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2008 APR 23 PM 4:01
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8 BEFORE THE CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

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

**MOTION BY CALIFORNIA AMERICAN
WATER COMPANY TO STRIKE
PORTIONS OF PRE-HEARING BRIEFS**

14 **I. Introduction**

15 NOTICE IS HEREBY GIVEN that California American Water Company ("CAW") hereby
16 moves the State Water Resources Control Board ("State Water Board") for an order striking
17 portions of the pre-hearing briefs of the Monterey Peninsula Water Management District, California
18 Salmon and Steelhead Association, Carmel River Steelhead Association and California Sportfishing
19 Protection Alliance, Public Trust Alliance, Division of Ratepayer Advocates, Sierra Club, and
20 National Marine Fisheries Service (sometimes referred to individually as "Offending Non-Party
21 Entity" or collectively as "Offending Non-Party Entities"). This motion is based on the grounds that
22 the Offending Non-Party Entities' pre-hearing briefs (1) contravene the specific authority provided
23 by the State Water Board when it permitted the filing of pre-hearing briefs, and (2) violate basic
24 rules of evidence that apply to proceedings such as this one.

25 **II. Background**

26 In January 2008, CAW received notice of a proposed cease and desist order based on
27 CAW's alleged noncompliance with Condition 2 of Order WR 95-10. (CAW-007 (Letter from
28 James W. Kassel).) CAW requested a hearing to contest that allegation and the proposed cease and

1 desist order. (Exhibit CAW-008 (Letter from Jon D. Rubin).) At a pre-hearing conference, the
2 parties and non-party entities raised questions and issues with the procedures the State Water Board
3 might employ when conducting a hearing in this matter. (See, e.g., Exhibit CAW-018 (Certified
4 Pre-hearing Conference Transcript (“Pre-hearing Transcript”)), 16:1-38:2.) They also raised
5 concerns with the possible scope of the proceeding. (See, e.g., Exhibit CAW-018 (Pre-hearing
6 Transcript), 25:19-25:21, 28:11-28:19, 29:14-29:24, 34:1-34:4.) Collectively, all of those concerns
7 are referred to herein as “procedural issues.” The State Water Board did not decide those issues at
8 the pre-hearing conference. Instead, it requested the procedural issues be briefed. (Exhibit CAW-
9 018 (Pre-hearing Transcript), 43:23-44:11.) Offending Non-Party Entities timely filed their
10 respective briefs.¹ The Offending Non-Party Entity briefs, however, are critically flawed in two
11 principal ways: they include arguments that are irrelevant, unsupported or inadequately supported
12 assertions, and documents attached to briefs without any evidentiary foundation and they do not
13 meet even the relatively liberal rules of evidence the State Water Board applies in adjudicatory
14 proceedings.

15 **III. Legal Argument**

16 The State Water Board’s rules and procedures, established by the California Code of
17 Regulations, make clear that, to ensure due process rights are afforded, the State Water Board must
18 conduct proceedings that are fair and orderly. (23 Cal. Code Regs. §648.5(a).) The California Code
19 of Regulations (and Hearing Notice) therefore prescribe the manner by which parties are identified,
20 and information offered, and, if appropriate, accepted into evidence.

21 “Adjudicatory proceedings will be conducted in accordance with the provision and rules of
22 evidence set forth in Government Code section 11513.” (23 Cal. Code Regs. § 648.5.1.)

23 Government Code section 11513 states, in part:

24 Any relevant evidence shall be admitted if it is the sort of evidence on which
25 responsible persons are accustomed to rely in the conduct of serious affairs,

26 ¹ Although the State Water Board is accepting pre-hearing briefs from all parties and non-party
27 entities interested in submitting them, the State Water Board indicated it will defer determining the
28 status of non-party entities until the State Water Board “get[s] through the briefs.” (Exhibit CAW-
018 (Pre-hearing Transcript), 44:22-45:14.)

1 regardless of the existence of any common law or statutory rule which might make
2 improper the admission of the evidence over objection in civil actions.

3 * * *

4 The presiding officer has discretion to exclude evidence if its probative value is
5 substantially outweighed by the probability that its admission will necessitate undue
consumption of time.

6 (Government Code § 11513(c), (f).)

7 CAW recognizes that the rules of evidence employed by the State Water Board are not as
8 rigid as those employed by a Court. Nonetheless, arguments unrelated to procedural issues and
9 unsupported or inadequately assertions presented by the Offending Non-Party Entities do not meet
10 even the less stringent evidentiary requirements established by the State Water Board. Also, several
11 of the Offending Non-Party Entities attempt to present evidence (attachments to briefs) without
12 laying any foundation. The State Water Board should not rely upon statements that are not made
13 under oath and subject to cross examination or that are not made through a declaration and under
14 penalty of perjury. (Government Code, §11515; *Harris v. Alcoholic Beverage Control Appeals*
15 *Board* (1965) 62 Cal. 2d 589, 596.) Furthermore, the State Water Board should not rely upon
16 documents, that are offered for the truth on the matters asserted, if those documents are simply
17 referenced in or attached to brief. (*See, e.g. Moore v. Grayson* 132 Cal. 602.) Irrelevant
18 arguments, unsupported or inadequately supported assertions, and documents attached to briefs
19 without establishing any evidentiary foundation, add nothing. They only risk creating an improper
20 record for this proceeding.

21 The following are only a few examples of offending submittals:

- 22 ▪ Public Trust Alliance expresses its belief, without any support other than a
23 citation to a submittal by the California Salmon and Steelhead Association, that “[a]
24 crisis has developed and deepened in the Carmel watershed in the 13 years since the
Board issued Order 95-10, requiring expeditious action within a relatively
comprehensive legal framework.” (Public Trust Alliance Pre-hearing Brief, p. 3.)
- 25 ▪ Carmel River Steelhead Association and California Sportfishing Protection
26 Alliance avoid any discussion of process, simply stating: “[w]e support the proposed
27 Cease and Desist Order. More than enough time has been given to the California
28 American Water Company (Cal-Am) to comply with the conditions of Board Order
95-10 and the Order’s phased reduction reducing the illegal diversions by Cal-Am on
the Carmel River is reasonable.” (Carmel River Steelhead Association Pre-hearing

1 Brief, p. 2.)

2 ▪ Division of Ratepayer Advocates, after identifying a procedural issue, argues
3 substance, positing: “the SWRCB should recognize that the Draft Cease and Desist
4 Order, if adopted, could have significant financial impacts on Cal-Am’s ratepayers.”
(Division of Ratepayer Advocates Pre-hearing Brief, p. 2.)

5 ▪ National Marine Fisheries Service recommends, without regard for process, a
6 remedy that “respond[s] to the biological needs of listed steelhead.” (National
Marine Fisheries Service Pre-hearing Brief, p. 2.)

7 ▪ The California Salmon and Steelhead Association presents the following
8 unsupported assertion: “the Carmel River is over appropriated resulting from the
9 authorized and unauthorized pumping of the Carmel River because of the lack of
10 daily year-round surface flows resulting from pumping the underflow of the river by
all diverters.” (California Salmon and Steelhead Association Pre-hearing Brief, p.
2.)

11 These examples demonstrate how the briefs filed by Offending Non-Party Entities present
12 arguments not relevant to any procedural issue and/or present unsupported or inadequately
13 supported assertions. They highlight how Offending Non-Party Entities exploit the State Water
14 Board’s request. The briefs of the Offending Non-Party Entities, if accepted, would divest the State
15 Water Board of its authority to marshal the proceedings before making party status and evidentiary
16 determinations. The briefs have begun to create and, if not dealt with now, will result in a muddled
17 and unwieldy hearing record. The briefs also risk depriving CAW of its due process rights to a fair
18 and orderly proceeding.

19 The State Water Board has recourse to address the Offending Non-Party Entities’ briefs.
20 “Persons who fail to comply with the procedural requirements specified in the hearing notice for
21 participation as parties in a proceeding may be dismissed as parties to the proceeding.” (23 Cal.
22 Code Regs. § 648.1(c).)

23 Where any of the provisions of this section have not been complied with, the
24 presiding officer may refuse to admit the proposed testimony or the proposed exhibit
25 into evidence, and shall refuse to do so where there is a showing of prejudice to any
26 party or the Board. This rule may be modified where a party demonstrates that
compliance would create severe hardship.

27 (23 Cal. Code Regs. § 648.4(e).) Further, as quoted above,
28

1 The presiding officer has discretion to exclude evidence if its probative value is
2 substantially outweighed by the probability that its admission will necessitate undue
3 consumption of time.

4 (Government Code § 11513(f).) The State Water Board has been provided briefs that fail to
5 conform to its request. The Offending Non-Party Entities' briefs are instead riddled with matters
6 irrelevant and the procedural issues at hand. As a result, those portions of the Offending Non-Party
7 Entities' briefs have little or no probative value. The foregoing regulations provide the State Water
8 Board adequate authority to strike portions of the offend Non-Party Entities' briefs, and attachments
9 thereto.

10 For the above-stated reasons, CAW moves the State Water Board for an order striking
11 sections of the briefs, including attachments, filed by Offending Non-Party Entities as highlighted in
12 the following exhibits:

- 13 ▪ Exhibit CAW-022, Proposed Strikeout for California Salmon and Steelhead
14 Association Pre-hearing Brief;
- 15 ▪ Exhibit CAW-023, Proposed Strikeout for Carmel River Steelhead
16 Association and California Sportfishing Protection Alliance Pre-hearing Brief;
- 17 ▪ Exhibit CAW-024, Proposed Strikeout for Public Trust Alliance Pre-hearing
18 Brief;
- 19 ▪ Exhibit CAW-025, Proposed Strikeout for Division of Ratepayer Advocates
20 Pre-hearing Brief;
- 21 ▪ Exhibit CAW-026, Proposed Strikeout for Sierra Club Pre-hearing Brief;
- 22 ▪ Exhibit CAW-027, Proposed Strikeout for National Marine Fisheries Service
23 Pre-hearing Brief; and
- 24 ▪ Exhibit CAW-028, Proposed Strikeout for Monterey Peninsula Water
25 Management District Pre-hearing Brief.

24 **IV. Conclusion**

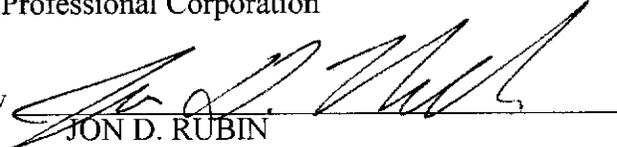
25 Confronted with a number of proposals on how the State Water Board should conduct the
26 hearing in this matter, the State Water Board permitted briefs to be filed to address procedural
27 issues. Offending Non-Party Entities failed to respond to the issues and instead filed briefs that
28 were advance arguments that contravene the State Water Board's request and/or rely on

1 unsubstantiated or inadequately supported assertions. Certain of the briefs improperly attach and
2 rely upon documents. To restore its authority over the administration of this proceeding and to
3 ensure due process is not compromised, the State Water Board should exercise its power to strike
4 the irrelevant and improper matter from those non-conforming pleadings.

5 Dated: April 23, 2008

Respectfully submitted,

6 DIEPENBROCK HARRISON
A Professional Corporation

7
8 By 
9 JON D. RUBIN
Attorneys for California-American Water Company

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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, California.

4 On April 23, 2008, I served a copy of the foregoing document following document entitled
5 **MOTION BY CALIFORNIA AMERICAN WATER COMPANY TO STRIKE PORTIONS**
6 **OF PRE-HEARING BRIEFS** on the following interested parties in the above-referenced case
7 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
12 be deposited for first class delivery, postage fully prepaid, in the United States Postal
13 Service that same day in the ordinary course of business as indicated in the attached
14 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
15 undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail
16 address(es) indicated in the attached Service List of Participants and noted by "Service by
17 Electronic Mail."

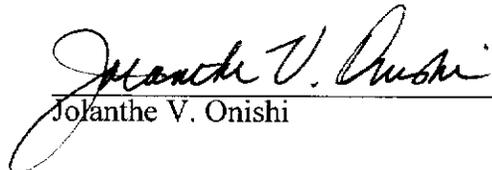
15 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above. The
16 facsimile machine I used complied with California Rules of Court, rule 2003 and no error
17 was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I
18 caused the machine to print a transmission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

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

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

22 **PERSONAL SERVICE**
23 via process server
24 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 April 23, 2008, at Sacramento,
26 California.



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:

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