



California Regional Water Quality Control Board

Central Coast Region



Linda S. Adams
Secretary for
Environmental
Protection

Internet Address: <http://www.waterboards.ca.gov/centralcoast>
895 Aerovista Place, Suite 101, San Luis Obispo, California 93401
Phone (805) 549-3147 • FAX (805) 543-0397

Arnold Schwarzenegger
Governor

September 8, 2009

Monterey Peninsula Water Management District
Attn: Henrietta Stern, Project Manager
5 Harris Court, Bldg. G
P.O. Box 85
Monterey, CA 93942-0085

Dear Ms. Stern:

**RESPONSE TO INITIAL STUDY AND NOTICE OF INTENT TO ADOPT MITIGATED
NEGATIVE DECLARATION FOR APPLICATION TO AMEND RANCHO DEL
ROBLEDO WATER DISTRIBUTION SYSTEM, ESQUILINE ROAD AREA, CARMEL
VALLEY, MONTEREY COUNTY – APPLICATION #20090709RAN**

Central Coast Regional Water Quality Control Board (Water Board) staff reviewed the August 5, 2009, Notice of Intent to Adopt Mitigated Negative Declaration and Initial Study prepared by the Monterey Peninsula Water Management District (District) for the Rancho del Robledo Water Distribution System. The project consists of the amendment of an existing Water Distribution System (WDS) serving nine parcels via a well within the Carmel Valley Alluvial Aquifer located on an additional parcel adjacent to the Carmel River. In its existing configuration, the WDS provides irrigation water supply for the nine parcels and domestic/potable water supply for two of the parcels. Potable water service is provided to the other five existing homes within the WDS by California American Water Company (Cal-Am). The project proposes annexing an additional parcel into the WDS to provide irrigation and potable service for a potential new home and providing potable service for a potential new home on an existing WDS parcel that currently only receives water for irrigation. The District is allocating 0.5 acre-feet/year (afy) for each of the two new homes (1.0 afy total). The initial study also includes an additional allocation of 1.25 afy for [equestrian] pasture irrigation on an existing seven-acre WDS parcel (-003) that has not received irrigation water from the WDS for an unspecified time.

The District is justifying the additional water allocations of 2.25 afy based on water diversion offsets realized due to repairs to the aging WDS resulting in the elimination of an estimated 2.42 afy of wasteful system losses (leakage). According to the Initial Study an additional 1.98 afy of system losses still exists. The District is also indirectly using an estimated 0.19 afy of reduced Cal-Am potable supply usage by the existing residences over the past eight years in support of the new allocations.

Based on an estimated annual average WDS production of 14.74 afy for the past five years, the District is proposing an "enforceable production limit" of 14.57 afy (14.74 – 2.42 + 2.25) as a condition of the emended WDS permit. Production limits do not

California Environmental Protection Agency

currently exist for the WDS which has been in operation since about 1939. The Initial Study also indicates the amended WDS "permit conditions will require continued identification and repair of leaks, as feasible." Based on the District's estimates the amended WDS permit will result in a net reduction in diversions from the Carmel River of 0.17 afy.

We are providing comments on this CEQA document as a responsible agency primarily based on our expertise and concerns regarding the beneficial uses of the Carmel River and Carmel River Lagoon. Although beneficial uses of the Carmel River and Carmel River Lagoon may be impaired by the proposed project, we do not have authority over the water supply issues causing the impairments and have no approval oversight of the project outside of our authority governing waste discharges from the proposed project.

The Mitigated Negative Declaration and Initial Study fail to provide sufficient mitigation to address significant cumulative offsite environmental impacts to the riparian and aquatic habitats of Carmel River and Carmel River Lagoon, and to the federally listed steelhead and California red-legged frogs that are dependent on these habitats for their survival.

Although the District provides a short and informed discussion of the well-documented¹ cumulative impacts water diversions from the Carmel River are having on the public trust resources within the Initial Study, we disagree with the "less than significant impact" and "no impact" determinations made within portions the environmental checklist. This is particularly true within the Biological Resources section of the checklist. These determinations appear to be primarily based on the mitigation realized by the estimated permanent reduction in the WDS diversion from the Carmel River of 0.17 afy. This is only 7% of the realized WDS offsets due to the elimination of wasteful system losses while the remaining 93% (2.25 afy) is being handed back to the project applicant by the District for new development. Additional wasteful losses, not including the remaining estimated 1.98 afy of losses, and variability in the District's estimates used to evaluate this project will likely negate the estimated water diversion reduction of 0.17 afy. The estimated reduction of 0.17 afy is well within the range of the future leakage rate of 13.6% estimated by the District within the Initial Study for the 2.25 afy additional allocation ($0.17/2.25 = 7.6\%$). This is also within the standard range of distribution systems losses of 10%.

The actual water usage for the two potential homes is uncertain given the homes have yet to be proposed and will likely be approved by the County without any consideration of size or potential water use. The allowable water use for any new home or project within the District's boundaries should be based on Rule 24 – Calculation of Water Use Capacity and Connection Charges within the District's Regulation II for Permits and not a seemingly arbitrary allotment of 0.5 afy per residence. Section A of Rule 24 states,

¹ Monterey Peninsula Water Management District April 1990, Water Allocation Program Final Environmental Impact Report and subsequent Mitigation Program Annual Reports; State Water Resources Control Board July 6, 1995, Order No. WR 95-10; State Water Resources Control Board July 27, 2009, Draft Cease and Desist Order against California American Water Company; National Marine Fisheries Service June 3, 2002, report on Instream Flow needs for Steelhead in the Carmel River.

"Residential Water Use Capacity shall be calculated using a fixture unit methodology whereby each water fixture is assigned a fixture unit value that corresponds to its approximate annual Water Use Capacity". Based on our review of the provided CEQA document, the District does not appear to have applied the methodology contained within its own regulations to the proposed project.

In addition, the District appears to provide mitigation measures in support of the project based on yet to be realized projects by others, namely the District, Cal-Am and the City of Seaside, that would significantly reduce diversions from the Carmel River over time. Although these pending and potential projects are significant in the cumulative context with regard to Cal-Am's ongoing excess diversions from the Carmel River, they should not be used to support individual and unrelated projects such as the one in question. All projects should be evaluated on their relative contribution to (or mitigation of) the cumulative impacts on the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon.

We question the District's ability to effectively enforce the new production limit proposed as a condition of the amended WDS permit. It is assumed that the District's enforcement authority is primarily based on Rule 20.4 – Permit Rule Noncompliance contained within Regulation II and Rule 40 – Determination of System Capacity and Expansion Capacity Limits within Regulation IV. Based on our cursory review of these rules, the District's enforcement powers appear to be limited to the WDS manager's ability to control the water use of multiple property owners and the District's powers to record Notices of Non-Compliance against all property owners within the WDS. It is unclear what effect these notices will have on individual water user's within the WDS given Rule 20.4 only appears to allow the District to record a lien against individual properties receiving water from an unpermitted WDS to recover enforcement related costs. It is assumed that the Rancho del Robledo WDS will be a permitted WDS upon approval of this project.

Although approval of the proposed project may not add significantly to the well-documented significant, cumulative impacts to public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon, it certainly does little or nothing to reduce the ongoing impacts or provide incentives to reduce the ongoing impacts. The initial study states, "The applicant has no control over the actions of other users who divert Carmel River water." What the District appears to fail to understand or take responsibility for is that it does have control over the actions of others who divert Carmel River Water. Surely the District can do better than provide a 7% return of estimated water diversion offsets back to the Carmel River on any given project.

Permitting or otherwise allowing additional diversions from the Carmel River would be inconsistent with the public trust doctrine.

As stated in the findings of the pending draft cease and desist order against Cal-Am,² exempting entitlements from Cal-Am's ongoing excess diversion would be inconsistent

² State Water Resources Control Board July 27, 2009, Draft Cease and Desist Order against California American Water Company

with Cal-Am's duty to protect public trust resources given the well-documented significant cumulative impacts on the public trust resources of the Carmel River and Carmel River Lagoon associated with Cal-Am's ongoing excess diversion of water from the river. To be certain, this determination is applicable to any public agency with the power to approve water supply-related projects given no party can obtain a vested right to appropriate water in a manner harmful to the uses protected by the public trust doctrine. Consequently, allowing increased dewatering of the Carmel River for new growth is incompatible with the District's affirmative duty as the lead CEQA agency to protect the public trust.

The ongoing excess diversion of water from the Carmel River by Cal-Am and others resulting in significant cumulative impacts to the public trust resources of the Carmel River is currently unmitigated. Ongoing diversions by all parties will continue to have significant adverse effects on the public trust resources of the river and lagoon until alternative supplies and conservation measures are implemented to offset the ongoing diversion.

Some have argued that the well-documented impacts to the Carmel River are being mitigated by the implementation of the District's Mitigation Program³ for the preservation of Carmel River environmental resources. We would strongly disagree with this argument because the applied mitigation measures⁴ are merely band-aid approaches applied to the symptoms of the real problem—dewatering of the Carmel River due to overdrafting of the alluvial aquifer—and given the riparian and aquatic habitats of the Carmel River and Lagoon would likely be unable to sustain a viable steelhead population without them for very long unless water diversions are substantially reduced. Although appropriate while diversions are being reduced, fish rescues, rearing facilities, monitoring and ongoing habitat restoration should not be considered as viable mitigation measures in support of new projects or long-term solutions to inadequate flows within the Carmel River. This is especially pertinent since the lack of flow necessary to sustain viable riparian and aquatic habitats is primarily due to the well-documented excess diversion of water from the Carmel River by Cal-Am and others.

It could also be argued that using water offsets generated from conservation efforts for new connections or development sufficiently mitigates additional significant cumulative impacts. This argument is flawed because it ignores the real problem and provides no incentive for the communities within Monterey Peninsula and Carmel Valley to develop

³ Developed in response to the Monterey Peninsula Water Management District April 1990, Water Allocation Program Final Environmental Impact Report. Order No. WR 95-10 requires Cal-Am to implement any portion of the Mitigation Program not implemented by the MPWMD. The MPWMD currently implements the program with funding from fees paid by Cal-Am's water customers.

⁴ The Mitigation Program focuses on potential impacts related to fisheries, riparian vegetation and wildlife, and the Carmel River Lagoon and includes special status species and aesthetics. Activities required to avoid or substantially reduce negative impacts to the environment include irrigation and erosion control programs, fishery enhancement programs, establishing flow releases from the existing dams to protect the fish and riparian habitat; monitoring water quality, reducing municipal water demand, and regulating activities within the riparian corridor.

the alternative water supplies needed to mitigate the existing significant cumulative impacts to the public trust resources of the Carmel River and Lagoon as a result of overdrafting the Carmel Valley Alluvial Aquifer.

Arguably, offsets realized from correcting wasteful losses should not be used to generate additional water supplies for new growth nor be considered as conservation, especially considering the gravity of the significant cumulative impacts due to overdrafting of the Carmel River. Moreover, system losses are generally viewed as preventable "waste or unreasonable use or unreasonable method of diversion" pursuant to Water Code Section 100. We are not strictly opposed to the District or others providing incentives for conservation in the form of additional water use allocations for new growth derived from realized conservation offsets, but only if significant portions of the offsets (50% or more) are used for the permanent reduction in Carmel River diversions that result in tangible reductions in the significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon. However, providing any portion of conservation offsets realized within the Cal-Am water service area for new development or connections within the Cal-Am water service area should not be allowed because Cal-Am is the single largest water diverter and contributor to the significant cumulative impacts to the public trust resources and it has been under order to reduce its diversions since 1995⁵.

To date, Cal-Am, the District, and Monterey Peninsula communities have apparently failed to develop an alternative water supply or implement conservation measure to substantially reduce diversions of water from the Carmel River. As evidenced by this and other projects, the latter is partly due to the fact that water diversion offsets from the Carmel River generated through conservation efforts or elimination of wasteful losses are commonly handed out for new development. No irony is lost on the fact that of the District's budgeted expenditures for fiscal year 2009-2010, 57.3% is proposed for mitigation, 25.6% is proposed for conservation and 17.1% is proposed for capital projects⁶. Many of the projects associated with these proposed expenditures are assumed to be directly related to the District's implementation of the District's Mitigation Program for the Carmel River funded by Cal-Am water customers. One would assume that shifting more funding towards the development of capital projects (for alternative water supplies) and conservation would go a long way in reducing the mid- and long-term costs associated with ongoing mitigation.

The proposed project may have a significant effect on the environment and a mitigated negative declaration is not consistent with the California Environmental Quality Act.

Findings of significance (not just potential significance) should be required for the following items within the environmental checklist:

- Biological Resources items 4.a, b, c and d.

⁵ Issued to California America Water Company by the State Water Resources Control Board on July 6, 1995 for its illegal diversion of water from the Carmel River

⁶ District Resolution No. 2009-07 and June 15, 2009, Budget Transmittal to the District Board

- Hydrology and Water Quality items 8.a and f.
- Land Use Planning items 9.b and c.
- Utilities and Service Systems item 16.d.

In addition, mandatory findings of significance should be required for items a. and b. within section VII. of the Initial Study.

We take specific issue with the "rationale for no impact" specified within the Biological Resources section discussion for checklist items 4.c and d given that seasonal offsite/downstream impacts within the Carmel River and Carmel River Lagoon may result from the project due to potential increases in water diversions. The District's rationale only gives credence to potential impacts immediately adjacent to the project area and appears to neglect the fact that existing water diversions have significant cumulative offsite impacts in downstream portions of the river.

Please note that these findings of significance are applicable to any and all projects with a water supply component within the Cal-Am water service area within the Monterey Peninsula, Carmel Valley and Carmel Highlands or individual projects within the Carmel Valley not within the Cal-Am service area.

All water diversions by Cal-Am and other water users within Carmel Valley contribute to the well-documented significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon. Consequently, all projects that are diverting water from the Carmel River, including the alluvial aquifer, should be subject to the same findings of significance regardless of their size and relative impact.

Please forward all future CEQA documents with a water supply component either within the Cal-Am water service area or areas of the Carmel Valley not within the Cal-Am water service area directly to this office and the State Water Resources Control Board Division of Water Rights at:

State Water Resources Control Board
Attn: Kathy Mrowka
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95812

Please do this in addition to checking these agencies off on the "Project Sent to the Following State Agencies" list on the Notice of Completion form.

In conclusion, the District should be commended on its ongoing implementation of the Mitigation Program for the preservation of Carmel River environmental resources and participation in numerous beneficial projects within the County. However, we feel that the District's current approach to handing out substantial portions of realized water

diversion offsets for new development is in direct conflict with its responsibility to protect and restore the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon. As evidenced by this and other projects, the District appears to fall short in asserting its authority over water supply issues for individual projects that could result in cumulatively significant improvements in the protection and restoration of the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon.

If you have any questions regarding this matter, please contact **Matthew Keeling** at **(805) 549-3685** or mkeeling@waterboards.ca.gov, or Burton Chadwick at 805-542-4786.

Sincerely,



Roger W. Briggs
Executive Officer

Paper File:
Electronic File: S:\NPS\Carmel River & Lagoon\RdRobledo WDS.doc
Task Code: 12601

cc:

State Water Resources Control Board
Kathy Mrowka
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95812
KMROWKA@waterboards.ca.gov

California American Water
Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
(916) 492-5000
jrubin@diepenbrock.com

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

Public Trust Alliance
Michael Warburton
Resource Renewal Institute
Room 290, Building D
Fort Mason Center
San Francisco, CA 94123
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

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

California Environmental Protection Agency

Calif. Sportfishing Protection Alliance
Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

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

The Seaside Basin Watermaster
Russell M. McGlothlin
Brownstein, Hyatt, Farber, Schreck
21 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

Monterey Peninsula Water Management
District
David C. Laredo
606 Forest Avenue
Pacific Grove, CA 93950
(831) 646-1502
dave@laredolaw.net

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

Pebble Beach Company
Thomas H. Jamison
Fenton & Keller
P.O. Box 791
Monterey, CA 93942-0791
(831) 373-1241
TJamison@FentonKeller.com

City of Monterey
Fred Meurer, City Manager
Colton Hall
Monterey, CA 93940
(831) 646-3886
meurer@ci.monterey.ca.us

Monterey County Hospitality Association
Bob McKenzie
P.O. Box 223542
Carmel, CA 93922
(831) 626-8636
info@mcha.net
bobmck@mbay.net

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

Planning and Conservation League
Jonas Minton
1107 9th Street, Suite 360
Sacramento, CA 95814
(916) 719-4049
jminton@pcl.org

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

Division of Ratepayer Advocates
Max Gomberg, Lead Analyst
505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-2056
eau@cpuc.ca.gov

City of Carmel-by-the-Sea
Donald G. Freeman
P.O. Box CC
Carmel-by-the-Sea, CA 93921
(831) 624-5339 ext. 11

Pebble Beach Community Services
District
Michael Niccum, District Engineer
3101 Forrest Lake Rd.
Pebble Beach, CA 93953
mniccum@pbcsd.org

California Department of Fish and Game
Central Region
Dr. Jeffrey R. Single, Regional Manager
1234 E. Shaw Avenue
Fresno, CA 93710

Monterey County Water Resources
Agency
Curtis V. Weeks, General Manager
893 Blanco Circle
Salinas, CA 93901-4455
curtisweeks@co.monterey.ca.us

The Honorable Dave Potter
District 5 Supervisor
County of the Monterey
Monterey Courthouse
1200 Aguajito Road, Suite 1
Monterey, CA 93940
district5@co.monterey.ca.us

The Honorable Jane Parker
District 4 Supervisor
2616 1st Avenue
Marina, CA 93933
district4@co.monterey.ca.us

National Marine Fisheries Service
Southwest Region – Santa Rosa Field
Office
John McKeon
777 Sonoma Ave, Rm 325
Santa Rosa, CA 95404
John.McKeon@NOAA.GOV

Monterey Peninsula Water Management
District
Kristi Markey, Chair - Board of Directors
5 Harris Court, Building G
P.O. Box 85
Monterey, CA 93942-0085

National Marine Fisheries Service
Bill Stevens
Natural Resource Management
Specialist
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404-6528
William.Stevens@noaa.gov