

Draft - July 27, 2009

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-00XX

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In the Matter of the Unauthorized Diversion and Use of Water  
by the California American Water Company

Parties

**Water Rights Prosecution Team<sup>1</sup>  
California American Water Company**

Interested Parties

**Monterey Peninsula Water Management District, City of Carmel by the Sea,  
City of Seaside, Seaside Basin Watermaster, Pebble Beach Company,  
Monterey County Hospitality Association, City of Monterey, City of Sand City,  
Division of Ratepayers Advocates of the California Public Utilities Commission,  
Public Trust Alliance, Carmel River Steelhead Association,  
Ventana Chapter of the Sierra Club, California Sportfishing Protection Alliance,  
Planning and Conservation League, California Salmon and Steelhead Association,  
National Marine Fisheries Service**

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SOURCE: Carmel River

COUNTY: Monterey

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**CEASE AND DESIST ORDER**

BY THE BOARD:

**INTRODUCTION**

The California American Water Company (Cal-Am or CAW) diverts water from the Carmel River in Monterey County. The water is used to supply the residential, municipal, and commercial needs of the Monterey Peninsula area (peninsula) communities. In 1995 the State Water

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<sup>1</sup> The Water Rights Prosecution Team includes: (1) James Kassel, Deputy Director for Water Rights, (2) John O'Hagan, Manager, Water Rights Enforcement Section (3) Mark Stretars, Senior Water Resource Control Engineer, (4) John Collins, Environmental Scientist and (5) Staff Counsels Reed Sato, Yvonne West and Mayumi Okamoto. In addition, for purposes of complying with *ex parte* prohibitions, Kathy Mrowka, Senior Water Resource Control Engineer, is also treated as a member of the Prosecution Team.

Resources Control Board (State Water Board) adopted Order WR 95-10 (Order 95-10). Among other matters, the order found that Cal-Am was diverting about 10,730 acre feet per annum (afa) of water from the Carmel River without a valid basis of right and directed that Cal-Am should diligently implement actions to terminate its unlawful diversion. Alleging that 13 years after the adoption of Order 95-10 Cal-Am continues to divert about 7,150 afa from the river without a valid basis of right, the Prosecution Team (Prosecution Team or PT) seeks issuance of a cease and desist order under Water Code section 1831, subdivision (d). Cal-Am requested a hearing. This order (1) finds that Cal-Am: (a) failed to comply with the requirements of Order 95-10, and (b) is in violation of Water Code section 1052; and (2) issues a cease and desist order (CDO).

The State Water Board finds as follows:

#### **1.0 LEGAL REQUIREMENTS FOR ISSUING A CEASE AND DESIST ORDER**

The State Water Board may issue a cease and desist order as provided in Water Code section 1831. Section 1831 provides in part:

- a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.
- b) The cease and desist order shall require that person to comply forthwith or in accordance with a time schedule set by the board.
- c) The board may issue a cease and desist order only after notice and an opportunity for a hearing pursuant to Section 1834.
- d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:
  - (1) The prohibition set forth in Section 1052 against the unauthorized diversions and use of water.<sup>2</sup>
  - (2) Any term or condition of a permit, license, certification, or registration issued under this division.
  - (3) Any decision or order of the board issued under this part.

Section 1832 provides:

Cease and desist orders of the board shall be effective upon issuance thereof. The board may, after notice and opportunity for hearing, upon its own motion or upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part an cease and desist order issued pursuant to this chapter.

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<sup>2</sup> Water Code section 1052, subsection (a) provides "[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass."

## **2.0 NOTICE OF PROPOSED CEASE AND DESIST ORDER**

On January 15, 2008, the Assistant Deputy Director for Water Rights<sup>3</sup> issued a notice of proposed cease and desist order (draft cease and desist order or draft CDO) to Cal-Am. (SWRCB-7.) Among other matters, the draft CDO alleges that:

- 1) In 1995 the Board adopted Order 95-10. The order required Cal-Am to “diligently implement” measures to terminate its illegal diversions from the river (pp. 2 and 3, Facts 5 and 9).
- 2) Cal-Am has failed to comply with Condition 2 of Order 95-10. Condition 2, requires Cal-Am to terminate its unauthorized diversions from the river (p. 5, Finding 3).
- 3) Since 1995 Cal-Am has illegally diverted at least 7,164 afa from the river (p. 5, Finding 1).
- 4) Cal-Am’s diversions continue to have adverse effects on the public trust resources of the river and should be reduced (p. 5, Finding 2).
- 5) The ongoing diversion is a violation of Water Code Section 1052 prohibiting the unauthorized diversion or use off water (p. 5, Finding 1).

The draft CDO seeks to compel Cal-Am to reduce the unauthorized diversions by specified amounts each year, starting in water year 2008-09 and continuing through water year 2014. For example, in 2008-09 Cal-Am would be required to reduce its unauthorized diversions by 15 percent; another 15 percent reduction would be required in water year 2009-2010, etc. (Staff Exhibit 7.)

## **3.0 REQUEST FOR HEARING**

On February 4, 2008, Cal-Am requested a hearing. (CAW-8, p. 2, ¶ 4.) Cal-Am’s request for hearing states, in part, that:

- 1) the terms and conditions of Order 95-10 are being met (id., p.2, ¶ 1);
- 2) the water diverted from the Carmel River is necessary to protect public health and safety (ibid.);
- 3) the schedule of reduction conflicts with the requirements of the California Public Utilities Commission (ibid.); and
- 4) the schedule for reducing diversions is not supported by the recitals in the draft cease and desist order and is unworkable (ibid.).

## **4.0 NOTICE OF HEARING**

On March 5, 2008, the State Water Board issued a notice of hearing for this proceeding. (CAW-10.) The notice stated that the purpose of the hearing is to receive evidence to

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<sup>3</sup> The Assistant Deputy Director for Water Rights who issued the draft is James W. Kassel.

determine whether to adopt the draft CDO issued to Cal-Am. (*Id.*, p. 5, Purpose of Hearing.)

The key issue noticed for hearing is as follows:

Should the State Water Board adopt the draft CDO? If the draft should be adopted, should any modifications be made to the measures in the draft order? What is the basis for each modification?

(*Id.*, p. 6, Key Issue.)

#### **4.1 Persons Intervening in the Proceeding**

The notice also provided that persons wishing to participate in the proceeding must file a Notice of Intent to Appear. In addition to the Prosecution Team and Cal-Am, the following persons filed Notices of Intent to Appear and participated in the hearing:<sup>4</sup>

Planning and Conservation League  
Public Trust Alliance  
Carmel River Steelhead Association  
Sierra Club, Ventana Chapter  
California Sportfishing Protection Alliance  
National Marine Fisheries Service  
California Salmon and Steelhead Association  
Monterey Peninsula Water Management District  
Seaside Basin Watermaster  
Division of Ratepayers Advocates, California Public Utilities Commission  
City of Monterey  
City of Seaside  
City of Sand City  
City of Carmel-by-the-Sea  
Monterey County Hospitality Association  
Pebble Beach Company

### **5.0 BACKGROUND**

#### **5.1 The Carmel River and Cal-Am Facilities on the River**

The Carmel River is a central coast stream that flows into Carmel Bay about five miles south of the City of Monterey. The river drains a watershed area of about 255 square miles. Cal-Am owns and operates the San Clemente Dam, the Los Padres Dam and 21 downstream wells that divert water from the underflow of the river. (See Figure 1, Carmel River Watershed and Figures 2 and 3, Alluvial Groundwater Basin Showing The Location of the California American Water Company Wells.) During 1994, the wells supplied “. . . about 69 percent of the water

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<sup>4</sup> Intervention by the Defenders of Wildlife and Mr. George T. Riley was denied. (May 13, 2008, Rulings on Procedural Issues, p. 4-5, Standing of Persons Filing Notices of Intent to Appear.)

needs of Cal-Am's customers. The balance of the water supplied to Cal-Am customers is supplied from: (1) San Clemente Dam and Los Padres reservoirs in the upper reaches of the Carmel River and (2) pumped ground water in the City of Seaside."<sup>5</sup> (Order 95-10, pp. 2-6.)

## 5.2 Cal-Am's Rights to Divert and Use Water from the Carmel River

Order 95-10, section 4.3 (pp. 24, 25) found that Cal-Am has the following rights to divert and use water from the river:

- 1) A pre-1914 appropriative right for 1,137 afa.
- 2) Riparian rights for use within the Carmel Valley on parcels which adjoin the surface watercourse or which overlie water flowing in the subterranean channel. These rights cannot be used to serve water outside the valley or non-riparian parcels within the valley. The order recognized 60 afa of use.
- 3) An appropriative right to divert up to 3,030 afa of water to storage in Los Padres Reservoir from October 1 to May 31 pursuant to the conditions in License 11866. The actual diversion is limited to 2,179 afa due to siltation at Los Padres Reservoir.
- 4) Order 95-10 further found that Cal-Am was diverting about 10,730 afa without a valid basis of right (p. 36, ¶2).

The foregoing findings are binding on Cal-Am.<sup>6</sup>

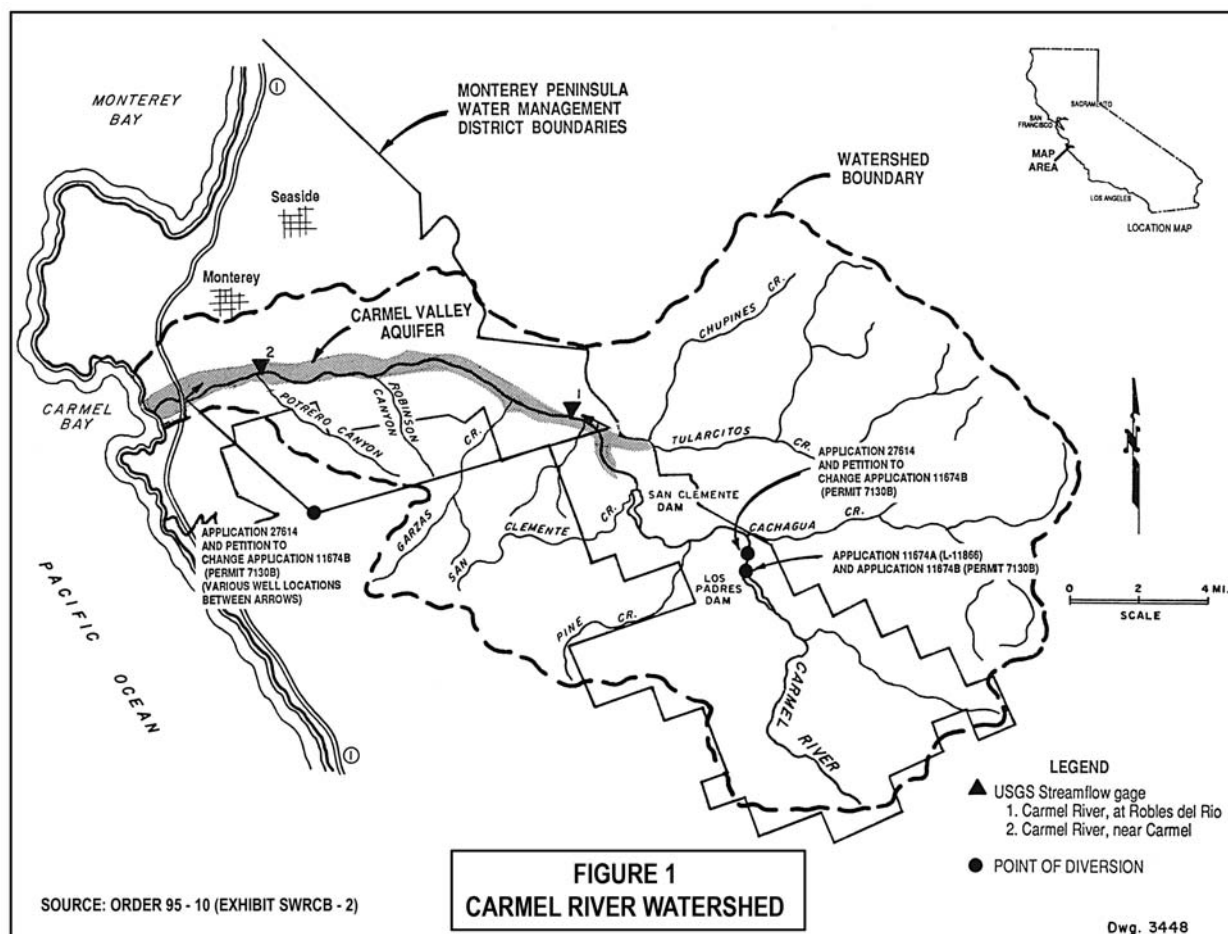
On November 30, 2007, both the Monterey Peninsula Water Management District (MPWMD) and Cal-Am jointly obtained an additional right to divert water from the river. The State Water Board issued Permit 20808A authorizing the diversion of 2,426 afa water from the river to underground storage in the Seaside Groundwater Basin from December 1 of each year to May 31 of the succeeding year at a maximum instantaneous rate of diversion of 6.7 cubic feet per second (cfs). Thus, Cal-Am's current legal rights to water in the river that may be used to supply peninsula cities is the 3,316 afa recognized in Order 95-10<sup>7</sup> plus 2,246 afa under Permit 20808A<sup>8</sup> for a total of 5,562 afa.

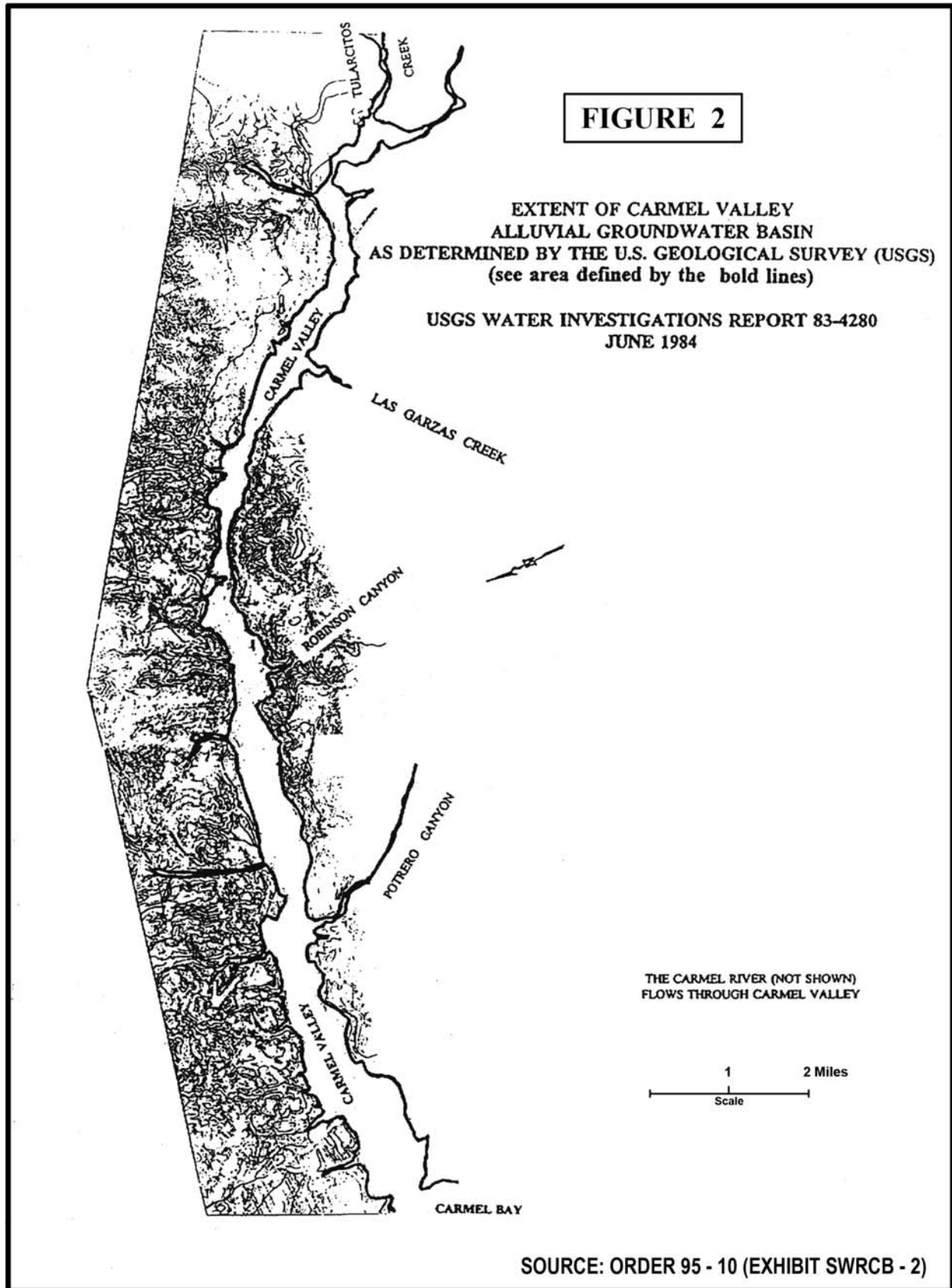
<sup>5</sup> The relative quantity of water delivered from the wells to Cal-Am customers has not materially changed because Cal-Am has failed to develop any meaningful new source of supply. (See 14.0 Cal-Am Has Not Complied with Condition 2 of Order 95-10, *infra*.)

<sup>6</sup> See Wat. Code, § 1126, subd. (d); see also *People v. Simms* (1982) 32 Cal.3d 468, 477 [principles of *res judicata* and collateral estoppel apply to administrative decision in appropriate circumstances]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4<sup>th</sup> 921, 944 [discussing the characteristics of administrative proceedings that may be the basis for collateral estoppel]. These findings are also binding on the Monterey Peninsula Water Management District, Pebble Beach Water Company, Carmel River Steelhead Association, Residents Water Committee, Ventana Chapter of the Sierra Club, the California Department of Parks and Recreation, Willis Evans, John Williams, and the California Department of Fish and Game. (Order 95-10, p.7, 2.0 Complaints; p. 9, 2.6 Interested Persons.)

<sup>7</sup> 856 afa is subtracted from this number to adjust for storage loss due to siltation at Los Padres Reservoir.

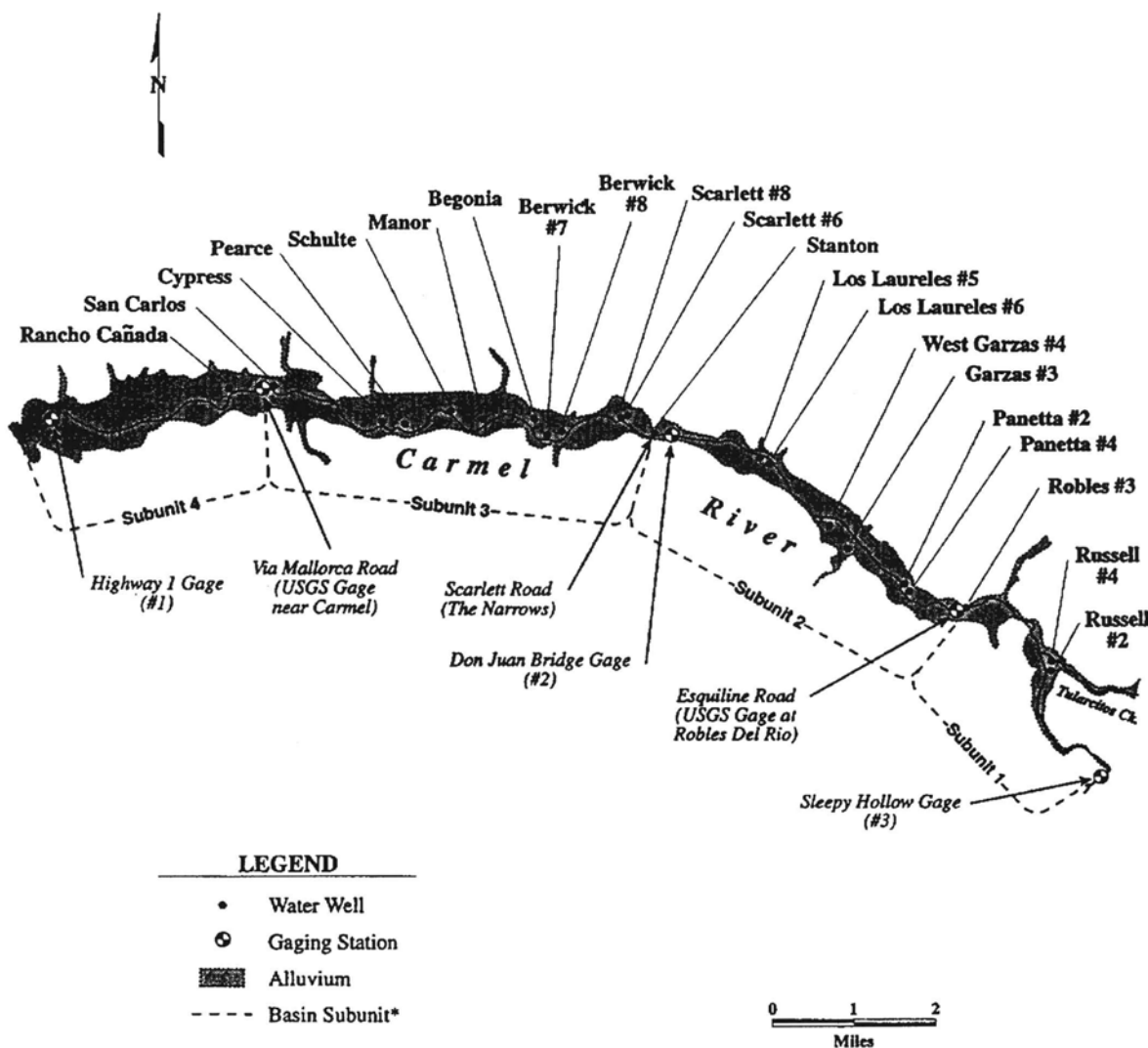
<sup>8</sup> As will be discussed, *infra*, the actual amount of additional water supply that may be generated by this project is uncertain, but certainly much less than the face value of the permit.





**FIGURE 3**

**ALLUVIAL GROUNDWATER BASIN SHOWING THE LOCATION OF THE CALIFORNIA-AMERICAN WATER COMPANY WELLS**



**SOURCE: ORDER 95 - 10 (EXHIBIT SWRCB - 2)**

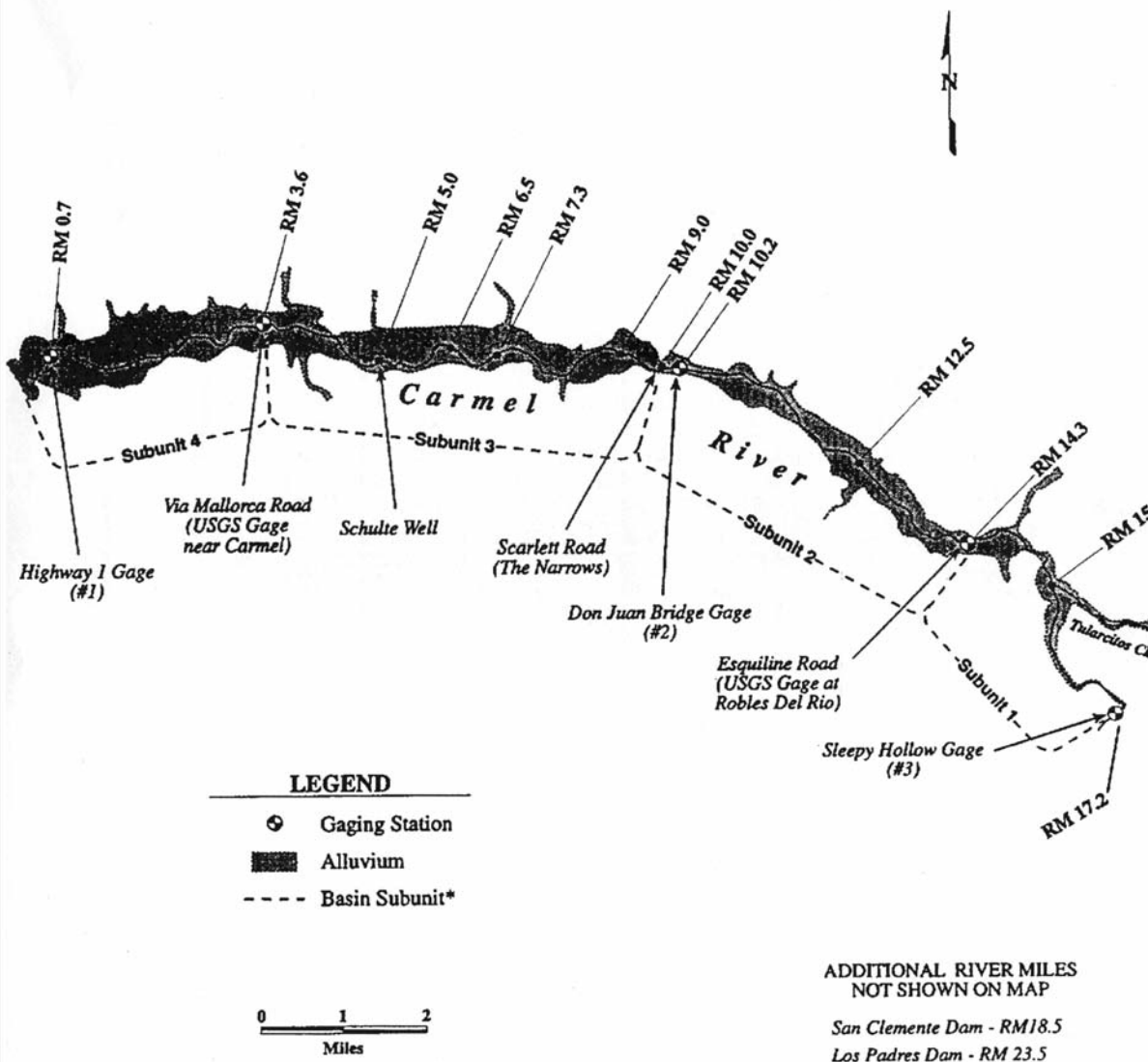
\* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage.

Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).



**FIGURE 4**

**ALLUVIAL GROUNDWATER BASIN  
IDENTIFYING RIVER MILES (RM)**



**SOURCE: ORDER 95 - 10 (EXHIBIT SWRCB - 2)**

\* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

### **5.3 Effects of Cal-Am's Diversions on the Carmel River in 1995**

Order 95-10, section 5.0 (pp 25-29) found that fish and wildlife were being adversely affected by Cal-Am's legal and illegal diversions. Section 5.5 states:

To summarize, Cal-Am diversions have historically had an adverse effect on:  
(1) the riparian corridor along the river below RM<sup>9</sup> 18.5; (2) wildlife that depend on riparian habitat; and (3) steelhead and other fish which inhabit the river.

Cal-Am's combined diversions from the river have the largest single impact on instream beneficial uses of the river, although diversions by other water users also contribute to the adverse effects on fish and wildlife. (Order 95-10, 5.0 Effect of Cal-Am Diversion on Instream Beneficial Uses, p. 25.)

### **5.4 Conditions Imposed on Cal-Am by Order 95-10**

The following conditions in Order 95-10 are particularly pertinent to this proceeding:

1. Cal-Am shall forthwith cease and desist from diverting any water in excess of 14,106 afa from the Carmel River, until unlawful diversions from the Carmel River are ended.
2. Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful diversions from the Carmel River: (1) obtain appropriative right permits for water being unlawfully diverted from the Carmel River; (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside Aquifer shall be governed by condition 4 of this Order not this condition; and/or (3) contract with another agency having appropriative rights to divert and use water from the Carmel River.
3. (a) Cal-Am shall develop and implement an urban water conservation plan. In addition, Cal-Am shall develop and implement a water conservation plan based upon best irrigation practices for all parcels with turf and crops of more than one-half acre receiving Carmel River water deliveries from Cal-Am. Documentation that best irrigation practices and urban water conservation measures have already been implemented may be substituted for plans when applicable.  
(b) Urban and irrigation conservation measures shall remain in effect until Cal-Am ceases unlawful diversions from the Carmel River. Conservation measures required by this Order in combination with conservation measures required by the District shall have a goal of achieving 15 percent conservation in the 1996 water year and 20 percent conservation in each subsequent year.<sup>10</sup> To the extent that this requirement conflicts with prior commitments (allocations) by the District, the Chief, Division of Water Rights shall have the authority to modify the conservation requirement. The base for measuring

<sup>9</sup> "RM" means river mile. See Figures 3 and 4.

<sup>10</sup> Footnote 23 of the Order provides that "[e]ach water year runs from October 1 to September 30 of the following year."

water conservation shall be 14,106 afa. Water Conservation measures required by the order shall not supersede any more stringent water conservation requirements imposed by other agencies.

Litigation followed the adoption of Order 95-10.<sup>11</sup> The parties negotiated changes to some of the conditions in Order 95-10. Accordingly, on February 19, 1998, the State Water Board adopted Order WR 98-04, replacing Condition 4 of Order 95-10 with the following:

4. Cal-Am shall maximize production from the Seaside Aquifer for the purpose of serving existing connections, honoring existing commitments (allocations), and to reduce diversions from the Carmel River to the greatest extent practicable during periods of low flow. Cal-Am shall minimize diversions from the Seaside Aquifer whenever flow in the Carmel River exceeds 40 cfs at the Highway One Bridge from November 1 to April 30. The long-term yield of the basin shall be maintained by using the practical rate of withdrawal method.

## **5.5 Decision 1632**

The State Water Board adopted Decision 1632 and Order 95-10 on the same day, July 6, 1995. Decision 1632 approved Application 27614 by MPWMD and the issuance of a permit to appropriate water from the Carmel River via the New Los Padres Project.<sup>12</sup> Up to 42 cfs of water could be taken by direct diversion, and up to 24,000 afa could be diverted to storage. The decision included numerous conditions to mitigate (1) the effects of the proposed project on the fish and wildlife in the river and (2) the effects of existing diversions from the river. Condition 11, specifically prohibited the MPWMD from diverting water pursuant to Decision 1632 unless Cal-Am had obtained an alternate supply of water for its illegal diversion from the river. Condition 11 recognizes that a contract between Cal-Am and MPWMD could be one means by which Cal-Am could obtain a legal supply of water. This means of providing a legal water supply for Cal-Am did not become available, however, because in 1995 the voters of MPWMD rejected the bond issue proposed to finance the project. (CAW, Exb. 32, pp. 2, 5-7.)

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<sup>11</sup> MPWMD, CAW, the Sierra Club, the Carmel River Steelhead Association and the California Sportfishing Protection Alliance filed petitions for writs of mandate in Monterey County Superior Court (*Monterey Peninsula Water Management District, et al. v. State Water Resources Control Board* (Monterey County Superior Court No. M 33519), *Monterey Peninsula Water Management District, California-American Water Company v. State Water Resources Control Board* (Monterey County Superior Court No. M 33520), and *Sierra Club, Inc. et al. v. State Water Resources Control Board* (Monterey County Superior Court No. 105610) against the State Water Board, challenging certain provisions in Decision 1632 and Order 95-10.

<sup>12</sup> See Figure 1.

## **5.6 Administrative Civil Liability Issued to Cal-Am**

Condition 3(b) of Order 95-10 (p. 40) required Cal-Am to develop and implement an urban water conservation plan to conserve 15 percent during the 1996 water year and 20 percent during each succeeding water year. Cal-Am failed to conserve 15 percent during 1996 and on October 20, 1997, Administrative Civil Liability Complaint No. 262.10-03 (ACL) was issued to Cal-Am. (PT-4.) The ACL proposed the imposition of civil liability on Cal-Am in the amount of \$168,000 for its failure to conserve water as required by Condition 3(b) and for the continuing unauthorized diversion of water from the river. This ACL Complaint was superseded on August 19, 1998, by ACL Complaint No. 262.5-6. (PT-5.) Both ACL complaints allege that Cal-Am's ongoing diversions from the river are unauthorized and illegal. (PT-4, ¶¶ 1, 3-6; PT-5, ¶¶ 1, 3-6.)

The initial ACL complaint was superseded in response to a Cal-Am settlement proposal. Cal-Am proposed that, in lieu of paying the civil liability, it would join in a number of transactions and undertakings with the Pebble Beach Community Services District (PBCSD) that would increase the amount of potable water conserved within PBCSD by approximately 400 to 500 afa. Cal-Am's proposal took effect pursuant to ACL Complaint No. 262.5-6, which states that the increased conservation would help to reduce damage to and to restore the public trust resources of the river. (PT- 5, ¶ 10). The proposed civil liability was suspended pending compliance with the measures Cal-Am was to undertake with the PBCSD. The final order also required Cal-Am to reduce its illegal diversions from the river by 15 percent.

## **5.7 Cal-Am is an Investor-Owned Public Utility**

Cal-Am is an investor-owned public utility holding a Certificate of Public Convenience and Necessity from the California Public Utilities Commission (PUC). Cal-Am must obtain approval from the PUC to: (a) charge higher rates; (b) recover expenses which are appropriate and prudently incurred; and (c) provide a fair return on Cal-Am's invested capital. (Exb. CAW-029, p. 2, 4-10.)

## **6.0 OFFICIAL NOTICE**

As a preliminary matter, we will address papers requesting that official notice be taken of the official acts of other agencies. The State Water Board may take official notice of such acts as may be judicially noticed by the courts of this state. (Cal. Code of Regs., tit. 23, § 648.2.) The

courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)

### **6.1 Request for Official Notice by the Sierra Club**

On November 10, 2008, the Sierra Club filed papers requesting that official notice be taken of five actions of the National Marine Fisheries Service (NMFS). (November 10, 2008, Sierra Club, Request for Official Actions of National Marine Fisheries Service etc.) The actions are:

- 1) The August 18, 1997 listing of the steelhead population within the California Central Coast as threatened under the Endangered Species Act<sup>13</sup> (ESA). (62 Fed.Reg. 43937.)
- 2) The January 5, 2006 listing reaffirming the threatened status of the steelhead population within the California Central Coast under the Endangered Species Act. (71 Fed.Reg. 834, 859.)
- 3) The September 2, 2005 listing of the Carmel River as critical habitat for the steelhead. (70 Fed.Reg. 52488.)
- 4) The July 10, 2000 promulgation of a section 4(d) rule under the ESA defining exceptions to the “takings” prohibitions of the act. (65 Fed.Reg. 42422.)
- 5) The December 30, 1997 proposed rule under section 4(d) of the ESA pertaining to “takings” of West Coast Steelhead. (64 Fed.Reg. 73479 at 73483.)

The State Water Board will take official notice of the requested actions. Some of the foregoing actions have been codified at 50 Code of Federal Regulations at sections 223.102 and 223.203. Official notice is also taken of these provisions.

### **6.2 Notices of Potentially Relevant Information by Sierra Club**

On March 25, 2009, the Sierra Club filed a Notice of Potentially Relevant Information. The notice referenced and attached a report prepared by the MPWMD staff for the March 26, 2009 board meeting of MPWMD. Entitled “Carmel River Fishery Report for February 2009,” the report consists of three pages of summarizing information addressing (1) aquatic habitat and flow conditions in the Carmel River, (2) the breaching of the sand bar for the Carmel River Lagoon by Monterey County Public Works, (3) the adult steelhead count at the San Clemente Dam for the early months of 2009 (See Figure 1), (4) the adult steelhead count at Los Padres Dam for the same period, and (5) a report of fish released from the Sleepy Hollow Steelhead Rearing Facility on February 20, 2009. While not expressly requesting that official notice be taken of the MPWMD staff report, the Sierra Club expresses the view that official notice may be

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<sup>13</sup> 16 U.S.C. § 1531, et seq.

taken of the staff report. Thereafter, on April 10, 2009, counsel for Cal-Am filed a paper entitled "Partial Opposition to Sierra Club Notice of Potentially Relevant Information." Cal-Am objects to official notice being taken of the staff report on the basis that the report is not an official act of an agency.

On May 21, 2009, the Sierra Club filed a second Notice of Potentially Relevant Information. The notice referenced and attached a report prepared by the MPWMD staff for the May 21, 2009, board meeting of MPWMD. Entitled "Carmel River Fishery Report for April 2009," the report consists of three pages updating the information addressed in the previous report. Counsel for the Sierra Club contends, without supporting foundation papers, that the staff report was prepared in the regular course of business by MPWMD employees.

The State Water Board declines to take official notice of the reports offered by the Sierra Club. In our view, the nature of the information is such that Cal-Am should have the opportunity to fully test the offer of such information and to rebut the information before it is admitted into the record. In addition, it is late in this proceeding to attempt to augment the record in a material way and would substantially delay reaching a decision on the evidentiary record that ended on August 8, 2008.

### **6.3 Request for Official Notice by Cal-Am**

On February 3, 2009, Cal-Am filed a request for official notice. Cal-Am requests that the State Water Board take official notice of the draft Environmental Impact Report (EIR) for the Coastal Water Project published by the California PUC on January 30, 2009. The State Water Board will take official notice of the publication of the draft EIR.

### **6.4 Request by the Public Trust Alliance**

On February 11, 2009, the Public Trust Alliance (PTA) filed a request for official notice. PTA requests that the State Water Board take official notice of the recent opinion of the California Supreme Court (Opinion No. S155589), *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731. The State Water Board will take official notice of the opinion.<sup>14</sup>

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<sup>14</sup> A request for official notice or other notification is not required for the State Water Board to consider decisional law of the courts of this state. (See Evid. Code, §§ 451, 455.)

## **7.0 EVIDENCE PERTAINING TO PUBLIC TRUST RESOURCES**

The May 13, 2008 Ruling on Procedural Issues provided that “consideration would be given to the public trust within the context of the enforcement proceeding. . .”<sup>15</sup> (Evidence Pertaining to Public Trust Resources Within an Enforcement Proceeding, p. 4, § 4.0.)

Based upon the Notices of Intent<sup>16</sup> filed by some intervening parties, it appeared that these parties would seek to have the State Water Board apply the public trust doctrine to Cal-Am’s legal diversions in addition to the unauthorized diversions subject to the notice of hearing. Cal-Am filed a motion seeking to exclude such testimony from this proceeding. (CAW, Prehearing Brief on Procedural Matters, III. Scope of Hearing, pp. 8-15.) The May 13, 2008, Rulings on Procedural Issues provided that any attempt to apply the public trust doctrine to Cal-Am’s legal diversions was outside the scope of the issues noticed for this proceeding. Further, the Hearing Officers declined to initiate an ancillary proceeding to consider whether to apply the public trust doctrine to Cal-Am’s legal diversions. (*Ibid.*)

## **8.0 HEARING HELD**

On April 1, 2008, the State Water Board held a public hearing in Monterey to receive public policy statements from anyone concerned with the draft CDO issued to Cal-Am. Seven days of evidentiary proceedings were held in Sacramento on June 19 and 20; July 23, 24, and 25; and August 7 and 8, 2008.

## **9.0 CAL-AM HAS BEEN PROVIDED A FAIR HEARING**

Alleging the State Water Board has failed to provide due process protection, Cal-Am requests that this action be dismissed. (October 9, 2008 Closing Brief, p. 25, 8-17; also see CAW April 23, 2008, Motion to Ensure Due Process.) In its April 23, 2008 Motion to Ensure Due Process, Cal-Am states the State Water Board must afford Cal-Am its constitutional due process protections and alleges, that “[t]he structure of the proceeding gives rise to concerns

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<sup>15</sup> “The extent of harm to the public trust may be relevant to determining how long the schedule should be for achieving compliance. A cease and desist order may also include measures to avoid or mitigate adverse effects on public trust uses during a period of continuing violations before full compliance is achieved. Where the parties propose different remedies, public trust impacts will also be relevant to the . . . choice of remedies.” (*Ibid.*)

<sup>16</sup> Persons seeking to intervene in a State Water Board proceeding must file a Notice of Intent. The Notice of Intent requires the filer to indicate the name of proposed witnesses and the subject of proposed testimony.

that such protections do not exist in this proceeding.” Cal-Am has not alleged that those participating in the proceeding are or may be biased; rather, Cal-Am seeks a hearing that contains no appearance of bias. In Cal-Am’s view, the specific matters giving rise to an appearance of bias include the involvement of the following persons in this proceeding: (1) Mr. James W. Kassel, the Assistant Deputy Director for Water Rights; (2) Ms. Kathy Mrowka, a Senior Engineer in the Compliance Unit of the Division of Water Rights; and (3) Mr. M. G. (Buck) Taylor, Senior Staff Counsel assisting the Hearing Officers in this proceeding. Cal-Am made no allegation of improper bias on the part of either Hearing Officer.

During the conduct of administrative proceedings, the adjudicative function must be separated from the investigative, prosecutorial, and advocacy functions within an agency. (Gov. Code, § 11425.10, subd. (a)(4).) Cal-Am’s appearance of bias claims arise out of the fact that some of the personnel in this proceeding have had responsibilities in other proceedings or other State Water Board activities that are claimed to be inconsistent with their roles in this proceeding. More specifically, Mr. Kassel, who is part of the Prosecution Team in this proceeding, has general managerial responsibilities over personnel who include staff assisting the Hearing Officers in this proceeding. In addition, Ms. Mrowka, a witness called by the Prosecution Team in this proceeding, assisted the Hearing Officers and the State Water Board at the time Order 95-10 was adopted, and has reviewed and drafted responses to quarterly compliance reports filed by Cal-Am since the adoption of Order 95-10.

Cal-Am’s fair hearing argument relies on the view that an appearance of bias, without evidence of actual bias, is sufficient to deny due process. In *Morongo Band of Mission Indians v. State Water Resources Control Bd* (2009) 45 Cal.4th 731, the California Supreme Court rejected that view.<sup>17</sup> The court concluded:

In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular. In the absence of financial or other personal interest, and when rules mandating an agency’s internal separation of functions and prohibiting ex parte communications are observed,

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<sup>17</sup> Cal-Am’s appearance of bias test was supported by only one published opinion. (*Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817 (*Quintero*).) In addition, Cal-Am inappropriately cited the Court of Appeal’s opinion in *Morongo Band of Mission Indians v. State Water Resources Control Board*, even though California Supreme Court had granted review. (See Cal. Rules of Court, rule 8.1105, subd. (d)(1) [when the California Supreme Court grants review, the Court of Appeal’s opinion is no longer considered published; see also *id.*, rule 8.1115 [unpublished opinions should not be cited or relied on].) In *Morongo Band of Mission Indians v. State Water Resources Control Board*, the California Supreme Court disapproved of *Quintero* to the extent that it is inconsistent with the Supreme Court’s decision. (45 Cal.4th 731, 740.)



the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.

(*Id.* at p. 741.)

Both separation of functions and *ex parte* prohibitions were in effect throughout this proceeding.

The March 5, 2008 Notice of Hearing included the following:

#### Hearing Officer and Hearing Team

State Water Board Members Arthur G. Baggett, Jr., and Gary Wolff will preside as hearing officers over this proceeding. Other members of the State Water Resources Control Board may be present during the pre-hearing conference, the meeting to receive public policy statements, and the hearing. State Water Board staff hearing team members will include Staff Counsel Buck Taylor, Engineering Geologist Paul Murphey, Water Resources Control Engineer Ernest Mona and Environmental Specialist Jane Farwell. The hearing staff will assist the hearing officers and other members of the [State Water Board] throughout this proceeding.

A staff prosecutorial team will be a party in this hearing. State Water Board prosecutorial team members will include Yvonne West, Staff Counsel, and Reed Sato, Director of the Office of Enforcement. Other members of the Prosecution Team from the Division of Water rights include Jim Kassel, Assistant Deputy Director for Water Rights, John O'Hagan, Supervising Water Resource Control Engineer, Mark Stretars, Senior Water Resource Control Engineer, and John Collins, Staff Environmental Scientist.

The Prosecution Team is separated from the hearing team, and is prohibited from having *ex parte* communications with the hearing officers, other members of the State Water Board and members of the hearing team regarding substantive issues and controversial procedural issued within the scope of this proceeding.<sup>18</sup>

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<sup>18</sup> In addition to the foregoing, the hearing notice included an attachment entitled "Information Concerning Appearance at the Water Rights Hearing." The attachment provided the following guidance re *ex parte* contacts:

7. *Ex Parte* Contacts: During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications between either the State Water Board members or State Water Board hearing staff and any of the other participants, including the members of the prosecution team, regarding substantive issues with the scope of this proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding non-controversial procedural matters are permissible and should be directed to the State Water Board staff attorney on the hearing team, not State Water Board members. (Gov. Code § 11430.20.) A document regarding *ex parte* communications entitled "*Ex Parte* Questions and Answers" is available upon request or from our website at: <http://www.waterboards.ca.gov/docs/exparte.pdf>.

In addition, on May 13, 2008, various procedural rulings were made addressing Cal-Am's *ex parte* concerns. The rulings enlarged and made more explicit the prohibition against *ex parte* contacts within the State Water Board as follows:

Cal Am's motion may be understood as a request for clarification as to the role of the Board personnel who were copied on the email and of other personnel. Those persons are: Michael Lauffer, Andy Sawyer, Larry Lindsay, Les Grober, Vicky Whitney, Tom Howard, and Dorothy Rice. These persons and Chief Deputy Director Jonathan Bishop are not involved in the day-to-day work of this proceeding but as part of management will be kept advised of the work of this proceeding. Some of these persons also exercise authority over the work of members of the hearing team in this proceeding. As a matter of practice in this and other water right proceedings, the State Water Board applies the same *ex parte* rules to supervisors and managers who are substantially involved in an advisory function, either through their supervision on the work of the hearing team members in the proceeding or through advice to Board members in the proceeding, as apply to hearing team members. These supervisory and management personnel do not accept *ex parte* communications from the Prosecution Team or the parties.

(April 13, 2008, Rulings on Procedural Issues Involving Considerations of a Cease and Desist Order Against California American Water (Cal Am) for Unauthorized Diversion of Water from the Carmel River in Monterey County.)<sup>19</sup>

The separation of investigatory and prosecutorial and adjudicatory functions is facilitated by the manner in which the Division of Water Rights is organized. The Division is divided into three major sections: the Permitting Section, the Hearings and Special Programs Section and the Enforcement Section. The first point at which all three sections share common management is at the level of the Assistant Deputy Director for Water Rights (Assistant Deputy Director), Mr. Kassel's position. (RT, Ph. 2, Vol.1, pp. 222, 17 - 223,25.)

#### **9.1 Mr. Kassel's Involvement in this Proceeding has not Violated Cal-Am's Due Process Rights**

Mr. Kassel issued the draft CDO to Cal-Am. As the Assistant Deputy Director, he has managerial responsibilities over all the functions within the Division of Water Rights, including the Hearings and Special Programs Section and the Enforcement Section. However, his role as a manager over the Hearings and Special Programs Section is circumscribed once a notice of proposed cease and desist order is issued. That is, he is prohibited by *ex parte* rules from

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<sup>19</sup> This discussions goes on to state that the hearing notice will be updated to make clear the role of supervisors and managers in this proceeding. The May 13, 2008 rulings on procedural issues were sent to all of the parties, but no subsequent hearing notice was issued regarding the *ex parte* issue.

communicating with the hearing staff, the Hearing Officers and all the State Water Board members in regard to this matter. (CAW-10, p. 3, ¶ 4.)

Mr. Kassel testified during this proceeding at the request of counsel for Cal-Am. In response to questions from Cal-Am's counsel, Mr. Kassel testified to the following: (1) he approved the issuance of the draft CDO; (2) the draft CDO was prepared under his direction and the direction of Mr. O'Hagan; (3) before sending the draft CDO to Mr. Turner at Cal-Am, he discussed the draft order with Mr. O'Hagan and his counsel; (4) in accordance with his delegation of authority from the State Water Board (the delegation requires him to inform his superiors of controversial issues), copies of the draft CDO were provided to his supervisor (Ms. Whitney) and her supervisor (Mr. Howard); (5) following issuance of the draft order, he discussed the order with a number of persons outside of the State Water Board and the State Water Board's public affairs officer; (6) since issuance of the draft CDO order, Mr. Kassel has not spoken to anyone employed by the State Water Board about this matter other than members of the Prosecution Team and Enforcement Section; (7) his supervisor, Ms. Whitney, is responsible for supervising the Hearings and Special Programs Section with regard to an enforcement proceeding; and, finally, (8) that only he is responsible for the management and supervision of the Enforcement Section with regard to an enforcement proceeding. (RT, Ph. 2, Vol. 1, p. 216,13 – p. 231,25.)

Mr. Kassel's testimony shows that he and the management of the Division of Water Rights have separate duties and responsibilities with regard to the (a) adjudicative and (b) investigative, prosecutorial and advocacy function in enforcement proceedings and that the separated duties and responsibilities are consistent with the *ex parte* prohibitions set forth in the March 5, 2008 Notice of Hearing and with the separation of functions required by the due process requirements of the Administrative Procedures Act. (See Gov. Code, §§ 11425.10, subd. (a)(4), 11425.30.) We conclude that Mr. Kassel's involvement in this matter has not violated Cal-Am's due process.

## **9.2 Ms. Mrowka's Involvement in this Proceeding Has Not Violated Cal-Am's Due Process**

Ms. Mrowka is a Senior State Water Board Engineer. She was a member of the hearing team that assisted the State Water Board when Order 95-10 was adopted in 1995. (PT-2, p.2, Order 95-10 and Decision 1632, ¶ 1.) Among other matters, Condition 13 of the Order 95-10 required Cal-Am to file quarterly compliance reports. Ms. Mrowka reviewed the reports and drafted correspondence to Cal-Am for the Division. (PT-2, p. 6, *Compliance With the Order.*) Cal-Am

did not introduce testimony or other evidence nor does the record contain testimony or other evidence demonstrating that Ms. Mrowka's evaluations of Cal-Am's quarterly compliance reports were prepared as part of an investigation leading to the issuance of the draft CDO.

For some years, Ms. Mrowka has served within the Permitting Section of the Division of Water Rights. (PT-1; RT, Ph. 1, Vol. 1 p. 31, 21 – p. 32, 6.) No one in the Enforcement Section has any managerial or supervisory responsibility over the Permitting Section. (*Id.*, p. 23, 8-18.) Finally, no one within the Division of Water Rights consulted with Ms. Mrowka before issuance of the draft CDO. (*Id.*, p. 91, 24 – p. 92, 4.)

Ms. Mrowka's direct testimony consists of a series of statements summarizing: (1) her professional background; (2) a description of the Carmel River watershed; (3) the background and history leading up to Order 95-10; (4) the contents of Order 95-10 and changes to the order; (5) her views on the intent of Order 95-10, as amended; and (5) Cal-Am's compliance, or lack thereof, with the requirements of Order 95-10. With minor exceptions, her testimony is no more than a summary of information found in the State Water Board's public records. The staff of the Enforcement Office discussed the draft CDO with Ms. Mrowka only after she was asked if she would appear as a witness. (*Id.*, p. 94, 5-25.) Ms. Mrowka was asked to be a witness shortly before the Notices of Intent to appear were due, that is after the draft CDO was already issued.<sup>20</sup> (*Id.*, p. 95, 1-4.) Ms. Mrowka, did not discuss her testimony or opinions on the draft CDO with any member of the hearing team. (*Id.*, p. 23, 15-19.)

Prior to this proceeding, Ms. Mrowka: (1) had not previously met or worked with Hearing Officer Wolff or any other member of the State Water Board as part of a hearing team other than Hearing Officer Mr. Baggett; and (2) had not worked with Mr. Baggett as part of a hearing team since 2004. (*Id.*, p. 20, 23 - 25.)

Ms. Mrowka's testimony shows she did not participate in an investigation leading to the issuance of the draft CDO for this proceeding, nor has she participated in the advocacy or prosecution of this case other than as a witness. Further, she has not assisted the State Water Board in its adjudicative functions for four years. Accordingly, we conclude that Ms. Mrowka's participation as a witness in this proceeding has not violated the requirement that the State Water Board must separate its (a) adjudicatory function from its (b) investigative, prosecutorial

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<sup>20</sup> The March 5, 2008, Notice of Hearing required the Notices of Intent to be filed by March 14, 2008.

and advocacy functions and that her involvement in this proceeding has not violated Cal-Am's due process.

### **9.3 Other Due Process Concerns**

Cal-Am contends that its due process rights were violated when Cal-Am's compliance with Order 95-10 was discussed during a meeting with State Water Board staff and Mr. Turner, the President of Cal-Am, because both Ms. Mrowka and Mr. Taylor were present. (October 9, 2008, Closing Brief, p. 25, 14; RT, Ph. 1, Vol. 1, p. 92, 16 -19; RT, Ph. 1, Vol. 2, p. 455, 19 – p. 456, 23.) The meeting occurred on December 13, 2007, before the draft CDO was issued. (RT, Ph. 1, Vol. 1, p. 92, 16-19.) The draft CDO was issued on January 15, 2008. Cal-Am alleges that this meeting reflects an improper mixing of advisory and prosecutorial roles and the action should be dismissed. (October 9, 2008, Closing Brief, p. 25, 15-17.)

Cal-Am points to nothing in the transcripts or exhibits, nor have we found anything in the record, that shows that Mr. Taylor was involved in the investigation, prosecution or advocacy functions of this proceeding. Further, Cal-Am has not pointed to anything in the record showing that Ms. Mrowka was involved in the investigation leading up to the issuance of the draft CDO. Indeed, her testimony shows quite the opposite. Ms. Mrowka was not identified as a member of the Prosecution Team in the Notice of Hearing and only became involved in this proceeding when asked if she would testify as a witness. (See 9.2 above, Ms. Mrowka's Involvement in this Proceeding Does Not Violate Due Process, ¶ 3.) We conclude that Cal-Am's due process concerns with regard to Ms. Mrowka's and Mr. Taylor's participation in a meeting with Cal-Am are not supported by the record in this proceeding.

### **9.4 The State Water Board Complied with *Ex Parte* Prohibitions**

In its April 23, 2008 Motion to Ensure Due Process, Cal-Am also made claims that certain communications among staff were *ex parte* communications and that the composition of the Prosecution Team creates an appearance of bias. These communications include:

(1) Mr. Kassel sending copies of the notice of proposed CDO sent to Cal-Am to Thomas Howard, State Water Board Chief Deputy Director, to Victoria Whitney, Deputy Director for Water Rights, and to Andy Sawyer, Assistant Chief Counsel; (2) Mr. Larry Lindsay sending copies of an email sent to the parties to various members of State Water Board management. Cal-Am also contends that listing Mr. Kassel as a member of the Prosecution Team creates an appearance of bias. We find that our Hearing Officers' April 13, 2008 responses to these

concerns are appropriate and, by reference, affirm and adopt those responses in this order. (April 13, 2008, Rulings on Procedural Issues Involving Considerations of a Cease and Desist Order Against California American Water (Cal-Am) for Unauthorized Diversion of Water from the Carmel River in Monterey County.)

#### **9.5 Cal-Am's Request for Dismissal Denied**

Cal-Am's request that this proceeding be dismissed for lack of due process is unsupported by either the law or the record in this proceeding. More specifically, the record demonstrates there has been no improper mixing of the: (a) adjudicatory and (b) investigatory, prosecutorial and advocacy functions of the State Water Board. We conclude that Cal-Am has been provided a fair hearing and that its request for dismissal should be denied.

#### **10.0 ORDER WR 95-10 DOES NOT AUTHORIZE CAL-AM TO DIVERT WATER FROM THE RIVER IN EXCESS OF ITS WATER RIGHTS**

The notice of proposed CDO alleged two bases for issuing a CDO: (1) violation of condition 2 of Order 95-10; and (2) unlawful diversion of water in violation of Water Code section 1052. (Draft CDO at p. 5, Staff Exhibit 7.) Cal-Am contends that a CDO may be issued only on the first basis, that is, for a violation of Order 95-10. Further, Cal-Am contends that Order 95-10 authorizes Cal-Am to divert water from the Carmel River (even though Cal-Am does not hold water rights for those diversions) and that a CDO may not be issued for a violation of Water Code section 1052.

Cal-Am contends that Order 95-10 required the imposition of a physical solution and authorized Cal-Am to continue its diversions from the river in exchange for the performance of mitigation measures. (April 23, 2008, CAW Opposition to Pre-Hearing Briefs, p. 5, 10 – 6, 15; Cal-Am's October 9, 2008 Closing Brief, B. The State Water Board Can Issue a CDO Against Cal-Am Only If The Board Finds Cal-Am is Threatening To Violate Or has Violated Condition 2 Of Order 95-10, p. 5, 13 - 7, 9.) Cal-Am states "Order 95-10 is a unique, interim physical solution, which provides CAW with a non-traditional authorization to extract water in excess of its water rights." (Oct. 9, 2008 Closing Brief, p.4, 22-p.5, 1.)

The concept of a physical solution is a judicial development following the adoption of article X, section 2 of California's Constitution in 1928. Article X, section 2 provides, in part:

The right to water or to the use of flow of water in or from a natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable method of use or unreasonable method of diversion of water.

The judiciary, and the State Water Board in appropriate circumstances, may impose a physical solution, providing a practical remedy that avoids waste or unreasonable use and is consistent with the water rights of the parties. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249.) This is an equitable remedy developed by the courts to comply with article X, section 2. (*Ibid.*) The doctrine is used to develop solutions that maximize the beneficial use that can be obtained from a limited supply of water among competing claimants who have valid water rights. (See State Water Board Order WR 2004-0004 at p. 15.) The courts have never used the physical solution doctrine to authorize the diversion and use of water in the absence of a legal right to divert and use water. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 309 [“The rights not subject to the statutory appropriation procedures are narrowly circumscribed . . . and include only riparian rights and [pre-1914 rights].”]; *id.* at pp. 308-309 [water right permitting requirements are in furtherance of article X, section 2 of the California Constitution; Wat. Code, § 1025 [same]; cf. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243 [A physical solution must protect water right priorities to the extent those priorities do not lead to unreasonable use].)

The State Water Board has no power to authorize the diversion and use of water except in compliance with the Water Code. Section 1225 of the Water Code provides that “[n]o right to appropriate or use water subject to appropriation shall be initiated or acquired except in compliance with the provisions of this division.” Persons seeking authorization to appropriate water must file an application with the State Water Board.<sup>21</sup> (Cal. Code Regs. tit. 23, § 650.)

Even assuming that the State Water Board has the authority to authorize the appropriation of water as a physical solution – without following the statutory procedures for approving a new appropriation – nothing in Order 95-10 suggests that the State Water Board intended to do so.

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<sup>21</sup> Cal-Am has an application (A30215) to appropriate water from the Carmel River that might lead to a permit authorizing the diversions and use of water. In the absence of a final environmental impact report (EIR) prepared pursuant to the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), the State Water Board may not act upon the application. The MPWMD is the lead agency and has not certified a final EIR. (CAW - 032, pp. 2, 7-25.)

Cal-Am cites language indicating that the State Water Board issued Order 95-10 instead of referring the matter to the Attorney General for enforcement, but that language merely indicates that the board was using its prosecutorial discretion, not that the board believed it was conferring a water right.

In conclusion, we find that the conditions in Order 95-10 requiring Cal-Am to mitigate the adverse effects of its unlawful diversions do not authorize Cal-Am to divert water from the river in excess of its water rights. Accordingly, the State Water Board may issue a CDO for the unauthorized diversion of water in violation of Water Code section 1052, even if the State Water Board concludes that Cal-Am is in compliance with Order 95-10.

#### **11.0 ORDER 95-10 REQUIRES CAL-AM TO DILIGENTLY IMPLEMENT ACTIONS TO TERMINATE ITS UNLAWFUL DIVERSIONS**

Condition 2 of Order 95-10 (p. 40.) states:

2. Cal-Am *shall diligently implement* one or more of the following *actions to terminate its unlawful diversions* from the Carmel River: (1) obtain appropriative right permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River . . . and/or (3) contract with another agency having appropriative rights to divert and use water from the Carmel River. (Italics added.)

Notwithstanding the plain meaning of Condition 2, Cal-Am has taken the position that Condition 2 of Order 95-10 merely requires it to *pursue* actions to obtain supplemental water supplies. (CAW-8, p.2, ¶1.) By the use of such semantics, Cal-Am seeks to convert the requirement to implement actions to terminate its unlawful diversions into a requirement that it merely pursue such actions.

Order 95-10 determined Cal-Am's water rights, or lack thereof, and the effect its diversions were having on fish and wildlife. (Order 95-10, pp. 25-29.) The order found that Cal-Am was diverting substantial amounts of water in excess of its rights (*id.* at pp. 17-24) and that its diversions, legal and illegal, were having an adverse effect on fish, wildlife and riparian habitat in and along the river. (*Id.* at pp. 24-29.)

Having found that Cal-Am was diverting water in violation of Water Code section 1052, the State Water Board could have initiated an enforcement action. (Wat. Code, § 1052, subs. (b)-(d).)



But the State Water Board found that there were circumstances militating against the use of its enforcement options. The order states in part:

In the short term, Cal-Am cannot significantly reduce its extraction from the wells along the Carmel River. As previously stated, most of Cal-Am's supply is obtained from wells along the river. The people and businesses of the Monterey Peninsula must continue to be served water from the Carmel River in order to protect public health and safety.

Cal-Am introduced exhibits during the hearing which show that during 1980 and 1981, on the basis of available information the [State Water Board] was not of the opinion that the water pumped by the wells would require a permit from the Board. Further, Cal-Am does not contend that the wells are not extracting water from the subterranean stream. Indeed, Cal-Am has filed an application to appropriate water with the [State Water Board].

Cal-Am also supports the New Los Padres Project proposed by the District as one means for providing a reliable and legal supply of water for its customers. Finally, Cal-Am has cooperated with the District, [Department of Fish and Game], and others to develop and implement measures to mitigate the effect of its diversions on the instream resources of the river.

Under circumstances such as these, the imposition of monetary penalties makes little sense. Rather, the [State Water Board's] primary concern should be the adoption of an order which, until a legal supply of water can be developed or obtained, will require that Cal-Am: (1) minimize its diversions from the Carmel river, (2) mitigate the environmental effects of its diversions, and (3) prepare a plan setting forth: (a) specific actions to develop or obtain a legal supply of water and (b) the dates specific actions will have occurred so that progress can be objectively monitored.  
(Order 95-10 at pp. 37-38 [citations omitted].)

Finally, the order states:

4. The [State Water Board] can request the Attorney General to take action under Section 1052. Alternatively, the [State Water Board] *can suspend such a referral provided that Cal-Am takes appropriate actions* to: mitigate the effect of its diversions on the environment and develop and diligently pursue a plan for obtaining water from the Carmel River on other sources consistent with California water law. The [State Water Board's] primary concern should be the adoption of an order requiring Cal-Am to (1) prepare a plan setting forth (a) specific actions which will be taken to develop or obtain a legal supply of water and (b) the dates specific actions will have occurred so that progress on the plan can be objectively monitored; (2) minimize its diversions for [sic] the Carmel River; and (3) mitigate the environmental effects of its diversions.  
(*Id.* at pp. 39-40 [italics added].)

Condition 1 of the order places a cap on Cal-Am's diversions from the river until unlawful diversions are ended. Condition 2 requires Cal-Am to diligently implement one or more actions

to terminate its unlawful diversion. (*Id.* at p. 40.) Condition 3 requires Cal-Am to implement water conservation measures to reduce its diversions from the river. Condition 4 requires Cal-Am to maximize production from the Seaside aquifer to reduce its diversions from the river. (*Id.* at pp. 40-41.) Conditions 5 through 10 are measures aimed at mitigating the adverse environmental effects of Cal-Am's diversions. (*Id.* at pp. 41-43.)

When the order is viewed in its entirety, we conclude that Condition 2 requires that Cal-Am diligently implement actions to terminate its unlawful diversions. We also conclude that Cal-Am's failure to comply with Condition 2 is adequate reason for the State Water Board to conclude that its suspension of an enforcement action for violations of section 1052 of the Water Code is no longer appropriate.

## **12.0 THE STATE WATER BOARD IS NOT ESTOPPED FROM ISSUING A CEASE AND DESIST ORDER**

Cal-Am contends that the State Water Board is equitably estopped from issuing a cease and desist order pursuant to Water Code section 1052 and that "[t]he Board must allow CAW to continue to extract in excess of its water rights." The contention is based on the *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 487-501. Four elements must be present in order to apply equitable estoppel:<sup>22</sup>

- 1) the party to be estopped must be appraised of the facts;
- 2) the party to be estopped must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
- 3) the party asserting estoppel must be ignorant of the true state of facts; and
- 4) the party asserting estoppel must rely upon the conduct to his or her injury.

Cal-Am's contention founders on the second, third and fourth elements necessary to prove estoppel. Order 95-10 requires Cal-Am to diligently implement actions to terminate its unlawful diversions. As discussed in the Section 10.0, Order 95-10 does not authorize Cal-Am's unauthorized diversions, and the State Water Board never intended Order 95-10 to be interpreted that way. Cal-Am has been on continuous notice that its unlawful diversions are viewed as a violation of Water Code section 1052 and subject to enforcement since the adoption of Order 95-10.

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<sup>22</sup> *Lents v. McMahon* (1989) 49 Cal.3d 393, 399. Estoppel may be asserted against the government where justice and right require it, but will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. (*Ibid.*)

Cal-Am contends that until it received the notice of proposed CDO that initiated these proceedings, it had not received any communication from the State Water Board indicating that Cal-Am might be in violation of the law. This contention is inconsistent with Order 95-10, which found that Cal-Am was illegally diverting from the Carmel River. However, even if it were true, it would not provide a basis for estoppel. Even where an agency has not taken an enforcement action for over a period of many years, it is not reasonable to assume the law will never be enforced. (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1369.)

Moreover, the State Water Board made clear in subsequent communications, not just in Order 95-10, that Cal-Am was in violation of Water Code section 1052. In 1997 and 1998 the State Water Board issued an ACL to Cal-Am for failing to comply with Condition 3(b) of Order 95-10. An ACL may be issued for violations of Water Code Section 1052. Both ACL's allege that Cal-Am is in violation of section 1052 and find that such violations are occurring. (PT-4, ¶¶ 1, 3-6; PT- 5, ¶¶ 1, 3-6). The ACL's were issued because Cal-Am failed to implement the conservation measures required by condition 3(b). In addition, on June 5, 1998, the Chief, Division of Water Rights, advised MPWMD that Order 95-10 "... is only an interim measure to provide some relief during development of a water supply project and does not provide a basis of right for continued diversion of water." (PT-6, p.3.) Mr. Larry Foy of Cal-Am was sent a copy of the letter. Thus, Cal-Am has been and is on notice that the State Water Board could take action under Water Code section 1052 if it was dissatisfied with Cal-Am's progress in complying with Order 95-10.

Thus, the second and third elements for estoppel clearly have not been established. The State Water Board clearly did not intend for Cal-Am to believe its diversions were legal, and Cal-Am knew its diversions were illegal. The fourth element, detrimental reliance, has not been established, either. Cal-Am introduced evidence that it has invested in the planning of long-term water supply projects, but offers no explanation as to how it has been harmed by that investment.

Even if the four elements for estoppel have been established, estoppel will not be applied to a public agency if a strong public policy will be violated. (*Phelps v. State Water Resources Control Board* (2007), 157 Cal.App. 4th 89, 114.) In particular "[p]ublic policy must be considered where a party raises estoppel to prevent enforcement of environmental statutes." (*Ibid.*) In providing authority for the State Water Board to issue CDOs, the Legislature has

declared, "that the state should take vigorous action to . . . prevent the unlawful diversion of water." (Wat. Code, § 1825.) Preventing the State Water Board from issuing a CDO would be inconsistent with this policy. This principle applies with particular force under the circumstances presented here, where Cal-Am's claim of estoppel is based on a State Water Board decision to forego enforcement in reliance on an order intended to eliminate Cal-Am's unlawful diversions, but those unlawful diversions have not been eliminated over a decade later.

The proposed CDO does not seek to punish Cal-Am for failure to diligently implement actions to terminate its unlawful diversions. Rather the proposed CDO seeks to bring Cal-Am into compliance by compelling Cal-Am to annually reduce the unauthorized diversions by specified amounts starting in water year 2008 and continuing through water year 2014. (CAW- 7.)

If the State Water Board cannot compel Cal-Am to reduce its unlawful diversions, Cal-Am will have obtained a de facto right to divert the water from the river in violation of the statutory requirements for obtaining appropriative water rights, a result contrary to law and public policy. As this State Water Board explained in Order WR 2004-0004:

[A]fter the enactment of the 1913 Water Commission Act, a water user cannot establish a new water right simply by using water; the water user either must have an existing water right under some theory or must acquire an appropriative right by complying with Division 2 of the Water Code. The exclusive means of obtaining an appropriative right to divert and use water from a surface stream is by complying with the provisions of Division 2 of the Water Code. (Wat. Code, § 1225.) Equitable estoppel is not available. The [State Water Board] cannot give the respondents, through equitable estoppel, a water right that it could not give them in the absence of following the statutorily prescribed procedures. (*American Federation of Labor v. Unemployment Insurance Appeals Board* (1996) 13 Cal.4th 1017, 1039 [56 Cal.Rptr.2d 109,122].)

Also, the California Supreme Court has made it clear that a water user cannot prescriptively acquire a water right against the state. (*People v. Shirokow* (1980) 26 Cal.3d 301 [162 Cal.Rptr. 30].) Based on the *Shirokow* decision, a water user cannot obtain equitable relief such as estoppel against the [State Water Board]'s enforcing the requirement that water users must obtain appropriative water rights under the Water Code if they do not have other water rights. (*Id.* at p. 14.)

### 13.0 **RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT A BAR TO ISSUING A CEASE AND DESIST ORDER**

Cal-Am contends that the doctrines of *res judicata* and collateral estoppel preclude consideration of the same claims and issues raised by the draft CDO as were decided by Order 95-10.<sup>23</sup> (Oct 9, CAW Closing Brief, 3. The Law Bars a Finding by the State Water Board that CAW has Committed a Trespass if it Complies With Order 95-10, pp 7-10.) *Res judicata* is a doctrine providing that when there is a final judgment on the merits of an issue, the same parties may not relitigate the same issue, giving the former judgment conclusive effect in subsequent litigation. (*People v. Barragan* (2004) 32 Cal.4th 236, 252.)<sup>24</sup> In its primary aspect, known as claim preclusion, it operates to bar a second suit between the same parties on the same cause of action. (*Ibid.*) In its secondary aspect, known as collateral estoppel, the prior judgment operates in a second suit as a conclusive determination as to issues in the second suit that were actually litigated and determined in the first suit. (*Ibid.*) The elements for applying the doctrine are: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Ibid.*) The doctrine will not be applied if injustice would result or if the public interest requires that the new action not be foreclosed. (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App. 4th 1053, 1065; 71 Cal.Rptr. 2d 77.)

Cal-Am contends, correctly, that Order 95-10: (1) determined Cal-Am's rights to the use of water from the Carmel River; and (2) identified the effects of Cal-Am's diversions from the river on fish and wildlife along the lower 18.5 miles of the stream in 1995. (See sections 5.2 and 5.3 of this order.) Cal-Am also contends, correctly, that some of the parties to the first proceeding are also parties to this proceeding. Those parties include Cal-Am, MPWMD, the Pebble Beach Company (PBC), Sierra Club, Carmel River Steelhead Association (CRSA), and the California Sportfishing Protection Alliance (CSPA). While some of the issues presented in this case are identical to those adjudicated in Order 95-10, some of the issues clearly are not identical.

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<sup>23</sup> MPWMD and the Seaside Basin Watermaster (SBW) make the same contention. (Oct. 9, 2008 Brief, p. 2, 18 - p. 4, 7.)

<sup>24</sup> The doctrine of collateral estoppel has been applied to the decisions of administrative agencies. (*People v. Sims* (1982) 32 Cal.3d 468; see also *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.)

For example, the issues are identical, and findings in Order 95-10 are binding on Cal-Am and other parties to Order 95-10, insofar as the extent of Cal-Am's rights for water diversion and use from the Carmel River are concerned, except where Cal-Am obtained water rights through the State Water Board's issuance of a water right permit after Order 95-10 was issued. On the other hand, issues concerning the appropriate remedy for violations that are occurring or threatening to occur at the time of these proceedings are not necessarily identical to issues concerning the appropriate remedy for violations occurring when Order 95-10 was issued over a decade ago.

In particular, there is no basis for Cal-Am's claim that principles of *res judicata* or collateral estoppel preclude the issuance of a CDO for the unauthorized diversion or use of water in violation of section 1052 of the Water Code. That issue was not considered or decided in Order 95-10. At the time Order 95-10 was issued, the State Water Board did not have authority to issue a CDO for the unauthorized diversion or use of water. (See Stats. 2002, ch. 652, § 6 [amending Wat. Code, § 1831 to authorize issuance of a CDO for the unauthorized diversion or use of water or for violation of a State Water Board order]. See also Stats. 1980, ch. 933, § 13, p. 2968 [under the prior version of Wat. Code, § 1831, a CDO could be issued only for violation of a term or condition of a water right permit or license].) Obviously, the issue of whether a CDO may be issued under current law, based on violations that are occurring or are threatened currently, presents a different issue from the issue whether a CDO could have been issued in 1995 based on violations then occurring and the law then in effect.

Cal-Am also contends that because its illegal diversions have continued unabated since the adoption of Order 95-10, no new evidence should be allowed as to the effects of its diversions from the river. Prior to the presentation of evidence on May 13, 2008, the Hearing Officers ruled that evidence as to the effects of Cal-Am diversions on the public trust resources would be considered within the context of this enforcement proceeding. Such evidence may be relevant to the State Water Board's consideration of what remedy may be most appropriate in this proceeding:

For example, the extent of harm to the public trust may be relevant to determining how long the schedule should be for achieving compliance. A cease and desist order may also include measures to avoid or mitigate adverse effects on public trust uses during a period of continuing violations before full compliance is achieved. Where the parties propose different remedies, public trust impacts will also be relevant to the . . . choice of remedies.  
(May 13, 2008, Ruling On Procedural Issues at p. 4.)

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This issue of how impacts on public trust resources should affect the remedy adopted in a CDO is somewhat different from the issue presented in Order 95-10. If Cal-Am's unauthorized diversions are continuing for a longer period than was anticipated in 1995 or those diversions are claimed to have impacts that differ from what those impacts were understood to be in 1995, those are relevant issues for the State Water Board's consideration.

Finally, the following events have occurred since the adoption of Order 95-10, on July 6, 1995:

- 1) The New Los Padres Project was not constructed. Order 95-10 was predicated, in part, upon the anticipated construction of the New Los Padres Project by MPWMD and Cal-Am's ability to use the water developed by that project to substitute a legal supply of water for its illegal diversions. (See Decision 1632, Cond. 11; Order 95-10, Cond. 2 (3).)
- 2) California Central Coast Steelhead has been determined to be a threatened species under the federal rare and endangered species act.
- 3) The Carmel River has been designated as habitat critical to the survival of the steelhead.
- 4) Cal-Am has made no meaningful progress in implementing actions to reduce its unlawful diversions from the Carmel River for 13 years. (See section 14.1 of this order.)

Because a CDO looks forward -- establishing appropriate terms to obtain compliance and to avoid or reduce impacts of threatened or continuing violations, as opposed to imposing penalties for past violations -- the State Water Board can and should consider this kind of evidence. The State Water Board is not limited to the facts as determined in Order 95-10. (See also Wat. Code, § 1832 [After notice and an opportunity for a hearing, the State Water Board may modify a CDO].)

We conclude that the doctrines of *res judicata* and collateral estoppel are not a bar to the Prosecution Team and other parties introducing evidence as to (1) whether a CDO should be issued and (2) what modifications, if any, should be made to the remedies proposed in the draft CDO.

**14.0 CAL-AM IS COMMITTING VIOLATIONS FOR WHICH A CEASE AND DESIST ORDER MAY BE ISSUED**

**14.1 Cal-Am has not Complied with Condition 2 of Order 95-10, and is Violating the Prohibition in Section 1052 of the Water Code Against the Unauthorized Diversion or Use of Water**

As discussed above, the draft CDO alleges two bases for issuing a CDO: (1) Cal-Am is violating Condition 2 of Order 95-10, which requires Cal-Am to diligently implement actions to terminate its unlawful diversions; and (2) Cal-Am is unlawfully diverting water in violation of Water Code section 1052.

The Prosecution Team's case-in-chief that Cal-Am has not complied with Condition 2 may be summarized as follows:

- 1) Cal-Am has the legal right to divert only 3,376 afa from the Carmel River.
- 2) Cal-Am has annually diverted an average of 10,978 afa from the river since Order 95-10 was adopted. (PT Exb. 11A; RT, Ph. 1, Vol. 1, p. 40, 12-14.)
- 3) Cal-Am has diverted an average of 7,632 afa without a basis of right for the past 13 years.<sup>25</sup> (Id., p. 41, 12-14.)
- 4) Thus, Cal-Am has not diligently implemented actions to terminate its unlawful diversions as required by under Condition 2.

The Prosecution Team presented evidence sufficient to support all four contentions. Further, Cal-Am offered no evidence to rebut the first three contentions made by the Prosecution Team. Notwithstanding the foregoing, Cal-Am contends that it is in compliance with Condition 2 and that if Cal-Am is in compliance with Condition 2, the State Water Board is precluded from issuing a CDO based on Cal-Am's violation of section 1052 of the Water Code.

Cal-Am advanced the following propositions in support of its contention that the State Water Board is precluded from issuing a CDO if Cal-Am is in compliance with condition 2 of Order 95.10:

- 1) Order 95-10 is an interim physical solution that authorizes Cal-Am to extract water in excess of that permitted under its water rights. (CAW Oct. 9, 2008, Closing Brief, pp. 4-6.)
- 2) Equitable estoppel precludes the issuance of a CDO. (CAW Oct. 9, 2008, Closing Brief, p. 15, 10 – p.17, 5.)

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<sup>25</sup> Between 1995 and 2007 Cal-Am's unlawful diversions ranged between 9,471 afa and 7,007 afa. Water year 1988/1989 was the year in which unlawful diversions were lowest. (PT Exb. 11A, John Collins written testimony, Table 1.)



- 3) The doctrines of collateral estoppel and *res judicata* bar a finding by the State Water Board that Cal-Am has committed a trespass if Cal-Am has complied with Order 95-10. (CAW Oct. 9, 2008, Closing Brief, p. 7, 10 – p.10, 9.)

Each of these contentions is addressed and rejected earlier in this order. Thus, Cal-Am is in violation of the prohibition in section 1052 of the Water Code against the unauthorized diversion or use of water, which would establish adequate grounds for issuance of a CDO even if no violation of Order 95-10 had been proven.

We also conclude, as explained in section 14.2, below, that Cal-Am has not complied with Condition 2 of Order 95-10 requiring that Cal-Am diligently implement actions to terminate its unlawful diversions.<sup>26</sup> Violation of Condition 2 of Order 95-10 provides a second basis for issuing a CDO.

#### **14.2 Efforts by Cal-Am to Comply with Condition 2 of Order 95-10**

Cal-Am presented evidence that it has made efforts to comply with the requirements of Condition 2. Initially, Cal-Am looked to MPWMD to construct the New Los Padres Project approved by the State Water Board in Decision 1632 for a legal source of water. Before proceeding with the project, however, MPWMD had to obtain public approval to issue bonds for the cost of the project. In late 1995, the bond issue failed. (CAW-029, p.2, 21-25.)

In 1996, Cal-Am began pursuing the Carmel River Dam and Reservoir Project. This project has not proceeded for a number of reasons, including but not limited to the following. First, in 1997 NMFS listed the steelhead trout and California Red Legged Frog as threatened species under the Endangered Species Act. Second, on August 6, 1998, the PUC required that Cal-Am prepare a long term contingency plan describing how the company would obtain a supply of water if the new dam project did not go forward. Third, in 1998 Assembly Bill 1182 was enacted. (Stats. 1988, ch. 797.) The bill requires the PUC, as opposed to Cal-Am, to study all available alternatives to the proposed Carmel River Dam and prepare a long term contingency plan. (CAW-032, p. 2, 26 - p. 3, 2.) The PUC's planning process involved a four-step process culminating in Plan B in 2002. (CAW-032, p. 3, 7 - p. 4, 11.) In Plan B, the principal alternative to the Carmel River Dam Project is the Coastal Water Project, a proposed 10,370 acre-feet (af)

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<sup>26</sup> Cal-Am contends that Condition 2 of Order 95-10 does not require Cal-Am to reduce its unlawful diversions, so long as Cal-Am maintains an effort to acquire alternative water supplies. (CAW Oct 9, 2008 Closing Brief, pp. 10-12.) This argument is addressed and rejected in Section 11.0 above.

desalinization project.<sup>27</sup> (CAW-029, p. 3, 1-3.) On February 11, 2003, Cal-Am requested the PUC to replace the proposed dam project with the Coastal Water Project. (CAW-032, p. 5, 25-27.) During the hearing, the PUC was preparing an EIR for the Coastal Water Project. On January 30, 2009, the PUC gave notice that a draft EIR was available for public comment for the Coastal Water Project. Project approval awaits a PUC decision on a final EIR and on the Coastal Water Project.

While pursuing the Coastal Water Project, Cal-Am has evaluated, to some degree, smaller project alternatives for obtaining a legal water supply including: (1) the evaluation of 3 million gallons per day (MGD) and 7 MGD desalinization plants; (2) additional groundwater production from the Peralta well in the Seaside groundwater basin (the inland area of the Seaside groundwater basin); (3) injection of treated wastewater at the mouth of the Carmel River and deep bedrock sources; (4) dredging the San Clemente and Los Padres Reservoirs; (5) importing water from the Arroyo Seco, Lower Salinas and Big (or Little) Sur Rivers; (6) purchasing water from the State Water Project and from local Carmel Valley holders of water rights; and (7) surface impoundments in the Seaside/Fort Ord area and Laguna Seca. (CAW-029, p. 4, 13-23.)

Beyond mere evaluation, Cal-Am has gone forward on several projects, including: (1) gathering information for seeking approval of Cal-Am's water right Application 30215A, an application to appropriate up to 2,964 afa from the Carmel River; (2) negotiations seeking to obtain a temporary water supply from (a) the Margaret Eastwood Trust and Clint Eastwood from the Odello well fields and (b) water rights associated with the Rancho Cañada Golf Course; (3) a negotiated agreement to temporarily obtain water surplus to the needs of Sand City from the desalinization plant being built by the city; and (4) implementation of Phase I of the Aquifer Storage Project (ASR). (CAW-029, p. 3, 17- p. 4, 5; p. 4, 24 - p. 5, 17.) Cal-Am's failure to complete negotiations to obtain a temporary water supply from the Eastwood Trust, Odello well fields and from the Rancho Cañada Golf Course is not explained.

On November 30, 2007, both MPWMD and Cal-Am jointly obtained an additional right to water from the river, Permit 20808A. This permit is a spin-off from the permit authorized in Decision 1632 in 1995 for MPWMD for the development of the New Los Padres. Permit

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<sup>27</sup> CAW contributed substantial resources to the study of project alternatives required by the PUC (CAW-032, p. 5, 23-25; CAW-032C, p. 3, 2 - p. 6, 19; CAW-032D p. 3, 26 - p. 10, 18.) Subject to PUC approval, CAW can recover the cost for studying project alternatives.

20808A authorizes the diversion of up to 2,246 afa of water from the Carmel River to underground storage in the Seaside groundwater basin from December 1 of each year to May 31 of the succeeding year at a maximum instantaneous rate of diversion of 6.7 cfs. The project is commonly identified as the ASR project. Thus, Cal-Am's current legal rights to water in the river that may be used to supply peninsula cities is the 3,316 afa recognized in Order 95-10<sup>28</sup> plus 2,246 afa under Permit 20808A, for a total of 5,562 afa. As will be discussed *infra*, the actual amount of additional water supply that may be generated by this project is uncertain, and certainly much less than the face value of the permit.

We are fully cognizant of the complex legal and institutional framework within which Cal-Am must operate to develop or obtain additional supplies of water. However, we find that nearly 13 years after the adoption of Condition 2 in Order 95-10, Cal-Am has implemented astonishingly few actions to reduce its unlawful diversions from the river. Most of Cal-Am's efforts toward obtaining additional water supplies have been directed toward large projects that could provide enough water both to offset its illegal diversions and to provide water for growth in its service area. We understand why such projects are desirable from the viewpoint of a utility, its customers and the PUC. Nevertheless, Cal-Am's only achievements toward reducing its illegal diversions have been the work done on two projects yielding small amounts of water. Significantly, these projects are in place largely due to the efforts made by other agencies, i.e., MPWMD and the City of Sand City. But for the efforts of these agencies, Cal-Am would not have made any reductions in its illegal diversions from the river during the past 13 years, except conservation savings compelled by the ACLs issued by the State Water Board in 1997 and 1998. We conclude that Cal-Am should have made and should make greater efforts toward implementing smaller projects, and that Cal-Am should make such efforts irrespective of whether the PUC approves the Coastal Water Project or one of its alternatives.

Condition 2 of Order 95-10 requires Cal-Am to diligently implement measures to terminate its unlawful diversions, and not merely to evaluate, propose, or otherwise pursue lawful alternatives. While Order 95-10 requires Cal-Am to implement these measures diligently, not instantaneously, it has taken far too long, and the reductions in Cal-Am's unlawful diversions to date have been too small to satisfy the requirement for diligence. In reaching this conclusion, we are mindful that (a) the steelhead are threatened, (b) miles of the steelhead's critical habitat, the river, are dry five to six months of the year and (c) the manager of MPWMD estimates that

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<sup>28</sup> 856 afa is subtracted from this number to adjust for storage loss due to siltation at Los Padres Reservoir.

Cal-Am will not be able to eliminate its illegal pumping from the river before 2016, at the earliest; 21 years after the adoption of Order 95-10. (RT, Ph. 2, Vol. IV, p. 953, 7 – p. 954, 23.)

**15.0 CAL-AM'S DIVERSIONS CONTINUE TO HAVE AN ADVERSE EFFECT ON FISH, WILDLIFE AND RIPARIAN HABITAT OF THE CARMEL RIVER, INCLUDING THE THREATENED STEELHEAD**

Order 95-10 found that fish and wildlife were being adversely affected by Cal-Am's legal and illegal diversions. (Order 95-10, pp. 25-29.) The order states:

Cal-Am's diversions, standing alone, are not the sole cause of current conditions in the Carmel River. Other causes include the diversion and use of water by other persons and, significantly, a series of dry and critically dry years during the late 1980s and early 1990s. Nevertheless, Cal-Am's combined diversions from the Carmel River constitute the largest single impact to instream beneficial uses of the river. (Order 95-10, p. 25.)

Cal-Am is responsible for approximately 85 percent of the total water diversions from the Carmel River and its associated subterranean flow. (PT- 45, p. 1, ¶ 2.)

Wells supply about 69 percent of the water needs of Cal-Am's customers. The balance of the water supplied to Cal-Am customers is supplied from: (1) San Clemente Dam and Los Padres reservoirs in the upper reaches of the Carmel River and (2) pumped groundwater in the City of Seaside. (Order 95-10, p. 2.)

Order 95-10 concludes

[t]o summarize, Cal-Am diversions have historically had an adverse effect on: (1) the riparian corridor along the river below RM 18.5, (2) wildlife that depend on riparian habitat, and (3) steelhead and other fish which inhabit the river. (*Id.* at p. 28.)

A fisheries biologist for the National Marine Fisheries Service, Ms. Joyce Ambrosius, testified during the hearing that Cal-Am's diversions result in a number of adverse impacts to steelhead. (RT. Ph. 1, Vol. 1, p. 45, 18-21.) As a result of direct diversions of water by Cal-Am and others, the Carmel River usually goes dry downstream from the Narrows (River Mile 9.5) by July of each year. From July until the winter rains begin, the only water remaining in the lower river is in isolated pools that gradually dry up as the groundwater table declines in response to pumping. Surface flow into the Carmel River Lagoon normally recedes after the rainy season in late spring and ceases in summer as rates of water extraction from the river and alluvial aquifer exceed the flow in the river. (PT-39, p. 4.) This results in the loss of river habitat and food

production needed by juvenile steelhead. Steelhead are stranded in pools, and predation increases. (RT. Ph. 1, Vol. 1, p. 65.) Competition for food increases in the areas of the river that remain wetted. (*Id.*, p. 44.) Cal-Am's illegal diversions also reduce the flow to the lagoon, which is very important to ocean survival of steelhead smolts. (*Id.*, p. 44: CRSA-3, p. 7. See also PT-39. p. 4; PT-45, p. 3, ¶ 2 and p. 7, last ¶ - p. 7, ¶ 1.)

Riparian vegetation along the Carmel River has died off due to Cal-Am's diversions, and this has caused bank erosion. To fix the bank erosion, many property owners have installed riprap to protect their property. Riprap is destructive to stream habitat because it decreases the amount of riparian vegetation allowed to grow on the bank. The erosion also increases sedimentation in the river that adversely impacts the fish, and there is a decrease in the availability of large woody debris to the river.<sup>29</sup> (RT, Ph. 2, Vol. 1, p. 45, 1-11; CRSA-3, p. 5.)

Since the adoption of Order 95-10, a number of regulations has been enacted for the protection of the South-Central California Coast (SCCC) steelhead Distinct Population Segment (DPS) (*Oncorhynchus mykiss*). These regulations include:

- 1) The August 18, 1997 listing of the steelhead population within the California Central Coast as threatened under the Endangered Species Act (ESA). (62 Fed.Reg. 43937.)
- 2) The January 5, 2006 listing reaffirming the threatened status of the steelhead population within the California Central Coast under the Endangered Species Act. (71 Fed.Reg. 834, 859.)
- 3) The September 2, 2005 listing of the Carmel River as critical habitat for the steelhead. (70 Fed.Reg. 52488.)

We find that Cal-Am's illegal diversions continue to have an adverse impact on fish, wildlife and the riparian habitat of the Carmel River. The regulations listing the SCCC steelhead as a threatened species and the Carmel River as critical habitat for the steelhead underscore the importance of reducing and terminating Cal-Am's illegal diversions from the Carmel River at the earliest possible date and of adopting conditions to mitigate the effect of the diversions.

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<sup>29</sup> Although not directly stated in the testimony, sedimentation is a problem because it (1) cements the gravel needed for spawning habitat and (2) settles and blankets bottom-dwelling organisms that are part of the food chain. Large woody debris is important because it provides cover for fish and reduces predation.

## **16.0 PROJECTS AND ACTIONS THAT MAY AFFECT CAL-AM'S NEED TO DIVERT WATER FROM THE CARMEL RIVER**

The following sections discuss projects and actions being taken that may affect Cal-Am's need to divert water from the Carmel River.

### **16.1 ASR Project**

Cal-Am and MPWMD have developed a small supplemental supply of water by diverting water from the river during periods of high flow for storage in the Seaside groundwater basin. Water diverted during periods of high flow is piped to the basin and injected via wells into the groundwater. Water stored in the basin can be subsequently recovered for use. Permit 20808A authorizes the diversion of up to 2,426 afa of water from the river to underground storage in the basin from December 1 of each year to May 31 of the succeeding year at a maximum instantaneous rate of diversion of 6.7 cfs. The average annual quantity of water that may be obtained by the operation of the ASR project is estimated to be 920 af. A witness for MPWMD estimated that 400 af per year will become available in 2009, with the remaining 520 af available in 2010. (MPWMD-HS14B; RT, Ph. 2, Vol. III, p. 814, 11-22, p. 822, 23 – p. 830,10.)

Cal-Am may only divert water from the river when minimum flow requirements in the river are being met. Depending upon the water year type, the quantity that may be diverted to storage can range from zero up to 1,500 af. When no carry-over storage is available from the previous year and no water may be diverted from the river in the current year, no water will be available from ASR operations. (RT, Ph. 2, Vol. III, p. 816, 16 -21.)

Permit 20808A is derived from and based upon Permit 20808 issued to MPWMD for the construction of the New Los Padres Dam. Permit 20808 was authorized by Decision 1632. Condition 11 of the decision provides: "Permittee shall not divert water under this permit unless and until California American Water Company (Cal-Am) has obtained an alternate supply of water for its illegal diversions from the Carmel River." Accordingly, any new water supply derived from Permits 20808 and 20808A must first be applied to reduce Cal-Am's illegal diversions from the river. Only after illegal diversions are ended can the water be used to serve Cal-Am customers. We conclude that any of the water developed by the ASR project must be used to reduce illegal diversions from the river.

## **16.2 Sand City Desalinization Project will Reduce Cal-Am's Diversions from the Carmel River**

The City of Sand City is constructing a 300 afa desalinization plant. The plant was scheduled to deliver water to Cal-Am in the first quarter of 2009. (Sand City-1, p. 1, 20-23.) Of the 300 afa, 94 afa will be used to replace water being diverted from the Carmel River by Cal-Am for existing water use within Sand City. The balance of the plant's production is for future growth. Pending the need for the remaining 206 afa, Cal-Am may use the water to meet the needs of its customers. (Sand City 1, p. 3, 16-21.) Thus, using the production from the Sand City desalinization plant, Cal-Am can permanently reduce diversions from the river by 94 afa and, temporarily, by another 206 afa. Assuming the desalinization plant is operated at a constant rate, the plant could reduce diversions from the river by about 0.8 af per day, or about 0.4 cfs.

## **16.3 Reduction of System Losses**

Unaccounted loss is defined as the difference between metered production and metered consumption. (RT, Ph. 2, Vol. IV, pp. 1004-1005.) As a general statement, all large water supply systems have losses between the point where water is diverted and the point where water is delivered for use. Cal-Am is no exception. The industry standard for unaccounted losses is 10 percent of total annual production. Cal-Am's losses are about 12 percent. (RT, Ph., 2, Vol. III, p. 746, 4 - 9.)

MPWMD has adopted a regulation requiring Cal-Am to reduce its losses to 7 percent. (MPWMD-SP3, p.1, Rule 160, G.) The prosecution estimates that 549 afa could be saved if Cal-Am reduced its system losses from 12 percent to 7 percent. (RT, Ph. 2, Vol. 1, p. 53, 24 - p. 54, 4; PT-49, p. 2.) Some unknown fraction of Cal-Am's losses may be due to faulty meter readings. (RT, Ph. 2, Vol. III, p. 811, 1 - p. 812, 1.) The General Manager of MPWMD is of the opinion that water supply mains must be replaced to reduce Cal-Am's system losses. (RT, Ph. 2, Vol. III, p. 811, 21 – p. 812, 1.) Cal-Am proposes to undertake a 10- to 12-year program to replace its larger mains. However, Cal-Am is seeking PUC approval before commencing work on its main replacement program. (*Id.*, p. 812, 2-7; *id.*, p. 812, 9-17.) No evidence was introduced to substantiate that 10 or more years was required to reduce system losses to an acceptable level.

Given the chronic shortage of water available for supply within Cal-Am's service area, evidenced by the nearly 14 years of ongoing illegal diversions from the river, about half of the

12 percent system loss may be viewed as preventable "waste or unreasonable use or unreasonable method of diversion" under Water Code section 100. The State Water Board has authority to compel Cal-Am to reduce its system losses. (Cal. Const., art. X, § 2; *Environmental Defense Fund v. East Bay Muni. Dist.* (1980) 26 Cal. 3d 183.) We are of the opinion that Cal-Am can proceed with a main replacement program at any time and that Cal-Am wishes to obtain PUC approval before proceeding with a main replacement program only to assure that the funds expended for main replacement may be recovered from its customers.<sup>30</sup>

We conclude that Cal-Am should be required to: (a) reduce its system losses by about 549 afa; and (b) immediately commence work to reduce the losses. Further, we are of the opinion that with the application of sufficient resources it should be feasible for Cal-Am to accomplish the work of replacing its mains within eight years. Thus, Cal-Am should be required to reduce its diversions from the river by 68 af per year until it has achieved 549 afa of savings.

#### **16.4 Water Conservation**

Order 95-10 included a condition requiring Cal-Am to develop and implement an urban water conservation plan. (Condition 3.) The condition required that conservation measures have a goal of achieving a 15 percent reduction in water usage in 1996 and 20 percent in each subsequent water year. Compliance with this condition is not at issue in this hearing. However, ten years have passed since the 20 percent reduction goal was ordered, and consideration should be given to how additional conservation measures may reduce the need to illegally divert water from the river. MPWMD and Cal-Am work together to implement conservation measures in the peninsula cities; however, MPWMD has a greater array of regulatory tools. (MPWMD-SP12, p.10, 15 – p.11, 26 and p. 20, 3-5.) Block rate pricing of water also affects the use of water. Cal-Am must obtain approval from the PUC to impose or modify block rates.

MPWMD has a retrofit program for toilets, showerheads and faucets. Retrofits are required for all title changes and for use and expansion changes. An estimated 664 afa has been saved since 1987. About two-thirds of the properties within MPWMD have been retrofitted. (MPWMD-SP12, p. 9, 8-16; RT, Ph. 2, Vol., IV, p. 1066, 12 - p. 1068, 11.) In our view, most of the remaining properties will probably be retrofitted within the next eight years, i.e., within 30 years of 1987.

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<sup>30</sup> In general, private businesses acting illegally are not excused from immediately complying with the law in order to make sure they can recoup their costs from their customers.



Thus, over time, as much as 330 afa of water may be saved through continued retrofitting of properties, or roughly 41 af of additional savings per year for eight years. We conclude, therefore, that water saved by retrofitting properties should be used to reduce Cal-Am's diversions from the river.

Reduction in the use of potable water for outdoor use offers the possibility for additional water savings. (MPWMD-SP12, p. 7, 15 -20.) Outdoor water usage is estimated to be about 500 afa; less than 5 percent of total potable water use. (RT, Ph. 2, Vol. IV, p. 1062, 8-23.) MPWMD recognizes that reductions in outdoor irrigation could save about 100 afa. (MPWMD-SP12, p. 8, 6-9.) Service addresses that use less water are rewarded with a lower block rate. An increasing block rate structure has been in place since 1997. Cal-Am has requested additional blocks for non-residential users in the current General Rate Case filing with the PUC. (MPWMD-SP12, p.18, 6-9.) We conclude that the use of potable water for outdoor irrigation should be reduced. Greater efforts to minimize the use of potable water for outdoor irrigation will result in incremental water savings. We are of the opinion that it should be feasible to save 100 af over eight years, or roughly 12 af per year. We also conclude that the water saved by reducing the use of potable water for outdoor irrigation should be used to reduce Cal-Am's diversions from the river.

#### **16.5 Adjudication of the Seaside Groundwater Basin**

Cal-Am produces water from the Seaside groundwater basin to serve customers in its main system. (MPWMD HS-13; RT, Ph. 2, Vol. V, p. 1324, 20 – p. 1325, 8.) Cal-Am gets approximately 25 percent of its supply from the Seaside basin. (RT, Ph. 2, Vol. III, p. 753, 11-12.) Currently, Cal-Am may extract up to 3,504 afa from the basin. However, the basin has been adjudicated.<sup>31</sup> (MPWMD-HS13, RT, Ph. 2, Vol. III, p. 754, 13-16.) The judgment ordered mandatory reductions of the operating yield by 10 percent triennially beginning in 2009 until the operating yield equals the natural safe yield. (SBW-1, p. 2, 17-21.) Each triennial reduction will be implemented unless: (1) the basin is replenished from new water sources or (2) the level of the groundwater is sufficient to prevent seawater intrusion. (*Id.*) The watermaster appointed pursuant to the judgment in the adjudication anticipates that the 10 percent reduction will be ordered every three years, and that this will result in a 417 af reduction in the water available to

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<sup>31</sup> A judgment has been entered in the Monterey Superior Court case, *California American Water Company v. City of Seaside et al*, Monterey Superior Court, Case No. M66343, dated March 27, 2006. The judgment adjudicated and limited rights to produce groundwater from the Seaside Groundwater Basin and implemented a physical solution for the management and protection of the basin. (SBW-2, ¶ 2.)

Cal-Am in 2009, and eventually a reduction of 2,010 afa by 2021. (SBW-1, p. 3, 4-9.) The 417 afa reduction represents about a 2.8 percent reduction in the supply of water available to Cal-Am and its customers.<sup>32</sup> We find that the adjudication will decrease the supply of water available to Cal-Am for its customers. Nevertheless, we conclude that Cal-Am should be prohibited from increasing its diversions from the river to offset the loss in production from the groundwater basin. Water to offset the loss of groundwater production may be found by aggressively implementing: (1) the retrofit program; (2) the program to reduce the use of potable water for outdoor irrigation; and (3) the main replacement program in conjunction with reduced consumption managed by a program like MPWMD's Regulation XV, prohibiting waste and non-essential water use. (MPWMD-SP3.) Such efforts should offset the loss of groundwater production within three years.

## **17.0 EFFORTS TO MITIGATE THE EFFECTS OF CAL-AM'S DIVERSIONS ON FISH AND WILDLIFE**

This section addresses efforts to mitigate the effects on fish and wildlife of diversions, principally Cal-Am's, from the Carmel River. Mitigation efforts must be viewed in a larger context because the effects of Cal-Am's illegal diversions cannot be isolated from its legal diversions and the diversions of others. The following discussion is relevant to an understanding of what actions may be appropriate for consideration in the CDO adopted by the State Water Board.

### **17.1 Releases from San Clemente Dam<sup>33</sup>**

Because the Carmel River usually goes dry downstream from the Narrows (River Mile 9.5) by July of each year, DFG annually negotiates with Cal-Am and MPWMD a flow bypass for San Clemente Dam. The objective of the negotiations is to keep as much stream channel wetted below San Clemente Dam as possible during the low flow season. Per the agreements, releases from SCD are generally around 5 cfs during late summer. (PT-39, p. 4, ¶ 2.) The operation of San Clemente Dam pursuant to the bypass flow agreements with DFG is outside the scope of this proceeding.

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<sup>32</sup> Between 1996 and 2007 Cal-Am diverted approximately 10,967 afa from the Carmel River. (MPWMD- Exhibit DF2.) This includes the legal and illegal diversions occurring within the limit set on diversions by Conditions 1 and 2 of Order 95-10. During 2008 Cal-Am could produce up to 3,504 afa from the Seaside basin. (MPWMD- Exhibit DF5, slide 7, Status of Cal-Am's Compliance with Seaside Basin Adjudication in WY 2008.) These combined sources provide a supply of 14,471 afa to Cal-Am.

<sup>33</sup> See Figure 1 for the location of San Clemente Dam.

### 17.2 Steelhead Rescue Efforts

Because the Carmel River bed begins to go dry in July downstream from the Narrows, MPWMD and the CRSA<sup>34</sup> make organized efforts to rescue steelhead stranded in pools. Rescue efforts are labor-intensive. Fish are scooped into buckets and transported to the lagoon or to upstream areas that have water. (CRSA-3, p. 6.) MPWMD annually rescues steelhead stranded due to dewatering between the Narrows and the Lagoon. From 1995 through 2005, a total of 208,015 juvenile steelhead were rescued. (PT-39, p. 5.)

The annual rescue effort only saves a portion of the steelhead lost in the lower river. Further, once rescued, the fish are subject to mortality due to a variety of factors such as capture, adverse conditions from competition and overcrowding in upper river segments or in the Sleepy Hollow Fish Facility (facility). MPWMD has spent over \$300,000 to improve rearing operations at the facility. The improvements, involving operational protocols, have resulted in increasing rearing survival. (MPWMD-KU1, pp.1, 6.) Nevertheless, fish mortality has been over 50 percent at the facility for a variety of reasons including high water temperatures, disease and predation. The fish that survive the summer and fall are released back into the river once winter flow reconnects the lower river to the lagoon. The State Water Board lauds the efforts being made by MPWMD and CRSA to rescue juvenile steelhead, but rescuing juvenile steelhead and rearing them over the summer cannot assure the recovery of steelhead populations and is not an acceptable long-term solution. (PT-39, p. 5, 12-14.) We find that these desperate efforts and their tenuous success underscore the importance of reducing Cal-Am's diversions from the river by all practicable measures. Further, we conclude that Cal-Am should be prohibited from increasing diversions from the river and should be required to reduce the quantity of water diverted from the river for existing service connections.

### 17.3 Preservation of Riparian Vegetation

A close connection has been demonstrated between groundwater diversions and both the health of the riparian vegetation and channel stability. Plant stress is directly related to soil

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<sup>34</sup> For more than 35 years, volunteers associated with the Carmel River Steelhead Association have been rescuing and rearing steelhead stranded on the Carmel River. (CRSA-3, pp. 5-6.) A voluntary effort of this duration is an extraordinary achievement.

water availability and depth to groundwater. MPWMD determined that mitigation in the form of irrigation can be used to prevent plant mortality along the riparian corridor, thus contributing to habitat for wildlife and stable riverbanks. A monitoring system was implemented to measure plant stress, soil moisture, and depth to groundwater. When necessary, supplemental irrigation is applied to help mitigate the effects of unacceptable vegetation stress. (MPWMD-TC16, pp. 3-4.) For example, in 2007 MPWMD applied a total of 11.81 af of supplemental irrigation water to offset stress to riparian vegetation associated with water diversions from the Carmel River. (*Ibid.*, p.18.) We find that the recovery of riparian habitat and associated channel stability in the lower part of the river will not occur until the level of the underflow in the river is close enough to the surface of the river bed to supply water to the roots of riparian vegetation. Thus, significant improvements in the preservation of riparian habitat and increased channel stability will not be possible until Cal-Am's illegal pumping from the river is terminated. Some marginal improvement to riparian habitat and channel stability may be possible if Cal-Am is required to reduce its pumping from the river. Thus, we conclude that Cal-Am should be prohibited from increasing its diversions from the river. In addition, we find that Cal-Am should be required to reduce the quantity of water diverted from the river for existing service connections.

#### **17.4 Mitigation Measures to be Implemented Pursuant to Settlement**

On June 29, 2006, Cal-Am contracted with the National Oceanic and Atmospheric Administration (NOAA) to provide substantial funds for a variety of projects to mitigate the effects of its diversions upon the steelhead in the Carmel River. However, the terms of the contract have not been implemented for reasons beyond Cal-Am's control. In the contract, Cal Am agreed to make an initial payment of \$3,500,000 and an additional \$1,100,000 each year until 2013, or until Cal-Am is in compliance with Order 95-10, whichever occurs first. (MPWMD DF11, p. 124, 2006 NOAA Settlement Agreement.) Table 1 below shows the projects for which the funds are to be provided:

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Table 1\*

**Recommended Spending Priorities for Restoration of the Carmel River Resource**

March 2007<sup>1</sup>

MPWMD Rank	NMFS Rank	Proposed Restoration Projects	CRWC Action Plan Item <sup>2</sup>	Estimated Cost	Estimated Time
1	1	Lagoon Reverse Osmosis Water Project	MON-1	\$50,000	1 to 3 years
2	2	Sleepy Hollow Steelhead Rearing Facility Water Intake Upgrade	---	\$570,000	1 to 2 years
3	5	Old Carmel River Dam Removal	SH-5	\$300,000 to \$500,000	---
4	6	Sediment/Gravel Injection	HAB-1; SH-7	\$60,000 to \$100,000 per year	1 year
5	4	Carmel River Enhancement – Mainstem, tributaries, and lagoon	HAB-3, 4 and 6; SED-1	\$10,000 to \$30,000 per habitat structure	1 year per structure
6	3	Los Padres Dam Fish Passage	SH-6 and 8	---	up to 5 years
7	7	Los Padres Reservoir Sediment and Organic Debris Removal	Flows-2 and 3	\$25,635,000	---
8	8	Natural Broodstock Program	---	\$60,000 to \$100,000 per year	3 years
9	9	Barrier Beach Sediment Budget Analysis	---	\$125,000	1 year

\* Based upon MPWMD-DF11, Exhibit 19A

Notes:

1. The proposed mitigation projects were developed at a workshop on November 18, 2005, that was conducted by the National Marine Fisheries Service (NMFS) and included representatives from California American Water (CAW), Monterey Peninsula Water Management District (MPWMD), Carmel River Steelhead Association (CRSA), and the Carmel River Watershed Conservancy (CRWC). Representatives from the California Department of Fish and Game (DFG), U.S. Fish and Wildlife Service (USFWS), and the Sierra Club were invited, but unable to attend.
2. The “CRWC Action Plan” items refer to actions originally described in the 2002 Carmel River Watershed Assessment developed by the CRWC and later ranked by the CRWC’s Technical Advisory Committee in 2006. “MON, SH, HAB, SED, and FLOWS” refer to actions related monitoring, steelhead, habitat, sediment, and flow, respectively. Each of the CRWC actions listed is consistent with the associated NMFS proposed mitigation project.

A detailed description of the proposed restoration projects can be found in Exhibit 19-8 to MPWMD-DF11. If implemented on a timely basis, these projects could provide significant mitigation benefiting steelhead in the river. To date, NMFS<sup>35</sup> has not received any of the funding from the 2006 Settlement Agreement due to issues of how the funds can be moved from Cal-Am to DFG, who will disperse the funds. (RT, Ph. 1, Vol. I, p. 59, 15-25.) The problem appears to be within agencies of the federal government. NOAA has not requested the funds from Cal-Am because it is feared that the funds would be captured under the Antideficiency Act<sup>36</sup> and used for other purposes. (RT, Ph. 2, Vol. IV, p. 1078, 12 – p. 1079, 3.) Valuable mitigation could be implemented if the federal agencies could resolve this dispute or if the settlement agreement could be renegotiated to provide a means of bypassing the federal agencies.<sup>37</sup> Although the mitigation measures negotiated between Cal-Am and NOAA are outside the scope of this proceeding their implementation would benefit the steelhead. We urge NOAA and NMFS to give prompt attention to resolving this dispute.

## **18.0 WATER NECESSARY FOR PUBLIC HEALTH AND SAFETY**

Under the heading titled "8.1 Considerations Mitigating Against the Use of Punitive Enforcement Options," Order 95-10 found that "[i]n the short term Cal-Am cannot significantly reduce its extraction from wells along the Carmel River." The order went on to state "[t]he people and businesses on the Monterey Peninsula must continue to be served water from the Carmel River to protect public health and safety." The order did not make a finding of what quantity of water was necessary for public health and safety in Cal-Am's service area. Indeed, condition 3 of the order required a 20 percent reduction in the quantity of water diverted from the river. No single fixed quantity of water per customer will protect public health and safety in all water supply systems. The quantity of water required to protect public health and safety will vary from system to system and will vary, over time, within a particular system depending upon how the water supply system is built, modified and operated, and upon measures taken by the end users of water to conserve the use of water. Nearly 14 years have passed since Order 95-10 was adopted, making it appropriate to consider requiring Cal-Am to further reduce its illegal diversions from the river, even without a substitute supply.

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<sup>35</sup> NMFS is within NOAA.

<sup>36</sup> 31 USC 1341.

<sup>37</sup> For instance, the funds might be placed in a private trust account and dispersed according to the agreement with NMFS.

Cal-Am contends that reducing the quantity of water currently being diverted from the river would jeopardize its ability to deliver water to its customers. (Nov. 11, 2008, CAW Reply Brief, p. 17.) Having sufficient water to operate a water treatment and supply system is a valid concern. Simply stated, sufficient water must be taken into the treatment system to meet daily user demand for water. If water is not available to supply user demand, some areas of Cal-Am's system will not have enough water to maintain pressure for delivery to users or for an emergency, such as a fire. We should not give too much weight to this contention, however, for three reasons. First, Cal-Am continues to make new connections to its system. If Cal-Am were truly concerned that the existing supply of water is inadequate, it could act to end new connections pursuant to Water Code section 350, et. seq., or seek an order from the PUC prohibiting new service connections in accordance with Public Utility Code section 2708. Second, having sufficient water to operate its system reliably is typically a problem for one day a year, although it could be for as long as 3 to 5 days at a time. (RT, Ph. 2, Vol. V, p. 1292, 2-7.) Finally, having enough water to meet user demand can also be accomplished by reducing user demand. Such reductions can be accomplished by water conservation and standby rationing programs similar to that administered by MPWMD. (MPWMD - SP12, p. 4, 17-25; MPWMD - SP3, Regulation XV.)

MPWMD is a special-purpose district created to provide water resource management in the Monterey Peninsula area. It regulates all water distribution systems within its boundaries, including Cal-Am's. (MPWMD-1, p. 4, 1 – p. 6, 21; RT, Ph. 2, Vol. IV, p. 925, 14-25.) In the interim between the adoption of Order 95-10 and the hearing for this proceeding, MPWMD has treated the quantity of water that Cal-Am is taking from the river as part of the supply of water available to serve the needs of peninsula communities. (RT, Ph. 2, Vol. IV, p.1008, 25 – p.1011, 24; p. 936, 5 - 21.) During this proceeding, MPWMD and many peninsula cities took the position that all of the water being diverted from the river by Cal-Am is necessary for public health and safety. (RT, Ph. 2, Vol. IV, p. 1046, 13-21.) Further, MPWMD and many peninsula cities also wish to have water for growth. MPWMD's water allocation program sets aside water for growth within the limits of the supply of water available within its jurisdiction, including the water being illegally diverted from the river by Cal-Am. (RT, Ph. 2, Vol. IV, p. 953, 7 – p. 954, 23; p. 1046, 13 – p. 1047, 21; Carmel-1, p. 2, 3-22; Monterey-1, p. 2, ¶ 4; City of Seaside-4, p. 3, 19 - 24.) An unintended consequence of this arrangement may be that because the peninsula cities have had water both for existing uses and for growth, their residents have had little incentive to support or pay for a project or projects to obtain a legal supply of water that can

be substituted for the illegal diversions from the river. In addition, diverting water from the river for growth is unacceptable when (a) Cal-Am has no legal right to divert the water, (b) the steelhead in the river has been declared a threatened species, (c) the river has been designated critical habitat for the steelhead and (d) miles of the river bed are dry for five to six months a year. Accordingly, we conclude that water should not be diverted from the river for growth and that the quantity of water that is illegally diverted by Cal-Am should be reduced over a period of years until illegal diversion from the river is ended.

The water available to supply Cal-Am's customers, from all sources (including Cal Am's illegal diversions from the Carmel River), is in rough equilibrium with current customer needs. MPWMD's regulations to encourage conservation, the reduction of losses within Cal-Am's water system, and other measures can offset modest reductions in supply that are gradually implemented without presenting a threat to public health and safety. An immediate and substantial reduction in the quantity of water that Cal-Am diverts from the river could present a threat to public health and safety unless Cal-Am's customers can be required to scale back their use of water by an amount equal to the quantity of reduced diversions. MPWMD's regulation adopted to curtail consumption within the peninsula communities depends heavily upon public education and the cooperation of water users. (MPWMD-SP12, p. 18, 21 - p. 20, 11; RT, Ph. 2, Vol. IV. p. 1029, 4 – p. 1036, 6.) Effective control over the quantity of water used by many thousands of users through voluntary cooperation is an uncertain undertaking at best. Thus, an immediate and substantial reduction in the quantity of water that Cal-Am diverts from the Carmel River could present a threat to public health and safety.<sup>38</sup> The State Water Board concludes that an order requiring Cal-Am to immediately make substantial reductions in the quantity of water illegally diverted from the river could present an unacceptable risk to public health and safety. On the other hand, modest reductions in the quantity of water Cal-Am diverts from the river that are gradually implemented can be offset by the types of projects and actions previously described in this order<sup>39</sup> and do not present a threat to public health and safety. Thus, the State Water Board also concludes that Cal-Am should be required to make modest and continuing reductions in the quantity of water diverted from the Carmel River until such time as it has developed a project or projects capable of providing a new source of water to supply

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<sup>38</sup> The peninsula area economy is also dependent upon the vitality of the hospitality industry. A marked and substantial reduction in the quantity of water that Cal-Am may divert from the river would, in all likelihood, affect the number of visitors that can be served by the hospitality industry and the economy of the area. (MPHA-001, p. 4, 9-17; MPHA-010, p. 3, 14-25.)

<sup>39</sup> Section 16.0. Projects and Actions that may Affect Cal-Am's Need to Divert Water from the Carmel River, subsections 16.1 – 16.4.



the needs of its customers to substitute for its unlawful diversions of water from the Carmel River.

## **19.0 OTHER MATTERS**

### **19.1 Pebble Beach Company should be Subject to All Limitations Imposed upon Cal-Am's Diversions from the Carmel River**

Pebble Beach Company (PBC) has a 365 afa water entitlement from MPWMD for developing properties within Del Monte Forest. The entitlement is used for making new service connections to Cal-Am's water system. The entitlement was granted as part of a contractual arrangement wherein PBC agreed to financially guarantee public financing of a wastewater reclamation project. PBC seeks to have its water entitlement for new growth excluded from any limitation that may be placed upon Cal-Am's withdrawals from the Carmel River. (Oct. 14, 2008, Closing Brief of PBC, p. 13, 20-22.). In addition, PCB contends that, during 2005-06, it relied upon findings and representations by the State Water Board when undertaking additional financial arrangements to further upgrade the wastewater reclamation plant and when acquiring a reservoir to store reclaimed wastewater.

The Pebble Beach Community Services District (PBCSD) and the Carmel Area Wastewater District (CAWD) operate the CAWD-PBSCD Wastewater Reclamation Project. (PBC-2, p. 1, 25-27.) The project provides reclaimed wastewater for irrigation of the golf courses and other recreational open spaces located in the unincorporated Del Monte Forest area of Monterey County. (PBC 1, p. 2, 7-9.) The project was designed to deliver not less than 800 afa of reclaimed water and to free an equal amount of potable water for other uses. Operationally, some potable water was necessary to control salinity levels in the reclaimed water used for golf course irrigation and to meet irrigation needs during times of peak demand. (PBC-1, p. 2, 16-23.) During 13 years of operation, between 1994-95 and 2006-07, the project supplied an average of 706 afa of reclaimed water; 267 afa of potable water was required for salinity control and to meet peak irrigation demand. (PBC-2, p. 3, 1-28.) Public project financing was facilitated by private financial guarantees. The PBC guaranteed: (a) \$33.9 million in capital costs for the project, and (b) net project operating deficiencies. In return for the financial guarantee, PBC was granted a 365 afa potable water entitlement by MPWMD for future development of lands owned by PBC. (PBC-1, p. 3, 19 – p. 4, 2.) Based on this entitlement, water has been sold to over 500 homeowners in the Del Monte Forest. (RT, Ph. 2, Vol. II, p. 556, 14-15.)

During 2005-2006, the project was upgraded through the addition of 325 af of storage for reclaimed water and by improvements to the wastewater treatment plant to reduce the level of salinity in the reclaimed water. During 2009, these improvements should result in the project being able to operate without the need for potable water. (*Id.*, p. 4, 1-17.) The upgraded project cost \$34 million. PBC obtained the funds for the upgrade by selling 175 afa of the entitlement obtained from MPWMD to landowners in Del Monte Forest. (PBC-1, p. 3, 25 – p. 4, 2.)

The 365 afa PBC water entitlement from MPWMD dates to at least 1989 (PBCMS-2) and was based upon what turned out to be an overestimate of the supply of water available to Cal Am. During 1995, subsequent to the entitlement granted by MPWMD, the State Water Board adopted Order 95-10 determining that Cal-Am was diverting about 10,730 afa from the Carmel River without a valid basis or right (Order 95-10, p. 39, ¶ 2.). Still later, during 2006, the Monterey Superior Court entered an order adjudicating and limiting the quantity of water that could be produced from the Seaside Groundwater Basin.<sup>40</sup> Among other matters, beginning in 2009, the order requires Cal-Am to reduce the quantity of water it may produce from the basin by 10 percent. Additional restrictions on groundwater production may be ordered, depending upon physical conditions within the groundwater basin.

The original wastewater reclamation project was planned, financed, constructed, and commenced operation in the fall of 1994, before the State Water Board adopted Order 95-10. (PBC-2, p. 2, 11-12; PBC-13; Order 95-10.) A footnote in Order 95-10 gives passing recognition to the supply of water made available to Cal-Am customers by the project:

In addition to supplies from the Carmel River and pumped ground water in the area of Seaside, reclaimed water is available to some Cal-Am users from the Carmel Area Wastewater District Pebble Beach Community Services District Wastewater Reclamation Project. The Project will provide 800 acre-feet of reclaimed water for the irrigation of golf courses and open space in the Del Monte Forest. In return for financial guarantees, the Pebble Beach Company and other sponsors received a 380 af potable water entitlement from the District for development within Del Monte Forest. As of the end of fiscal 1993-1994, the District had not allocated the remaining 420 af of project yield. (Order 95-10 at p. 6, fn. 2.)

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<sup>40</sup> See discussion under Section 16.5, *supra*.

**Draft - July 27, 2009**

On March 27, 1998, the Chief, Division of Water Rights, wrote MPWMD and Cal-Am concerning the relation of the project to the water being diverted from the river by Cal-Am and Order 95-10. (PBC-7.) The letter states, in part:

The [State Water Board] has recognized that the Pebble Beach Company and other sponsors were project participants in, and assisted in funding, the wastewater reclamation project which enabled Cal-Am to reduce its delivery of potable water to Del Monte Forest property and thereby reduce the demand on the Carmel River by at least 500 afa and potentially 800 afa. Upon completion of the Del Monte Forest property, 380 afa will be diverted from the Carmel River by Cal-Am for delivery to these lands. Thus, there will be no net increase in Carmel River diversions in the future over the level of past documented diversions as a result of developing these projects. As a result of the reclamation project and especially during the interim period while the Del Monte Forest property is being developed, the net diversion from the Carmel River to serve Del Monte Forest properties will be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus under Footnote 2 of Order WR 95-10, the 380 afa is available to serve the projects.

As a result, Order WR 95-10 does not preclude service by Cal-Am to the Del Monte Forest property under the 380 afa entitlement granted by the District. As you are aware, the [State Water Board] is requiring Cal-Am to maintain a water conservation program with the goal of limiting annual diversions from the Carmel River to 11,285 afa until full compliance with Order WR 95-10 is achieved. While Cal-Am has been exceeding the limit, it is not the intent of the [State Water Board] to penalize the developers of the wastewater reclamation project for their efforts to reduce reliance upon the potable water supply via utilization of treated wastewater.

Thus, the [State Water Board] will use its enforcement discretion to not penalize Cal-Am for excess diversions from the Carmel River as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to the Pebble Beach Company and other sponsors under this entitlement for use on these lands. This enforcement discretion will be exercised as long as the wastewater reclamation project continues to produce as much as, or more than, the quantity of potable water delivered to the Del Monte Forest property, and the reclaimed water is utilized on lands within the Cal-Am service area.

Footnote 2 of Order 95-10 deals with the issue of water use for purposes of projects in the Del Monte Forest. Consequently, the order does not provide discretion to address any projects involving the use of the unassigned 420 afa (800 afa minus 380 afa identified in the footnote equals 420 afa) developed by the wastewater treatment facility.

On October 18, 2001, the Chief, Division of Water Rights, sent another letter to MPWMD concerning this subject. The letter stated in part:

You specifically asked whether the use of a portion of the original Pebble Beach Company water entitlement from the CAWD reclamation project can be used on non-Pebble Beach Company properties within (1) the Del Monte Forest and (2) outside the Del Monte Forest. Cal-Am may distribute the new potable water supply anywhere in its service area, subject to the Carmel River diversion requirements of Order 95-10 (and any subsequent modification approved by the State Water Resources Control Board) and requirements (a) and (b) above.<sup>41</sup> (PCB-8.)

Significantly, the second letter clearly states that potable water may be diverted from the river but subject to the requirements of Order 95-10 and any subsequent modifications approved by the State Water Board.

On the basis of a noncommittal footnote in Order 95-10 and two letters from the Chief, Division of Water Rights, the second of which subjects Cal-Am diversions from the river for PBC properties to future State Water Board decisions, PBC seeks to have its water entitlement from MPWMD excluded from any limitation placed upon Cal-Am's withdrawals from the Carmel River. (Oct. 14, 2008, Closing Brief of PBC, p.13, 20 - 22.) Such an exclusion might have been reasonable if it appeared the Cal-Am was likely to come into compliance reasonably soon, and if the harm during the period required to come into compliance was relatively small, but that is not the case here.

To the extent that the letter of March 27, 1998, can be interpreted to assure that the State Water Board would not take enforcement against PBC, the letter was inappropriate. In Order 95-10 the State Water Board adopted conditions (1) placing a cap on the total quantity of water Cal-Am could divert from the Carmel River, (2) requiring Cal-Am to diligently implement actions to terminate its unlawful diversions and (3) requiring that Cal-Am reduce its diversions from the river by 20 percent. (Order 95-10, Conditions 1, 2 and 3(b).) Water code section 1052(a) provides that the diversion and use of water other than as authorized in this division is a trespass. Water Code section 1825 declares that "the state should take vigorous actions . . . to prevent the unlawful diversion of water." Contrary to this policy, the letter expresses an intent not to penalize Cal-Am for excess diversions from the Carmel River as long as their diversions

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<sup>41</sup> The reference to the "requirements of (a) and (b) above" refers to the following: "Continual records must be maintained, on both a monthly and total annual basis, to document that (a) the new use of potable water does not exceed the historic quantity of potable water provided by the California-American Water Company (Cal-Am) to the Del Monte property and (b) the quantity of treated wastewater put to beneficial use equal or exceeds the potable water use."

do not exceed 11,285 afa plus the quantity of potable water provided to the PBC and other sponsors under the entitlement from MPWMD.<sup>42</sup>

The letter cannot be understood as a binding commitment that the State Water Board would never take an enforcement action that might affect PBC or others relying on the entitlement from MPWMD, however. To the contrary, because the letter expressly identifies the State Water Board's action as an exercise of enforcement discretion, it serves as a warning that Cal-Am's excess diversions constitute an ongoing violation and the State Water Board could take enforcement action. The letter's reference to enforcement discretion should also have served as a warning that while the State Water Board was not inclined to take enforcement at the time the letter was issued, the State Water Board could decide to take enforcement at a later time if the violation continues. It is doubtful whether any correspondence from a State Water Board officer or employee expressing how the Board intends to apply the law may be relied on as a guarantee that the Board will follow that course of action even the Board later determines that doing so would be contrary to law or public policy. Given the highly discretionary nature of enforcement, the nonbinding nature of any expression of how the State Water Board intends to act is highlighted where that intent is expressly identified as an exercise of enforcement discretion. Moreover, even if the letter had purported to promise that there would be no enforcement, it would not be binding. It would violate public policy to enjoin the State Water Board from enforcing the laws it is charged with administering. (See *Phelps v. State Water Resources Control Board* (2007), 157 Cal.App. 4<sup>th</sup> 89, 114-115.)<sup>43</sup> Because of the harm Cal-Am's unauthorized diversions are causing harm to public trust uses of the Carmel River, not taking enforcement action or exempting deliveries to PBC would also be inconsistent with the State Water Board's affirmative duty to protect public trust resources. (See generally *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 441.)

The Federal Endangered Species Act (ESA) prohibits the taking of threatened species. (16 U.S.C. §§ 1531, et seq; 1538 (a) & (g).) The California Central Coast steelhead has been declared as threatened, and the Carmel River has been declared as critical habitat for the species. (See Section 6.1 Request for Official Notice by the Sierra Club, subsections (1) through (3) of this order.) "Taking" means "an act which actually harms or injures wildlife. Such

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<sup>42</sup> The letter of October 18, 2001, is also problematic. It should be noted, however, that the letter expressly states that Cal-Am's diversions from the river for the PBC are subject to Order 95-10 and any subsequent modification to the order approved by the State Water Board. This order is such a modification.

<sup>43</sup> See discussion concerning the same subject under Section 12.0 of this order at p. 27.

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.”<sup>44</sup> (50 C.F.R. § 17.3.) We find that increased diversions from the river by Cal-Am will further aggravate an already substantial degradation to the habitat of the river for the threatened steelhead. Although the State Water Board is not directly compelled to implement the prohibitions of the ESA, the State Water Board should take ESA requirements into account in the exercise of its public trust responsibilities.

In *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 441, the court held that “the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with the purposes of the trust.” Allowing increased dewatering of the Carmel River for new growth is incompatible with the State Water Board’s affirmative duty to protect the public trust when the river is critical habitat for the threatened steelhead. And just as no party can obtain a vested right to appropriate water in a manner harmful to the uses protected by the public trust doctrine (*id.* at p. 445-446), no prior statement from the State Water Board indicating it would forego enforcement gives any party an entitlement to avoid or be exempted from any enforcement order the State Water Board later determines is necessary to carry out its public trust responsibilities. PBC’s expectation that it could count upon undiminished deliveries from Carmel River, notwithstanding the illegality of those diversions and the harm those diversions were causing to the public trust, is understandable, but honoring that expectation would amount to an abdication of the State Water Board’s responsibilities for proper administration of water rights. (See *Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 573 [rejecting claims that reasonable use requirements should not be applied based on the reliance of the water right holder in the certainty of its rights, observing that water law “has passed beyond traditional concepts of vested and immutable rights.”])

We conclude, therefore, that the State Water Board should prohibit any increased diversions from the river by Cal-Am, and should not exclude any deliveries made under PBC’s entitlement from MPWMD. Nor should any water users who receive water under the PBC entitlement be

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<sup>44</sup> This definition is upheld in *Babbitt v. Sweet Home Chapter of Communities for A Great Oregon* (1995), 515 U.S. 687.

exempted from any conservation program or other effort to reduce Cal-Am's unauthorized diversions. In reaching this conclusion we are particularly mindful that (a) the lower 9.5 miles of the Carmel River bed is dry for 5 to 6 months of the year, (b) the steelhead is threatened, (c) the river has been declared to be critical habitat for the steelhead, and (d) the earliest date which Cal-Am's illegal diversions may be brought to an end is 2016, some 21 years after the adoption of Order 95-10 requiring Cal-A to diligently implement actions to terminate its illegal diversions from the river.

**19.2 Any Monterey Peninsula Community that Wishes to Develop Water from a New Source for Growth Must First Apply Water from the New Source to Reduce its Share of the Water Being Illegally Diverted by Cal-Am; Only after its Share of Illegal Diversions from the River is Ended may Water from the New Source be Used for Growth**

Some additional water has been developed for growth in Cal-Am's service area since entry of Order 95-10. The City of Sand City independently made an effort to develop water for growth within its jurisdiction. The city sought assurances from the State Water Board that any new water it developed would not be reduced to offset Cal-Am's illegal diversions from the river. (Sand City -1, Attachment A.) Whatever assurances may have been provided in the past, such assurances should not be provided in the future. All communities receiving water from Cal-Am are obtaining some portion of that water from illegal diversions from the river. Any community or combination of communities seeking to develop a new source supply must first apply water from a new source to reduce its share of the water being illegally diverted by Cal-Am. Water from a new source of supply should not become available for growth until after the community has fully substituted water from the new source for its share of the water being illegally diverted from the river by Cal-Am. Monterey Peninsula communities and their residents have little incentive to support efforts to develop new water supplies to replace the water being illegally pumped from the river by Cal-Am if water can be obtained for growth without having to reduce their pro-rata share of water illegally pumped from the river. Nearly 14 years after the adoption of Order 95-10, Cal-Am is unable to tell the State Water Board what project may be built to end its illegal diversions, when a project will be approved or when construction might be commenced. Indeed, there is no assurance that any project will be approved during the next several years.

**19.3 Affirmation and Adoption of Rulings by the Hearing Officers.**

Unless otherwise expressly addressed in this order, all rulings of the Hearing Officers are affirmed and adopted by this order.

## CONCLUSIONS

Order 95-10 does not authorize Cal-Am to divert water from the Carmel River in excess of its water rights, and Cal-Am is illegally diverting water from the Carmel River in violation of Water Code section 1052. The doctrines of *res judicata* and collateral estoppel are not a bar to the State Water Board's adoption of a CDO.

Condition 2 of the Order 95-10 requires Cal-Am to diligently implement actions to terminate its unlawful diversions. Cal-Am has diverted an average of 7,632 afa from the river without a basis of right for the past 13 years, and in the roughly 10-year period since it achieved the 20 percent reduction required by Condition 3 of Order 95-10, Cal-Am has not made any meaningful progress toward reducing the amount of its unlawful diversions. Further, Cal-Am has not diligently pursued several smaller projects that might have been able to alleviate the serious conditions in the Carmel River affecting the survival of steelhead.

Thus, Cal-Am has not diligently implemented actions to terminate its unlawful diversions under Condition 2. Cal-Am's only action reducing its illegal diversions has been the work done on two projects yielding small amounts of water: the ASR project and the Sand City Desalinization Plant. Significantly, these projects are in place due largely to the efforts made by other agencies, i.e., MPWMD and the City of Sand City.

The lower 9.5 miles of the riverbed are dry for five to six months of each year, due primarily to Cal-Am's diversions<sup>45</sup>. Cal-Am's diversions from the river continue to have an adverse effect on the fish, wildlife and riparian habitat of the river, including the threatened steelhead. Since the adoption of Order 95-10, the California Central Coast steelhead has been declared as threatened under the Endangered Species Act, and the Carmel River has been declared as critical habitat for the steelhead.

The adjudication of the Seaside groundwater basin will decrease the supply of water available to supply Cal-Am's customers by 417 af in 2009, or by about 2.8 percent of the available supply. Other projects or regulatory actions will make additional water available to Cal-Am, including: (1) the ASR project; (2) the City of Seaside Desalinization Project; (3) the reduction of system losses within the Cal-Am distribution system; (4) the retrofit program; and (5) reducing the use

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<sup>45</sup> See discussion under Section 15.0, *supra*.



of potable water for outdoor irrigation. Cumulatively, these projects and initiatives may reduce the need to divert water from the river by as much as 1,322 afa.

MPWMD's water allocation program sets aside water for growth within the limits of the supply of water available within its jurisdiction, and for this purpose water being illegally diverted from the river by Cal-Am is treated as available supply. An unintended consequence of this set aside may be that because sufficient water appears to be available for both existing uses and for growth, the peninsula cities and their residents have little incentive to support or pay for a project or projects to obtain a legal supply of water that can be substituted for the illegal diversions from the river.

In consideration of the foregoing, we conclude that Cal-Am should be prohibited from further degrading conditions in the river by diverting water from the river for new service connections, and that Cal-Am should be required to reduce the amount of water being diverted from the river to serve existing service connections. In reaching this conclusion, we are particularly mindful that (a) the lower 9.5 miles of the Carmel River bed are dry for 5 to 6 months of each year, (b) the steelhead is a threatened species, (c) the river has been declared to be critical habitat for the steelhead, and (d) the earliest date which Cal-Am's illegal diversions may be brought to an end is 2016, some 21 years after the adoption of Order 95-10. We further conclude that the Pebble Beach Company and associated development interests should not be exempt from the conditions restraining Cal-Am from diverting water from the river.

In addition to the foregoing, the State Water Board wishes to highlight the fact that Cal Am has contracted with the National Oceanic and Atmospheric Administration (NOAA) to provide substantial funds for a variety of projects to mitigate the effects of its diversions upon the steelhead in the Carmel River. The funds have not been spent due to administrative problems within the federal government. We strongly urge the NOAA and Cal Am to find a way to resolve the federal administrative problem and free up the funds Cal Am has committed to spend for projects to aid steelhead survival in the Carmel River.

## **ORDER**

**NOW, THEREFORE, IT IS ORDERED THAT** Cal-Am shall cease and desist from the unauthorized diversion of water from the Carmel River in accordance with the following schedule and conditions:

1. Cal-Am shall diligently implement actions to terminate its unlawful diversions from the Carmel River as soon as reasonably possible. These measures shall include implementing urban and irrigation water conservation measures and obtaining alternative water supplies.
2. Until Cal-Am has terminated its unlawful diversions; Cal-Am shall comply with all of the following:
  - a. Cal-Am shall not divert water from the Carmel River for new service connections that were not provided a “will serve commitment” before \_\_\_\_\_.<sup>46</sup> (Insert date of first public workshop to consider the draft order.)
  - b. Cal-Am shall not divert water from the river for any increased use at existing service addresses resulting from a change in zoning or use and that was not provided a “will serve commitment” (or similar commitment) before \_\_\_\_\_. (Insert date of first public workshop to consider the draft order.)
  - c. Commencing on October 1, 2009,<sup>47</sup> Cal-Am shall not divert more water from the river than the base of 10,978 afa,<sup>48</sup> as adjusted by the following:
    - (1) Immediate Reduction: Commencing on October 1, 2009, Cal-Am shall reduce diversions from the river by 5 percent, or 549 afa.
    - (2) Annual Reductions: Commencing on October 1, 2009, the base shall be further reduced by 121 afa per year through savings that will accrue from (1) reduced system losses, (2) the retrofit program, and (3) the reduction of potable water used for outdoor irrigation. The 121 af reduction shall be cumulative. For example, 121 af shall be reduced in the first year and 242 af shall be reduced in the second year. Commencing on October 1, 2014, annual reductions shall

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<sup>46</sup> Multiunit residential, commercial or industrial sites may currently be served by a single water meter. The installation of additional meters at an existing service will not be viewed as a new service connection provided that the additional metering does not result in an increase in water use. Metering each unit of a multiunit building tends to increase accountability in the use of water and the effectiveness of water conservation requirements.

<sup>47</sup> Each water year runs from October 1 to September 30 of the following year.

<sup>48</sup> Cal-Am diverts 3,376 afa under legal rights and, on average, 7,632 afa without a basis or right. (3,376 + 7,632 = 10,978 afa).

increase to 242 af per year. Annual reductions shall continue until Cal-Am has terminated all unlawful diversions from the Carmel River.

- (3) ASR Project: The amount of water diverted to underground storage under Permit 20808A (Application 27614A) as of May 31 of each year and which will be supplied to Cal Am customers after that date shall be subtracted from the base.<sup>49</sup> On May 1 of each year, Cal Am shall submit an operating plan to the Deputy Director for Water Rights specifying the quantity of water it intends to supply from ASR Project for its customers after May 1 of each year. Water pumped from the project for delivery to customers shall be consistent with the requirements of paragraph "e" below.
  - (4) Sand City Desalination Plant: 94 af shall be subtracted from the base plus any quantity of production not served to new growth within Sand City.
  - (5) Small Projects: Water produced from new sources developed pursuant to Condition 3 of this order shall be subtracted from the base.
- d. Cal-Am may petition the State Water Board Deputy Director for Water Rights for relief from annual reductions imposed under condition c.(2). No relief shall be granted unless all of the following conditions are met: (a) Within 18 months of the adoption of this order, Cal-Am has imposed a moratorium on new service connections pursuant to Water Code section 350 or has obtained an order prohibiting new connections from the PUC pursuant to Public Utility Code section 2708; (b) MPWMD has imposed a 15 percent conservation requirement pursuant to Regulation XV, or a similar regulation, and consumption is being reduced by no less than 90 percent of the 15 percent requirement;<sup>50 51</sup> (c) a showing is made that public health and safety will be threatened if relief is not granted. Any relief granted shall remain in effect only as long as (a) a prohibition on new service connections remains in effect, and (b) the

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<sup>49</sup> This condition shall apply to Phase I and Phase II of the ASR project.

<sup>50</sup> The State Water Board recognizes that MPWMD may need to modify regulation XV in response to this order.

<sup>51</sup> For purposes of measuring compliance, the 15 percent reduction shall be measured against the adjusted base required by condition 2.c. for the year in which the conservation requirement is imposed.

15 percent conservation requirement remains in effect and is at least 90 percent effective.

- e. ASR project water stored in the Seaside groundwater basin under Permit 20808A (Application 27614A) shall be used to mitigate the effect of Cal-Am's 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. Commencing June 1 of each year, Cal-Am shall use stored groundwater to supply the needs of its customers and reduce diversions from the river. 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 stored water is available under the operating plan. The river's habitat and fish may receive greater benefits from a substitution regime that differs from that required by this condition, a regime requiring that substitution commence at a different date, at a different rate or be coordinated with the level of flow in the river. In addition, it may be desirable to hold stored water from one year to the next to assure that more water is available for the steelhead and its habitat in years when the potential for steelhead survival may be greater. Several substitution trials may be necessary to determine which regime will have the greatest benefit. The National Marine Fisheries Service and the California Department of Fish and Game are encouraged to negotiate different substitution regimes with Cal-Am. The State Water Board will honor such agreements, provided Cal-Am submits the written agreement to the Deputy Director for Water Rights no later than May 1 of each year and the written agreement is approved by the Deputy Director.
3. Cal-Am shall implement one or more small projects that, when taken together, total not less than 500 afa to reduce unlawful diversions from the river. Within 90 days of entry of this order, Cal-Am shall identify to the Deputy Director for Water Rights the projects that it will implement and shall implement the projects within 24 months of entry of this order. Cal-Am may petition the Deputy Director for additional time in which to implement the projects. However, no time extension shall be considered unless the petition is accompanied by detailed plans and time schedules for each project. Detailed justification shall be provided for additional time. No additional time may be granted in order to allow Cal-Am time to obtain prior approval from the PUC. To the maximum practicable extent, small projects shall be operated in conjunction with the ASR project

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to reduce illegal diversions from the river during the months when surface flow in the river begins to go dry and through the months when surface flow in the river disappears below river mile 9.5.

4. Starting three months following adoption of this order, Cal-Am shall post quarterly reports on its website and file the quarterly reports with the Deputy Director for Water Rights. The quarterly reports shall include the following:
  - (a) Monthly summaries of the quantity of water it diverts from the river.
  - (b) Monthly summaries of the quantity of ASR project water diverted from the river under Permit 20808A and stored in the Seaside ground water basin. The monthly reporting shall also state the quantity of water beneficially used under Permit 20808A and the current balance of water in storage.
  - (c) Monthly summaries of the quantity of water being produced by the Sand City desalinization plant. The reporting shall identify new service connections within Sand City and thereafter report the quantity of water being delivered to the new connections. The monthly reports shall specify the quantity of water used to reduce diversions from the river during the reporting period.
  - (d) Monthly summaries of the quantity of water saved by reducing system losses.
5. Starting six months after adoption of this order, Cal-Am shall file quarterly reports of its progress toward implementing Condition 3 (small project implementation) and note specifically any problems with its schedule of implementation. The Deputy Director for Water Rights is authorized to modify the timing and the content of the reporting required by all of the provisions in this condition in order to more effectively carry out the intent of this order.
6. Cal-Am shall comply with all requirements of Order 95-10, except as follows:
  - (a) Condition 1 of Order 95-10 is superseded by Condition 2 of this order.
  - (b) Condition 3(b) of Order 95-10 is superseded by Condition 2 of this order.

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- (c) The last sentence of Condition 4 is deleted because the Seaside groundwater basin watermaster will determine the manner in which water may be withdrawn from the groundwater basin.
- (d) All other conditions of Order 95-10 shall remain in full force and effect until fully implemented.

**CERTIFICATION**

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on \_\_\_\_\_, 2009.

AYE:

NO:

ABSENT:

ABSTAIN:

**DRAFT**

Jeanine Townsend  
Clerk to the Board