

CALIFORNIA ENVIRONMENTAL LAW PROJECT  
A Non-Profit Legal Corporation



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Sent Via Electronic Mail and  
U.S. Mail

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 from the Seaside Basin for the SNG project by increasing its diversions from the Carmel River (up to the ceiling allowable under the CDO), in order to minimize its production from the Seaside Basin. It must also include a prohibition on use of ASR water (Carmel River Water) as replacement for water that would otherwise be served to Cal-Am Seaside Basin customers but for service of water to SNG. The purpose of this letter reasserts the arguments previously made, and corrects the impression conveyed in the July 17 letter that the Adjudication causes any production by Cal-Am for SNG to be deducted from its Standard Producer Allocation.

- I. Under the District's Currently Proposed Conditions of Approval, the Joint Water Distribution Project Could Result in Significant Impacts to the Carmel River Not Described In Any Environmental Documentation for the Project.

In Water Year 2007, Cal-Am accounted for about 90% 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>1</sup> Thus, Cal-Am diversions were 841 AF (7.5%) below the 11,285 AF

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<sup>1</sup> The MPWMD Mitigation Program Report shows that CAW Main System Production in Water Year 2007 comes from a variety of sources:

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.

A. The District's Regulatory Duties to Promote Coordinated Management of the Seaside Basin and the Carmel River 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 That Are Likely to Result From Approval of The Joint Application.

1. 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.

2. 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

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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 from the Seaside Basin Coastal Subareas. Its total 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. See Exhibit A attached as Exhibit 1.

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 Paralta Well for the use of SNG and will transport it via new delivery infrastructure to the SNG site if the Ecoresort is constructed. The effects on the Carmel River attributable to the production offsets described below that may be made by Cal-Am that would result in a increase in its production from the River are “indirect or secondary effects” of the project. These are indirect and/or cumulative effects resultant from the project (the provision by Cal-Am of up to 90 afy 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).

3. 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, indirect and cumulative impacts 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 increases in its production from the Seaside Basin 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 on its project site. Additional environmental documentation is required on the resulting (indirect) impacts of that proposal on the Carmel River.

On January 20, 2009 the City considered an Addendum to the FEIR approved in December 1998. That 1998 FEIR evaluated the environmental effects of a 597 unit mixed use resort and residential project. In August 2008, the City prepared a Draft Addendum to the FEIR, intended to address the revised proposed project (the “Ecoresort”). On January 20, 2009 the City considered the Addendum and voted to reserve final CEQA review of the project until a later time.

Under CEQA Guideline, §15090(a), the Agency’s decision-making body must conclude that the “final EIR reflects the lead agency’s independence and analysis.” Sand City has found that the Addendum does not constitute the final EIR since final CEQA review is reserved for a later time and has not made the required finding.

The City’s Resolution (09-06-2009) states:

“The City will make a final determination under CEQA with respect to the project as permitted by the Coastal Commission at the time the City takes action on the local approvals referred to in Paragraph 5.<sup>2</sup>

Under Guideline §15096 a “responsible agency complies with CEQA by considering the EIR...prepared by the Lead Agency and reaching its own conclusions on whether and how to approve the project involved.” Section §15162 of the Guidelines limits the authority of the Responsible Agency to prepare a Subsequent EIR, only when an EIR has been certified. (Only the 1998 EIR has been certified; there is no final certified FEIR on the Ecoresort Project that the District can consider). Likewise, the constraints on adopting an Addendum are applicable only when there is a “previously certified EIR.”

In short, the District has plenary authority here to perform additional environmental documentation concerning the effects of Cal-Am’s delivery of water to the “Ecoresort” pursuant to a joint water distribution permit, and is not constrained by the limiting conditions set forth in §15162.

Even if Section 15162(a) is applicable, there are “new significant environmental effects ...due to a change in the project” and “new significant environmental effects due to a change in the circumstances (setting) under which the project is undertaken.” Guidelines, §15162(a)(1-2). Certainly the SWRCB CDO and the Seaside Basin Adjudication constitute changes in the regulatory setting under which the project is being undertaken. And the Project has been completely redesigned with respect to how water is produced and delivered.

4. There Are Indirect Impacts of the Project That Need Environmental Documentation and Mitigation.
  - (a) A Supplemental Environmental Document Must Analyze Impacts to the River Caused by Augmented Pumping Attributable to Cal-Am’s Supplying SNG With Water 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 its Seaside Basin production for SNG 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 production from the Seaside Basin to serve the Ecoresort (especially during summer and fall months when Ecoresort demand will be high but diversions from the River must be minimized to protect Steelhead).<sup>3</sup>

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<sup>2</sup> See attached Exhibit B.

<sup>3</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. 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.

The above-described "indirect" impact particularly needs investigation and mitigation. Once Cal-Am begins serving the Ecoresort with 90 afy, Cal-Am may, for a variety of reasons, *see below*, elect to serve its other customers now served by Seaside Basin production with Carmel River water produced by augmented pumping.<sup>4</sup> An increase of diversions from the Carmel River alluvium (up to 90 afy) could well occur once service to SNG commences, causing significant impacts to the Carmel River and its resources.<sup>5</sup>

Given the future constraints imposed on its pumping (the 2012 triennial reduction) from the Seaside Basin under the Adjudication Decision, it is likely that Cal-Am will elect to produce more water from the Carmel River (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 (as an indirect result of service to SNG) 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>6</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....."

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 production 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 carry-

<sup>4</sup> While continuing to serve the Ecoresort with up to 90 afa from the Paralta Well.

<sup>5</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>6</sup> Given the triennial production reductions under the Adjudication Decision (the 2012 10% reduction in the Standard Production Allocation) that will be in force in 2012---(the earliest date the Ecoresort may be constructed), Cal-Am will likely have incentives to increase its production from the Carmel River up to the maximum allowed to make up for reductions in its Standard Production Allowance arising under the Adjudication. The Adjudication Decision establishes maximum production limits on yield from the Seaside Aquifer, which it found to be in overdraft. If Cal-Am exceeds its production allowance under the Adjudication, as may otherwise occur in 2012, it will be assessed a fee for artificial replenishment of the Seaside Basin necessary to off-set its 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 a overproduction fee by exceeding its production limit under the Adjudication.

over credits.

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). 90 afy of any such increase should be attributable to its service to SNG if the Ecoresort is constructed and served water. The 90 afy produced by Cal-Am for SNG from the Seaside Basin should, to the extent it likely will impact the River, be treated as production from the River and deducted from the SWRCB production ceiling.

Thus, in light of the other incentives to offset its reduced production from the Seaside Basin by maximizing its production from the Carmel River, 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>7</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) through an environmental document.<sup>8</sup> The District has a duty to mitigate this environmental

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<sup>7</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 Cal-Am could decide to provide water to customers currently served by the Seaside Basin from the Carmel River, while maintaining Paralta Well production at 90 afy annually solely to serve the EcoResort project. This would be consistent with the CDO, provided that Cal-Am does not increase pumping in the River to offset production losses from the 2012 triennial 10% reduction.

The chart "California-American Annual Production Targets and Actual Production From Carmel River Sources and Seaside Basin Coastal Subarea Wells for Customers in the Main Monterey System – Water Years 2005-2010" (Exhibit B, attached) shows that in Water Years 2005 and 2009 Cal-Am shifted production from the Coastal Subarea to the Carmel River. The 2005 shift may have been attributable to pump failure or repair. In 2009 the 742 acre foot difference between the production allowance and the amount actually produced constitutes a 23% reduction. By contrast the diversions from the river were 7% than the SWRCB production ceiling.

<sup>8</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

impact and to prevent incremental (illegal) diversions of water from the River. *One modality it may consider is to require that 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.*

(b) 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 attributable to use of the stored ASR water for any new connection to the SNG site. Nor can Cal-Am be allowed to use ASR water to serve existing customers previously served by production from Seaside Basin wells to make up for water from the Paralta Well served to SNG. 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>9</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 SNG or Cal-Am's existing customers to replace water provided to SNG. Thus, the ASR Project should not be used in any manner that results in less relief (up to 90 afy) to the River by means of a reduction in pumping after May 31.

(c) 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:

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,

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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

<sup>9</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."

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>10</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 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' [emphasis added]. The same is true of findings 20 and 21." (Opinion at 12).

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<sup>10</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 Exhibit D.

"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)



The Court continued:

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

The Court’s opinion makes it abundantly clear that where, under a water wheeling arrangement, joint production and distribution are involved, the District may analyze the environmental impacts on the Carmel River, when, as here, the Seaside Basin Standard Producer can offset production from Seaside Basin Wells for 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. Cal-Am Is Not Permitted Under The Terms Of The CDO From Mitigating The Effects Of Future Reductions In Its Standard Production Allowance By Increasing Its Diversions From The Carmel River.

As discussed above, there is no Condition of Approval that forbids the use of ASR water for supplying SNG or customers previously served with Basin water (up to 90 afy). 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.

Also, 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.”

The CDO was addressing the effects of the 10% triennial reductions on Cal-Am’s Standard Producer Allocation. As described above use of the ASR project as replacement water for Cal-Am’s production for SNG is not consistent with the goal of reducing illegal diversions from the River or mitigating the effects of Cal-Am’s diversions, but is not expressly prohibited under the CDO.

As argued, supra, Cal-Am has every incentive to increase its river diversions to offset its loss of production from the groundwater basin as a result of Court ordered 10% triennial reductions. This is expressly prohibited under the terms of the Order. However, shifting production to the Carmel River for other reasons, including enhancing its carry-over credits or avoiding replenishing assessments, is not. It is within the District’s regulatory purview to address this effect on the Carmel River.

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 alters its essential behavioral patterns. 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.<sup>11</sup>

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.

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<sup>11</sup> In a Settlement Agreement between Cal-Am and NMFS (found on the SWRCB CDO Hearing website as Exhibit PT 48), Cal-Am has admitted to unlawful “takes” of steelhead attributable to its (unlawful) diversions from the River in return for NMFS’s forbearance in prosecuting it for “takes” under Section 9 of the ESA.

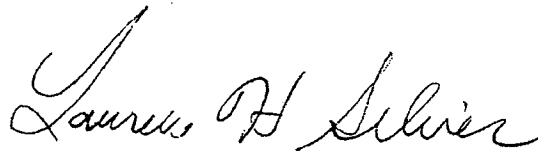
The District is exposing itself to liability under the ESA if it authorizes increased diversions from the Carmel River (up to 90 afy) to offset water produced for SNG.

#### VI. Conclusion.

For the foregoing reasons, Sierra Club requests the Board not to approve the Project until legally required supplemental 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 replace water from the Basin served to SNG and that require that diversions from the River not increase as an indirect result of service to SNG, except in emergencies (such as mechanical breakdowns in the Seaside pumps).

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 and Standard Producers. It was determined that the Alternative Producers had primary rights to pump their adjudicated amounts, and that the Standard Producers were subordinate to such overlying rights. Adjudication, p. 13. The Adjudication confers no rights on Cal-Am to seek "replacement" water from the Carmel River when total production from the Seaside Basin is increased because of service to an overlying rights holder.

Through the joint distribution agreement, once the Ecoresort is served, Cal-Am production from the Seaside Basin will be increased by up to 90 afy. Cal-Am should not be allowed to shift the "burden" of this production to the Carmel River. Cal-Am currently has the power, so long as it is below its production ceiling from the Carmel River, to augment pumping from the Carmel River to serve its customers previously served with water pumped from the Seaside basin. In order to prevent impacts on the river, a permit should be conditioned on Cal-Am not increasing its diversions from the Carmel River attributable in any manner to its production from the Seaside Aquifer to serve SNG.<sup>12</sup>



Laurens H. Silver, Esq.  
California Environmental Law Project  
Attorney for Sierra Club

cc: Vicky Whitney

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<sup>12</sup> These issues were raised by Sierra Club in its Application of Sierra Club to File Amicus Brief and Amicus Brief of Sierra Club in Support of MPWMD's Opening Brief. At page 14 of the Slip Opinion the Court stated: "This accommodation of the District's proposed review of potential Carmel River impacts undermines Sierra Club's amicus position, which assumes that adverse impacts are likely and that the order precludes such review." The Court did not rule on the merits of Sierra Club's arguments in light of its decision recognizing the authority of the District to consider impacts on the River attributable to the Cal-Am-SNG water distribution and production project.

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**BEFORE THE STATE WATER  
RESOURCES CONTROL BOARD**

In the Matter of the State Water Resources )  
Control Board (State Water Board) )  
Hearing to Determine whether to Adopt a )  
Draft Cease & Desist Order against )  
California American Water Regarding its )  
Diversion of Water from the Carmel River )  
in Monterey County under Order WR 95-10 )  
)

Hearing Date: June 19, 2008

Carmel River in Monterey County

**EXHIBIT DF-2**

**MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**

**California American Water Annual Production from Carmel River Sources  
Compared to Diversion Limits Set By State Water Resources Control Board  
Order 95-10 for Water Years 1996 through 2007**

Monterey Peninsula Water Management District

**California American Water Annual Production from Carmel River Sources  
Compared to Diversion Limits Set By State Water Resources Control Board  
Order 95-10 for Water Years 1996 through 2007**

Water Year	SWRCB	Cal-Am	Difference		Water Year Class
	Limit (AF)	Production (AF)	(AF)	(%)	
1996	11,990	11,701	-289	-2.4%	Above Normal
1997	11,285	12,847	1,562	13.8%	Above Normal
1998	11,285	10,133	-1,152	-10.2%	Extremely Wet
1999	11,285	10,384	-901	-8.0%	Normal
2000	11,285	11,179	-106	-0.9%	Normal
2001	11,285	10,721	-564	-5.0%	Normal
2002	11,285	10,759	-526	-4.7%	Below Normal
2003	11,285	11,130	-155	-1.4%	Normal
2004	11,285	11,094	-191	-1.7%	Below Normal
2005	11,285	10,675	-610	-5.4%	Wet
2006	11,285	10,542	-743	-6.6%	Wet
2007	11,285	10,443	-842	-7.5%	Critically-Dry
<b>Average:</b>		<b>10,967</b>	<b>-376</b>	<b>-3.3%</b>	

Source: California American Water, Monthly Production Reports

Notes:

1. Production values have been adjusted to exclude diversions that were made for injection into the Coastal Subareas of the Seaside Groundwater Basin.
2. Cal-Am's annual "unlawful diversions" are calculated as Cal-Am's actual annual diversions from Carmel River sources minus Cal-Am's "recognized" rights to divert from the Carmel River system, i.e., 3,376 acre-feet per year.

Monterey Peninsula Water Management District

California American Water Annual Production Targets and Actual Production  
 From Carmel River Sources and Seaside Basin Coastal Subarea Wells  
 for Customers in Its Main Monterey System:  
 Water Years 2005-2010

(All Values in Acre-Feet, Unless Indicated Otherwise)

Water Year	Carmel River Sources				Coastal Subareas of Seaside Basin			
	Production		Difference		Production		Difference	
	Limit	Actual	Acre-Feet	Percent	Limit	Actual	Acre-Feet	Percent
2005	11,285	10,675	-610	-5%	---	2,652	---	---
2006	11,285	10,542	-743	-7%	3,504	2,852	-652	-19%
2007	11,285	10,443	-842	-7%	3,504	3,613	109	3%
2008	11,225	10,600	-625	-6%	3,504	3,329	-175	-5%
2009	11,103	10,285	-818	-7%	3,191	2,449	-742	-23%
<i>2010</i>	<i>9,850</i>	<i>9,065</i>	<i>-785</i>	<i>-8%</i>	<i>3,087</i>	<i>3,086</i>	<i>-1</i>	<i>0%</i>

Source: California American Water production reports

Notes:

1. The annual limits on Cal-Am's production from Carmel River Sources in WY 2005 -2008, i.e., 11,285 af, are specified in SWRCB Order WR No. 95-10.
2. The annual limits on Cal-Am's production from Carmel River Sources in WY 2008 -2009 are based on the Order 95-10 limit, i.e., 11,285 af, adjusted for the amounts of water injected and recovered as part of the Phase 1 Aquifer Storage and Recovery (ASR) project. Specifically, 60 af and 182 af of stored water were recovered in WY 2008 and WY 2009, respectively.
3. The annual limit on Cal-Am's production from Carmel River Sources in WY 2010 is projected and is based on the new baseline specified in SWRCB Order 2009-0060, 10,978 af, adjusted for reductions due to system improvements (549 af), Phase 1 ASR recovery (459 af), and Sand City Desalination Plant production (120 af) estimated through the end of WY 2010.
4. The annual limits on Cal-Am's production from Coastal Subareas of the Seaside Groundwater Basin in WY 2006 -2010 are specified in the Seaside Basin Adjudication Decision (*California American Water v. City of Seaside*, Case No. M66343, California Superior Court, Monterey County). These limits do not include "carryover" credits from previous years.
5. All WY 2010 values, which are shown in *italics*, are projected.

Monterey Peninsula Water Management District

Seaside Groundwater Basin Adjudication Allocations: Water Years 2006 - 2026

Water Years	Coastal Subareas				Laguna Seca Subarea				Basin
	Operating Yield	Alternative Production Allocation	Standard Production Allocation	CAW Share	Operating Yield	Alternative Production Allocation	Standard Production Allocation	CAW Share	Operating Yield
	(afy)	(afy)	(afy)	(afy)	(afy)	(afy)	(afy)	(afy)	(afy)
2006-2008	4,611	743	3,868	3,504	989	644	345	345	5,600
2009	4,265	743	3,522	3,191	915	644	271	271	5,180
2010-2011	4,150	743	3,407	3,087	890	644	246	246	5,040
2012-2014	3,689	743	2,946	2,669	791	644	147	147	4,480
2015-2017	3,228	743	2,485	2,251	692	644	48	48	3,920
2018-2020	2,752	743	2,009	1,820	608	608	0	0	3,360
2021-2023	2,392	743	1,649	1,494	608	608	0	0	3,000
2024-2026	2,392	743	1,649	1,494	608	608	0	0	3,000

Source: *California American Water v. City of Seaside, et al.* (Case No. M66343, California Superior Court, Monterey County, March 27, 2006, as amended February 9, 2007)

Notes:

1. Values are based on the Court's decision at the January 12, 2007 hearing to switch to a Water Year-based accounting period (October 1 through September 30), the first "Administrative" Year began on October 1, 2006. However, consistent with the original decision, the first reduction in the Operating Yield will occur on January 1, 2009. Each reduction after January 1, 2009, will occur at the beginning of each triennial period, i.e., October 1, 2012, October 1, 2015, and so forth.
3. CAW's share of the Standard Production Allocation for the Coastal Subareas is calculated as 90.60% of the total Standard Production Allocation. For the first triennial period, i.e., Water Years 2006 through 2008, CAW's share is 3,504 afy. This calculation is consistent with the procedure described in the adjudication decision (pages 17 through 19) and Cal-Am's arguments in the *Joint Post-Judgment Motion to Request Clarification of the Court's Final Decision Relating to the Calculation of the Over-Production Replenishment Assessment* dated November 28, 2006 (pages 8 through 10).
4. For computation purposes, it is assumed that the 10% reduction in the Operating Yield is based on the initial Operating Yield specified by the Court, i.e., 5,600 afy. For example, at the beginning of Water Year 2010, the 10% reduction equals 560 afy ( $5,600 \times 0.10 = 560$ ). Similarly, at the beginning of Water Year 2012, the 10% reduction also equals 560 afy ( $5,600 \times 0.10 = 560$ ).
5. For computation purposes, it is assumed that the Natural Safe Yield for the basin is and remains at 3,000 afy, with 608 afy assigned to the Laguna Seca Subarea and the remainder, 2,392 afy, assigned to the Coastal Subareas within the basin.



**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAND CITY  
CONCERNING AN ADDENDUM TO THE FINAL ENVIRONMENTAL IMPACT  
REPORT FOR THE MONTEREY BAY SHORES ECO-RESORT**

**WHEREAS**, Security National Guaranty, Inc., a California corporation ("Applicant") previously made application to Sand City (the "City") for a Coastal Development Permit to allow development of certain property in the City, designated as APN 01 1-501-014, located in the coastal zone west of Highway One in the City;

**WHEREAS**, Applicant's project was previously known as the Monterey Bay Shores Resort (the "Original Project");

**WHEREAS**, in 1998, the City certified the Final Environmental Impact Report (the "EIR") for the Original Project in accordance with the California Environmental Quality Act ("CEQA");

**WHEREAS**, following certification of the EIR and public hearings conducted in the manner required by law, the City acted to conditionally approve a Coastal Development Permit for the Original Project on December 1, 1998;

**WHEREAS**, the City's conditional approval of a Coastal Development Permit for the Original Project was appealed to the California Coastal Commission;

**WHEREAS**, the California Coastal Commission conducted a de novo review of the Original Project and acted to deny approval of a Coastal Development Permit for the Original Project;

**WHEREAS**, acting in accordance with the decision in *Security National Guaranty, Inc., v. California Coastal Commission* (2008) 159 Cal.App.4th 402, the Superior Court ordered a preemptory writ to issue on May 27, 2008 commanding the Coastal Commission to vacate its denial of the Applicant's application for a coastal development permit and reconsider the application for a coastal development permit;

**WHEREAS**, prior to such reconsideration, in order to address concerns previously expressed by the Commission and its staff, the Applicant has redesigned and reduced the size of the Original Project (hereinafter referred to as the "Revised Project");

**WHEREAS**, an Addendum and Errata of the Addendum to the EIR have been prepared (copies of which are attached hereto as Exhibits "A" and "B", respectively and by this reference incorporated herein), for the Revised Project which shows:

A. The changes to the Original Project will not cause new significant environmental effects or a substantial increase in the severity of significant effects identified in the EIR;

B. The circumstances under which the Revised Project is proposed to be undertaken will not result in new significant environmental effects or a substantial increase in the severity of previously identified significant environmental effects;

C. No new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the EIR was certified as complete shows any of the following:

(i) that the Revised Project will have any significant effect which was not discussed in the EIR;

(ii) that significant effects examined in the EIR will be substantially more severe than shown in the EIR;

(iii) that mitigation measures or alternatives previously found not to be feasible would now in fact be feasible and would substantially reduce one or more significant effects of the Revised Project;

(iv) that there are no mitigation measures or alternatives which are considerably different from those analyzed in the EIR which would substantially reduce one or more significant effects of the Revised Project on the environment;

WHEREAS, although circulation of an Addendum is not required by CEQA, a draft Addendum was issued in August 1998 and thereafter distributed to certain agencies including the California Coastal Commission, U.S. Fish and Wildlife Service, the California Department of Fish and Game; and the Monterey Peninsula Water Management District;

WHEREAS, the Addendum in its present form was redistributed to the above listed agencies in November of 2008;

WHEREAS, if the Coastal Commission acts to approve a coastal development permit for the Revised Project, the Applicant must obtain additional permits (or revisions to prior approvals) from the City prior to developing the Revised Project;

WHEREAS, prior to seeking additional permissions from the City, the Applicant may need to obtain permissions from one or more responsible agencies.

**NOW THEREFORE, IT IS HEREBY RESOLVED BY THE SAND CITY COUNCIL  
AS FOLLOWS:**

1. No major revisions to the EIR are required for the Revised Project.
2. No subsequent EIR is required for the Revised Project.
3. Following approval of a coastal development permit for the Revised Project, the City will review the project as permitted by the Coastal Commission and consider revisions to local approvals which are then necessary prior to commencement of development of the project as approved by the Coastal Commission, including but not limited to revisions to the vesting tentative subdivision map for the project, planned unit development permit for the project and site plan for the project.
4. The City will make a final determination under CEQA with respect to the project as permitted by the Coastal Commission at the time the City takes action on the local approvals referred to in paragraph 3.

PASSED AND ADOPTED by the Sand City Council this 20th day of January 2009, by the following votes:

AYES: Council Members Blackwelder, Carbone, Hubler, Kruper, Pendergrass

NOES: None

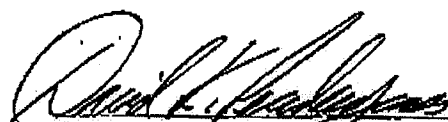
ABSTAIN: None

ABSENT: None

ATTEST:

APPROVED:

  
Linda K. Scholink, City Clerk

  
David K. Pendergrass, Mayor





# California Regional Water Quality Control Board

## Central Coast Region



Linda S. Adams  
Secretary for  
Environmental  
Protection

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

Arnold Schwarzenegger  
Governor

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.

- 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:

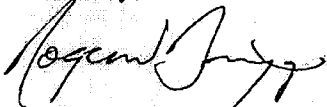
***California Environmental Protection Agency***

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\Carmel River & Lagoon\Enea PLN070333-final.doc  
Task Code: 12601

cc:

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