

CALIFORNIA ENVIRONMENTAL LAW PROJECT  
A Non-Profit Legal Corporation



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MPWMD

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Regina Doyle, Chair  
Board of Directors  
Monterey Peninsula Water Management District  
5 Harris Court, Box 85,  
Monterey, CA 93942-0085

Re: Joint Application of Cal-Am and SNG For A Water Distribution Permit

Dear Ms. Doyle:

Sierra Club, for the reasons, set forth below, urges the Board not to approve the Joint Application of Cal-Am and SNG for a Water Distribution Permit until supplemental environmental documentation is performed, as required by CEQA. If a permit is granted there must be a finding that the project has significant environmental impact on the Carmel River that must be mitigated. The permit must contain conditions that would not allow Cal-Am to damage Carmel River Resources by off-setting the water produced for the SNG project by increasing its diversions from the Carmel River up to the ceiling allowable under the CDO. It must also include in its prohibitions use of ASR water (Carmel River Water) (as replacement for water that would otherwise be served to Cal-Am Seaside Basin customers) to serve SNG.

- I. Under the District's Proposed Conditions of Approval the Joint Water Distribution Project Will Result in Significant, Unmitigated Impacts to the Carmel River In Violation of CEQA and SWRCB Orders 95-10, and the 2009 CDO.
  - A. The District's Existing Program Relating to Conjunctive Management will be Adversely Impacted if the Water Stored in the ASR Project is Used to Service SNG As Replacement Water to Serve Cal-Am Customers Previously Served From Seaside Wells.

Since Order 95-10, various measures have been taken by the District and Cal Am to promote conjunctive and coordinated use of the River and the Seaside Aquifer.<sup>1</sup> To protect against Basin

<sup>1</sup> Order 95-10 found that Cal-Am's diversions caused the lower 9 miles of the Carmel River to dry up during mid-summer. This annually causes harm to juvenile steelhead that are trapped in isolated river pools. The steelhead are a threatened species under the Endangered Species Act, 16 U.S.C. §1531 *et.*

overdraft and to prevent salt-water intrusion Cal-Am has increased pumping from the River alluvium during heavy flow (winter) months and transports the pumped water by pipeline to the Seaside Basin to be used for groundwater recharge and municipal purposes. The water is transported via existing Cal-Am pipelines for injection into the Seaside groundwater basin. This joint Aquifer Storage and Recovery Project is intended to reduce demand on the Carmel River for water production during summer and fall months when River volume is low and diminishing. Under the CDO, beginning May 31, 2010 and every year thereafter, while the CDO is in effect, ASR water must be used to serve existing demand in Cal-Am's service area in order to minimize pumping the River alluvium during low flow periods.<sup>2</sup>

- B. Cal-Am Must Not Be Allowed to Increase Pumping From the River in Years When It Is Producing Less Than its Maximum (SWRCB) Production Allowance to Make Up for Water It Is Losing By Reason of Reductions in its Standard Production Allowance Attributable to Its Delivery of Seaside Basin Water to SNG.

In Water Year 2007, Cal-Am accounted for about 81% of total production within the MPWRS (Monterey Peninsula Water Resource System). Cal-Am production from the Carmel River Basin in WY 2007 was 10,444 AF.<sup>3</sup> Thus, Cal-Am diversions were 841 AF (7.5%) below the 11,285 AF diversion limit from the Carmel River Basin imposed by the SWRCB. As will be discussed below, the fact that CAW's production has been in most years since 1999 below the SWRCB production ceiling is of substantial significance to the District in its oversight of Cal-Am production within its Water Resource System. In WY 2008 and 2009, Cal-Am production has been below the production ceiling.

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seq. and are a protected public trust resource. The CDO found that Cal-Am's continued unlawful diversions damaged the steelhead population in the River. The CDO's findings were supported by substantial evidence in the record that stands unrefuted by anything in this Record.

<sup>2</sup> CAW's sources for production within the service area include water from San Clemente Reservoir on the River, groundwater from the Upper Carmel Valley Alluvial Aquifer, groundwater from the Lower Carmel Valley Alluvial Aquifer, and groundwater from the coastal sub-areas of the Seaside Groundwater Basin.

<sup>3</sup> The MPWMD Mitigation Program Report shows that CAW Main System Production in Water Year 2007 comes from a variety of sources:

During Water Year 2007, CAW produced a total of 14,076 acre-feet (AF) of water from all sources for its main system, including 12 AF diverted from the Carmel River Basin and injected into the Seaside Basin by the District. Subtotals of 461 AF and 9,995 AF (including the 12 AF injected into the Seaside Basin) were produced from CAW wells in the Upper and Lower Carmel Valley aquifer units, respectively. CAW produced 3,621 AF produced from the Seaside Basin Coastal Subareas. This production exceeded the established allocation under the Seaside Basin Decision and therefore CAW was assessed by the Seaside Groundwater Basin Watermaster for this over production.

Id. at III-4

Since 2005 production from the Carmel River has been lower than the production limit. In 2005, 5.4% less; in 2006, 6.6% less. CDO, Exhibit DF2.

II. The District's Regulatory Duties to Promote Coordinated Management of the Area Through Approval of Water Distribution Permits Warrant Requiring Additional Environmental Documentation With Respect to The Effects of the Joint Cal-Am-SNG Water Distribution Permit Application on The Public Trust Resources of The Carmel River and Require Mitigating Significant Impacts on the Carmel River and its Resources Resulting From Approval of The Joint Application.

A. The Purpose of the California Environmental Quality Act Is To Ensure that Agencies Give Primary Consideration to Preventing Environmental Damage, Based on Adequate Information.

In Save Our Peninsula Committee, et al., v. Monterey County Board of Supervisors (2001), 87 Cal.App.4<sup>th</sup> 99, 117-118, the Court stated the primary purposes of the California Environmental Quality Act:

[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage. (*Laurel Heights Improvement Assn. v. Regents of University of California*, supra, 47 Cal. 3d at p. 390.) CEQA is the Legislature's declaration of policy that all necessary action be taken "to protect, rehabilitate, and enhance the environmental quality of the state." (Id. at p. 392; Pub. Resources Code, § 21000.) . . . "The ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." [Citation.] The error is prejudicial 'if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.' " [citations]. When the informational requirements of CEQA are not complied with, an agency has failed to proceed in "a manner required by law" and has therefore abused its discretion.

B. MPWMD Is a Responsible Agency Under CEQA.

For this project (the joint water distribution and production water distribution permit application), the MPWMD is a responsible agency under CEQA. (CEQA Guidelines, § 15381.) "A responsible agency may refuse to approve a project in order to avoid direct or indirect environmental effects of that part of the project which the responsible agency would be called on to carry out or approve." (CEQA Guidelines, § 15042. See *Save Our Carmel River v. Monterey Peninsula Water Management District* (2006) 141 Cal.App.4<sup>th</sup> 677, 701). The MPWMD must fulfill CEQA's requirement to have adequate information before it regarding the environmental impacts of the project before it makes a decision to approve the project so that it can avoid effects on the River of its approval of the Joint Water Distribution Permit. To the extent the Project may have significant impacts on the Carmel River and public trust resources therein, such impacts must be mitigated.

Cal-Am is a co-applicant for the project. It produces water from its Peralta Well for the use of SNG and will transport it via new delivery infrastructure to the SNG site. The effects on the Carmel River attributable to the production offsets described below that may be made by Cal-Am that would increase its production from the River are "indirect or secondary effects" of the project. These are effects resultant from the project (the provision by Cal-Am of up to 90 afy of water to SNG). To the extent its production allowance as a standard producer is reduced under the terms of the Adjudication, as a result of its delivery of water to SNG, it is "reasonably foreseeable" that Cal-Am would attempt to make up for that production reduction by increasing its diversions from the Carmel River to the maximum extent permitted under the CDO. The CEQA Guidelines provide:

“Indirect or secondary effects may also include growth-inducing effects and ...related effects on air and water and other natural systems, including ecosystems.” Section 15358 (a)(2).

C. MPWMD Should Determine It Needs to Have Additional Environmental Documentation Performed.

The MPWMD has the authority to require a Subsequent EIR under CEQA Guidelines §§ 15096 (e)(f) and 15162 (c). As a responsible agency, the MPWMD has the authority to determine a Subsequent EIR is needed to identify the direct and indirect effects of the project on the Carmel River and associated public trust resources under the MPWMD’s authority. Without constraints set forth in conditions of Approval, Cal-Am will be free to increase its diversions from the Carmel River to offset losses in production attributable to its deliveries of water to SNG. The developer is proposing to implement a water distribution system for its EcoResort project, using Cal-Am as a producer and purveyor, rather than pumping water as an overlying right holder. Additional environmental documentation is required on the resulting impacts of that proposal on the Carmel River.

D. There Are Indirect Impacts of the Project That Need Environmental Documentation and Mitigation.

There are indirect impacts of the Joint Water Distribution Project that the District must consider.

(1) The ASR project is intended to relieve pressure on the Carmel River and its public trust resources during periods when the River’s surface flow is diminishing and receding. The Board’s Cease and Desist Order requires the effective May 31 of each year that stored water in the ASR project be used to serve Cal-Am customers to reduce pumping in the Carmel River alluvium. There needs to be disclosure in an environmental document and mitigation conditions to eliminate impacts on the Carmel River diversions attributable to use of the stored ASR water for any new connection to the SNG site rather than to relieve pumping from the alluvium of the Carmel River. To the extent its Standard Production Allowance is reduced, Cal-Am cannot be allowed to use ASR water to serve existing customers previously served by production from Seaside Basin wells. Such environmental analysis and mitigation conditions are especially critical in light of the SWRCB Cease and Desist Order which requires Cal-Am to use all water stored under the ASR project (after May 31<sup>st</sup> of each year) to mitigate the effect of Cal-Am’s existing illegal diversions from the river. “ASR water shall be supplied to Cal-Am customers only during months when water is most needed in the river to preserve steelhead.” CDO at 59-60. “Consistent with Cal-Am’s operating plan, water shall be pumped from the groundwater basin at the maximum practicable rate for as long as possible; Cal-Am’s diversions from the river shall be reduced at the same rate for as long as possible; Cal-Am’s diversions from the River shall be reduced at the same rate for as long as stored water is available.” *Id.*<sup>4</sup> Thus, the District needs to consider through an environmental document and mitigate whatever impacts would occur to the Carmel River alluvium and the River’s public trust resources attributable to use of ASR water to serve existing customers to replace water production lost to Cal-Am by reason of its service to SNG.

(2) A Supplemental Environmental Document Must Analyze Impacts to the River Caused by Augmented Pumping Attributable to Cal-Am’s Supplying SNG With Water That Results in

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<sup>4</sup> At p. 41, the CDO states: “Any new water supply derived from Permits 20808 and 20808A must first be applied to reduce Carmel River Diversions.”

Reduction in Its Standard Production Allowance And If Significant Impacts Are Found, They Must Be Mitigated.

The Legislature delegated to the MPWMD authority to approve water distribution permits. This authority must be exercised in furtherance of its delegated duty to manage conjunctively and integrate the water resources of the Monterey Peninsula, which primarily consist of the Carmel River and its alluvium, and the Seaside Aquifer. In connection with this environmental documentation, focused on matters within the District's regulatory authority, it would be appropriate for the District to consider some of the environmental implications of Cal-Am's ability to shift some of its Seaside Basin production to the Carmel River. The District must have full disclosure in an environmental document of how Cal-Am diversions from the Carmel River might be increased by Cal-Am's off-setting its reduced production from the Seaside Basin as a result of serving the Ecoresort, especially during summer and fall months when diversions from the River must be minimized.

The above-described indirect impact particularly needs investigation and mitigation. If in light of the reduction in its production allowance as a Standard Producer attributable to its production of water for delivery to SNG, pursuant to the Adjudication, (at p. 20), Cal-Am elects to serve its other customers now served by Seaside Basin production with Carmel River Water,<sup>5</sup> an increase of monthly diversions from the Carmel River alluvium (up to 89% of 90 afy) during low flow periods could well occur, causing significant impacts to the Carmel River and its resources.<sup>6</sup>

In the Seaside Basin Adjudication, two types of "allocations" were defined for the various producers in the basin. The first type, i.e., "Alternative Production Allocation", referred to a fixed amount of water that could be pumped by each "Alternative Producer" from the basin each year. This first type is analogous to an "overlying" groundwater right. The second type, i.e., "Standard Production Allocation", referred to the amount of water that a "Standard Producer" could pump each year, calculated as a percentage of the safe yield of the basin available after subtracting the Alternative Producers' allocations. This second type is analogous to an "appropriative" groundwater right. Cal-Am is a Standard Producer under the Adjudication Decision. If it produces up to 90 afy to serve the Ecoresort SNG, the amount permitted to be pumped by Cal-Am as a Standard Producer will be reduced by a proportion (87%) of the amount furnished to SNG. (so long as the Basin continues in overdraft).<sup>7</sup> Adjudication Decision at 18-19.<sup>8</sup>

<sup>5</sup> While continuing to serve the Ecoresort with up to 90 afa from the Peralta Well.

<sup>6</sup> This additional production is possible since Cal-Am production from the Carmel River since 2005 has been below the imposed by the SWRCB. In Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal.App.3d 692, the Court of Appeal required the Lead Agency to consider whether any additional cumulative impacts over baseline should be considered "significant."

<sup>7</sup> In California, overlying rights allow property owners to pump water from beneath their properties for use on their overlying properties. See City of Barstow v. East Mohave Water District, et al., 23 Cal.4<sup>th</sup> 891 (2000). In contrast, appropriative rights allow producers to use groundwater produced from the basin on non-overlying properties or for municipal supply, which is not considered an overlying use. Overlying rights are considered prior and paramount to appropriative rights. Standard Producers such as Cal-Am can only pump the amount of groundwater in the basin that is surplus to the cumulative production of the overlying producers. Cal-Am produces 87% of the water produced by the Standard Producers.

<sup>8</sup> Given the production constraints under the Adjudication Decision (the 10% reduction every three years plus the production ceiling that reduces the amount that can be produced by the Standard Producers when Alternative Producers exercise their priority rights), Cal-Am has every incentive to

Given the constraints imposed on its pumping from the Seaside Basin under the Adjudication Decision, it is likely that Cal-Am will elect to produce more water from the Carmel River to make up for its loss of production attributable to furnishing water to Cal-Am (up to the maximum permitted under Order 95-10 as modified by the CDO (5% reduction in production from the Carmel River)). The effects of any such incremental production from the Carmel River alluvium over the environmental baseline of use existing at the time the water distribution permit application is made must be disclosed in environmental documentation required under CEQA.<sup>9</sup>

The carry over provision of the Adjudication is also a critical factor to be considered in evaluating Cal Am's production effects on the Carmel River. Section 3 F of the Adjudication provides:

"....each [Standard] Producer who, during a particular Administrative year , does not extract from the Basin a total quantity equal to such producer's Standard Production Allocation for the particular administrative year may establish carryover credits, up to the total amount of that Producer's storage allocation....."

For 2009 the Watermaster Board recognized a carry over credit of 496 acre feet for Cal Am from WY 2009. "This amount is included in Cal Am's production allocation from the Basin, i.e., 3882.5 acre feet in WY 2010." See Item 10. MPWMD Board meeting December 12, 2009 (To consider the Adoption of Resolution 2009 -17 Modifying Rule 162).

The 2009 carry over credit allowed Cal Am to pump more from the Seaside Aquifer than its allocation for 2009 because it used below its limit in 2008. Through increased pumping from the Carmel River, Cal-Am can reduce its pumping from the Seaside Aquifer and maximize any carry-over credit.

There is every incentive for Cal-Am to enhance in future years (as further triennial decreases in Seaside Basin production are implemented) its carry over credit by supplying customers heretofore served with water from the Seaside Basin with water from the Carmel River instead (so long as the production ceiling imposed under the Cease and Desist Order is not exceeded).

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increase its production from the Carmel River up to the maximum allowed. The Adjudication Decision establishes maximum production limits on yield from the Seaside Aquifer, which it found to be in overdraft. When Cal-Am exceeds its production allowance under the Adjudication, it is assessed a fee for artificial replenishment of the Seaside Basin necessary to off-set the cumulative Basin Over-Production. Adjudication Decision at 32, III L3 jiii. Cal-Am has a financial incentive to pump more from the Carmel River (if it is below its Order 95-10 production limit) rather than incur an assessment fee by exceeding its production limit under the Adjudication.

<sup>9</sup> It is clear in this record that Cal-Am has not promised not to increase its pumping from the alluvium of the River up to the maximum permitted to serve other customers now served by water from the Seaside Basin. In the Cease and Desist Order the SWRCB prohibits Cal-Am from increasing its diversions from the River to off-set the loss in production from the groundwater basin. CDO, at p.40. The CDO finds "that the adjudication will decrease the supply of water to Cal-Am customers. Nevertheless, we conclude that Cal-Am shall be prohibited from increasing its diversions from the River to offset the loss in production from the groundwater basin."

Thus, in light of the mandated reduction in its production as a Standard Producer from the Seaside Basin as required by the Superior Court as a result of the Adjudication Decision and other incentives to offset its reduced production from the Seaside Basin, it would be likely that Cal-Am could choose to serve its existing customers (previously served by water from the Seaside Basin) from the Carmel River through diversions from the Carmel River up to the ceiling imposed by the CDO.<sup>10</sup> Thus there will be impacts on the Carmel River and its alluvium resulting from increased Cal-Am diversions over baseline conditions to meet customer needs previously met through pumping in the Seaside Basin that may need to be mitigated. The fact that Cal Am will still remain within its CDO production limit does not discharge the obligation of the District to explore the impacts on the Carmel River and its alluvium of augmented groundwater production from the River (over baseline attributable to its service to SNG), especially during the dry season, through an environmental document.<sup>11</sup> The District has a duty to mitigate this environmental impact and to prevent incremental (illegal) diversions of water from the River. *One modality it may consider is to require that 87% of the amount Cal-Am produces for the Ecoresort be considered production from the Carmel River for the purpose of the ceiling on production imposed under the Cease and Desist Order.*

The District, in previous findings 16 and 17, *inter alia*, correctly determined that environmental documentation was necessary and appropriate to assist it in its consideration of the joint application for a water distribution permit. Findings 16 and a portion of Finding 17, are set forth below:

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<sup>10</sup> In its February 26, 2009 letter to the SWRCB, Cal-Am states that: "Order 95-10 is silent on what parcels of land [CAW] can serve from the Carmel River, and does not prohibit [CAW] from serving new development, provided that the company otherwise complies with the volume limits set by that Order." (Finding 11, p.5) Thus Cal-Am can (within the existing regulatory system) decide to serve customers with Carmel River water rather than with Seaside Water Basin so long as it does not exceed SWRCB regulatory limits. Thus, it could decide to provide water to customers currently served by the Seaside Basin from the Carmel River, while maintaining Peralta Well production at 90 afy annually to serve the EcoResort project.

<sup>11</sup> In Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001), 87 Cal.App.4<sup>th</sup> 99, this Court set aside an EIR prepared in connection with a proposed 109 unit residential development on agricultural property in an area of Monterey County subject to severe groundwater overdraft. The Court held that the Lead Agency had not properly established baseline groundwater usage conditions in order to evaluate the impacts of proposed development on the groundwater supply of the surrounding area (The proposed development would consume roughly 61.15 afy).

This Court held that establishment of baseline water use was a critical feature of the environmental review process. The Court held "the impacts of the project must be measured against the 'real conditions on the ground.'" 87 Cal.App.4<sup>th</sup> at 121. The Court concluded that a proper baseline groundwater consumption figure should have reflected actual historical usage at the time the development application was filed.

This Court noted that the draft EIR for the project concluded that:

"[A]ny increase in the impacts to the [Carmel Valley] aquifer would be considered an adverse environmental impact given the water supply problems in the Carmel Valley Area." Any impact reducing flow to the Carmel Valley aquifer was potentially significant."

87 Cal.App.4<sup>th</sup> at 109

The MPWMD Board, exercising its independent judgment as a Responsible Agency, has determined that, due to the interconnected nature of the CAW system, and the current difficulty to track sources of water supply (except on a monthly basis), the cumulative effects of approval of the MBSE application could potentially result in significant adverse impacts to the Carmel River, and/or the species and habitat dependent on that supply, which have not been evaluated in environmental documents to date. The Board has determined that a Subsequent EIR is needed to address this issue prior to MPWMD consideration of project approval based on the criteria in CEQA Guidelines Section 15162(a). (Finding 16) (emphasis added)<sup>12</sup>

III. The Opinion of the Court of Appeal Reserved Authority in the District To Consider Impacts of the Project on the River.

The Proposed Conditions of Approval abandon the requirement that there be supplemental environmental documentation with respect to impacts of approval of the Joint Water Distribution Report on pumping from the Carmel River Alluvium. In California American Water Company City of Seaside, the Court of Appeals made it very clear that in affirming the trial court's Order, it was in no manner impinging on the authority of the District to consider and mitigate the impacts of the project on the Carmel River. The Court of Appeals emphasized that the lower court's order "does not entirely invalidate Finding 19 and its

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<sup>12</sup> Previous Finding 19 states, inter alia, that the District Board, has determined that a Subsequent EIR is needed in order to make an informed decision on the environmental effects of the proposed project as it relates to water supply. Finding 19, p. 8. Id.

The Executive Officer of the Central Coast, RWQCB, by letter dated August 31, 2009. "Response to Mitigated Negative Declaration and Initial Study for ENEA Properties LLC," concluded that service by Cal-Am of .5 afy "derived from the Carmel River" to a small project consisting of two residential units could produce significant cumulative off-site environmental impacts to the "riparian and aquatic habitats of Carmel River and the Carmel River Lagoon, and the federally listed steelhead that are dependent on these habitats for their survival." (p.1). See Attachment A.

"The ongoing significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon as a result of Cal-Am's ongoing excess diversions are essentially unmitigated because Cal-Am has failed to develop any meaningful source of supply and the relative quantity of water delivered from the Carmel River to Cal-Am customers within the Monterey Peninsula has not materially changed since the issuance of Order No. WR 95-10 against Cal-Am in 1995. The water service connection to Cal-Am's distribution system for the proposed project constitutes an additional diversion of up to 0.5 afy from the Carmel River that will contribute to the ongoing significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon."

Id. at p.4

The Executive Director found that:

"The Proposed project will have a significant effect on the environment and a mitigated negative declaration is not consistent with the California Environmental Quality Act." (Id. at p.7)



concomitant call for a subsequent EIR, but only disapproves it to the extent that it conflicts with the physical solution – that is, to the extent that it “references a need for CEQA review of the impact of the application on Seaside Basin production’ (italics added). The same is true of findings 20 and 21.” (Opinion at 12).

The Court continued:

“The MPWMD maintains, however, that the order obstructed its effort to control the parties’ use of water from the Carmel River. The record does not support this position. At the hearing the court explicitly acknowledged that the District, not the court, had jurisdiction to require CEQA review to the extent that potential impacts on Carmel River water usage existed. The only ostensible limitation expressed by the court was in agreeing with Seaside that CEQA review is not compelled based solely on the District’s concern about commingling of water and storage from different sources; any “issues concerning the source of water molecules as opposed to an accounting of water quantify are irrelevant.” More specifically, any commingling that would occur from a contemplated wheeling arrangement between the producers would not “transmute Carmel River water into Seaside Basin water, nor Seaside Basin water into Carmel River water.” Thus, the [trial] court explained “MPWMD has authority to require an accounting of water quantity to satisfy itself that no Carmel River water is being used in the project at hand, but it cannot make environmental decisions based on the mere storage of water from two sources. The [trial] Court’s careful wording of its ruling left ample room for the District’s exercise of its authority under the applicable constitutional and statutory mandates.” (Opinion at 13-14).

The Court’s opinion makes it abundantly clear that where, under a water wheeling arrangement, joint production and distribution are involved, the District may analyze the environmental impacts on the Carmel River, when, as here, the Seaside Basin standards producer can offset its losses in production from Seaside Basin Wells attributable to delivery to SNG by reducing delivery of water to its customers in the Basin and increasing its pumping from the Carmel River (so long as it is below the Carmel River production ceiling).

Sierra Club proposes that the District revise previous findings 19 and 20 in the following fashion:

Finding 19, line 11:

Delete “water supply” and insert “the Carmel River.”

Finding 20, line 6:

Add after “significant effects” the phrase “on the Carmel River.”

#### IV. The Joint Water Distribution Project is Not Permitted Under the Terms of the CDO.

As discussed above, there is no Condition of Approval that forbids the use of ASR water for supplying SNG. The CDO states: “We conclude that water developed by the ASR project should be used to reduce illegal diversions.” CDO at 41. The CDO also states ASR water “should be used to mitigate the effects of Cal-Am’s illegal diversions.” CDO at 59. As described above use of the ASR project as replacement water for Cal-Am reduced production

capability under the Adjudication, is not consistent with the goal of reducing illegal diversions from the River or mitigating the effects of Cal-Am's diversions."

Finally, the CDO, at 40, states:

"We find that the adjudication will decrease the supply of water to Cal-Am customers. Nevertheless we conclude that Cal-Am shall be prohibited from increasing its diversions from the River to off-set the loss in production from the groundwater Basin.

As argued, supra, Cal-Am has every incentive to increase its river diversions to offset its loss of production from the groundwater basin. This is prohibited under the terms of the Order.

V. Unless It Imposes Conditions of Approval That Would Eliminate Adverse Effects on the River, The District Will Have Permitted Diversions to Take Place That will Result in Violations of the ESA.

In *Straham v. Coxe*, 127 F3d 155 (1st Cir. 1997), the Court of Appeal held that the Secretary of the Massachusetts Department of Executive Office of Environmental Affairs, the Commissioner of the Massachusetts Division of Marine Fisheries, and the Commissioner of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement violated Section 9 of the Endangered Species Act, 16 USC §1531 et seq. and had facilitated a "taking" of the Northern Right Whale, an endangered species listed under the Act, insofar as they had issued licenses and permits authorizing gillnet and lobster pot fishing that caused "takings" of the Northern Right Whale.

The Court ruled that the agency defendants had violated Section 9 of the ESA, 16 USC §1538(g):

"...[The ESA prohibits any person from "tak[ing] any [endangered] species within the United States or the territorial sea of the United States." § 1538(a)(1)(B). In addition, the ESA makes it unlawful for any person "to attempt to commit, solicit another to commit, or cause to be committed, any offense defined" in the ESA. See § 1538(g). The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532(19). "Take" is defined ... in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.Rep. No. 93-307, at 7 (1973); The Secretary of the Interior has defined "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." See 50 C.F.R. § 17.3 (1994); Sweet Home, at 695-701, 115 S.Ct. at 2412-14 ... The term "person" includes "any officer, employee, agent, department, or instrumentality ... of any State, municipality, or political subdivision of a State ... [or] any State, municipality, or political subdivision of a State.... 16 U.S.C. § 1532(13)". 127 F3d at 162.

The Court held that §1538 (a)(i)(b) (prohibiting "take") and §1538 (g) (prohibiting solicitation or causation by a third party of a taking) applied to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place. 127 F3d at 163. The Court

cited, with approval, cases from other circuits, that had found a Section 9 taking, on the part of federal and state governmental officials, in similar circumstances:

*See, e.g., Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir.1991) (finding Forest Service's management of timber stands was a taking of the red-cockaded woodpecker in violation of the ESA); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir.1989) (holding that the EPA's registration of pesticides containing strychnine violated the ESA, both because endangered species had died from ingesting strychnine bait and because that strychnine could only be distributed pursuant to the EPA's registration scheme); ...*Loggerhead Turtle v. County Council of Volusia County*, 896 F.Supp. 1170, 1180-81 (M.D.Fla.1995) (holding that county's authorization of vehicular beach access during turtle mating season exacted a taking of the turtles in violation of the ESA). The statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that, contrary to the defendants' argument on appeal, the district court properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA. 127 F3d at 163. (emphasis added).

The Court noted that "it was not possible for a licensed commercial fishing operative to use its gill-nets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking." 127 F3d at 164. The Court of Appeal upheld the District Court's finding that entanglement with fishing gear in Massachusetts waters caused injury (harm) or death to Northern Right Whales. *Id.* As in *Strahan*, in this case the District will (if it approves a permit) in effect authorize Cal-Am to divert water from the Carmel River unlawfully as "replacement" water to offset its production for SNG's uses, which directly gives rise to takings of the SCCC steelhead and its critical habitat. *Id.* The Court rejected the Commonwealth's argument that the District Court should have taken into account the "significant efforts made by the Commonwealth to "minimize Northern Right Whale entanglements in fishing gear," 127 F3d at 165. The Court held that to the extent "any entanglement with fishing gear injures a Northern Right Whale and given that a single injury to one whale is a taking under the ESA, efforts to minimize such entanglements are irrelevant." *Id.* The SWRCB CDO has already found that Cal-Am's continuing diversions are "harming" the steelhead.

The First Circuit affirmed the order of the District Court requiring the defendants to "develop and prepare a proposal to restrict, modify or eliminate the use of fixed fishing gear in coastal waters of Massachusetts listed as critical habitat for Northern right whales in order to minimize the likelihood additional whales will actually be harmed by such gear." 127 F3d at 158.

The District is exposing itself to liability under the ESA if it authorizes increased diversions from the Carmel River to offset water produced for SNG and to offset reductions in its Standard Production Allowance required under the Adjudication (resultant from delivery of water to SNG).

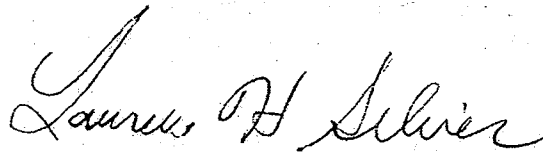
## VI. Conclusion.

For the foregoing reasons, Sierra Club requests the Board not to approve the Project until legally required environmental documentation has been performed. If the Board chooses to approve the Project, it should attach Conditions of Approval that prohibit use of ASR water to reduce Cal-Am's

production "losses" from the Basin and that require diversions from the River to offset Cal-Am's production losses attributable to service to SNG, be treated as production from the Carmel River.

Such a result is entirely consistent with the intent of the Adjudication. The Adjudication determined the safe yield and determined the rights of the Alternative Producers. It was determined that the Alternative Producers had plenary rights to pump their adjudicated amounts, and that the Standard Producers were subordinate to such overlying rights. When an Alternative Producer exercises its dormant rights (while the Basin remained in overdraft), the Standard Producers would have to reduce their pumping pro rata in order that the Operating Safe Yield, established under the Adjudication, would not be exceeded. Adjudication, p. 13. The Adjudication confers no rights on the Standard Producers to seek replacement water from the Carmel River.

Cal-Am should stand ready as a Standard Producer to take a "hit" when a Alternative Producer chooses to exercise its paramount right. The Carmel River is not available to "indemnify" Cal-Am for any cut-backs in its pumping as a Standard Producer.<sup>13</sup>



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<sup>13</sup> ("Wheeling" the water does not change its status as a Standard Producer.)

