25 CAW.

26 First, the prosecution team's dismissal is based predominantly, if not exclusively on the
27

28 ¹⁰ CAW and the MPWMD explained in their closing briefs and CAW provides additionally below more substantive problems with Mr. Stretars' testimony.

1 testimony of Mr. Stretars. Mr. Stretars, not unexpectedly due to his limited understanding of the
2 circumstances on the Monterey Peninsula, does not accurately account for water supply conditions.
3 The prosecution team does not adequately consider the decree adjudicating the Seaside Basin
4 restricts CAW's water used from that basin, (*see* Ex. CAW-005), CAW's decreasing availability of
5 water from the City of Sand City desalination project, (HT2, p. 94:7-95:10, 187:15-25), and the
6 variable nature of water available from Phase 1 Aquifer Storage and Recovery Project. (*Id.*, pp.
7 53:18-20, 92:2-93:16, 91:15-18, 95:11-16, 816:18-21.)

8 Mr. Stretars also presumes CAW could "save" water through eliminating unaccounted for
9 water. (Ex. PT-49, p. 2.) While CAW believes it can reduce unaccounted for water, the time
10 needed to implement actions that will cause the reduction is uncertain and any realized reduction
11 will not necessarily "save" water or increase the "water yield" available to CAW. (HT2, pp.
12 167:19-23, 186:3-24, 101:16-103:24.) Unaccounted for water is in essence un-metered water. (*Id.*,
13 pp. 811:9-13. Ensuring all water is metered does not mean CAW will extract less water from the
14 Carmel River. (*Id.*, pp. 103:10-24; 811:13-16.) And, while conservation has been and will continue
15 to be a tool used by CAW, Mr. Stretars improperly assumes it can be used to "guarantee" a level of
16 water savings or extraction reductions. (*Id.*, pp. 180:12-17, 180:7-11, 806:6-21.) Efforts are
17 intended to encourage conservation. (*Id.*, p. 836:19-21.) They do not necessarily compel changes
18 in water use. (*Id.*, p. 835:17-21.)¹¹

19 Second, the prosecution team dismisses the Monterey Peninsula's concerns based on an
20 improper calculation. Mr. Stretars was placed in the untenable position of trying to estimate the
21 minimum level of water use required by the Monterey Peninsula to maintain and project public
22 health and safety. Not unexpectedly, Mr. Stretars' estimate attempts to quantify the requisite
23 protections. Based on that quantification, Mr. Stretars concludes the Monterey Peninsula could

24 ¹¹ The failures noted immediately above may be most easily appreciated when one considers Exhibit A to the
25 prosecution team's closing brief. There, the prosecution team tries to explain the limited impact to the Monterey
26 Peninsula that its proposed remedy will cause. As the Exhibit reflects, the prosecution team assumes 300 acre-feet will
27 be available each year from the City of Sand City's desalination plant, although that will not be the case as demands of
28 Sand City increase. The prosecution team assumes 920 acre-feet will be available the ASR, Phase 1 project, although
that quantity of water is the annual average and in some years significantly less than 920 acre-feet will be available.
And, the prosecution team assumes additional water will be available from reductions in unaccounted for losses,
although reductions in unaccounted for losses will not produce additional water on a one-for-one basis. No explanation
is provided for many of the assumptions made in the Exhibit.

1 withstand all of the shortages in the proposed cease and desist order without jeopardizing public
2 health and safety. Unfortunately for the prosecution team, testimony elicited from Mr. Stretars and
3 others made it clear Mr. Stretars' attempt fails. Mr. Stretars' quantification was based on a number
4 of unsupported assumptions and incorrect calculations. These inconsistencies were recounted in the
5 closing briefs of CAW and MPWMD. (CAW brief, pp. 20:8-21:9; MPWMD brief, pp. 13:19-
6 15:17.) However, most glaring was the fact that Mr. Stretars confused two different statistics: one
7 statistic – the per capita statistic – that considers water use by all areas (residential, municipal,
8 industrial, public authority, etc.) in relation to the number of residents served by the water purveyor;
9 and another statistic – the residential statistic – that considers only use by the residents served by
10 the water purveyor. (HT2, p. 109:1-14.)

11 Initially, the prosecution team recognized the distinction. (PT brief, p. 12:7-14 (recognizing
12 evidence that current CAW customer residential use is approximately 70 gallons per day, whereas
13 current total water use is 99 gallons per person per day].) The prosecution team then blurred the
14 lines, as does Mr. Stretars in portions of his testimony. The prosecution team confuses the
15 concepts, stating “the existing information on the average per capita consumption ranging from 70
16 to 99 gallons per person per day.” (*Id.*, p. 13:6-8.) As a result, the prosecution team perpetuates,
17 instead of correcting the error made by Mr. Stretars – an error that results in applying the
18 residential statistic of 75 gallons, as if it were a per capita statistic. Consequently, both the
19 prosecution team and Mr. Stretars draw unrealistic conclusions about health and safety impacts of
20 their proposed remedy. They assume all beneficial uses on the Monterey Peninsula will be
21 protected by providing only enough water to satisfy one segment – the residential population. (*Id.*,
22 p. 13:10-14.)

23 Third, the asserted flexible application of the prosecution team's remedy fails because it is
24 simply a classic defense maneuver; dodging responsibility for a number of wrongs by claiming that
25 no individual wrong can be proven. When defending against the potential impacts of the proposed
26 remedy, the prosecution team alleged the remedy can be implemented without moratoriums. (*Id.*,
27 p. 20:23-27.) However, when defending against concerns of viability of alternative water sources,
28 the prosecution team suggested that, if valid, these concerns could be surmounted by imposing a

1 moratorium. (*Id.*, p. 17:1-2.) This circular approach is not effective here, because the prosecution
2 team has the burden of proving the remedy is reasonable. The prosecution team fails to
3 demonstrate by a preponderance of the evidence that the remedy it proposes will not jeopardize
4 public health and safety. They also offer nothing to refute the overwhelming evidence that harm
5 will result if the Board adopts the prosecution team's proposed remedy.

6 In a last attempt to undermine the concerns expressed by the Monterey Peninsula
7 community and CAW, the prosecution team is joined by the Public Trust Alliance in arguing that
8 the Board cannot consider economic impacts of the proposed cease and desist order. (PT brief, p.
9 20:20-22; PTA brief, p. 2:9-13.) In support of their effort, the prosecution team and the Public
10 Trust Alliance seek to draw an analogy to the Federal Endangered Species Act ("FESA"). (PT
11 brief, p. 20:5-22; PTA brief, p. 2:13-23.) Neither provides an explanation of the relationship
12 between the FESA and the current proceeding. The Board must deny the attempt. Nothing in the
13 law or regulations governing adjudicatory proceeding, like this one prohibits the Board from
14 considering economic impacts. Indeed, such impacts are critical to understanding the effect of the
15 proposed remedy on public health and safety. For the reasons explained above, the prosecution
16 team fails to meet its burden. Nothing in the record supports a finding that the remedy proposed by
17 the prosecution team will protect public health and safety. The evidence supports the opposite
18 conclusion.

19 **D. The Only Remedy Supported By The Record Is The Remedy Issued By Order**
20 **95-10**

21 As explained by CAW in its closing brief, the preponderance of the evidence demonstrates
22 existing regulatory oversight of CAW is sufficient during the interim period CAW continues to
23 pursue alternative water supplies. (*See* Order 95-10; Ex. MPWMD-1, pp. 13:26-14:9, p. 8:21-24;
24 Ex. PT 47; Ex. PT 48.) With these regulatory controls in place, the steelhead and riparian habitat
25 have improved significantly. (HT2, pp. 125:1-10, 614:21-24, 764:18-21, 780:6-16.) The
26 overwhelming evidence also demonstrates that, as the Board concluded in Order 95-10, the only
27 remedy that will protect public health and safety is one that allows CAW to continue to operate
28 pursuant to the terms and conditions of Order 95-10. Accordingly, if the Board adopts a cease and

1 desist order, it must allow CAW to continue to extract up to 11,285 acre-feet of Carmel River water
2 until it develops alternative water supplies.

3 **IV. PROSECUTION TEAM CANNOT SHIFT ITS BURDEN OF PROOF TO CAW**

4 The prosecution team does not provide the Board with evidence sufficient to allow for a
5 finding of liability or to impose the remedy advanced by the prosecution team. In an attempt to
6 surmount this failure, the prosecution team seeks to shift its burden to CAW in two separate
7 instances. In its first attempt, the prosecution team proposes CAW maintains the burden of showing
8 the remedy proposed by the prosecution team is unreasonable because of public health and safety
9 concerns. The prosecution team appears to believe it maintains the burden to prove the remedy is
10 reasonable, but that it shifts to CAW if CAW challenges the prosecution team's showing.
11 (*Compare* PT brief, p. 2:20-22 with p. 2:22-25.)

12 This attempt is transparent and defies logic; CAW's assertion that the prosecution team's
13 remedy is unreasonable because of the health and safety concerns is simply a challenge to whether
14 the prosecution team has met its burden, not a new claim or defense. Whether the remedy is
15 reasonable and reasons the remedy is unreasonable are two sides of the same coin. The prosecution
16 team concedes it has the "burden of proof of establishing that the Draft CDO is a reasonable
17 remedy" and that impact on public health and safety is a component of reasonableness. (*Id.*,
18 p. 2:20-28.) The prosecution team cannot be allowed to artificially shift the burden to avoid
19 proving its case.

20 Similarly, the prosecution team alleges CAW has the burden of proof when evidence
21 "essential to the claim" is "peculiarly within the knowledge and competence" of CAW. (*Id.*,
22 p. 11:21-24.) Specifically, the prosecution team alleges the burden of proof shifts to CAW to
23 "provide data on indoor verses outdoor water use to demonstrate why compliance with the Draft
24 CDO reduction schedule is not achievable" because "the data that would support this argument is
25 peculiarly within its knowledge." (*Id.*, p. 14:6-15.) To support that position, the prosecution team
26 relies upon a single case, which is distinguishable and whose rule does not apply to the current
27 proceeding.

28 ///

1 The case cited by the prosecution team involves a probate matter in which an ex-step-
2 daughter of the decedent challenges a probate rule of law. (*In re Estate of Jones* (2004) 122
3 Cal.App.4th 326, 337 (“*Jones*”).) The court determined the ex-step daughter’s challenge amounts
4 to an affirmative defense and is based on facts that only she could present. That situation is very
5 different from the current matter.

6 CAW does not mount an affirmative defense, but only challenges the prosecution team’s
7 satisfaction of its own burden. As noted above, the prosecution team asserts its proposed remedy is
8 reasonable. Certainly, it is not CAW’s burden to develop and present evidence which proves indoor
9 versus outdoor data demonstrate the prosecution team’s remedy is not achievable. Although this
10 may be true, it is not an argument advanced by CAW.¹²

11 For the reasons stated above, there are no circumstances presented in this proceeding that
12 cause a shift in the burden of proof away from the prosecution team. On all counts, the prosecution
13 maintains, but has failed to meet its burden.

14 **V. THE BOARD MUST REFUTE ATTEMPTS TO EXPAND THE SCOPE OF THE**
15 **CURRENT PROCEEDING**

16 The scope of the current proceeding has been defined. (May 13, 2008 Ruling, p.1.) The
17 Hearing Officers did not, nor as a matter law could they, define this proceeding as one focused on
18 compliance with the Endangered Species Act. Also, the Hearing Officers also refused to reopen
19 Order 95-10 and conduct a proceeding based on the public trust doctrine. (*Id.*) The review of
20 responsibilities and potential liability outside the narrowly noticed scope cannot be allowed.

21 Nonetheless, the prosecution team and other parties argue the Board must re-balance public
22 trust resources of the Carmel River. (PT brief, pp. 8:11-9:20; Sierra Club brief, p. 12:14-22; PTA
23 brief, pp. 3:1-9:7.) These assertions offer nothing new. The Hearing Officers have framed the
24 issues for this proceeding. CAW has participated in this proceeding based on the scope defined by
25 the Hearing Officers early in the process. (Prehearing Transcript, p. 39:19-25.) The Hearing
26 Officers cannot now change the scope of the proceeding, without violating CAW’s due process

27
28 ¹² Also, citation to this case presumes CAW is the only party that has data on indoor versus outdoor water use information. This is untrue; CAW testified it did not have this information readily available. (HT2, p. 1353:18-25.)

1 rights and the Board's own regulations.

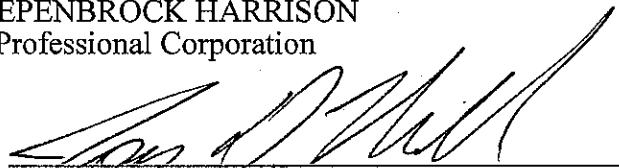
2 **VI. CONCLUSION**

3 The prosecution team has not met its burden. The prosecution team has not demonstrated
4 by a preponderance of the evidence that CAW violated condition 2 of Order 95-10. Without
5 proving liability, the Board cannot issue a cease and desist order. However, even if the Hearing
6 Officers disagree, the prosecution team has not been able to meet its burden of proving its proposed
7 remedy is protective of public trust resources or public health and safety. The only remedy
8 supported by a preponderance of the evidence the remedy previously developed and reflected in
9 Order 95-10. It is one that allows CAW to continue to divert up to 11,285 acre-feet of water until
10 CAW is able to obtain alternative water supplies.

11 Dated: November 10, 2008

Respectfully submitted,

12 DIEPENBROCK HARRISON
13 A Professional Corporation

14 By 
15 JON D. RUBIN
16 Attorneys for California American Water Company

PROOF OF SERVICE

1 I declare as follows:

2 I am over 18 years of age and not a party to the within action; my business address is 400
3 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County,
4 California.

5 On November 10, 2008, I served a copy of the foregoing document entitled **CALIFORNIA**
6 **AMERICAN WATER COMPANY'S REPLY BRIEF** on the following interested parties in the
7 above-referenced case number to the following:

8 See Attached Service List of Participants

9 **BY MAIL**

10 By following ordinary business practice, placing a true copy thereof enclosed in a sealed
11 envelope, for collection and mailing with the United States Postal Service where it would
be deposited for first class delivery, postage fully prepaid, in the United States Postal
Service that same day in the ordinary course of business as indicated in the attached
Service List of Participants and noted as "Service by Mail."

12 **ELECTRONIC MAIL**

13 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the
14 electronic mail transfer system in place at Diepenbrock Harrison, originating from the
undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail
address(es) indicated in the attached Service List of Participants and noted by "Service
by Electronic Mail."

15 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above. The
16 facsimile machine I used complied with California Rules of Court, rule 2003 and no
error was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I
caused the machine to print a transmission record of the transmission, a copy of which is
attached to this declaration.

17 A true and correct copy was also forwarded by regular U.S. Mail by
18 following ordinary business practice, placing a true copy thereof enclosed in a sealed
envelope, for collection and mailing with the United States Postal Service where it would
be deposited for first-class delivery, postage fully prepaid, in the United States Postal
19 Service that same day in the ordinary course of business.

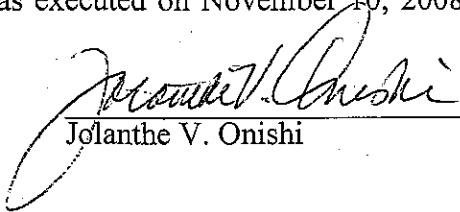
20 **BY OVERNIGHT DELIVERY**

21 Federal Express Golden State Overnight
Depositing copies of the above documents in a box or other facility regularly maintained
by Federal Express, or Golden State Overnight, in an envelope or package designated by
Federal Express or Golden State Overnight with delivery fees paid or provided for.

22 **PERSONAL SERVICE**

23 via process server
 via hand by

24 I certify under penalty of perjury under the laws of the State of California that the foregoing
25 is true and correct and that this declaration was executed on November 10, 2008, at Sacramento,
26 California.

27 
28 Jolanthe V. Onishi

1 CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
2 JUNE 19, 2008 HEARING
3 SERVICE LIST OF PARTICIPANTS

4 Service by Electronic Mail:

5 **Division of Ratepayer Advocates**
6 Andrew Ulmer
7 Division of Ratepayer Advocates
8 California Public Utilities Commission
9 505 Van Ness Avenue
10 San Francisco, CA 94102
11 (415) 703-2056
12 eau@cpuc.ca.gov

State Water Resources Control Board
Reed Sato
Water Rights Prosecution Team
1001 I Street
Sacramento, CA 95814
(916) 341-5889
rsato@waterboards.ca.gov

9 **Public Trust Alliance**
10 Michael Warburton
11 Resource Renewal Institute
12 Room 290, Building D
13 Fort Mason Center
14 San Francisco, CA 94123
15 Michael@rri.org

Sierra Club - Ventana Chapter
Laurens Silver
California Environmental Law Project
P.O. Box 667
Mill Valley, CA 94942
(415) 383-7734
larrysilver@earthlink.net
jgwill@dcn.davis.ca.us

13 **Carmel River Steelhead Association**
14 Michael B. Jackson
15 P.O. Box 207
16 Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

California Sportfishing Protection Alliance
Michael B. Jackson
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(530) 283-1007
mjatty@sbcglobal.net

17 **City of Seaside**
18 Russell M. McGlothlin
19 Brownstein, Hyatt, Farber, Schreck
20 21 East Carrillo Street
21 Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

The Seaside Basin Watermaster
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21 East Carrillo Street
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21 **Pebble Beach Company**
22 Thomas H. Jamison
23 Fenton & Keller
24 P.O. Box 791
25 Monterey, CA 93942-0791
(831) 373-1241
TJamison@FentonKeller.com

National Marine Fisheries Service
Christopher Keifer
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
(562) 950-4076
christopher.keifer@noaa.gov

1 Service by Electronic-Mail (Cont.):

2 **Monterey County Hospitality Association**

3 Bob McKenzie
4 P.O. Box 223542
5 Carmel, CA 93922
6 (831) 626-8636
7 info@mcha.net
8 bobmck@mbay.net

California Salmon and Steelhead Association

Bob Baiocchi
P.O. Box 1790
Graeagle, CA 96103
(530) 836-1115
rbaiocchi@gotsky.com

7 **Planning and Conservation League**

8 Jonas Minton
9 1107 9th Street, Suite 360
10 Sacramento, CA 95814
11 (916) 719-4049
12 jminton@pcl.org

City of Sand City

James G. Heisinger, Jr.
Heisinger, Buck & Morris
P.O. Box 5427
Carmel, CA 93921
(831) 624-3891
hbm@carmellaw.com

11 **Monterey Peninsula Water Management District**

12 David C. Laredo
13 De Lay & Laredo
14 606 Forest Avenue
15 Pacific Grove, CA 93950
16 (831) 646-1502
17 dave@laredolaw.net

16 Service By Mail:

17 **City of Carmel-by-the-Sea**

18 Donald G. Freeman
19 P.O. Box CC
20 Carmel-by-the-Sea, CA 93921
21 (831) 624-5339 ext. 11

Courtesy Copy by Mail:

Sierra Club - Ventana Chapter

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