

CALIFORNIA ENVIRONMENTAL LAW PROJECT  
A Non-Profit Legal Corporation



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MPWMD

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

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

Dear Ms. Doyle:

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

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

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

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

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

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

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

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

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

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

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

Id. at III-4

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

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

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

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

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

B. MPWMD Is a Responsible Agency Under CEQA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at p.4

The Executive Director found that:

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



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

The Court continued:

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

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

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

Finding 19, line 11:

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

Finding 20, line 6:

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

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

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

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

Finally, the CDO, at 40, states:

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

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

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

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

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

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

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

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

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

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

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

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

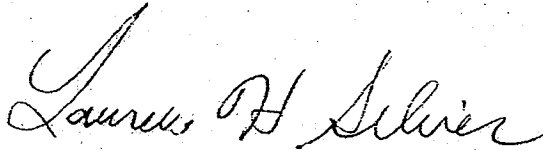
## VI. Conclusion.

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

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

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

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



Laurens H. Silver, Esq.  
California Environmental Law Project  
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<sup>13</sup> ("Wheeling" the water does not change its status as a Standard Producer.)





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Arnold Schwarzenegger  
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August 31, 2009

County of Monterey  
Resources Management Agency – Planning Department  
Attn: Mike Novo, Director of Planning  
168 West Alisal, 2<sup>nd</sup> Floor  
Salinas, CA 93901

Dear Mr. Novo:

**RESPONSE TO MITIGATED NEGATIVE DECLARATION AND INITIAL STUDY FOR  
ENEA PROPERTIES LLC, COMBINED DEVELOPMENT PERMIT FOR 1140  
OLEADA ROAD, PEBBLE BEACH, MONTEREY COUNTY – PLN 070333**

Central Coast Regional Water Quality Control Board (Water Board) staff reviewed the June 27, 2009, Mitigated Negative Declaration and June 17, 2009, Initial Study prepared by Monterey County for the Enea Properties LLC project (PLN 070333). The project consists of the construction of a single family dwelling and detached senior unit on Oleada Road in Pebble Beach.

The Initial Study indicates the proposed project will be served by California American Water Company (Cal-Am) with water rights (0.50 acre-feet/year [afy]) purchased from the Pebble Beach Company. It is assumed that these water rights are associated with a 365 afy water entitlement from the Monterey Peninsula Water Management District (MPWMD) for developing properties within Del Monte Forest with new connections to the Cal-Am water system. Consequently, the water supply for the Enea Properties LLC project will be derived from the Carmel River.

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

**The Mitigated Negative Declaration and Initial Study fail to identify and address significant cumulative offsite environmental impacts to the riparian and aquatic habitats of Carmel River and Carmel River Lagoon, and the federally listed steelhead that are dependent on these habitats for their survival. We present the following findings to substantiate this statement:**

1. Cal-Am owns and operates the San Clemente Dam, the Los Padres Dam and 21 downstream alluvial wells that divert water from the Carmel River. The alluvial wells

*California Environmental Protection Agency*



divert water from the underflow of the river and supply about 69 percent of the water needs to Cal-Am customers within the Monterey Peninsula cities and unincorporated areas of the Carmel Valley and Carmel Highlands.

2. Cal-Am has a current legal right to water in the Carmel River of 5,562 afy<sup>1</sup>. Cal-Am has diverted an average of 7,632 afy from the Carmel River in excess of this water right for the past 13 years (currently diverting about 7,150 afy) for a total diversion of approximately 12,712 afy<sup>2</sup>.
3. Cal-Am is responsible for approximately 85 percent of the total water diversions from the Carmel River and its associated subterranean flow<sup>2</sup>.
4. The Carmel River is home to a genetically distinct steelhead population commonly identified as the California Central Coast Steelhead<sup>3</sup>. The California Central Coast Steelhead are listed as threatened under the Federal Endangered Species Act (ESA)<sup>4</sup>. In addition, the Carmel River is listed as a critical habitat for the survival of the California Central Coast Steelhead<sup>5</sup>.
5. The Carmel River and Carmel River Lagoon are also documented habitats for California Red Legged Frogs, which are also listed as threatened under the ESA.
6. It is well-documented that Cal-Am's ongoing diversions from the Carmel River are the largest single contributor to significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon<sup>6</sup>.
7. The Central Coast Water Quality Control Plan (Basin Plan) lists the following as beneficial uses of the Carmel River:
  - a. Municipal & Domestic Water Supply
  - b. Agricultural Water Supply
  - c. Industrial Process Supply
  - d. Ground Water Recharge

<sup>1</sup> State Water Resources Control Board July 27, 2009, Draft Cease and Desist Order against California American Water Company; legal water rights consist of 3,316 afy recognized in Order No. WR 95-10 plus 2,246 afy under Permit 20808A

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

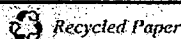
<sup>3</sup> South-Central California Coast (SCCC) steelhead Distinct Population Segment (DPS) (*Oncorhynchus mykiss*)

<sup>4</sup> Listed as a threatened species under the Endangered Species Act (ESA) on August 18, 1997 (62 Fed.Reg 43973). The threatened status of the steelhead was later reaffirmed under the ESA on January 5, 2006 (71 Fed.Reg. 834, 859).

<sup>5</sup> The Carmel River was listed as a critical habitat for the survival of the California Central Coast Steelhead on September 2, 2005 (70 Fed.Reg. 52488)

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

**California Environmental Protection Agency**



- e. Water Contact Recreation
  - f. Non-Contact Water Recreation
  - g. Wildlife Habitat
  - h. Cold Fresh Water Habitat
  - i. Warm Fresh Water Habitat
  - j. Migration of Aquatic Organisms
  - k. Spawning, Reproduction, and/or Early Development
  - l. Preservation of Biological Habitats of Special Significance
  - m. Rare, Threatened, or Endangered Species
  - n. Freshwater Replenishment
  - o. Commercial and Sport Fishing
8. The Central Coast Water Quality Control Plan (Basin Plan) lists the following as beneficial uses of the Carmel River Estuary [Lagoon]:
- a. Ground Water Recharge
  - b. Water Contact Recreation
  - c. Non-Contact Water Recreation
  - d. Wildlife Habitat
  - e. Cold Fresh Water Habitat
  - f. Migration of Aquatic Organisms
  - g. Spawning, Reproduction, and/or Early Development
  - h. Preservation of Biological Habitats of Special Significance
  - i. Rare, Threatened, or Endangered Species
  - j. Estuarine Habitat
  - k. Commercial and Sport Fishing
  - l. Shellfish harvesting
9. Ongoing significant impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon due to Cal-Am's ongoing diversions include, but are not limited to the following:
- a. The Carmel River generally goes dry downstream from the Narrows (River Mile 9.5) by July of each year resulting in the loss of aquatic habitat for food production and outmigration necessary for the survival of juvenile steelhead returning back to the Pacific Ocean. Steelhead stranded in pools are subject to predation, starvation and mortality due to poor water quality conditions (primarily high temperature and low dissolved oxygen) and desiccation.
  - b. Ongoing loss of riparian vegetation along the Carmel River due to lack of water (low groundwater and decreased soil moisture) for sufficient growth. The loss of riparian vegetation results in 1) stream bank erosion and sedimentation within the river that adversely impact steelhead due to loss of habitat necessary for food production, 2) the loss of foliar shading to control temperature, which directly affects dissolved oxygen concentrations within the river, thereby increasing the potential for algal blooms due to nutrient loading,



and 3) the loss of woody debris within the river that provide food production and shelter from predators for steelhead.

- c. Fresh water inputs to the Carmel River Lagoon where steelhead smolt mature and acclimate to saline conditions prior to migrating to the Pacific Ocean in the fall/winter are significantly decreased, and often limited to groundwater seeps, in the late spring and early summer. Decreased fresh water inputs to the lagoon result in 1) loss and impairment of riparian and aquatic habitat for food production and maturation, 2) increased predation, and 3) increased salinity and temperature stratification due to the lagoon water quantity/quality conditions being dictated by tidal influences through the sand bar. Increased salinity and temperature stratification within the lagoon result in poor water quality conditions for maturing smolt and drives them to the thin and cooler fresh water lens at the surface where they are subject to increased predation.

10. The ongoing significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon as a result of Cal-Am's ongoing excess diversions are essentially unmitigated because Cal-Am has failed to develop any meaningful source of supply and the relative quantity of water delivered from the Carmel River to Cal-Am customers within the Monterey Peninsula has not materially changed since the issuance of Order No. WR 95-10 against Cal-Am in 1995<sup>7</sup>.
11. The water service connection to Cal-Am's distribution system for the proposed project constitutes an additional diversion of up to 0.5 afy from the Carmel River that will contribute to the ongoing significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon.

**Additional diversions of water from the Carmel River as a result of providing a water supply for the proposed project via a connection to the Cal-Am distribution system would be in direct violation of Order No. WR 95-10 and Section 1052 of the Water Code.**

Cal-Am is currently in violation of Order No. WR 95-10 and the prohibition contained within Section 1052 of the Water Code against the unauthorized diversion or use of water. Approval of the proposed project would facilitate and add to the ongoing violation of Order No. WR 95-10 and Water Code Section 1052 in addition to the ongoing unmitigated significant cumulative impacts to the public trust resources of the Carmel River and Carmel River Lagoon as noted above. In addition, the proposed project would be in violation of a pending draft cease and desist order<sup>8</sup> against Cal-Am if it is adopted in its current form. The cease and desist order is being considered

<sup>7</sup> Issued to California America Water Company by the State Water Resources Control Board on July 6, 1995 for its illegal diversion of water from the Carmel River

<sup>8</sup> A July 27, 2009 draft of the Cease and Desist Order is currently scheduled for a State Water Resources Control Board public workshop in Sacramento on September 2, 2009.

against Cal-Am for its ongoing failure to comply with Order No. WR 95-10 and violation of Water Code Section 1052.

The findings of Order No. WR 95-10 and draft cease and desist order clearly state that Cal-Am's riparian rights [to water from the Carmel River or Carmel River Alluvial Aquifer] do not extend to water that is served outside the Carmel Valley or water served to non-riparian parcels located within the valley (such as parcels in Pebble Beach or Del Monte Forest).

**The use of Pebble Beach Company water entitlements obtained from the Monterey Peninsula Water Management District (MPWMD) constitute additional diversions of water from the Carmel River and are not exempt from Order WR 95-10 and the pending draft cease and desist order against Cal-Am.**

The Pebble Beach Company is currently seeking to have its 365 afy water entitlement from the MPWMD for new connections to Cal-Am's water system excluded from any limitation placed on Cal-Am's withdrawals from the Carmel River. The Pebble Beach Company's argument for this exemption is based in part on the assertion that the entitlement is based on water offsets generated as a result of the Carmel Area Wastewater District and Pebble Beach Community Services District Wastewater Reclamation Project. The reclamation project provides reclaimed wastewater for the irrigation of golf courses and other recreational spaces located in Pebble Beach and Del Monte Forest. It was intended to free up potable water from Cal-Am for new development on land owned by the Pebble Beach Company formerly used to irrigate these areas. The Pebble Beach Company was granted a 365 afy potable water entitlement by the MPWMD as part of a contractual agreement in exchange for financial guarantees to fund the reclamation project. The 365 afy entitlement dates back to at least 1989 (prior to the issuance of Order No. WR 95-10) and was based upon an overestimate of the water supply legally available to Cal-Am and the offsets generated from the reclamation project as documented in Order No. WR 95-10 and the pending draft cease and desist order against Cal-Am. Based on this entitlement, water has been sold to over 500 homeowners in the Del Monte Forest for new connections to Cal-Am's water system. Meanwhile, Cal-Am has failed to develop an alternative water supply and substantially reduce its diversion of water from the Carmel River. As evidenced by this and other projects, the latter is partly due to the fact that water diversion offsets from the Carmel River generated through conservation efforts and the reclamation project are commonly handed out for new development within the Cal-Am water service areas.

Based on findings presented within the pending draft cease and desist order against Cal-Am, the State Water Resources Control Board may determine that increased diversions from the Carmel River by Cal-Am for new development should be prohibited and that deliveries made under the Pebble Beach Company's entitlement from MPWMD should not be excluded from this prohibition.

**Providing a water supply for the proposed project or any project via a connection to the Cal-Am distribution system diverting water from the Carmel River would be inconsistent with the public trust doctrine.**

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

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

Some have argued that the above-noted impacts to the Carmel River are being mitigated by the implementation of the MPWMD Mitigation Program<sup>9</sup> for the preservation of Carmel River environmental resources. We would strongly disagree with this argument because the applied mitigation measures<sup>10</sup> are merely band-aid approaches applied to the symptoms of the real problem—dewatering of the Carmel River due to overdrafting of the alluvial aquifer—and given the riparian and aquatic habitats of the Carmel River and Lagoon would likely be unable to sustain a viable steelhead population without them for very long unless water diversions are substantially reduced. Although appropriate while diversions are being reduced, fish rescues, rearing facilities, monitoring and ongoing habitat restoration should not be considered as viable mitigation measures in support of new projects or long-term solutions to inadequate flows within the Carmel River. This is especially pertinent given the lack of flow necessary to sustain viable riparian and aquatic habitats is primarily due to the well-documented excess diversion of water by Cal-Am.

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

<sup>9</sup> Developed in response to the Monterey Peninsula Water Management District April 1990, Water Allocation Program Final Environmental Impact Report. Order No. WR 95-10 requires Cal-Am to implement any portion of the Mitigation Program not implemented by the MPWMD. The MPWMD currently implements the program with funding from fees paid by Cal-Am's water customers.

<sup>10</sup> The Mitigation Program focuses on potential impacts related to fisheries, riparian vegetation and wildlife, and the Carmel River Lagoon and includes special status species and aesthetics. Activities required to avoid or substantially reduce negative impacts to the environment include irrigation and erosion control programs, fishery enhancement programs, establishing flow releases from the existing dams to protect the fish and riparian habitat, monitoring water quality, reducing municipal water demand, and regulating activities within the riparian corridor.

incentive for the communities within Cal-Am's water supply service area to develop the alternative water supplies need to mitigate the existing significant cumulative impacts to the public trust resources of the Carmel River and Lagoon as a result of Cal-Am's ongoing excess diversions.

Consequently, the only appropriate mitigation measure is the complete offset of Cal-Am's excess diversion with suitable alternative water supply sources prior to any new connections or development within the Cal-Am water service area. In addition, water from any new sources should only become available for new growth within the Cal-Am water service area after the excess diversions have been completely offset by the new sources. Applying water usage offsets to support new growth should not be an allowable mitigation measure.

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

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

- Biological Resources items 4.a, b, c and d.
- Hydrology and Water Quality items 8.a and f.
- Land Use Planning items 9.b and c.
- Utilities and Service Systems item 16.d.

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

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

As noted above, Cal-Am's combined diversions from the Carmel River have the largest single impact on the public trust resources of the river. However, diversions by other water users within Carmel Valley also contribute to the well-documented significant cumulative impacts to the public trust resources and beneficial uses of the Carmel River and Carmel River Lagoon. Consequently, all projects that are diverting water from the Carmel River, including the alluvial aquifer, should be subject to the same findings of significance regardless of their size and relative impact.

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

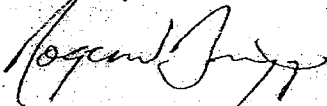
*California Environmental Protection Agency*

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

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

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

Sincerely,



Roger W. Briggs  
 Executive Officer

Paper File:  
 Electronic File: S:\NPS\Camel River & Lagoon\Enea\PLN070333-final.doc  
 Task Code: 12601

CC:

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rana creek  
LIVING ARCHITECTURE

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July 13<sup>th</sup> 2010

Monterey Peninsula Water Management District  
5 Harris Court  
Building GPO  
Box 85 Monterey California 93942

Re: SNG water distribution permit

Dear MPWMD Board of Directors,

I am writing to express my support for your approval of Ed Ghandour's SNG Water Distribution Permit. Your decision is about SNG's water distribution permit for Monterey Bay Shores EcoResort (a joint Cal Am and SNG application). Your opinion of other non-related land use and architectural issues should not have bearing on this decision. The Coastal Commission will deal with all other issues related to the project. Your job is only related to the WDS Permit and the regulations governing its issuance. Here you need be focused only on compliance with your rules for a WDS permit. The applicant has complied with your rules. Your staff supports approval.

I am disappointed the District has expended so much money on excessive legal fees after wrongful denial of the permit last year. The court has ruled in favor of SNG. No CEQA environmental studies need to be conducted on impacts to the Carmel River by the Seaside Adjudicated Basin.

In the future I encourage your board to be more focused on water conservation and water innovation projects for our County. As part of its application SNG-MBS obtained Monterey County Health Departments endorsement of its grey water recycling system that reduces water consumption. The District should be proud of this leading edge approach and grateful to the applicant for his vision and leadership.

SNG has gone through the process. It has complied with the regulations. The District should act in accordance with the Court's ruling. The Board should approve the permit.

Respectfully

Paul Kephart  
CEO and President  
Rana Creek Habitat Restoration

Cc  
SNG

RECEIVED

JUL 16 2010

MPWMD





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JUL 16 2010

MPWMD

Re: SNG water distribution permit

Dear MPWMD Board of Directors,

I am writing to express my support for your approval of Ed Ghandour's SNG Water Distribution Permit, a joint Cal Am and SNG application for a water distribution for Monterey Bay Shores EcoResort. Please keep in mind that your role is to focus on compliance with rules for a WDS permit, upon which your opinion about other non-related land use issues should not come to bear. The applicant has complied with your rules for a WDS permit, and your staff supports its approval. The Coastal Commission has jurisdiction over other related issues for this project.

It is unfortunate that that such a large amount of taxpayer's money has been spent in legal fees following the wrongful denial of the permit last year. No CEQA environmental studies about impacts to the Carmel River by the Seaside Adjudicated Basin need to be conducted. The court has ruled in favor of SNG.

Going forward, I hope that MPWMD realigns its priorities to embrace water conservation and water innovation projects in our County. As part of its application, SNG-MBS obtained an endorsement by the Monterey County Health Department for its graywater recycling system that will reduce water consumption onsite. Indeed, we should be proud of this innovative and visionary project.

SNG has gone through the process. It has complied with the regulations. The District should act in accordance with the Court's ruling. The Board should approve the permit.

Respectfully,

Rick Alpers  
Vice President, Operations & Sales  
Rana Creek Habitat Restoration

Cc  
SNG

Filed 4/1/10

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CALIFORNIA AMERICAN WATER,

Plaintiff and Respondent,

v.

CITY OF SEASIDE, et al.,

Defendants and Respondents;

MONTEREY PENINSULA WATER  
MANAGEMENT DISTRICT,

Intervener And Appellant.

H034335  
(Monterey County  
Super. Ct. No. M66343)

The Monterey Peninsula Water Management District (MPWMD or the District) appeals from an order clarifying and enforcing a prior decision, which had defined the rights of parties interested in the production of groundwater from the Seaside Basin. The MPWMD contends that the court exceeded its jurisdiction and violated the doctrine of separation of powers by restricting the District's authority to require environmental review of subsequent permit applications by the water-producing parties. We find no error and will therefore affirm the order.

### *Background*

The MPWMD was created in 1977 with the enactment of the Monterey Peninsula Water Management District Law. (Water Code App. §§ 118-1, 118-101.)<sup>1</sup> In establishing the District, the Legislature recognized the shortage of water resources in the Monterey Peninsula area and declared the need for "integrated management of ground and surface water supplies, for control and conservation of storm and wastewater, and for promotion of the reuse and reclamation of water." (§ 118-2.) Toward these objectives of conservation, the MPWMD was empowered to store water, appropriate water rights, control waste and exportation, and maintain proceedings to prevent interference with beneficial water use. (§ 118-328.) Its authority includes the right to approve the establishment or expansion of water distribution systems. (§ 118-363.)

Respondent California American Water Company (Cal-Am) is an investor-owned public utility which extracts groundwater from the Seaside Basin and delivers it to locations in its service area in Monterey County. Security National Guaranty, Inc. (SNG) is a real estate developer which owns land overlying the Basin and produces groundwater from it. Although Cal-Am originally named SNG as a defendant in the action that gave rise to the motion at issue, the two companies have taken the same position in the motion proceedings and on appeal from the resulting order.

#### *1. The 2007 Amended Decision and Order*

The controversy leading to the challenged order centers on water distribution from the Seaside Basin, which underlies the cities of Seaside, Sand City, Monterey, and Del Rey Oaks, as well as portions of unincorporated areas. On August 14, 2003, Cal-Am sought a declaration of rights among the parties interested in the production and storage of groundwater from the Seaside Basin. Cal-Am further requested an injunction "requiring the reasonable use and coordinated management of groundwater within the

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<sup>1</sup> Further unspecified section references are to the Water Code Appendix.

Seaside Basin," along with the appointment of a watermaster to administer the resulting decision. The complaint named multiple defendants, including respondents City of Seaside, City of Sand City (Sand City), and SNG. The MPWMD intervened, resulting in multiple cross-complaints among the parties and an appearance by Sierra Club as amicus curiae in support of the District.<sup>2</sup> Seaside, Sand City, and other "Water User Defendants" joined Cal-Am in requesting approval of a stipulated judgment, which was opposed by the MPWMD and another intervener, the Monterey County Water Resources Agency.

Exercising its authority under article X, section 2, of the California Constitution, the superior court adjudicated the rights of the parties. In its amended decision on February 9, 2007, the court partially rejected the stipulation and set forth its findings regarding the status and permissible use of the Seaside Basin. The court recognized that groundwater production from the Basin had exceeded its "Natural Safe Yield"<sup>3</sup> in each of the preceding five years, which could lead to deleterious intrusion of seawater in the area. It therefore created and defined the position of Watermaster, a 13-member group, and it adopted a "Physical Solution" to provide coordinated management of the groundwater resources and thereby "maximize the reasonable and beneficial use of [w]ater resources" in a manner consistent with the California Constitution and the public's interest in a maximum natural yield. The court's specifically stated objective was "to ultimately reduce the drawdown of the aquifer to the level of the Natural Safe Yield; to maximize the potential beneficial use of the Basin; and to provide a means to augment the water supply for the Monterey Peninsula." The Watermaster's function was to oversee the process and implement regulations to ensure compliance with the physical solution.

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<sup>2</sup> Sierra Club has continued in that role, having filed an amicus brief in this court.

<sup>3</sup> "Natural Safe Yield" was defined as "the quantity of Groundwater existing in the Seaside Basin that occurs solely as a result of Natural Replenishment."

The court set forth a method of calculating the amount each producer was permitted to extract from the Basin, subject to a determination by the Watermaster and the court that continued pumping at the designated amount would cause "Material Injury to the Seaside Basin or to the Subareas or will cause Material Injury to a Producer due to unreasonable pump lifts." In the event of such injury, the court specified the method of calculating the "modified Operating Yield" and concomitant revised production allocations. Toward the goal of augmenting the total yield of the Basin, the court's decision provided for artificial means (i.e. recapture, storage, and recovery), transfer of allocations, utilization of reclaimed water for irrigation, and specified schedules of reduction in extractions when required by the court, the watermaster, or "other competent governmental entity." The court further ruled that each producer was "prohibited and enjoined from [p]roducing [g]roundwater from the Seaside Basin except pursuant to a right authorized by this Decision, including Production Allocation, Carryover, Stored Water Credits, or Over-Production subject to the Replenishment Assessment."<sup>4</sup> If Cal-Am were to intrude on a water defendant's production allocation, the Decision spelled out the substantive and procedural consequences of the harm caused by the intrusion.

Addressing the MPWMD's complaint in intervention, the court rejected the District's request to be the Watermaster in favor of the 13-member collaborative group. Specifically addressing the MPWMD's assertion of exclusive authority to regulate groundwater pumping under the separation of powers doctrine, the court pointed out that

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<sup>4</sup> "Carryover" was defined as "that portion of a [p]arty's Production Allocation that is not [e]xtracted from the Basin during a particular Water Year." "Over-Production" referred to either extraction exceeding the Natural Safe Yield or extraction in excess of an individual producer's base water right. "Replenishment Assessment" meant an assessment levied by the Watermaster based on the amount of over-production by any party in the previous year. The amount of the assessment was to be determined by the cost of artificial replenishment with non-native water sufficient to offset the degree of over-production.

the District itself had requested a physical solution, thereby conceding that the court had superior authority to regulate the use of the Basin. Water Code section 10753, the court noted, precluded any local agency's adoption and implementation of groundwater management plans to the extent that its service area is already managed by "a court order, judgment, or decree."<sup>5</sup> Accordingly, "the District will not be able in the future to adopt a Groundwater management plan for the Seaside Basin. Clearly the [L]egislature contemplated that courts had the power to develop management plans for aquifer management even if a water management district already existed in a geographical area." The court acknowledged that "the District possesses certain authority, which it is free to exercise according to the legislative mandate which created it. However, it is apparent [that] the [L]egislature did not intend that all of the powers it granted to the District be held exclusively by the District, [or] else it would not at a later time have created the Monterey County Water Resources Agency and endowed it with many of the powers granted to the MPWMD." Should the powers of the Watermaster overlap those of the MPWMD, the court would, under its retained jurisdiction, be in a position to resolve any resulting conflict. One conflict already asserted by the District was the interference with its authority by the Watermaster "regarding maintenance and modification of the Operating Safe Yield."<sup>6</sup> The court rejected this assertion, finding that its decision did not

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<sup>5</sup> Subdivision (a) of this statute provides: "Any local agency, whose service area includes a groundwater basin, or a portion of a groundwater basin, that is not subject to groundwater management pursuant to other provisions of law or a court order, judgment, or decree, may, by ordinance, or by resolution if the local agency is not authorized to act by ordinance, adopt and implement a groundwater management plan pursuant to this part within all or a portion of its service area."

<sup>6</sup> "Operating Safe Yield" was defined as "the maximum amount of [g]roundwater resulting from Natural Replenishment that this Decision, based upon historical usage, allows to be produced from each Subarea for a finite period of years" without material injury. The decision established the Operating Yield for each target area, including the Basin, to be maintained for three years or until the Watermaster (with the court's concurrence) determined that continued pumping at that level would cause material

conflict with "any procedure or plan currently in place by the District to establish an Operating Yield for the Basin."

Finally, the court specified the means by which the parties could obtain future adjudication of their rights. De novo review of Watermaster decisions, for example, was to be pursued within 30 days by noticed motion. Of particular relevance to this appeal was the court's reservation of jurisdiction: "Full jurisdiction, power and authority are retained by and reserved by the Court upon the application of any [p]arty or by the Watermaster, by a noticed motion to all [p]arties, to make such further or supplemental orders or directions as may be necessary or appropriate for interpretation, enforcement, or implementation of this Decision." The court did not purport to retain authority to adjust any producer's base water right or production allocation, except upon intervention by a new party and then only under certain conditions. As to other remedies between the parties, the court stated that "Nothing in this Decision shall either expand or restrict the rights or remedies of the [p]arties concerning any subject matter that is unrelated to the use of the Seaside Basin for Extraction and/or Storage of Water as allocated and equitably managed pursuant to this Decision."

## *2. The 2009 Order*

On September 15, 2008, respondents Cal-Am and SNG applied to the MPWMD for a permit allowing Cal-Am to pump water from the Seaside Basin in order to serve a proposed project, the Monterey Bay Shores Ecoresort. The resort site, comprising just over 39 acres, was to encompass a 161-room hotel, 226 condominium units, a restaurant, a spa, and conference facilities, in addition to outdoor areas and parking. Cal-Am sought to extract up to 90 acre-feet per year for distribution to the resort site. Cal-Am and SNG

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injury to the Basin, to one of the two affected subareas, or to a producer. The Watermaster was then to determine a modified Operating Yield in accordance with specified principles, procedures, and criteria.

represented that no water would be removed from any source other than the Seaside Basin. The application was also submitted to the Watermaster, which determined that the proposal was consistent with the superior court's 2007 Amended Decision.

The Board of Directors of the MPWMD conducted hearings on the application between November 2008 and February 2009, and voted four to three to deny the application until further environmental review could be obtained pursuant to the California Environmental Quality Act (CEQA). On March 26, 2009, the Board similarly voted to adopt findings of denial. The Board majority specifically directed the MPWMD to prepare a new Environmental Impact Report (EIR) focused on the potential impacts of the Project on the Carmel River as well as on the Seaside Basin. Some of the Board's concerns were based on issues raised after January 2009, when Sand City had considered a prior EIR. The new EIR was also to evaluate possible alternative sources of water and mitigation measures that would be less environmentally damaging.

In April 2009 SNG, joined by Cal-Am and Sand City, moved in superior court for an order enforcing or clarifying the court's February 9, 2007 Amended Decision. SNG asserted that by revising pumping allocations the MPWMD had ignored the physical solution, had disregarded the Watermaster's jurisdiction, and had improperly purported to re-examine factual issues adjudicated in the Amended Decision. SNG sought declaratory and injunctive relief to invalidate the Board's denial of the permit. Cal-Am added the argument that the MPWMD had exceeded its statutory authority under chapter 118 of the Monterey Peninsula Water Management District Law, Water Code Appendix sections 118-1 et. seq. Seaside directly addressed the concerns identified by the MPWMD and emphasized that the Board's findings went "too far" by interfering with the physical solution established by the court's Amended Decision. Seaside urged the court to issue declaratory relief to clarify the findings and rationale in the Amended Decision.

In its opposition, the MPWMD argued that SNG's protest should have been made by a petition for a writ of administrative mandate under Code of Civil Procedure section



1094.5, and that judicial review was limited to preserve the separation of powers. It pointed out that its denial had been made without prejudice, and it argued that as a responsible agency it was required under CEQA to review projects that might have significant negative effects on the environment. The District further maintained that it had properly exercised its statutory authority and duty, and that any doubts should be resolved in favor of the Board's findings.

At the hearing and in its ensuing order, the superior court explained its concern for the integrity of the basin in the implementation of the physical solution. With that concern the court scrutinized "[a]ny attempts by any agency or organization to impose obligations on the use of Basin water rights." More specifically, the court found, although the MPWMD had authority to issue water distribution permits, it "cannot exercise that authority in contravention of the Physical Solution imposed by the Amended Decision for management of the Basin." Accordingly, the court ruled that "the Physical Solution governs the environmental aspects of Seaside Basin [groundwater] usage, and . . . no [p]arty to this adjudication can require environmental review under [CEQA] with regard to such usage. . . . [¶] To the extent that the findings of the MPWMD denying the application of SNG and [Cal-Am] are inconsistent with the principles set forth hereinabove, and in particular Findings 17 through 21<sup>7</sup> and specifically to the extent that

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<sup>7</sup> Finding 17 reflected the Board's determination that an additional EIR ("Subsequent EIR") was needed to determine whether approval of the application "could result in potential near-term adverse impacts to the Seaside Groundwater Basin . . . . A related issue is the timing and implementation of 10% triennial reductions in production for Standard Producers in order to attain the Court-ordered 'natural safe yield,' and the cumulative effect of [Cal-Am] service to [the resort] in light of these other actions." Finding 18 pertained to the Board's determination that alternative sources of Basin water "could possibly be available to enable SNG to exercise its water rights in a less environmentally damaging manner," thus contributing to the need for a subsequent EIR. Finding 19 generally asserted the need for a "Subsequent EIR" "in order to make an informed decision on the environmental effects of the proposed project as it relates to water supply," by consolidating all environmental information at hand into one document

any of the findings reference a need for CEQA review of the impact of the application on Seaside Basin production the findings impinge upon the decision and cannot stand."

The court therefore ordered the MPWMD to set aside its denial of the permit application, rehear the matter, and reconsider the application in light of the court's ruling. This appeal followed.

### *Discussion*

The central issue in this appeal is whether the February 9, 2007 Amended Decision encompassed the issues addressed in the MPWMD's action. The MPWMD argues that the court's review power was limited to a determination of whether the District's findings were supported by substantial evidence. By entertaining the motion for declaratory relief, the MPWMD contends, the court exceeded its jurisdiction and violated the doctrine of separation of powers. The MPWMD further renews its assertion that the motion for declaratory relief was procedurally improper, as the request should have been made by a petition for administrative mandate under Code of Civil Procedure section 1094.5 (hereafter, "section 1094.5"). The MPWMD insists that a section 1094.5 challenge is "sole remedy for denial of a permit."

#### *1. Section 1094.5 Challenge*

The MPWMD overstates the section 1094.5 requirement as applied to the primary issues before the court. As the court noted in responding to this argument, the question addressed in SNG's motion was whether the District's decision involved subject matter

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to which the public would be entitled to comment before a decision was made. Finding 20 expressed the Board's opinion that approval of the application "could involve new significant environmental effects or a substantial increase in the severity of previously identified significant effects due to a change in the project from an on-site well supply to the [Cal-Am] system as the source of supply." Likewise, Finding 21 suggested the possibility of "new significant environmental effects or a substantial increase in the severity of previously identified significant effects due to a change in the circumstances (setting) under which the project is undertaken . . . ."

already covered by the February 2007 order and reserved for future adjudication. Consideration of the motion required the court to revisit its prior ruling and clarify its scope; it did not call for a ruling on the merits of the underlying application.

The cases cited by the District are not helpful. In *State of California v. Superior Court* (1974) 12 Cal.3d 237, for example, the denial of the developers' permit was a discretionary decision by the commission which was reviewable only by writ of mandate; thus, whether the permit should have been granted (as well as the jurisdiction of the commission to hear the appeal) could not be reviewed in a declaratory relief action. (*Id.* at p. 249; see also *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 644-649 [action to challenge the merits of city council's decision].) Here, by contrast, the dispositive grounds of the motion were directed at the asserted interference with the reserved jurisdiction of the court, not the evidentiary support for the Board's decision or the wisdom of its reasoning in refusing to grant the permit application. The resulting order did not purport to dictate the issuance of the permit but only remanded for reconsideration and a result consistent with the physical solution already in place.

For the same reason, the absence of an administrative record does not invalidate the present order. While the court did note that the Carmel River was not a prospective source of production, that observation was not necessary for the court to reach its conclusion. The key portion of the order is not a resolution of factual disputes or an adjudication of rights under the separation of powers doctrine, but an interpretation of the court's prior Amended Decision. The court was asked to determine whether the District had overstepped its authority by reaching a decision on issues that were within the reach of the physical solution and the court's reserved jurisdiction. Whether that determination was correct is the dispositive question in this appeal.

## 2. *Conflict-between the Findings of Denial and the Physical Solution*

A physical solution is an equitable remedy designed to alleviate overdrafts and the consequential depletion of water resources in a particular area, consistent with the

constitutional mandate to prevent waste and unreasonable water use and to maximize the beneficial use of this state's limited resource. (Cal. Const., art. X, § 2.) Courts are vested with not only the power but also the affirmative duty to suggest a physical solution where necessary, and it has "the power to enforce such solution regardless of whether the parties agree." (*City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 341.) "It must be remembered that in this type of case the trial court is sitting as a court of equity, and as such, possesses broad powers to see that justice is done in the case. The state has a definite interest in seeing that none of the valuable waters from any of the streams of the state should go to waste. Each case must turn on its own facts, and the power of the court extends to working out a fair and just solution, if one can be worked out, of those facts." (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 560.)

The solution must not, of course, unreasonably or adversely affect the existing legal rights and respective priorities of the parties. (Cf. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243-1244, 1250-1251.) But a trial court nonetheless has discretion to implement its physical solution within the bounds of its authority. (*Id.* at p. 1256.)

We discern no error in the court's ruling, even if we apply a de novo standard of review, as urged by the MPWMD. Examination of the Board's "Findings of Denial," particularly Findings 17 through 21 (the focus of the superior court's order) reveals overlap with the court's 2007 physical solution. Finding 17 directly applied to the Seaside Basin; it declared the need for an EIR to address the Board's concern that "approval of the application could result in potential near-term adverse impacts to the Seaside . . . Basin." Finding 18 also pertained to the Basin, in expressing the Board's view that "alternative sources of Seaside Basin water could possibly be available to enable SNG to exercise its water rights in a less environmentally damaging manner." Finding 19 stated more generally the Board's concern for environmental harm. The court's order, however, does not entirely invalidate Finding 19 and its concomitant call

for a subsequent EIR, but only disapproves it to the extent that it conflicts with the physical solution—that is, to the extent that it "reference[s] a need for CEQA review of the impact of the application *on Seaside Basin production.*" (Italics added.) The same is true of Findings 20 and 21.

We agree with the court that these findings contravened the 2007 amended decision to the extent that they purported to adjudicate water rights in the Seaside Basin. In adopting the physical solution the court expressly defined it as "the efficient and equitable management of Groundwater resources within the Seaside Basin." It established the Operating Yield and delineated the rights of the producing parties, including calculation of each party's production allocation for the succeeding years. The court acted within its jurisdiction and properly exercised its discretion in adhering to its prior rulings to minimize conflict with and frustration of the physical solution. In so doing, it facilitated both the exercise of the parties' water rights and the beneficial use of the Seaside Basin.

The MPWMD's argument that the order violated the separation of powers doctrine is not well taken. The 2007 decision addressed a similar argument, rejecting the District's assertion that appointment of a Watermaster other than itself would interfere with the separation of powers. In so ruling, the court pointed to Water Code section 10753<sup>8</sup> and ruled that the District would "not be able in the future to adopt a Groundwater management plan for the Seaside Basin." The present order reaffirms that prior statement.

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<sup>8</sup> Subdivision (a) of this statute provides: "Any local agency, whose service area includes a groundwater basin, or a portion of a groundwater basin, that is not subject to groundwater management pursuant to other provisions of law or a court order, judgment, or decree, may, by ordinance, or by resolution if the local agency is not authorized to act by ordinance, adopt and implement a groundwater management plan pursuant to this part within all or a portion of its service area."

We further see no improper restriction of the MPWMD's discretion. The court's order clearly acknowledged that the District had the authority to issue water distribution permits, and it accommodated the District's ability to examine other environmental effects of SNG's proposal. Nevertheless, the court explained, the District's power must not be used in a way that conflicts with the provisions of the physical solution and thereby disrupts the carefully established groundwater production rights of the parties to that solution. The court did not overturn the MPWMD's decision in every respect, as the District appears to suggest, but only identified the areas in which the Board had attempted to take on issues reserved for resolution by the court or the Watermaster. Accordingly, the court properly directed the District to reconsider its findings in a manner consistent with the physical solution.

The MPWMD maintains, however, that the order obstructed its effort to control the parties' use of water from the Carmel River. The record does not support this position. At the hearing the court explicitly acknowledged that the District, not the court, had jurisdiction to require CEQA review to the extent that potential impacts on Carmel River water usage existed. The only ostensible limitation expressed by the court was in agreeing with Seaside that CEQA review is not compelled based solely on the District's concern about commingling of water and storage from different sources; any "issues concerning the source of water molecules as opposed to an accounting of water quantity are irrelevant." More specifically, any commingling that would occur from a contemplated wheeling arrangement between the producers would not "transmute Carmel River water into Seaside Basin water, nor Seaside Basin water into Carmel River water." Thus, the court explained, "MPWMD has authority to require an accounting of water quantity to satisfy itself that no Carmel River water is being used in the project at hand, but it cannot make environmental decisions based on the mere storage of water from two

sources."<sup>9</sup> The court's careful wording of its ruling left ample room for the District's exercise of its authority under the applicable constitutional and statutory mandates. In the court's findings and remand order, limited in scope as they are, no error appears.

*Disposition*

The order is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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<sup>9</sup> This accommodation of the District's proposed review of potential Carmel River impacts undermines Sierra Club's amicus position, which assumes that adverse impacts on the Carmel River are likely and that the order precludes such review.

Trial Court: Monterey County Superior Court

Trial Judge: Hon. Roger D. Randall

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