

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 and Members of the District Board:

Sierra Club appreciates the opportunity to comment on the above captioned Joint Application, which will be heard by this Board on Monday August 16, 2010. Sierra Club urges the Board to deny the Joint Application for lack of sufficient information, or alternatively to require preparation of environmental documentation to ascertain the indirect and cumulative impacts of this Project on the Carmel River.

I.

The Board Lacks Sufficient Information Upon Which to Base A Decision That Is Consistent With the Requirements of CEQA and the Board's Duties As A Trustee Agency With Respect to the Carmel River's Threatened Steelhead.

Under District Rule 21A.2, an applicant for a Permit to Create/Establish a Water Distribution System shall submit "Environmental Information as required by CEQA." District Rule 22B requires that "in order to protect public trust resources," prior to making discretionary decision, the Board must decide, based on information submitted by the Applicant:

(3) "Whether the Proposed Water Distribution System would result in significant environmental effects that cannot be mitigated by conditions attached to the permit."

District Rule 22D requires the Board to identify which mitigation measures are required to address potential adverse environmental impacts associated with a proposed Water Distribution System.

The District Board lacks sufficient information to determine what significant impacts on the Carmel River are “associated with” Cal-Am’s production and delivery of water to the Ecoresort beginning in 2012, once the project is constructed. The Board lacks sufficient information to determine how such impacts “associated with” the Project can be mitigated.¹ As a trustee of the Carmel River and the SCCC Steelhead DPS (listed as threatened under the ESA), the Board cannot properly exercise its trust duties in the absence of relevant information lacking in the Record. See District Rule 22D (“in order to protect public resources...”).

The Front-Loading Agreement (Delivery of Water) between the co-applicants suggests that agreement, when implemented, will affect the Carmel River through impacts “associated with” the Project. Despite their obligation, as co-applicants, to provide environmental information as required by CEQA. District Rule 21A2, Cal-Am and SNG provide only vague verbal assurance that there “will be no temporal or other impact on waters produced or stored from the Carmel River.” This statement misstates the environmental issue that is the subject of the Board’s CEQA inquiry. The environmental impacts in question involve impacts on the Carmel River and its trust resources rather than impacts on water produced from the River, or stored in the ASR project, as stated in the Front-loading Agreement. It provides no assurance that production for its customers now served from the Seaside Basin will not be served by increased diversions from the Carmel River once water is produced by Cal-Am for SNG. If it constitutes a promise that ASR waters will not be used to serve SNG or that water from ASR will not be used to serve customers heretofore served from Seaside production, then that promise, if honored, only fortifies the premise that Cal-Am will have great incentive to shift some of its augmented production from the Seaside Basin to the Carmel River in 2012 when the triennial 10% reduction ordered by the Court occurs and when SNG, at the earliest, will be constructed. See Sierra Club’s July 26, 2010 letter at pp 4-8.

Under the Front-End Loading Agreement, CAW agrees that after setting of the SNG meter, “CAW will pump an estimated amount of Seaside Basin Water into the Hilby tanks, or other existing CAW facility.” We understand that there are two storage tanks at the Hilby site with a nominal capacity of one million gallons each. (Oliver, J., email communication in response to counsel’s request). If it is conservatively postulated that SNG, when the Ecoresort is constructed, will consume at least 8 acre feet per month in summer months, CAW would have to pump approximately 2,608,000 gallons into the Hilby tanks over the course of the months in anticipation of service to SNG.² To the extent it could be anticipated that in 2012 the Hilby tanks are likely already to have “stored” water during these months of increased demand, Cal-Am makes no promises where their customers who were served stored water from the Hilby tanks prior to SNG coming on line will be getting their water and makes no promises not to shift production to the Carmel River (to the extent Cal-Am is below its Carmel River production ceiling) in order to serve customers previously served with Seaside Aquifer water (or to serve these customers with ASR water).

Cal-Am provides no information as to how it uses these tanks (or other storage tanks) in its delivery of water to customers in its distribution system. It would appear that if the tanks are currently utilized to store water for customers in the main system during the months of January – March (when under Order 95-10 pumping from the Basin is to be minimized), and

¹ District Rule 22D addresses impacts “associated with” the Water Distribution System. These would include not only direct impacts but indirect and cumulative impacts as well. See Guidelines (CEQA), §§15358, 15355.

² 1 acre-foot equals 325,851 gallons.

instead some of that water goes to the resort, Cal-Am will likely increase the pumping from the Carmel River during these months in 2012, when the second triennial 10% reduction goes into effect and water service may be initiated to the "Ecoresort." There is no evidence in the record as to what extent such increased pumping from the Carmel River could affect pumping for the ASR project (which can only occur when the river flow exceeds 40 cfs at a particular gauge). If the project increases pumping from the Carmel River during the months of January to March, that pumping will lower to some extent the cubic feet per second (cfs) flow in the River. ASR can only be operational when the flow exceeds 40 cfs. This could reduce the frequency of operating the ASR program, which means reduced water going into the ASR system, with adverse effects on the Carmel River when, after May 31 of each year, ASR water is to be used to reduce pumping from the Carmel River.

II.

CEQA Case Law Requires the District to Consider the Cumulative (and Indirect) Impacts of the Joint Water Distribution Project.

In its deliberations with respect to this Joint Application, Sierra Club urges the Board to consider *Friends of the Eel River v. Sonoma Water Agency*, 108 Cal. App. 4th 859 (2003). In that case, the Court of Appeals found an EIR deficient for failing to take into account ongoing licensing proceedings before FERC that could result in a reduction in diversions from the Eel River that would affect the plans of the Sonoma Water Agency to augment its diversions from the Russian River for water supply purposes. The Court held that in order to fulfill the purposes of CEQA to "afford the fullest possible protection of the environment." (*Citizens Assn. for Sensible Development v. Count of Inyo*, 172 Cal.App. 3d 151, 168 (1985)), it was necessary in the EIR to consider the FERC proceeding as a related project that needed to be considered in a (cumulative) impacts analysis with respect to how curtailment of diversions from the Eel River could lead to a "risk that Lake Mendocino, and the Russian River between Coyote Valley and Healdsburg would be dewatered in a critically dry year..." 108 Cal.App. 4th 859 at 870-871.

The Court held that the cumulative impacts analysis needed to take into account the fact that:

"The National Marine Fisheries Service has listed steelhead trout and coho salmon in the Russian River as threatened species under the Endangered Species Act ('ESA'). In addition to the obvious impacts on endangered fish of dewatering the upper Russian River, lower Lake Mendocino water levels would often result in higher water temperatures that could adversely affect the salmonid rearing habitat maintained for several miles downstream of Coyote Valley Dam by cold water releases from Lake Mendocino. Salmonid rearing habitat on Dry Creek also could be adversely affected by warmer releases from Lake Sonoma resulting from reduced diversions to the Russian River." 108 Cal.App. 4th at 870.

The Court concluded that the Agency's failure to consider the cumulative impact of the potential curtailment of water from the Eel River resulted in an EIR that fails to alert decision makers and the public to the possibility that the Agency will not be able to supply water "in an environmentally sound way." *Id.*

The Court applied a "cumulative" impacts analysis based on Guidelines §15130(b)(i)(A), which requires the Agency to consider "past, present, and probable future

impacts producing related or cumulative impacts.” Citing *Kings County Farm Bureau v. City of Hanford* (1990), 221 Cal.App. 3d 692, the court held that in considering whether an EIR must include related projects:

“[t]he primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately.” Here, the answer to this inquiry leads to the conclusion that the FERC proceeding was a related project and should have been included in the EIR. (221 Cal.App. 720, emphasis added).” 108 Cal.App. 4th at 868-871.

The Court held the ongoing FERC proceeding was a “related project.” Sierra Club urges that the Board consider the adjudication a “related project” and that the 2012 triennial cutbacks ordered by the Court in the Adjudication Decision be deemed, as in *Friends*, a “project” that is related, and whose cumulative impact (on the Carmel River) must be considered along with the project (wheeling Paralta well water for SNG through a front-end loading agreement).

Neither Cal-Am or SNG discusses the potential for impacts on the River associated with the joint production project either as an indirect impact or as a cumulative impact of the project when the triennial reductions are treated as a “related” project.

As set forth in detail in Sierra Club’s letters to you dated July 16, 2010 and July 26, 2010, it is apparent that the project is likely to induce impacts on the Carmel River through Cal-Am shifting (in whole or in part) its augmented production from the Seaside Basin to the Carmel River (provided that it is below its production ceiling from the River) when viewed in light of the triennial reduction in 2012 that will considerably reduce Cal-Am’s Standard Production Allowance.³

The District Board may appropriately take note that in 2012, CAW, as a standard producer, will have to reduce its production by 835 afy relative to its 2008 production from the Basin or 418 afy relative to its 2010-2011 production.⁴

Given this reduction in 2012, (and its continuing duty to provide up to 90 afy to SNG as an Alternative Producer), it is apparent that without any further constraint imposed by the Board as a condition on a joint distribution permit, Cal-Am will have every incentive to shift some of this

³ For an analysis of these “indirect impacts” see the Sierra Club letter of July 26, 2010, pp.4-8.

⁴ CDO Exhibit, “SWRCB Proposed Reduction Schedule for CAW’s Carmel River Diversions and Court Required Reduction Schedule for CAW’s Seaside Groundwater Diversions: Water Years 2009 through 2021. MPWMD – DF10. This shows the annual percent reductions and associated acre-foot reductions for CAW, as ordered by the Superior Courts Seaside Basin (Adjudication Decision, as amended February 9, 2007). This document, prepared by Darby Fuerst, is attached.

production burden to the Carmel River by augmenting production from its Carmel River wells or using Carmel River water stored in the ASR project.⁵

III.

The Board to Establish An Accurate Environmental Setting for the SNG-Cal-Am Water Distribution Project In Order That the Effects Associated With the Project Can Be Ascertained.

In *Friends of the Eel River*, supra, the Court noted:

An EIR must contain an accurate description of the project's environmental setting. An EIR "must include a description of the physical environmental conditions in the vicinity of the project ... from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Guidelines, § 15125, subd. (a).) There is good reason for this requirement: "Knowledge of the regional setting is critical to the assessment of environmental impacts. ... The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context." (Guidelines, § 15125, subd. (c).) We interpret this Guideline broadly in order to "afford the fullest possible protection to the environment." (*Kings County Farm Bureau*, supra, 221 Cal. App. 3d 692, 720.) In so doing, we ensure that the EIR's analysis of significant effects, which is generated from this description of the environmental context, is as accurate as possible. 108 Cal.App.4th 874-875.

The Court concluded in *Friends of the Eel River*, supra, that the EIR was deficient because its description of the environmental setting does "not disclose either the impact on the Eel River salmonid species of diverting water from the Eel River, or the fact that FERC is considering proposals to curtail these diversions in order to prevent harm to these species." Id. The Court concluded that the EIR's incomplete description of the Project's environmental setting fails to set the stage for a discussion of the cumulative impacts of the FERC proceeding and the project.

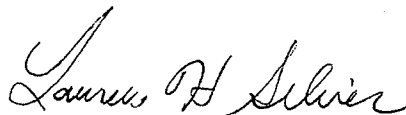
Here, Sierra Club is asking the District to consider, in light of the anticipated regulatory setting in 2012 (a 418 afy reduction in Cal-Am's Standard Production allowance) the indirect and cumulative impacts on the Carmel River of Cal-Am's production for SNG through the front-end loading agreement on the Carmel River.⁶ The environmental setting of the Project

⁵ These are anticipated indirect or cumulative effects of the water wheeling project, whereby Cal-Am produces water for SNG from its Paralta Well and delivers it through its water distribution system, using water placed in storage in the Hilby tanks, or other storage facilities. This project is a joint project, with SNG being the passive partner (assigning its water right to Cal-Am). As a co-applicant Cal-Am bears an equal burden with SNG in coming forward with evidence that there will not be adverse effects on the River associated with the project. It has not done so.

⁶ The environmental setting must include considering the downward trend over the last five years of adult spawning steelhead returning below San Clemente dam. See, WRO at 39, concluding that Cal-

must include consideration of the 2012 water supply reductions in production from the Seaside Aquifer ordered by the Court, as well as the expected condition of the steelhead when the project is implemented. The steelhead have been declining since 2005 in terms of returning spawning adults. Only 194 returned last year.⁷

The Cal-Am and SNG Water Distribution Permit application fails to disclose any of these indirect or cumulative effects. It is not a candid document that addresses the District's needs as a trustee agency to fulfill its legal duties to protect Carmel River resources, and fails to study or even acknowledge any effects on the River that may be "associated with" the wheeling agreement. The wheeling agreement is clearly a "win-win" situation for Cal-Am, as it acquires a new customer and can augment its production both from the Basin and from the River, permitting it to augment its revenues at the expense of the River, and continue its unlawful diversions.



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cc: Vicky Whitney,
SWRCB, Water Rights Division

Am's diversions are continuing to have an adverse effect on steelhead and that the steelhead population, listed as threatened under the ESA, is declining.

⁷ "Cal-Am's illegal diversions continue to have an adverse impact on fish, wildlife, and the riparian habitat of the Carmel River. The regulations listing the SCCC steelhead as a threatened species and the Carmel River as critical habitat for the steelhead underscore the importance of reducing and terminating Cal-Am's illegal diversions from the Carmel River at the earliest possible date and of adopting conditions to mitigate the effects of the diversions." (CDO at 39).

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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 Date: July 23 - 25, 2008
Hearing to Determine whether to Adopt a)
Draft Cease & Desist Order against)
California American Water Regarding its) Carmel River in Monterey County
Diversion of Water from the Carmel River)
in Monterey County under Order WR 95-10)
)

EXHIBIT MPWMD-DF10

MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

**SWRCB Proposed Reduction Schedule for CAW's Carmel River Diversions and
Court Required Reduction Schedule for CAW's Seaside Groundwater Diversions:
Water Years 2009 through 2021**

**SWRCB Proposed Reduction Schedule for CAW's Carmel River Diversions and
Court Required Reduction Schedule for CAW's Seaside Groundwater Diversions:
Water Years 2009 through 2021**

Water Year	Carmel River		Seaside Groundwater		Total
	Annual Percent Reduction: CAW	Annual Acre-Foot Reduction: CAW	Annual Percent Reduction: Standard Producers	Annual Acre-Foot Reduction: CAW	Annual Acre-Foot Reduction: CAW
2009	15	1,693	10	313	2,006
2010	15	1,693	10	417	2,110
2011	20	2,257	10	417	2,674
2012	20	2,257	20	835	3,092
2013	35	3,950	20	835	4,785
2014	35	3,950	20	835	4,785
2015	50	5,643	30	1,253	6,896
2016	50	5,643	30	1,253	6,896
2017	50	5,643	30	1,253	6,896
2018	50	5,643	40	1,684	7,327
2019	50	5,643	40	1,684	7,327
2020	50	5,643	40	1,684	7,327
2021	50	5,643	50	2,010	7,653

Notes:

1. "SWRCB" refers to the State Water Resources Control Board, "CAW" refers to California American Water's main water distribution system, and "Court" refers to the Monterey County Superior Court.
2. The annual percent reductions and associated acre-foot reductions for CAW from the Carmel River are taken from SWRCB's draft Cease and Desist Order WR 2008-00XX-DWR issued January 15, 2008.
3. The annual percent reductions and associated acre-foot reductions for CAW from the Seaside Groundwater Basin are taken from the Court's Seaside Basin decision filed March 26, 2006 and amended February 9, 2007 (*California American Water v. City of Seaside et al.*, Case No. M66343).
4. The acre-foot reductions shown for CAW from the Seaside Groundwater Basin are maximum values and may be reduced if the Seaside Basin Watermaster secures and adds equivalent amounts of non-native or reclaimed water to the basin.
5. "Standard Producers" refer to users diverting surplus groundwater for nonoverlying uses and are considered "appropriators". CAW is the largest Standard Producer or appropriator in the Seaside Groundwater Basin.