



Supplement to 9/20/10 MPWMD Board Packet

Attached are copies of letters received between July 16, 2010 and September 13, 2010. These letters are also listed in the September 20, 2010 Board packet under item 15, Letters Received.

Author	Addressee	Date	Topic
Craig Anthony	Victoria Whitney	8/20/10	JWC:A011674A – Cal-Am Response Regarding Compliance with Order 95-10 and WR 2009-0060
Mark Stilwell	Victoria Whitney	8/17/10	Certification under Order WR 2000-0060, as amended by Order WR 2010-0001
Amy L. White	MPWMD Board	8/16/10	Joint Application of Cal-Am and SNG for a Water Distribution Permit
Laurens Silver	MPWMD Board	8/13/10	Joint Application of Cal-Am and SNG for a Water Distribution Permit
Brian LeNeve	Darby Fuerst	8/13/10	Protest by Carmel River Steelhead Association/Permit 20808B (App. 27614B) Carmel River Monterey County
Rose-Eve K. Lewis	Darby Fuerst	8/12/10	Apparent Water Use Violation
John Ramirez	Darby Fuerst	8/12/10	Request for Co-funding of Expanded Assessment of Fractured Rock Wells within the MPWMD
Laurens Silver	MPWMD Board	8/11/10	Joint Application of Cal-Am and SNG for a Water Distribution Permit
Victoria Whitney	Jon Rubin	8/5/10	Compliance with Order 95-10 and WR 2009-0060
Laurens Silver	MPWMD Board	7/26/10	Joint Application of Cal-Am and SNG for a Water Distribution Permit
Laurens Silver	MPWMD Board	7/19/10	Testimony of Sierra Club Opposing Approval of a Water Distribution Permit to Serve the SNG Ecoresort
Laurens Silver	MPWMD Board	7/17/10	Joint Application of Cal-Am and SNG for a Water Distribution Permit

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August 20, 2010

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MPWMD

Victoria Whitney,
Deputy Director for Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, CA 95812

Re: JWC: A011674A – California American Water's Response Regarding Compliance with Order 95-10 and WR-2009-0060

Dear Ms. Whitney:

Thank you for your letter of August 5, 2010 to Jon Rubin regarding our good faith efforts to comply with Order 95-10 and Order WR-2009-0060, and confirming the summary of our discussions on May 13, 2010. We greatly appreciate the efforts of you and your staff to work with us on these complex issues. We continue to make progress on each of the bullet items listed on page one of your letter.

Your August 5 letter also identifies two potential compliance issues, one relating to Condition 3(a)(6) of Order WR-2009-0060, and the other to Condition 4 of Order 95-10. We have closely reviewed both issues and write this letter to share our findings with you. In both cases, we believe California American Water is in compliance. Once you have had a chance to review this letter, we would like to schedule a meeting with you and your staff to discuss this information and answer any questions you may have.

Condition 3(a) (6), Order WR-2009-0060

As noted in your letter, Condition 3(a) (6) of WR-2009-0060 requires the Pebble Beach Company to certify the total quantity of water annually used under its entitlement from the Monterey Peninsula Water Management District. Ten percent of that amount is then added to California American Water's allowed diversions from the Carmel River to allow for increased use of the entitlements in the following year, or, as stated in the Condition, "to allow Cal-Am to divert water from the river to supply water for PBC water entitlements initiated in the following 12 months." The actual amount of increased usage



CALIFORNIA
AMERICAN WATER

Page 2 of 6
August 20, 2010

is then trued-up through an annual report of actual increased usage to be submitted by the Pebble Beach Company to the State Water Board on September 30. Those increased amounts are also added to the adjusted base.

As also noted in your letter, the obligation to provide this information to the State Water Board is an obligation of the Pebble Beach Company, not California American Water. You state a valid concern, however, that California American Water needs the information from Pebble Beach Company to determine whether it is in compliance with the diversion limitations of Order WR 2009-0060.

After receiving your letter, we contacted the Pebble Beach Company and alerted them to this issue. We understand that Pebble Beach Company has since sent the required certification to the State Water Resources Control Board. A copy of the Pebble Beach Company's submission is enclosed for your convenience.

At this time, and based upon the information submitted in our third quarter report for this water year, California American Water's diversions for this water year combined with historical consumption for the remainder of the water year indicates that California American Water will meet the diversion limits in WR-2009-0060 without the addition allowed by Condition 3(a)(6). Accordingly, with or without the additional percentage added to the base relating to the Pebble Beach Company's entitlements, staff can determine that California American Water is within the diversion limits.

Condition 4, Order 95-10

Your letter also indicates a potential compliance issue with Condition 4 of Order 95-10 because California American Water carried over 495.9 acre feet of its Operating Yield allocation in the Seaside Groundwater Basin for the 2008-2009 water year. There are several factors, however, that contribute to maximizing use of the aquifer, including (1) Condition 4's requirement that pumping from the aquifer be minimized at certain times; (2) the protocols for recovering water from groundwater storage set forth in the ASR Phase 1 (Permit 20808A) settlement agreement; (3) compliance with the Operational Water Supply Budget approved and monitored by other regulatory agencies; and (4) equipment limitations. Taking all of these competing factors into account, we believe that California American Water did, in fact, maximize use of the aquifer in compliance with Condition 4. Condition 4 of Order 95-10, as originally adopted in 1995, and then amended by Order 98-04, requires California American Water to both maximize and minimize its diversions from the Seaside Aquifer, depending upon river conditions and time of year.

As amended by Order 98-04, Condition 4 reads:



CALIFORNIA
AMERICAN WATER

Page 3 of 6
August 20, 2010

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

This language requires conjunctive use of the Seaside Basin and the Carmel River. California American Water's ability to maximize diversions from the Seaside Basin in any year is necessarily limited by those days each year between November 1 and April 30 when the river's flow is high and it makes sense to preserve the water in the aquifer for later use.

California American Water's ability to maximize pumping from the Seaside Basin is also limited by the settlement between California American Water, the Monterey Peninsula Water Management District, the National Marine Fisheries Service, and the California Department of Fish and Game resolving protests to State Water Resources Control Board applications 27614A.¹ As discussed in Finding 14 of Order WR 2007-0042, California American Water, the Monterey Peninsula Water Management District, the National Marine Fisheries Service, and the Department of Fish and Game entered into a Memorandum of Understanding establishing protocols for recovering water from groundwater storage under Permit 20808A. A copy of that Memorandum of Understanding is included as Attachment Two. Depending on the amount of ASR water injected in any year and when that water is recovered, California American Water may not use all of its allocation of the Seaside Basin Operating Yield within the water year, but may use that water in the beginning of the next water year, which is still the "low flow period" for the Carmel River.

In addition, as required by the Monterey Peninsula Water Management District, California American Water works collaboratively with the District, the National Marine Fisheries Service, and the California Department of Fish and Game to set an Operational Water Supply Budget, which is then reviewed and approved by the Water Management District's Board in a public hearing. Attachment Three contains the approved Water Supply Budgets for the 2008-2009 Water Year. California American Water is required by law to comply with the Water Supply Budget.

¹ For water years after the 2008-2009 water year, Order WR 2009-0060 has the same effect, as the accounting set forth in Condition 3(a)(3) of that order is substantially similar to the recovery protocol agreed to in the settlement.



**CALIFORNIA
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Page 4 of 6
August 20, 2010

Finally, the amount of water that can be pumped from the Seaside Basin at any given time is limited by the production capacity of the available wells and equipment. At maximum capacity and assuming that all equipment is fully operational, California American Water can pump an estimated 17 acre feet per day. If equipment is down for repair, production will be less, and may affect our ability to exhaust our allocation of the Seaside Basin's Operating Yield.

Taking all of these factors into consideration, California American Water maximized its production of the Seaside Basin for the 2008-2009 Water Year. Attachment Four tallies California American Water's extractions from the Seaside Groundwater Basin for the water year. As shown in this attachment, and consistent with Condition 4, California American Water did not pump water from the Coastal area of the Seaside Groundwater Basin during the months of January, February, March and April due to either the high flow of the river or as agreed to with the resource agencies in the Water Supply Budget. In addition, as agreed to with the Monterey Peninsula Water Management District, the National Marine Fisheries Service and the California Department of Fish and Game, California American Water recovered 182 acre feet of ASR water during the fourth quarter of the Water Year. This reduced the volume of native Seaside Basin water that we could extract in the fourth quarter of the water year because water that would have otherwise been counted toward our allocation of the Operating Yield was instead counted toward ASR recovery.

California American Water also experienced equipment failures in July, August and September that reduced our production during this quarter. The Water Supply Budget shifts the majority of production from the Seaside Basin to the fourth quarter, consistent with Condition 6 of Order 95-10, because this is part of the "low flow season." Any equipment failures that occur in this period will appear to have a disproportional effect on production from the Seaside Basin because there will not be sufficient time to resume production from the Basin before the end of the water year.

We are currently working to increase well capacity in the Seaside Basin. We applied to the California Department of Public Health for a permit to produce water from the Santa Margarita ASR Injection well. We have been responding to information requests from the Department of Public Health, including arranging site visits. It is our understanding that, like most State agencies, the Department of Public Health is experiencing a work backlog due to on-going furloughs. We do not have an estimated date when we expect the Department of Public Health to issue that permit; however, once issued, the Santa Margarita well will increase our well capacity in the Seaside Basin by 2,000 gallons per minute, or 9 acre feet per day.



CALIFORNIA
AMERICAN WATER

Page 5 of 6
August 20, 2010

As you are aware, California American Water and the Monterey Peninsula Water Management District are also in the process of installing an additional well at Fitch Middle School. We are applying for a permit from the Department of Public Health for that well. That well is designed to produce 2,000 gallons per minute, or 9 acre feet per day.

Finally, it is important to acknowledge the physical limitations that currently exist. The transmission and distribution system includes numerous pressure gradients that have been constructed over the years to provide water service throughout the mountainous terrain of Monterey. Elevations range from sea level to over 1,300 feet above sea level, requiring multiple "lift-zones" to distribute water to the higher elevations of the distribution system. In general, because of distribution system hydraulics, the water supplied from the Upper and Lower Carmel Valley Wells flows into Monterey and into Seaside (under certain conditions and times of the year). However, because of ground elevation differences and the height of certain distribution storage facilities, water is unable to be transferred very far into the distribution system from the Seaside Wells. There is basically a hydraulic "barrier" in the vicinity of the Naval Postgraduate School that prevents water pumped from the Seaside Wells from being transferred any further into the distribution system. The existence of this hydraulic condition prevents any water produced from the Seaside Wells from moving into Monterey, Pacific Grove, Pebble Beach, or even further up into Carmel Valley. Hence, California American Water must pump some water from the Carmel River at all times during the year to supply the customers in these communities. With that in mind, according to California American Water's reports to the State Water Resources Control Board for the 4th quarter of the Water Years 2008 and 2009, California American Water's diversions differed by only 140 acre feet for the period, while diversions for the entire water year exceeded 10,400 acre feet. Thus, California American Water did not shift production from the Seaside Basin to the Carmel River to maintain an allocation in the Seaside Basin. We are working to resolve the "hydraulic barrier." We are replacing existing distribution mains with larger transmission mains in the City of Monterey. We are also installing a pressure reducing station to allow us to increase the system pressure leaving the wells in Seaside so water moves farther south without damaging the distribution system in the northern service area. The "hydraulic barrier" will be completely resolved when the CPUC approves a permanent water supply project. The proposed improvements include constructing a transmission main through the City of Monterey to deliver water from the Seaside Basin and the proposed desalination facility to the southern portions of our service area. We expect the CPUC to issue a proposed decision on this project in October.



**CALIFORNIA
AMERICAN WATER**

Page 6 of 6
August 20, 2010

Conclusion

California American Water is continuing its efforts to comply with Order WR 2009-0060 and Order 95-10. We appreciate State Water Resources Control Board staff sharing its concerns regarding our compliance, and we hope this letter addresses those concerns. We would appreciate the opportunity to discuss these issues further and answer any additional questions you may have. We will contact you to set up a meeting in the near future.

As noted previously, the development of California American Water's Water Supply Budget is a collaborative process involving multiple regulatory agencies in a quarterly conference call. If State Water Resources Control Board staff remains concerned over the conjunctive use of California American Water's sources of supply in Monterey County, State Water Resources Control Board staff are welcome to participate in these quarterly conference calls.

Thank you again for your attention to these issues and we look forward to meeting with you soon.

Best regards,

Craig E. Anthony
Director of Operations
Coastal Division
California American Water

cc: Robert MacLean
Darby Fuerst
Jon Rubin, Esq.

Enclosures



PEBBLE BEACH
COMPANY

Anthony Miller 7
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AUG 19 2010

CALAM WATER CO.

August 17, 2010

Via Federal Express

Ms. Victoria A. Whitney
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: Certification under Order WR 2009-0060, as amended by Order WR 2010-0001
(collectively, the "Order")

Dear Ms. Whitney:

Pursuant to Condition 3.a.(6) of the Order, I, Mark Stilwell, on behalf of Pebble Beach Company ("PBC"), hereby certify that the following information was true and accurate as of January 31, 2010 (three months following adoption of Order WR 2009-0060 on October 20, 2009):

- 1) Out of the 365 acre feet of Water Entitlement granted to PBC by the Monterey Peninsula Water Management District ("MPWMD") in exchange for PBC's financial support of the CAWD/PBCSD Wastewater Reclamation Project, 36.352 acre feet had been used, or approved for use through issuance of a MPWMD water connection permit, in accordance with, and pursuant to, ordinances, rules, and regulations of MPWMD.
- 2) The 36.352 acre feet consisted of 10.452 acre feet of approved usage by PBC and 25.90 acre feet of approved usage by residential property owners who had purchased a portion of PBC's Water Entitlement pursuant to MPWMD's Ordinance 109 and related rules and regulations. Approved usage in each case is measured by and in accordance with the applicable rules and regulations of MPWMD. For the source of this usage information, please see the attached report from MPWMD for the period ending January 31, 2010.

On or around September 30, 2010, PBC or MPWMD (as allowed by Order WR 2010-0001) will submit an annual report to your office describing the amount of the Water Entitlement that has been used, or approved for use, by MPWMD for the period from February 1, 2010, through September 30, 2010, consistent with Condition 3.a.(6) of the Order. Each year thereafter, this annual report will cover the 12 month period from October 1 through September 30.

LEGAL AFFAIRS

Post Office Box 1767, Pebble Beach, California 93953 831-647-7500 telephone 831-625-8411 facsimile

Ms. Victoria A. Whitney
SWRCB
Re: Order WR 2009-0060
August 17, 2010
Page 2 of 2

Under penalty of perjury, the forgoing information is true and accurate to the best of my knowledge and belief.

Please feel free to contact me at 831-625-8449 if you have any questions.

Sincerely,



Mark Stilwell
Executive Vice President
and General Counsel

Attachment

cc: Darby Fuerst/MPWMD
David Laredo/MPWMD
Stephanie Pintar/MPWMD
~~Anthony/Cal-Am~~
Rob MacLean/Cal-Am
Tim Miller/Cal-Am

EXHIBIT 24-B
MONTHLY ENTITLEMENT REPORT
 Reported in Acre-Feet
 For the Month of January 2010

Entitlement Holder	Entitlement	Changes this Month	Total Demand from Water Permits Issued	Remaining Entitlement/and Water Use Permits Available
Quail Meadows	33.000	0.167	30.233	2.767
Water West	12.760	0.114	6.621	6.139

|||
CAWD/PBCSD Recycled Water Project Entitlements

Pebble Beach Co. [2]	259.790	0.260	10.452	249.338
Del Monte Forest Benefited Properties ² (Pursuant to Ord No. 109)	105.210	0.037	25.900	79.310
Macomber Estates	10.000	0.000	9.595	0.405
Griffin Trust	5.000	0.000	4.809	0.191
CAWD/PBCSD Project Totals	380.000	0.297	50.756	329.244

[1]

This section shows changes resulting from Water Use Permits and Water Permits issued to properties located in Pebble Beach, pursuant to Rule 23.5, as amended by Ordinance No. 109.

[2]

Increases in the Del Monte Forest Benefited Properties Entitlement will result in reductions in the Pebble Beach Co. Entitlement.

MEMORANDUM OF UNDERSTANDING
by and among MONTEREY PENINSULA WATER MANAGEMENT DISTRICT,
CALIFORNIA AMERICAN WATER, CALIFORNIA DEPARTMENT OF FISH AND
GAME, AND NATIONAL MARINE FISHERIES SERVICE Regarding Water
Management of the Phase 1 Seaside Basin Aquifer Storage and Recovery Project
by establishing protocols for the recovery of water from groundwater storage
during the recovery season (June 1 through November 30)

THIS AGREEMENT, is made and entered into by and between the California Department of Fish and Game (hereinafter called "CDFG"), NOAA's National Marine Fisheries Service (hereinafter called "NMFS"), Monterey Peninsula Water Management District (hereinafter called "MPWMD") and California American Water (hereinafter called "CAW") (CDFG, NMFS, MPWMD, and CAW shall be collectively referred to as "Parties").

RECITALS

- A. MPWMD is a public agency, authorized in 1977 by the California Legislature (Chapter 527 of the Statutes of 1977, as amended, found at West's Water Law Appendix, section 118-1, et seq.). The voters of the Monterey Peninsula ratified creation of the Water Management District in June 1978. The District holds comprehensive authority to integrate management of the ground and surface water resources in the Monterey Peninsula area;
- B. CAW is an investor owned, public utility providing water service to the Monterey Peninsula;
- C. CDFG is the trustee for fish and wildlife resources in the State of California and has jurisdiction over the protection, conservation and management of fish, wildlife, native plants, and habitat necessary for the biologically sustainable population of those species;
- D. NMFS is authorized to protect and conserve steelhead in the Carmel River, including maximizing the Carmel River Basin's substantial contribution toward recovering the South-Central California Coast Steelhead ESU and to enforce the Endangered Species Act;
- E. MPWMD and CAW, through the Phase 1 Aquifer Storage and Recovery Management & Operations Agreement, cooperatively operate the Aquifer Storage and Recovery Project;
- F. MPWMD, CAW, CDFG and NMFS have a mutual desire to define and clarify the means by which the operations of the Phase 1 Aquifer Storage and Recovery project is implemented to offset production from the Carmel River that would otherwise occur during the low-flow season.

NOW THEREFORE, the parties do agree as follows:

1. Not later than June 1 of each year, the amount of water to be recovered from groundwater storage during that year's June 1 through November 30 period shall be determined by MPWMD and CAW, in consultation with the CDFG and the NMFS, following the procedures stated in items 2 through 10 below.
2. The maximum amount for recovery each year (pumping of water previously diverted from the Carmel River and injected in the Seaside Groundwater Basin) was determined by using the logic developed for the computer simulation made by MPWMD's Carmel Valley Simulation (CVSIM) model. In any year, an alternative recovery amount may be agreed upon by MPWMD, CAW, CDFG and NMFS.¹ The selected recovery amount shall be deemed the "Determined Recovery Amount."
3. To the maximum extent operationally feasible, during each recovery season, MPWMD and CAW shall use their best efforts to recover the Determined Recovery Amount.
4. Each year at the end of the injection season, the amount of water injected into the Seaside Basin during the current injection season shall be calculated. If this amount equals or exceeds the Determined Recovery Amount, then the Determined Recovery Amount shall be recovered. Any water injected during the current injection season that is in excess of the Determined Recovery Amount shall be added to "Carryover Storage."
5. If the total amount of water injected during the current injection season is less than the Determined Recovery Amount, and the Carryover Storage from previous injection seasons is sufficient to make up the difference, then the Determined Recovery Amount shall be recovered. In this case, water from Carryover Storage shall be produced to supplement water injected during the current injection season to meet the Determined Recovery Amount. Any water that is produced from Carryover Storage to meet the Determined Recovery Amount shall be subtracted from Carryover Storage.
6. If the total amount of water injected during the current injection season is less than the Determined Recovery Amount, and the Carryover Storage from previous

¹ The maximum amount for recovery each year is 1,500 acre-feet. This value was derived from a series of computer-based simulations performed by MPWMD as part of the Final Environmental Impact Report/Environmental Assessment for MPWMD's Phase 1 ASR Project dated August 2006. This value represents the maximum amount of water that would be recovered in any year such that, as simulated, the long-term average amount of water diverted from the Carmel River for injection into the Seaside Groundwater Basin during the injection season from December 1 through May 31 approximates the long-term average amount of water recovered from the Seaside Groundwater Basin during the recovery period from June 1 through November 30 for CAW customer service. The simulations were based on a 45-year period of record, (Water Years 1958 through 2002). The maximum amount for recovery will be re-assessed every five years, using the above-referenced computer-based simulations, to take into account additional Carmel River streamflow data and any unforeseen changes in Carmel River hydrology.

injection seasons is insufficient to make up the difference, then the Determined Recovery Amount cannot be met. Instead, the amount of water recovered that year will be the total amount injected during the current injection season plus the total amount of Carryover Storage, if any, from previous injection seasons.

7. Following the above decisions, if the amount of water stored by injection in the Seaside Groundwater Basin exceeds 7,200 acre-feet on June 1, the amount in excess of 7,200 acre-feet shall be added to the amount available for recovery that year.
8. The actual amount of water produced from storage for recovery each year shall be uniformly distributed over the recovery season, unless modified and agreed upon by MPWMD, CAW, CDFG and NMFS.
9. The water produced by MPWMD and CAW from the ASR wells will be used to offset production from the Carmel River that would otherwise occur during the low-flow season in compliance with this MOU. In any year that ASR water is recovered and delivered to CAW distribution system, CAW shall, to the maximum extent operationally feasible, reduce water diversion from its Carmel River sources. The actual amount of ASR water that is recovered each year will be subtracted from CAW's total annual diversion allowance from its Carmel River sources for that year (e.g., Order No. WR 95-10, as amended, so long as it is in effect).
10. The following procedures will be implemented to facilitate cooperative compliance monitoring of the reductions in dry season (June-November) diversions from the Carmel River Aquifer that will be offset by utilizing water recovered from the ASR Phase 1 wells: a) CAW will provide copies by e-mail of its weekly "Carmel Valley & Seaside Production Report" to one designated contact for each agency at DFG and NMFS. b) This e-mail Report will show daily values in acre feet of the water produced from each source, vs daily targets. These daily targets are derived from the monthly production targets developed as part of the CAW/MPWMD Quarterly Water Budget process. c) If the amount of water produced differs significantly from daily targets for more than two weeks, the designated CDFG or NMFS contact can choose to call for the four parties to meet and confer on ongoing CAW operations during the first five business days of the succeeding month. In any case, these production numbers are and will continue to be reviewed as part of the CAW/MPWMD Quarterly Water Budget process, which includes two regularly scheduled quarterly meetings during the dry season between CAW, MPWMD, CDFG, and NMFS. The regulatory agency's ability to call for a monthly meeting to review CAW's patterns of production for compliance with the intended offset of Carmel River Aquifer diversions by ASR Phase 1 production, will be in addition to these regularly scheduled Quarterly Water Budget Meetings.

- 11 Any Party may open for renegotiation this Memorandum if the SWRCB fails to incorporate the terms specified in the "Proposed Change to the Current Permit Conditions," (attached to this MOU and provided to the SWRCB by all Parties) or incorporates conditions different from, or in addition to, the terms specified in said attachment, into Permits 7130B and 20808. Unless agreed to by all Parties, renegotiation discussions shall be limited to the terms omitted, altered, or added by the SWRCB into Permits 7130B and 20808.
- 12 This Memorandum may be amended at any time with the written approval of all Parties.
- 13 This Memorandum shall become effective upon the signature of all Parties.

IN WITNESS WHEREOF, the Parties have executed this Memorandum as of the dates written below.

Date: _____ MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
 By: _____
 Title: _____

Date: 9/17/2007 CALIFORNIA AMERICAN WATER
 By: [Signature]
 Title: Vice President

Date: _____ CALIFORNIA DEPARTMENT OF FISH AND GAME
 By: _____
 Title: _____

Date: _____ NATIONAL MARINE FISHERIES SERVICE
 By: _____
 Title: _____

- 11 Any Party may open for renegotiation this Memorandum if the State Water Resources Control Board ("SWRCB") fails to incorporate the terms specified in the "Proposed Changes to Current Permit Conditions" (attached to this MOU and provided to SWRCB by all Parties), or incorporates conditions different from, or in addition to, the terms specified in said attachment, into Permits 7130B and 20808. Unless agreed to by all Parties, renegotiation discussions shall be limited to the terms omitted, altered, or added by the SWRCB into Permits 7130B and 20808.
- 12 This Memorandum may be amended at any time with the written approval of all Parties.
- 13 This Memorandum shall become effective upon the signature of all Parties.

IN WITNESS WHEREOF, the Parties have executed this Memorandum as of the dates written below.

Date: 9-17-07 MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
 By: [Signature]
 Title: GENERAL MANAGER

Date: _____ CALIFORNIA AMERICAN WATER
 By: _____
 Title: _____

Date: _____ CALIFORNIA DEPARTMENT OF FISH AND GAME
 By: _____
 Title: _____

Date: _____ NATIONAL MARINE FISHERIES SERVICE
 By: _____
 Title: _____

**Petitions for Change to Permits 7130B and 20808
for
Phase I Aquifer Storage and Recovery (ASR) Project
Proposed Changes to Current Permit Conditions**

Base Concept as Agreed to by Monterey Peninsula Water Management District, California American Water, National Marine Fisheries Service, and California Department of Fish and Game during protest dismissal: It is anticipated that each permit will be split into two parts, one for the Phase I ASR Project and the second representing the remainder of the permit quantities, terms, and conditions. Conditions in the "remainder" permits would not be changed from their previous form. Conditions not referenced in either Section A or Section B below would be retained without change in both the Phase I ASR Project permits and the "remainder" permits.

A. Changes Proposed as Resolution of CDFG and NMFS Protests

References: May 20, 2005 Memorandum from Robert W. Floerke, CDFG, to Victoria Whitney, SWRCB - Protest of MPWMD Petitions for Change to Permits 7130B and 20808

May 12, 2005 letter from Dick Butler, NMFS, to SWRCB Division of Water Rights, c/o Megan Sheely

Condition 1a

Condition 1a (a new, added condition) shall be as follows:

"Permit 7130B [Permit 20808] shall be divided into two parts. The first part (Permit 7130B-1) [Permit 20808-1] is in support of the Phase I Aquifer Storage and Recovery Project and shall be held in joint ownership by the Monterey Peninsula Water Management District (MPWMD) and California American Water (CAW). The second part (Permit 7130B-2 [Permit 20808-2]), shall contain the remainder of the storage and diversion quantities (the differences in amounts between the original Permit 7130B [Permit 20808] and Permit 7130B-1 [Permit 20808-1]) and shall continue to be held by MPWMD."

Condition 5

Condition 5 shall be as follows:

"The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 2,426 acre-feet per annum. The water diverted from the Carmel River shall be

collected from December 1 of each year through May 31 of the succeeding year and taken to groundwater storage in the Seaside Basin."

Condition 17

Condition 17 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 21

Condition 21 shall be retained as written.

Condition 30

Condition 30 shall be as follows:

"MPWMD shall maintain in good working order all riparian irrigation systems owned or operated by MPWMD under its Water Allocation Program Environmental Impact Report, 5-Year Mitigation Program (November 1990) for use as needed during dry or critically dry water years. Water year types are defined in Table C, Carmel River Water Supply Index (attached), and may be amended from time to time to include the most recent available hydrologic data. For the purposes of amending water year types, Permittee shall submit to the Chief, Division of Water Rights, revised criteria to define normal or better, below normal, dry and critically dry year types. If Permittee receives no objection within 30 days of submittal, those criteria shall be deemed approved"

Tables A, B, and C in the Amended Permits 7130B and 20808 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 32

Condition 32 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 33

Condition 33 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 34

Condition 34 shall be as follows:

"Permittee shall not divert water from the Carmel River unless minimum instream flows are met as defined in Tables A, B, and C (attached)."

Tables A, B, and C in the Amended Permits 7130B and 20808 shall be removed from the permits for the Phase I ASR Project and retained for the "remainder permits."

Condition 35

Condition 35 shall be removed from the permits for the Phase I ASR Project and retained for the "remainder permits."

Condition 36

Condition 36 shall be as follows:

"Permittee shall operate or install and properly maintain continuous flow measurement devices, satisfactory to the State Water Resources Control Board, at the following locations in the Carmel River:

- a) *Carmel River at the Highway 1 Bridge (River Mile [RM] 1.1) – (December 1 through May 31 of the succeeding year)*
- b) *USGS Near Carmel Gage (RM 3.2), if the USGS does not continue to operate and maintain this gage – (December 1 through May 31 of the succeeding year)*
- c) *Carmel River at Sleepy Hollow Weir (RM 17.6) – (December 1 through May 31 of the succeeding year)"*

Condition 37

Condition 37 shall be as follows:

"Permittee shall submit annual reports to the State Water Resources Control Board, Chief, Division of Water Rights, California Department of Fish and Game, and National Marine Fisheries Service stating the mean daily flows from December 1 through May 31 of the succeeding year at the three monitoring locations specified in Condition 36."

Condition 38

Condition 38 shall be removed from the permits for the Phase I ASR Project and retained for the "remainder permits."

Condition 43

Condition 43 shall be removed from the permits for the Phase I ASR Project and retained for the "remainder permits."

B. Proposed Changes to Permit Conditions Not Addressed by CDFG and NMFS Protests

References: Revised Petitions for Change to Permits 7130B and 20808, transmitted to SWRCB by letters dated September 15, 2003, Attachment 3 to each petition: "Proposed Amendments to Permit Conditions"

The Petitions for Change to Permits 7130B and 20808 for the Aquifer Storage and Recovery Project propose changes to or removal of several other conditions in the existing permits that are not addressed by CDFG or NMFS in their protests. These conditions would be revised or removed from the permits for the Phase 1 ASR Project and retained as currently written for the "remainder permits."

Permit conditions not addressed by CDFG and NMFS in their protests that are proposed to be changed or removed are as follows:

Condition 2

Condition 2 shall be changed by adding San Clemente Dam as a point of diversion.

Condition 7

Condition 7 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 8

Condition 8 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 18

Condition 18 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 20

Condition 20 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 22

Condition 22 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 23

Condition 23 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 24

Condition 24 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 25

Condition 25 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 26

Condition 26 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 27

Condition 27 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 28

Condition 28 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 29

Condition 29 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 41

Condition 41 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 42

Condition 42 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 45

Condition 45 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 48

Condition 48 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 49

Condition 49 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 50

Condition 50 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 51

Condition 51 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 52

Condition 52 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

Condition 53

Condition 53 shall be removed from the permits for the Phase 1 ASR Project and retained for the "remainder permits."

TABLE A
MINIMUM MEAN DAILY INSTREAM FLOW REQUIREMENTS (see Condition 34)

Fall December 1-December 15	Winter December 16-April 15	Spring April 16-May 31
<p><u>All Water Year Types</u>¹</p> <p>May divert with minimum bypass of 40 cfs at the Highway 1 gage.</p>	<p><u>Normal or Better and Below Normal Water Years</u>¹</p> <p>For Normal or Better and Below Normal Water Years, an Attraction Day is defined as: Estimated unimpaired flow² at the Highway 1 gage of 200 cfs or greater.</p> <p>Prior to First Attraction Day: Continue December 1-15 bypass flows.</p> <p>During Attraction Day(s): Bypass sufficient flow to maintain 200 cfs at the Highway 1 gage.</p> <p>Following Attraction Day(s): Ramp down bypass flows as indicated on Table B. Following the ramp-down period, bypass 90 cfs between the Sleepy Hollow Weir gage and the USGS Near Carmel gage, and 60 cfs between the USGS Near Carmel gage and the Highway 1 gage.</p> <p>Cumulative maximum average daily diversion from the Carmel River downstream of River Mile 17.6 shall not exceed 80 cfs.</p> <hr/> <p><u>Dry and Critically Dry Water Years</u>¹</p> <p>For Dry and Critically Dry Water Years, an Attraction Day is defined as: Estimated unimpaired flow² at the Highway 1 gage of 200 cfs or greater in January, 100 cfs or greater in February, and 75 cfs or greater in March.</p> <p>Prior to First Attraction Day: Continue December 1-15 bypass flows.</p> <p>During Attraction Day(s): Bypass sufficient flow to maintain 150 cfs at the Highway 1 gage.</p> <p>Following Attraction Day(s): Ramp down bypass flows as indicated on Table B. Following the ramp-down period, bypass the same as for wet, normal, and below normal water years.</p> <p>Cumulative maximum average daily diversion from the Carmel River downstream of River Mile 17.6 shall not exceed 80 cfs.</p>	<p><u>All Water Year Types</u>¹</p> <p>Bypass 80 cfs between the Sleepy Hollow Weir gage and the Highway 1 gage.</p> <p>Cumulative maximum average daily diversion from the Carmel River downstream of River Mile 17.6 shall not exceed 80 cfs.</p>

- ¹ Water Year types are as specified in Table C.
- ² For purposes of this Table A, "estimated unimpaired flow" shall be defined as the measured mean daily flow at the specified gage plus the mean daily diversion by California American Water from the Carmel River and underlying alluvial aquifer upstream of that gage during the preceding five days.

This table is based on Table 9 in *Instream Flow Needs for Steelhead in the Carmel River, Bypass Flow Recommendations for Water Supply Projects Using Carmel River Waters*, National Marine Fisheries Service, Southwest Region – Santa Rosa Field Office, June 3, 2002, page 32.

20070917.Table A - Minimum Instream Flow Requirements

TABLE B

Carmel River Bypass Flows - "Ramp-Down" Flows

Minimum Mean Daily Instream Flows Following an Attraction Day or Days
(All Values in Cubic Feet Per Second)

Day	Between MPWMD Sleepy Hollow Gage and USGS Near Carmel Gage		Between USGS Near Carmel Gage and MPWMD Highway 1 Gage	
	Normal or Better and Below Normal Water Years	Dry and Critically Dry Water Years	Normal or Better and Below Normal Water Years	Dry and Critically Dry Water Years
0	200	150	200	150
1	175	125	175	125
2	150	100	150	100
3	125	90	125	80
4	90	90	100	60
5	90	90	80	60
6	90	90	60	60

Source: *Instream Flow Needs for Steelhead in the Carmel River, Bypass Flow Recommendations for Water Supply Projects Using Carmel River Waters*, National Marine Fisheries Service, Southwest Region - Santa Rosa Field Office, June 3, 2002, page 15.

Note: "Day 0" refers to an Attraction Day or Days. "Day 1" refers to the first day after an Attraction Day or Days. See Table A for the definition of an Attraction Day.

TABLE C

Carmel River Water Supply Index

Cumulative Unimpaired Carmel River Flow
at the Sleepy Hollow Weir Site in Acre-Feet

Period	Water Year Type			
	Normal or Better	Below Normal	Dry	Critically-Dry
Oct	> 300	300 - 100	99 - 1	0
Oct - Nov	> 1,000	1,000 - 500	499 - 300	< 300
Oct - Dec	> 4,000	4,000 - 1,700	1,699 - 1,200	< 1,200
Oct - Jan	> 11,700	11,700 - 5,700	5,699 - 3,200	< 3,200
Oct - Feb	> 28,800	28,800 - 11,800	11,799 - 7,300	< 7,300
Oct - Mar	> 40,600	40,600 - 21,300	21,299 - 10,700	< 10,700
Oct - Apr	> 47,600	47,600 - 24,300	24,299 - 13,200	< 13,200
Oct - May	> 49,500	49,500 - 26,000	25,999 - 13,900	< 13,900
Oct - Jun	> 49,900	49,900 - 26,800	26,799 - 14,600	< 14,600
Oct - Jul	> 50,000	50,000 - 27,200	27,199 - 14,700	< 14,700
Oct - Aug	> 50,300	50,300 - 27,300	27,299 - 14,800	< 14,800
Oct - Sep	> 50,700	50,700 - 27,400	27,399 - 14,900	< 14,900

Expected Unimpaired Carmel River Flow
at the Sleepy Hollow Weir Site in Acre-Feet Assuming 75% Reliability

Period	Water Year Type			
	Normal or Better	Below Normal	Dry	Critically-Dry
Nov - Sep	50,400	34,000	25,000	21,000
Dec - Sep	43,000	27,000	17,500	14,900
Jan - Sep	36,000	22,300	12,200	10,000
Feb - Sep	29,000	17,300	9,000	7,000
Mar - Sep	21,500	11,275	6,000	3,400
Apr - Sep	13,000	5,850	3,250	1,575
May - Sep	5,000	2,500	1,425	800
Jun - Sep	2,000	900	625	400
Jul - Sep	600	300	300	300
Aug - Sep	200	200	200	200
Sep	100	100	100	100

Notes:

1. "Cumulative" and "Expected" water year types are derived from the daily unimpaired flow record at the Sleepy Hollow Weir site simulated by the Monterey Peninsula Water Management District for Water Years 1902 through 1996.
2. Water Year types are based on selected exceedence frequencies. "Normal or Better" refers to flows that are equalled or exceeded 50% of the time. "Below Normal" refers to flows that are exceeded between 50% and 75% of the time. "Dry" refers to flows that are exceeded between 75% and 87.5% of the time. "Critically-Dry" refers to flows that are exceeded 87.5% of the time.
3. The Water Supply Index shall incorporate a daily timestep so that it can be updated on a daily basis.

**California American Water Main Distribution System
Quarterly Water Supply Strategy and Budget: October - December 2008**

Proposed Production Values by Source in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Oct-08	Nov-08	Dec-08	Oct-07 - Aug-08	Percent
Source					
San Clemente Reservoir	0	0	0	0	0.0%
Carmel Valley Aquifer					
Upper Subunits	31	30	31	566	4.5%
Lower Subunits	862	629	594	9,167	72.4%
Seaside Groundwater Basin					
Coastal Subareas	450	400	350	2,927	23.1%
Phase 1 ASR Recovery	0	0	0	60	0.5%
Use					
Customer Service	1,343	1,059	975	12,600	
Phase 1 ASR Storage	0	0	0	60	
Total	1,343	1,059	975	12,660	100.0%

Notes:

- The budget reflects "critically-dry year" inflow conditions and assumes that the monthly unimpaired inflows at the San Clemente Dam site during the October-December 2008 period will approximate the flows that occurred in 2007, i.e., 130, 250, and 270 AF during the September through November 2007 period.
- The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
- Total monthly production for "Customer Service" in CAW's main system was calculated by multiplying total annual production (14,789 AF) times the average percentage of annual production for October, November, and December (9.08%, 7.16%, and 6.59%, respectively). The annual production total was based on the assumption that production from the Coastal Subareas of the Seaside Groundwater Basin would not exceed 3,504 AF and production from Carmel River sources would not exceed 11,285 AF in WY 2009. The average production percentages were based on monthly data for customer service from WY 1998 to 2007.
- Anticipated production for "Phase 1 ASR Storage" is based on an average diversion rate of approximately 1,000 gallons per minute (gpm) or 4.4 AF per day from CAW's sources in the Carmel River Basin. "Total" monthly CAW "Use" includes water for customer service and water for injection into the Seaside Basin.
- No surface water diversions from San Clemente Reservoir are assumed for this period based on concerns regarding water quality (elevated turbidity) and lowered water levels required by the Division of Dam Safety as part of the San Clemente Reservoir Drawdown Project.
- The target production values for the Seaside Coastal Subareas are based on the targets developed for the first quarter of WY 2008.

**California American Water Main Distribution System
Quarterly Water Supply Strategy and Budget: January - March 2009**

Proposed Production Targets by Source and Projected Use in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Jan-09	Feb-09	Mar-09	Oct-08 - Nov-08	Percent
Source					
San Clemente Reservoir	0	0	0	0	0.0%
Carmel Valley Aquifer					
Upper Subunits	47	81	90	59	2.7%
Lower Subunits	988	893	1,028	1,425	65.5%
Seaside Groundwater Basin					
Coastal Subareas	0	0	0	693	31.8%
Phase 1 ASR Recovery	0	0	0	0	0.0%
Total	1,035	974	1,118		
Use					
Customer Service	945	864	993	2,177	
Phase 1 ASR Injection	90	110	125	0	
Total	1,035	974	1,118	2,177	100.0%

Notes:

- The budget reflects "dry year" inflow conditions and assumes that the monthly unimpaired inflows at the San Clemente Dam site during the December 2008-March 2009 period will equal the 75% exceedence flows, i.e., 991, 2,638, 3,979, and 4,511 AF, respectively. The exceedence values are based on simulated flows for the 1902-2008 period of record.
- The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
- Total monthly production for "Customer Service" in CAW's main system was calculated by multiplying total annual production (14,789 AF) times the average percentage of annual production for January, February, and March (6.39%, 5.84%, and 6.71%, respectively). The annual production total was based on the assumption that production from the Coastal Subareas of the Seaside Groundwater Basin would not exceed 3,504 AF and production from Carmel River sources would not exceed 11,285 AF in WY 2009. These values could change pending potential regulatory actions in 2009. The average production percentages were based on monthly data for customer service from WY 1998 to 2007.
- Anticipated production for "Phase 1 ASR Injection" is based on an average diversion rate of approximately 1,000 gallons per minute (gpm) or 4.4 AF per day from CAW's sources in the Carmel River Basin. "Total" monthly CAW "Use" includes water for customer service and water for injection into the Seaside Basin.
- No surface water diversions from San Clemente Reservoir are assumed for this period based on concerns regarding water quality (elevated turbidity) and lowered water levels required by the Division of Dam Safety as part of the San Clemente Reservoir Drawdown Project.
- The production targets for CAW's wells in the Upper Carmel Valley are based on median production from these wells for these months during the 2000-2008 period.
- The production targets for CAW's wells in the Coastal Subareas of the Seaside Basin, i.e., 0 AF, are based on the assumption that sufficient flow will occur in the Carmel River at the Highway 1 Bridge, i.e., 40 cubic feet per second, to allow CAW to shift its pumping to the Carmel Valley, consistent with SWRCB Order 98-04.

**California American Water Laguna Seca Subarea Distribution Systems
Quarterly Water Supply Strategy and Budget: January - March 2009**

Proposed Production Targets by Source and Projected Use in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Jan-09	Feb-09	Mar-09	Oct-08 - Nov-08	Percent
Source					
Seaside Groundwater Basin					
Laguna Seca Subarea	16	14	19	90	100.0%
Other	0	0	0	0	0.0%
Total	16	14	19		
Use					
Customer Service	16	14	19		
Total	16	14	19	90	100.0%

Notes:

1. The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
2. Total monthly production for "Customer Service" in CAW's Laguna Seca Subarea systems was calculated by multiplying total annual production (345 AF) times the average percentage of annual production for January, February, and March (4.64%, 4.21%, and 5.61%, respectively). The annual production total was based on the assumption that production from the Laguna Seca Subarea of the Seaside Groundwater Basin would not exceed 345 AF. The average production percentages were based on monthly data for customer service from WY 2000 to 2007. The 345 AF annual production limit is specified in the Seaside Basin Adjudication Decision.
3. It should be noted that, based on recent historical use, actual monthly use will likely exceed the proposed monthly production targets. For example, in the January through March 2008 period, CAW produced 24, 25, and 39 AF to meet customer demand in its Laguna Seca Subarea systems. In this context, the production targets represent the maximum monthly production that should occur so that CAW remains within its Standard Production Allocation for the Laguna Seca Subarea specified in the Seaside Decision. However, because the Seaside Decision allows CAW to combine its production in the Coastal Subareas with its production in the Laguna Seca Subarea in determining compliance, CAW can use production savings in the Coastal Subareas to offset overproduction in the Laguna Seca Subarea. These values could change pending potential regulatory actions in 2009.
4. "Other" production sources refer to supplies transferred to Highway 68 customers from CAW's Carmel River sources or water rights acquired from other producers in the Seaside Basin to produce additional water.

**California American Water Main Distribution System
Quarterly Water Supply Strategy and Budget: April - June 2009**

Proposed Production Targets by Source and Projected Use in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Apr-09	May-09	Jun-09	Oct-08 - Feb-09	Percent
Source					
San Clemente Reservoir	0	0	0	0	0.0%
Carmel Valley Aquifer					
Upper Subunits	30	31	30	109	2.3%
Lower Subunits	885	1,059	953	3,649	77.4%
Seaside Groundwater Basin					
Coastal Subareas	250	300	500	957	20.3%
Phase 1 ASR Recovery	0	0	0	0	0.0%
Total	1,165	1,390	1,483		
Use					
Customer Service	1,100	1,390	1,483	4,652	
Phase 1 ASR Injection	65	0	0	63	
Total	1,165	1,390	1,483	4,715	100.0%

Notes:

- The budget reflects "dry year" inflow conditions and assumes that the monthly unimpaired inflows at the San Clemente Dam site during the March-June 2009 period will equal the 75% exceedence flows, i.e., 4,511, 2,775, 1,395, and 552 AF, respectively. The exceedence values are based on simulated flows for the 1902-2008 period of record.
- The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
- Total monthly production for "Customer Service" in CAW's main system was calculated by multiplying total annual production (14,789 AF) times the average percentage of annual production for April, May, and June (7.44%, 9.40%, and 10.03%, respectively). The annual production total was based on the assumption that production from the Coastal Subareas of the Seaside Groundwater Basin would not exceed 3,504 AF and production from Carmel River sources would not exceed 11,285 AF in WY 2009. These values could change pending potential regulatory actions in 2009. The average production percentages were based on monthly data for customer service from WY 1998 to 2007.
- Anticipated production for "Phase 1 ASR Injection" is based on an average diversion rate of approximately 1,000 gallons per minute (gpm) or 4.4 AF per day from CAW's sources in the Carmel River Basin. "Total" monthly CAW "Use" includes water for customer service and water for injection into the Seaside Basin.
- No surface water diversions from San Clemente Reservoir are assumed for this period based on concerns regarding water quality (elevated turbidity) and lowered water levels in June required by the Division of Dam Safety as part of the San Clemente Reservoir Drawdown Project.
- The production targets for CAW's wells in the Upper Carmel Valley are based on minimum production from these wells for these months, i.e., 0.5 cfs or 1.0 AF per day.
- The production targets for CAW's wells in the Coastal Subareas of the Seaside Basin are based on the need to allow sufficient time for CAW's to pump its full Standard Production Allocation during the remainder of WY 2009, i.e., 1,050 AF in the April-June quarter and 1,496 AF in the July-September quarter.

**California American Water Laguna Seca Subarea Distribution Systems
Quarterly Water Supply Strategy and Budget: April - June 2009**

Proposed Production Targets by Source and Projected Use in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Apr-09	May-09	Jun-09	Oct-08 - Feb-09	Percent
Source					
Seaside Groundwater Basin					
Laguna Seca Subarea	24	33	38	169	100.0%
Other	0	0	0	0	0.0%
Use					
Customer Service	24	33	38		
Total	24	33	38	169	100.0%

Notes:

1. The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
2. Total monthly production for "Customer Service" in CAW's Laguna Seca Subarea systems was calculated by multiplying total annual production (345 AF) times the average percentage of annual production for April, May, and June (6.95%, 9.68%, and 11.15%, respectively). The annual production total was based on the assumption that production from the Laguna Seca Subarea of the Seaside Groundwater Basin would not exceed 345 AF. The average production percentages were based on monthly data for customer service from WY 2000 to 2007. The 345 AF annual production limit is specified in the Seaside Basin Adjudication Decision and is subject to change.
3. It should be noted that, based on recent historical use, actual monthly use will likely exceed the proposed monthly production target. For example, in the April through June 2008 period, CAW produced 45, 53, and 58 AF, respectively, to meet customer demand in its Laguna Seca Subarea systems. In this context, the production targets represent the maximum monthly production that should occur so that CAW remains within its Standard Production Allocation for the Laguna Seca Subarea specified in the Seaside Decision. However, because the Seaside Decision allows CAW to combine its production in the Coastal Subareas with its production in the Laguna Seca Subarea in determining compliance, CAW can use production savings in the Coastal Subareas to offset overproduction in the Laguna Seca Subarea.
4. "Other" production sources refer to supplies transferred to Laguna Seca Subarea customers from CAW's Carmel River sources or water rights acquired from other producers in the Seaside Basin to produce additional water. For example, under emergency conditions, water can be transferred from sources that serve customers in CAW's main system, via an existing interconnection, to customers in CAW's Ryan Ranch system.

**California American Water Main Distribution System
Quarterly Water Supply Strategy and Budget: July - September 2009**

Proposed Production Targets by Source and Projected Use in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Jul-09	Aug-09	Sep-09	Oct-08 - May-09	Percent
Source					
San Clemente Reservoir	0	0	0	0	0.0%
Carmel Valley Aquifer					
Upper Subunits	31	31	30	584	7.4%
Lower Subunits	971	966	829	6,048	76.4%
Seaside Groundwater Basin					
Coastal Subareas	500	500	500	1,287	16.3%
Phase 1 ASR Recovery	61	61	60	0	0.0%
Total	1,563	1,558	1,419		
Use					
Customer Service	1,563	1,558	1,419	7,737	
Phase 1 ASR Injection	0	0	0	182	
Total	1,563	1,558	1,419	7,919	100.0%

Notes:

1. The budget reflects "below normal" inflow conditions and assumes that the monthly unimpaired inflows at the San Clemente Dam site during the July-September 2009 period will equal the flows that occurred during the June 4 through October 27, 2008 period, i.e., 607, 175, and 190 AF, respectively.
2. The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
3. Total monthly production for "Customer Service" in CAW's main system was calculated by multiplying total annual production (14,476 AF) times the average percentage of annual production for July, August, and September (10.80%, 10.76%, and 9.80%, respectively). The annual production total was based on the assumption that production from the Coastal Subareas of the Seaside Groundwater Basin would not exceed 3,191 AF and production from Carmel River sources would not exceed 11,285 AF in WY 2009. The average production percentages were based on monthly data for customer service from WY 1998 to 2007.
4. Anticipated production for "Phase 1 ASR Injection" is based on an average diversion rate of approximately 1,000 gallons per minute (gpm) or 4.4 AF per day from CAW's sources in the Carmel River Basin. "Total" monthly CAW "Use" includes water for customer service and water for injection into the Seaside Basin.
5. No surface water diversions from San Clemente Reservoir are assumed for this period based on concerns regarding water quality (elevated turbidity) and lowered water levels in June required by the Division of Dam Safety as part of the San Clemente Reservoir Drawdown Project.
6. The production targets for CAW's wells in the Upper Carmel Valley are based on minimum production from these wells for these months, i.e., 0.5 cfs or 1.0 AF per day.
7. The production targets for CAW's wells in the Coastal Subareas of the Seaside Basin are based on the need for CAW to pump its full Standard Production Allocation during the remainder of WY 2009, i.e., 300 AF in the June quarter and 1,500 AF in the July-September quarter.

**California American Water Laguna Seca Subarea Distribution Systems
Quarterly Water Supply Strategy and Budget: July - September 2009**

Proposed Production Targets by-Source and Projected Use in Acre-Feet

SOURCE/USE	MONTH			YEAR-TO-DATE	
	Jul-09	Aug-09	Sep-09	Oct-08 - May-09	Percent
Source					
Seaside Groundwater Basin					
Laguna Seca Subarea	33	33	31	283	100.0%
Other	0	0	0	0	0.0%
Use					
Customer Service	33	33	31		
Total	33	33	31	283	100.0%

Notes:

1. The annual budget period corresponds to the Water Year, which begins on October 1 and ends on September 30 of the following Calendar Year.
2. Total monthly production for "Customer Service" in CAW's Laguna Seca Subarea systems was calculated by multiplying total annual production (271 AF) times the average percentage of annual production for July, August, and September (12.33%, 12.15%, and 11.49%, respectively). The annual production total was based on the assumption that production from the Laguna Seca Subarea of the Seaside Groundwater Basin would not exceed 271 AF. The average production percentages were based on monthly data for customer service from WY 2000 to 2007. The 271 AF annual production limit is specified in the Seaside Basin Adjudication Decision and is subject to change.
3. It should be noted that, based on recent historical use, actual monthly use will likely exceed the proposed monthly production target. For example, in the July through September 2008 period, CAW produced 60, 59, and 57 AF, respectively, to meet customer demand in its Laguna Seca Subarea systems. In this context, the production targets represent the maximum monthly production that should occur so that CAW remains within its Standard Production Allocation for the Laguna Seca Subarea specified in the Seaside Decision. However, because the Seaside Decision allows CAW to combine its production in the Coastal Subareas with its production in the Laguna Seca Subarea in determining compliance, CAW can use production savings in the Coastal Subareas to offset overproduction in the Laguna Seca Subarea.
4. "Other" production sources refer to supplies transferred to Laguna Seca Subarea customers from CAW's Cannel River sources or water rights acquired from other producers in the Seaside Basin to produce additional water. For example, under emergency conditions, water can be transferred from sources that serve customers in CAW's main system, via an existing interconnection, to customers in CAW's Ryan Ranch system.

Production data comes from the "Monterey Co. District, Production" report prepared by Tina Haines.
 Values in AF

	Seaside Coastal (served to customers, includes ASR Recovery)	ASR Recovery	Seaside Coastal (served to customers, excludes ASR Recovery)	Ryan Ranch 1814	Hidden Hills 1818	Bishop 1821	Total Subareas	Total Seaside Basin
Oct-08	393.92		393.92	8.97	21.42	20.80	51.19	445.11
Nov-08	311.37		311.37	8.87	15.21	14.30	38.38	349.75
Dec-08	252.26		252.26	8.74	12.01	9.40	30.15	282.41
Jan-09	0.00		0.00	7.08	11.65	10.51	29.24	29.24
Feb-09	0.00		0.00	4.57	9.04	7.27	20.88	20.88
Mar-09	0.00		0.00	4.92	10.71	10.66	26.29	26.29
Apr-09	114.94		114.94	6.35	16.43	18.47	41.25	156.19
May-09	215.21		215.21	6.32	19.69	21.42	47.43	262.64
Jun-09	303.28		303.28	7.73	21.48	23.50	52.71	355.99
Jul-09	369.81	-61.00	430.81	8.86	25.61	27.04	61.51	492.32
Aug-09	290.93	-61.00	351.93	8.57	24.16	27.87	60.60	412.53
Sep-08	378.50	-60.00	439.50	6.85	22.63	25.35	54.83	494.33
Total			2,813.22	87.83	210.04	216.59	514.46	3,327.68



PEBBLE BEACH
COMPANY

HAND
DELIVERED

Via Federal Express

RECEIVED

AUG 18 2010

MPWMD

August 17, 2010

Ms. Victoria A. Whitney
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: Certification under Order WR 2009-0060, as amended by Order WR 2010-0001
(collectively, the "Order")

Dear Ms. Whitney:

Pursuant to Condition 3.a.(6) of the Order, I, Mark Stilwell, on behalf of Pebble Beach Company ("PBC"), hereby certify that the following information was true and accurate as of January 31, 2010 (three months following adoption of Order WR 2009-0060 on October 20, 2009):

- 1) Out of the 365 acre feet of Water Entitlement granted to PBC by the Monterey Peninsula Water Management District ("MPWMD") in exchange for PBC's financial support of the CAWD/PBCSD Wastewater Reclamation Project, 36.352 acre feet had been used, or approved for use through issuance of a MPWMD water connection permit, in accordance with, and pursuant to, ordinances, rules, and regulations of MPWMD.
- 2) The 36.352 acre feet consisted of 10.452 acre feet of approved usage by PBC and 25.90 acre feet of approved usage by residential property owners who had purchased a portion of PBC's Water Entitlement pursuant to MPWMD's Ordinance 109 and related rules and regulations. Approved usage in each case is measured by and in accordance with the applicable rules and regulations of MPWMD. For the source of this usage information, please see the attached report from MPWMD for the period ending January 31, 2010.

On or around September 30, 2010, PBC or MPWMD (as allowed by Order WR 2010-0001) will submit an annual report to your office describing the amount of the Water Entitlement that has been used, or approved for use, by MPWMD for the period from February 1, 2010, through September 30, 2010, consistent with Condition 3.a.(6) of the Order. Each year thereafter, this annual report will cover the 12 month-period from October 1 through September 30.

LEGAL AFFAIRS

Post Office Box 1767, Pebble Beach, California 93953 831-647-7500 telephone 831-625-8411 facsimile

Ms. Victoria A. Whitney
SWRCB
Re: Order WR 2009-0060
August 17, 2010
Page 2 of 2

Under penalty of perjury, the forgoing information is true and accurate to the best of my knowledge and belief.

Please feel free to contact me at 831-625-8449 if you have any questions.

Sincerely,



Mark Stilwell
Executive Vice President
and General Counsel

Attachment


cc: 
David Laredo/MPWMD
Stephanie Pintar/MPWMD
Craig Anthony/Cal-Am
Rob MacLean/Cal-Am
Tim Miller/Cal-Am

EXHIBIT 24-B
MONTHLY ENTITLEMENT REPORT
 Reported in Acre-Feet
 For the Month of January 2010

Entitlement Holder	Entitlement	Changes this Month	Total Demand from Water Permits Issued	Remaining Entitlement/and Water Use Permits Available
Quail Meadows	33.000	0.167	30.233	2.767
Water West	12.760	0.114	6.621	6.139

[1]
CAWD/PBCSD Recycled Water Project Entitlements

Pebble Beach Co. [2]	259.790	0.260	10.452	249.338
Del Monte Forest Benefited Properties ² (Pursuant to Ord No. 109)	105.210	0.037	25.900	79.310
Macomber Estates	10.000	0.000	9.595	0.405
Griffin Trust	5.000	0.000	4.809	0.191
CAWD/PBCSD Project Totals	380.000	0.297	50.756	329.244

[1]

This section shows changes resulting from Water Use Permits and Water Permits issued to properties located in Pebble Beach, pursuant to Rule 23.5, as amended by Ordinance No. 109.

[2]

Increases in the Del Monte Forest Benefited Properties Entitlement will result in reductions in the Pebble Beach Co. Entitlement.

RECEIVED

AUG 16 2010

August 16, 2010

MPWMD

LandWatch
monterey county

Post Office Box 1876
Salinas, CA 93902-1876
831-422-9390

Website: www.landwatch.org
Email: landwatch@mchw.org
Fax: 831-422-9391



37

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:

LandWatch Monterey County supports the Sierra Club's recommendation to adopt conditions for the SNG permit for the EcoResort. LandWatch is concerned about the potential for incremental diversions from the Carmel River during the summer months attributable to (as an indirect effect) Cal-Am's increased production from the Seaside Basin to serve SNG. We hope MPWMD Board formulates conditions that will mitigate potential impacts.

LandWatch specifically directs the MPWMD Board to consider the language below taken from the Sierra Club letter dated August 4, 2010:

Preventing Cal-Am from indirectly diverting summertime production to serve SNG to the Carmel River would benefit the survival of steelhead fry in the River. Many steelhead fry rear in the habitat below the Narrows. Maintaining flow through this summer and fall in more of this habitat will allow such fish to rear to the smolt life-stage in the river, and avoid the stress and mortality associated with rescue and rearing in an artificial habitat. Even for parts of the river that do eventually go dry, keeping water in the river longer will allow fish more time to grow before they are subjected to rescue. See Williams Declaration at ¶¶20, 25, 26. Sierra Club again requests that if the District Board declines to perform additional environmental review, it minimize any impacts of Cal-Am production for SNG on the Carmel River, by requiring that there be no increased summer diversions from the Carmel River as an indirect result of Cal-Am's service to SNG and that in terms of water accounting, Cal-Am shall not use ASR water to serve SNG.

LandWatch appreciates this opportunity to provide comment on the Joint Application in anticipation of the meeting today, August 16.

Sincerely,

Amy L. White, Executive Director

CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



Of Counsel

Laurens H. Silver, Esq.
P. O. Box 667
Mill Valley, CA 94942
Telephone: (510) 237-6598
Facsimile: (510) 237-6598
Mobile: (415) 515-5688

August 13, 2010

RECEIVED

AUG 13 2010

MPWMD

Sent Via Electronic 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 would like to make several observations concerning the Staff Report prepared for the meeting on the 17th of August.

On page 17, the discussion of finding 12 relating to cumulative impacts of the WDS permit does not include any consideration of the cumulative impacts of the triennial reductions required under the Adjudication that are associated with the permit. As pointed out in the August 11 letter the District has not considered as a cumulative impact the 2012 triennial reductions ordered under the adjudication (when considered in light of assessment penalties for exceeding the production allowance) that will provide strong incentives to Cal-Am to shift some of its production burden to the River. If such cumulative impacts are considered it will not be possible, on the basis of existing evidence, for the District Board to find that "the cumulative effects of issuance of this WDS permit do not result in significant adverse effects to the source of supply or the species and habitats dependent on the source of supply due to actions by the Superior Court to reduce Seaside Pumping to the natural safe yield."

Secondly, the Statement at p. 15 is facially preposterous and portrays a misunderstanding of the Adjudication:

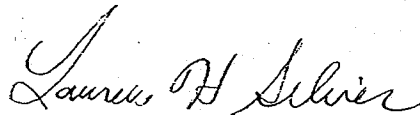
"Notably, the Seaside Basin Adjudication requirement for CAW customers to reduce Seaside Basin Coastal Subarea use by 418 AF in year 2012, with another reduction of 418 AF in 2015, provides more than adequate supply to ensure that MBSE can be served by CAW facilities in the Seaside Basin. Recall that the SNG water right to 149 AFY does not change; thus 90 AFY will remain available for CAW to supply to MBSE while other CAW customers must reduce their consumption."

There is no dispute that there will be adequate water for SNG. However, the inference that "CAW customers must reduce their consumption" is based upon a mistaken interpretation of the Adjudication. CAW customers are under no obligation to reduce their consumption and will do so only if Cal-Am cannot use Carmel River Water to supply them. It is Cal-Am, as the dominant Standard Producer that will be curtailed in its pumping from the Basin. While it curtails its production and continues to serve SNG, it is free to divert more from the River to serve its other customers and to make up for its production losses in the Basin. There is no attempt, through the proposed water accounting-protocol conditions, to treat any such production from the Carmel River associated with this WDS as a cumulative impact that needs to be mitigated. One obvious mitigation requirement would be that if the "accounting" determines that there has been a shift in production from the Basin to the River that it be counted as Cal-Am production from the River.

In the Shute, Mihaly, Weinberger memo dated 8/11/10, it is stated that "the Court is likely to conclude that any incentive to increase diversions from the Carmel River is a result of that decision (the Court's decision to grant SNG 49 afy and the Court's establishment of replenishment fees) and not the Application itself." (Memo at 5). That statement is true, it supports Sierra Club's cumulative impacts argument, since the Adjudication is a "project" within the holding of *Friends of Eel River*, cited in the August 11 letter.

Counsel's memo of 8/11/10 was not addressed to cumulative impacts, nor to *Friends of Eel River*, discussed in the Sierra Club's August 11 letter. It is clear, however, that to the extent the Court intended that the triennial 10% reduction take place in 2012 (and again in 2015) while service to SNG as an overlying rights holder continue, these operative conditions of the Adjudication, under *Friends of Eel River*, should be considered a cumulative impact associated with the Project. In fact, the most likely interpretation of the Adjudication Decision is that the Court did intend Cal-Am production for its other customers to be curtailed (by 10%) while it served SNG with its full water right and did not intend Cal-Am to make up for that production "loss" from the Seaside Basin by increasing diversions from the Carmel River.

It would be consistent with the intent of the Adjudication for the District Board to consider the triennial reductions as a cumulative impact of this Project, to consider it significant, and to condition the WDS permit in such a manner as to remove any Cal-Am incentive to shift its production "burden" to the River by treating any such shift identifiable through water accounting protocols as production from the Carmel River.



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

cc: Vicky Whitney,
SWRCB, Water Rights Division



Carmel River Steelhead Association

501 (C)(3) TIN 77-0093979

P.O. Box 1183

Monterey, CA 93942

RECEIVED

AUG 16 2010

MPWMD

Darby Fuerst, General Manager
 Monterey Peninsula Water Management District
 P.O. Box 85
 Monterey, CA 93942-0085

August 13, 2010

**Subject: Protest by Carmel River Steelhead Association
 Permit 20808B (Application 27614B) Carmel River Monterey
 County**

Dear Mr. Fuerst:

On Monday August 9, 2010 we received your letter dated August 5, 2010. On Tuesday August 10th I stopped by your office and talked to Andy Bell as you requested.

The visit to your office was in good faith and an attempt to determine if a meeting was even necessary or warranted. During the meeting with Andy I felt Andy was trying to intimidate and bully me. I may have gotten the wrong impression, and I hope I have, but it was the impression I got. I do hope that is not the posture MPWMD will take when we do meet. CRSA has always stated that we believe in the concept of ASR, we just have a difference of opinion on some of the items in the permit application.

One of the items that Andy brought up is that MPWMD feels that CRSA is being uncooperative in our willingness to meet with MPWMD. CRSA believes that is an unfair characterization of what has happened. My understanding of the time line is as follows.

- 1: On August 31, 2009 SWRCB sent a letter to MPWMD giving MPWMD 30-days to meet with CRSA.
- 2: SWRCB did extend the period to meet until October 19, 2009.
- 3: On October 16, 2009 MPWMD sent a letter to SWRCB and CRSA stating that MPWMD would "offer to meet with CRSA representatives of CRSA."
- 4: On October 26, 2009 CRSA attended a meeting where Cal-Am asked CRSA to stop by and discuss our protest. (Andy Bell was adamant that MPWMD did not call that meeting.) CRSA attended the meeting with the understanding that it would be between Cal-Am and CRSA. As we all know that meeting was not just between Cal-Am and CRSA.
- 5: On November 5, 2009 CRSA sent a letter to MPWMD stating that CRSA was willing to meet if there was anything MPWMD would negotiate. MPWMD never answered that letter.
- 6: On March 8, 2010 CRSA sent another letter to MPWMD once again offering to meet.
- 7: On April 27, 2010 CRSA sent yet another letter to MPWMD.

8: On June 7, 2010 MPWMD sent a letter to CRSA answering our previous letters and stating that MPWMD would "like to meet with you again to resolve CRSA's protest." There was no date offered for such a meeting.

9: On July 22, 2010 CRSA responded stating that we were willing to meet but we needed two week's notice.

10: On August 9th we received a letter asking for a meeting in one week.

CRSA will not accept that we have been unwilling to meet. We believe the record proves otherwise.

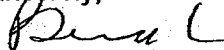
We really seem to be getting off on the wrong foot here. CRSA only wants to protect the Carmel River Steelhead and their habitat; I hope and believe that MPWMD has the same desires. CRSA wants to work with MPWMD and others to collectively protect the Steelhead.

I have been told at least three times that Cory Hamilton is making a study and preparing a report. CRSA has made its own studies and is preparing a report. CRSA believes it would be a waste of everyone's time to meet before the two reports are ready, especially when MPWMD states the meeting would be to find out why CRSA is making a study and report.

While we have told you the reasons for our report we have not been given the reasons for MPWMD's report. Once again, the reason for the CRSA report is to try to get current information on the river so educated decisions can be made by everyone. We hope to share this information with MPWMD, California Dept. of Fish and Game, NMF, and SWRCB so we all can do what is best for the fish.

Considering the above, CRSA respectfully declines the invitation to meet until both reports are complete. We will notify you when our report is complete and would appreciate if you would notify us when your report is complete.

Sincerely,



Brian LeNeve
CRSA Board member

cc: Katherine Mrowka, Chief Inland Streams Unit, State Water Resources Control Board

Robert McLean, President, California American Water
Craig Anthony, General Manager, Coastal Division, California American Water
Joyce Ambrosius, Central Coast Supervisor, NMFS
Jeffery R. Single, Regional Manager, CA Dept. of Fish and Game

EMAIL
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ROSE-EVE K. LEWIS
A PROFESSIONAL LAW CORPORATION
CARMEL VALLEY OFFICE
9 DEL FINO PLACE, SUITE 208
CARMEL VALLEY, CA 93924

TELEPHONE
(831) 659-1722
FACSIMILE
(831) 659-1289

RECEIVED

August 12, 2010

AUG 15 2010

MPWMD

Mr. Darby Fuerst
General Manager
Monterey Peninsula Water Management District
P.O. Box 85
Monterey, CA 93942

RE: Apparent Water Use Violation

Dear Mr. Fuerst;

I have been asked to inform you of apparent violations of Carmel Valley "uses" and which are generating far greater water consumption than allocated to a specific use/property. The Monterey Building Department has already been informed of the complaints which relate not only to water usage, but are also to unauthorized structures as more fully explained below. In fact, there is at least one violation of record which is now being further investigated.

In addressing the water concerns, you may be aware that miscellaneous "wine tasting" activities have been popping up all over Carmel Valley Village in non restaurant locals. The problem is not when the wine tasting use is associated with an existing restaurant operation; rather, when the non-restaurant operations hang out such signs. These non-restaurants tenants/property owners do not appear to have complied with either the water, or rest room, requirements for a wine tasting use. One that was specifically brought to my attention is on Pilot Road *opposite* an existing restaurant known as the Vineyard Bistro. It is operating on what is usually gallery space. This tenant/property owner does not appear to have the water required to operate such a use; nor is their a restroom facility designated to their existing use. Further, this parcel appears to share ownership with another parcel on Del Fino Place and which has an open building violation. That parcel is 187-432-014-000. The open violation pertains to structures having been erected on what was the designated parking spaces required for that use. Now, the parking has been blocked off through a patio space which is gated. The Monterey Building Department is further investigating this site as there appears to be shared ownership from Pilot Road through to the back of the Del Fino Place location. It is not known, since the area cannot be seen from the street, whether the wine tasting and related activities are now on that space as well. Thus, there is an increased density of use on these parcels as evident by the existing violation arising from the increased structures.

ROSE-EVE K. LEWIS
A PROFESSIONAL LAW CORPORATION


Mr. Darby Fuerst
General Manager
August 12, 2010
Page 2

In addition, it has been brought to my attention that another restaurant location is attempting to expand into a neighboring parcel without the proper upgrade in water allocation. The restaurant operation at 187-433-061-000-62, is presently under a change of ownership. However, concern has been expressed about having incorporated what was formally a woodworking shop at 187-433-062-000-61 into the restaurant use either for dinners and/or wine tasting. This appears to be inconsistent with the water allocated to that property based on the water allocation for the -62 parcel only.

Although the structural issues have been brought to the attention of the Planning and Building Departments, the unauthorized increase of water consumption is of serious concern. If true, these uses are obtaining "virtual water permits" to the detriment of others properly waiting in line for residential and commercial development permits.

Very truly yours,

ROSE-EVE K. LEWIS
a PROFESSIONAL LAW CORPORATION
by


Rose-Eve K. Lewis

RKL:ddw

cc: Wanda Hickman, Planning Services Manager

MONTEREY COUNTY



DEPARTMENT OF HEALTH

ANIMAL SERVICES
BEHAVIORAL HEALTH
CLINIC SERVICES

EMERGENCY MEDICAL SERVICES
ENVIRONMENTAL HEALTH

PUBLIC HEALTH
PUBLIC ADMINISTRATOR/PUBLIC GUARDIAN

RECEIVED

AUG 24 2010

MPWMD

August 12, 2010

Darby Fuerst
Monterey Peninsula Water Management District
5 Harris Court, Bldg G
Monterey, CA 93940

RE: Request for Co-funding of Expanded Assessment of Fractured Rock Wells within the Monterey Peninsula Water Management District

Dear Mr. Fuerst,

The Monterey County Health Department, Environmental Health Bureau (EHB) has appreciated your staff's assistance on our newly adopted Interim Well Ordinance. As you are aware, due to concerns about long term reliability of wells drilled into fractured rock formations and the potential impacts on neighbors, our interim ordinance will prohibit most new wells being drilled on lots less than 2.5 acres within the ordinance's study area.

The interim ordinance will expire May 24, 2011 and EHB staff is currently working on gathering and analyzing information to determine if we will recommend that the Monterey County Board of Supervisors adopt an ordinance to address the issues presented in the interim ordinance. The results of your pilot study have been helpful in supporting the interim ordinance. The results of your expanded study will also most likely be very helpful in our ongoing investigation of wells in fractured rock.

EHB staff has and will continue to spend a significant amount of time researching and analyzing wells in fractured rock formation. We will also be working with other counties and professionals to gather as much information and data that is available. Unfortunately, due to the present economic environment our budget has been severely impacted this fiscal year and will continue to be severely impacted into the foreseeable future. At present, EHB does not have the resources to spend any additional funds beyond staff time on the project. However, we feel that the results of our own investigation will be very valuable to your study and may be a resource for your agency.. If you have any specific questions regarding existing information we have or our current investigation, please contact Cheryl Sandoval at (831) 755-4552 or sandovalcl@co.monterey.ca.us as the primary contact or Richard LeWarne at (831) 755-4544 or lewarner@co.monterey.ca.us

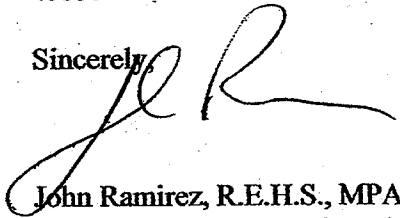
Page 2 of 2

August 12, 2010

RE: Request for Co-funding of Expanded Assessment of Fractured Rock Wells within the Monterey Peninsula Water Management District

We look forward to continue our agencies' collaborative working relationship in addressing mutual items of concern. If you have any questions, please feel free to call me at (831) 755-4539.

Sincerely,

A handwritten signature in black ink, appearing to read 'JR', written over the word 'Sincerely,'.

John Ramirez, R.E.H.S., MPA
Director, Environmental Health Bureau

CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



Of Counsel

Laurens H. Silver, Esq.
P. O. Box 667
Mill Valley, CA 94942
Telephone: (510) 237-6598
Facsimile: (510) 237-6598
Mobile: (415) 515-5688

RECEIVED

AUG 12 2010

MPWMD

August 11, 2010

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.

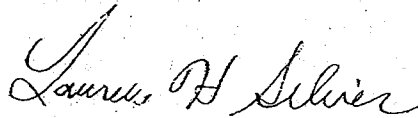
Here, Sierra Club is asking the District to consider, in light of the anticipated regulatory setting in 2012 (a 418 afy reduction in Cal-Am's Standard Production allowance) the indirect and cumulative impacts on the Carmel River of Cal-Am's production for SNG through the front-end loading agreement on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



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

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 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: July 23 - 25, 2008

Carmel River in Monterey County

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.



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterboards.ca.gov/waterrights

Arnold Schwarzenegger
Governor

AUG 05 2010

In Reply Refer to:
JWC:A01674A

RECEIVED

CERTIFIED MAIL

AUG 16 2010

Jon Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814

MPWMD

Dear Mr. Rubin:

COMPLIANCE WITH ORDER WR 95-10 and WR 2009-0060, CALIFORNIA AMERICAN WATER COMPANY (CAW), MONTEREY COUNTY

This letter is written in response to your letter to the Division of Water Rights (Division) dated June 9, 2010. Your letter was written to summarize points that were discussed at our meeting on May 13, 2010.

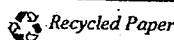
Your letter states that CAW is making a good faith effort to comply with Order WR 95-10 and Order WR 2009-0060, given the following activities discussed during our meeting:

- CAW continues to pursue the Coastal Water Project with the California Public Utilities Commission (PUC) in order to eliminate its unlawful diversions of water from the Carmel River.
- There was confirmation that the Sand City Desalination Plant is complete and is now producing water.
- CAW has filed with the PUC a request to place a moratorium on new connections. However, CAW informed the Division that it may take approximately six months before the PUC processes the application.
- CAW identified the potential for a new small project that is a well at Fitch Middle School which may provide 500 acre-feet of water as part of the Aquifer Storage Recovery (ASR) project.
- The Division received CAW's June 3, 2010 ASR Operating Storage and Recovery Plan.

I agree with your description of our May 13, 2010 meeting.

As we discussed, the Santa Clara Superior Court issued a decision regarding the stay of the State Water Resources Control Board's (State Water Board) Cease and Desist Order (WR 2009-0060) against CAW dated October 20, 2009. Judge Murphy ruled in favor of the State Water Board and lifted the stay of Order WR 2009-0060 that the Monterey Superior Court had issued in the case brought by the Monterey Peninsula Water Management District (MPWMD). As a result of this ruling, the terms and conditions of the Order WR 2009-0600 are in effect.

California Environmental Protection Agency



Jon Rubin
Diepenbrock Harrison

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AUG 05 2010

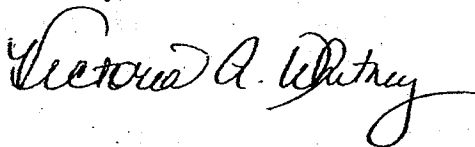
After our meeting, Division staff finds that CAW is not fully compliant with Order WR 2009-0060. Division staff concludes that compliance is lacking for the following conditions of Order WR 2009-0060:

- Condition 3 (a)(6) of the Order requires that "within 90 days following adoption of the Order, the Pebble Beach Company shall certify, under penalty of perjury, the total quantity of water annually used under its water entitlement from MPWMD (for the funding assurances provided for the construction and expansion of the CAWD-PBCSD wastewater reclamation project)." To date, the State Water Board has not received a certification from Pebble Beach. Although this condition was placed on the Pebble Beach Company, CAW must rely on this information to comply with diversion limitations of this condition.
- Condition 9 of the Order requires that CAW shall comply with certain requirements of Order WR 95-10. Condition 4 of Order WR 95-10 requires that CAW maximize production from the Seaside Groundwater Basin and to minimize diversions from the Carmel River. On December 14, 2009, MPWMD reported that CAW had a 496 acre-feet carryover credit for water it was entitled to pump from the Seaside Groundwater Basin. If this groundwater was not ASR water and was available for use at the time water was being diverted from the Carmel River, and CAW neglected to maximum its Seaside Groundwater pumping capacity, a violation of Condition 4 occurred.

CAW is also required to comply with all annual reduction schedules of Order WR 2009-0060. CAW must implement the immediate reduction requirements from the Carmel River. CAW should take immediate corrective actions regarding the above-described violations and inform the State Water Board within 15 days of the date of this letter of its time schedule for compliance. As stated in Condition 10 of Order WR 2009-0060, the Deputy Director for Water Rights is directed to closely monitor CAW's compliance with Order WR 95-10 and Order WR 2009-0060. Appropriate action shall be taken to ensure compliance with these orders.

If there are any questions concerning this matter, please contact Mr. John O'Hagan at (916) 341-5368 or me at (916) 341-5302.

Sincerely,



Victoria A. Whitney
Deputy Director for Water Rights

cc: ✓ Darby Fuerst, General Manager
Monterey Peninsula Water Management District
P.O. Box 85
Monterey, CA 93940

Robert MacLean, President
California American Water Company
P.O. Box 951
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CALIFORNIA ENVIRONMENTAL LAW PROJECT
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July 26, 2010

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

RECEIVED

JUL 26 2010

MPWMD

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.¹ Thus, Cal-Am diversions were 841 AF (7.5%) below the 11,285 AF

¹ 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.4th 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

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.4th 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 an 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 5.²

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).³

² See attached Exhibit B.

³ 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.⁴ 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.⁵

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.⁶

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-

⁴ While continuing to serve the Ecoresort with up to 90 afa from the Paralta Well.

⁵ 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."

⁶ 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.⁷ 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.⁸ The District has a duty to mitigate this environmental

⁷ 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.

⁸ In *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001), 87 Cal.App.4th 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.4th 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 31st 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.*² 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,

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.4th at 109

⁹ 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)¹⁰

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).

¹⁰ 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.¹¹

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.

¹¹ 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.

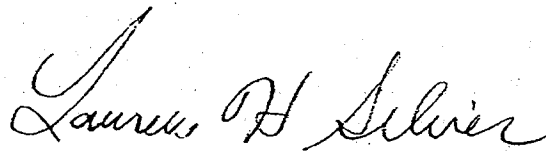
The District is exposing itself to liability under the ESA if it authorizes increased diversions from the Carmel River (up to 90 afy) to offset water produced for SNG.

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.¹²



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cc: Vicky Whitney

¹² 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
Average:		10,967	-376	-3.3%	

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 I 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 I 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 (afy)	Alternative Production Allocation (afy)	Standard Production Allocation (afy)	CAW Share (afy)	Operating Yield (afy)	Alternative Production Allocation (afy)	Standard Production Allocation (afy)	CAW Share (afy)	Operating Yield (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.

CITY OF SAND CITY

RESOLUTION SC 09-06 2009

EXHIBIT C

**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

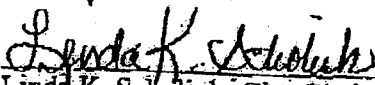
NOES: None


ABSTAIN: None

ABSENT: None

ATTEST:

APPROVED:


 Linda K. Scholink, City Clerk


 David K. Pendergrass, Mayor



Linda S. Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board

Central Coast Region

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, 2nd 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 afy¹. 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 afy².
3. Cal-Am is responsible for approximately 85 percent of the total water diversions from the Carmel River and its associated subterranean flow².
4. The Carmel River is home to a genetically distinct steelhead population commonly identified as the California Central Coast Steelhead³. The California Central Coast Steelhead are listed as threatened under the Federal Endangered Species Act (ESA)⁴. In addition, the Carmel River is listed as a critical habitat for the survival of the California Central Coast Steelhead⁵.
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 Lagoon⁶.
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

¹ 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

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

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

⁴ 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).

⁵ 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)

⁶ 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 1995⁷.

11. The water service connection to Cal-Am's distribution system for the proposed project constitutes an additional diversion of up to 0.5 cfs 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 order⁸ against Cal-Am if it is adopted in its current form. The cease and desist order is being considered

⁷ 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

⁸ 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.

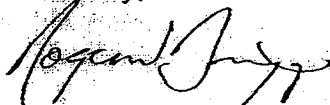
Providing a water supply for the proposed project or any project via a connection to the Cal-Am distribution system diverting water from the Carmel River would be inconsistent with the public trust doctrine.

State Water Resources Control Board
 Attn: Kathy Mrowka
 Division of Water Rights
 1001 I Street, 14th 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, or Burton Chadwick at 805-542-4786.

Sincerely,



Roger W. Briggs
 Executive Officer

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

cc:

State Water Resources Control Board
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State Water Resources Control Board
 Reed Sato
 Water Rights Prosecution Team

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California Environmental Protection Agency



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Calif. Sportfishing Protection Alliance
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 Heisinger, Buck & Morris
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 Fenton & Keller
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 Colton Hall
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California Salmon and Steelhead
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 Bob Baiocchi
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 Graeagle, CA 96103
 (530) 836-1115
rbaiocchi@gotsky.com

Planning and Conservation League
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jminton@pcl.org

National Marine Fisheries Service
 Christopher Keifer
 501 W. Ocean Blvd., Suite 4470
 Long Beach, CA 90802
 (562) 950-4076

christopher.keifer@noaa.gov

Division of Ratepayer Advocates
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City of Carmel-by-the-Sea
Donald G. Freeman
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Carmel-by-the-Sea, CA 93921
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Pebble Beach Community Services
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mniccum@pbcsd.org

California Department of Fish and Game
Central Region
Dr. Jeffrey R. Single, Regional Manager
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Fresno, CA 93710

Monterey County Water Resources
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Curtis V. Weeks, General Manager
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Salinas, CA 93901-4455
curtisweeks@co.monterey.ca.us

The Honorable Dave Potter
District 5 Supervisor
County of the Monterey
Monterey Courthouse
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Monterey, CA 93940
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The Honorable Jane Parker
District 4 Supervisor
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National Marine Fisheries Service
Southwest Region – Santa Rosa Field
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Monterey Peninsula Water Management
District
Kristi Markey, Chair - Board of Directors
5 Harris Court, Building G
P.O. Box 85
Monterey, CA 93942-0085

Received at 7/19/2010
MPWMD Board Meeting
Item 21

Re: Testimony of Sierra Club Opposing Approval of a Water Distribution Permit to Serve the SNG "Ecoresort."

In a letter dated July 16, 2010, to District Chair Regina Doyle. Sierra Club urged the District Board. at its meeting Monday evening, July 19, to deny the joint Cal Am-SNG (Monterey Bay Shores Ecoresort) water distribution application. Cal Am is seeking to deliver 90 acre feet from its Seaside Basin (Peralta Well) production to the SNG "Ecoresort." through an addition to its service area and extension of its delivery substructure.

The Sierra Clubs letter requests that the District Board must take into account all impacts to the resources of the Carmel River from Cal Am's delivery of water to SNG by Cal Am. Because the Seaside Basin is over draft, the water Cal Am provides to SNG (90 afy) will result in a proportionate reduction (by 85 AFY) of water available to Cal Am's other customers in the Seaside Basin. This is required under the terms of the Adjudication.

In order to avert paying substantial penalties for exceeding its production allocation as a Standard Producer under the Adjudication decree., Cal Am has substantial economic incentive to increase its diversions from the Carmel River (by 85 afy) as replacement water (so long as Cal production is less than the amount permitted by the SWRCB under the 2009 Cease and Desist Order. (In fact since 2005 Cal Am has been below the production ceiling by 5-8%).

Sierra Club strongly believes that the resources of the Carmel River should not harmed to any degree by an increase in Cal Am's illegal diversions resultant from its delivery of water to the "Eco-Resort". To the extent the Seaside Basin is in overdraft, as determined in the Adjudication,, the Adjudication requires Cal Am to proportionately reduce its production (Cal Am produces 87% of the water produced by the standard producers) when it provides water service to the Ecoresort. Cal Am should not be allowed to avoid the required decreases its production allocation to serve other customers relying on Seaside Basin water by increasing its unlawful diversions from the Carmel River.

Sierra Club believes this matter deserves your immediate attention, and urges you appear Monday night to protest against Cal Am "robbing" the River to make up for increases in its production from the Seaside Basin ordered by the Court. Cal Am must not be allowed to shift to the River its production decreases. It must not be allowed to increase its unlawful diversions from the River in order to accommodate the needs of the Eco Resort. The joint water distribution permit, if approved, would provide with Cal Am with a means to enhance its water delivery capabilities at the expense of the rate payers.

CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



Of Counsel

Laurens H. Silver, Esq.
P. O. Box 667
Mill Valley, CA 94942
Telephone: (510) 237-6598
Facsimile: (510) 237-6598
Mobile: (415) 515-5688

RECEIVED

JUL 16 2010

MPWMD

July 17, 2010

Sent Via Electronic Mail & Facsimile

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

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

Dear Ms. Doyle:

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

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

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

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

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

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

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

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

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

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

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

Id. at III-4

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

- II. The District's Regulatory Duties to Promote Coordinated Management of the Area Through Approval of Water Distribution Permits Warrant Requiring Additional Environmental Documentation With Respect to The Effects of the Joint Cal-Am-SNG Water Distribution Permit Application on The Public Trust Resources of The Carmel River and Require Mitigating Significant Impacts on the Carmel River and its Resources Resulting From Approval of The Joint Application.
- A. The Purpose of the California Environmental Quality Act Is To Ensure that Agencies Give Primary Consideration to Preventing Environmental Damage, Based on Adequate Information.

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

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

- B. MPWMD Is a Responsible Agency Under CEQA.

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

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

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

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

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

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

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

(1) The ASR project is intended to relieve pressure on the Carmel River and its public trust resources during periods when the River's surface flow is diminishing and receding. The Board's Cease and Desist Order requires the effective May 31 of each year that stored water in the ASR project be used to serve Cal-Am customers to reduce pumping in the Carmel River alluvium. There needs to be disclosure in an environmental document and mitigation conditions to eliminate impacts on the Carmel River diversions attributable to use of the stored ASR water for any new connection to the SNG site rather than to relieve pumping from the alluvium of the Carmel River. To the extent its Standard Production Allowance is reduced, Cal-Am cannot be allowed to use ASR water to serve existing customers previously served by production from Seaside Basin wells. Such environmental analysis and mitigation conditions are especially critical in light of the SWRCB Cease and Desist Order which requires Cal-Am to use all water stored under the ASR project (after May 31st 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.*⁴ Thus, the District needs to consider through an environmental document and mitigate whatever impacts would occur to the Carmel River alluvium and the River's public trust resources attributable to use of ASR water to serve existing customers to replace water production lost to Cal-Am by reason of its service to SNG.

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

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

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

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

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

In the Seaside Basin Adjudication, two types of "allocations" were defined for the various producers in the basin. The first type, i.e., "Alternative Production Allocation", referred to a fixed amount of water that could be pumped by each "Alternative Producer" from the basin each year. This first type is analogous to an "overlying" groundwater right. The second type, i.e., "Standard Production Allocation", referred to the amount of water that a "Standard Producer" could pump each year, calculated as a percentage of the safe yield of the basin available after subtracting the Alternative Producers' allocations. This second type is analogous to an "appropriative" groundwater right. Cal-Am is a Standard Producer under the Adjudication Decision. If it produces up to 90 afy to serve the Ecoresort SNG, the amount permitted to be pumped by Cal-Am as a Standard Producer will be reduced by a proportion (87%) of the amount furnished to SNG. (so long as the Basin continues in overdraft).⁷ Adjudication Decision at 18-19.⁸

⁵ While continuing to serve the Ecoresort with up to 90 afa from the Peralta Well.

⁶ 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ In Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001), 87 Cal.App.4th 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.4th at 121. The Court concluded that a proper baseline groundwater consumption figure should have reflected actual historical usage at the time the development application was filed.

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

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

87 Cal.App.4th at 109

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

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

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

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

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

Id. at p.4

The Executive Director found that:

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

Page 9 of 13

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

The Court continued:

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

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

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

Finding 19, line 11:

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

Finding 20, line 6:

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

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

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

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

Finally, the CDO, at 40, states:

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

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

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

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

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

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

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

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

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

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

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

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

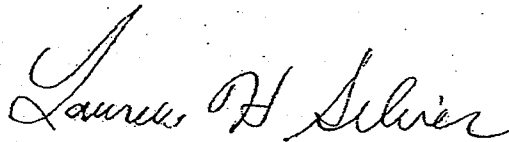
VI. Conclusion.

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

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

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

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



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



Linda S. Adams
Secretary for
Environmental
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Arnold Schwarzenegger
Governor

August 31, 2009

County of Monterey
Resources Management Agency – Planning Department
Attn: Mike Novo, Director of Planning
168 West Alisal, 2nd 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 afy¹. 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 12,742 afy².
3. Cal-Am is responsible for approximately 85 percent of the total water diversions from the Carmel River and its associated subterranean flow².
4. The Carmel River is home to a genetically distinct steelhead population commonly identified as the California Central Coast Steelhead³. The California Central Coast Steelhead are listed as threatened under the Federal Endangered Species Act (ESA)⁴. In addition, the Carmel River is listed as a critical habitat for the survival of the California Central Coast Steelhead⁵.
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 Lagoon⁶.
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

¹ 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

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

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

⁴ 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).

⁵ 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)

⁶ 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 1995⁷.

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 order⁸ against Cal-Am if it is adopted in its current form. The cease and desist order is being considered

⁷ 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.

⁸ 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 Program⁹ for the preservation of Carmel River environmental resources. We would strongly disagree with this argument because the applied mitigation measures¹⁰ 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

⁹ 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.

¹⁰ 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



Mike Novo

8

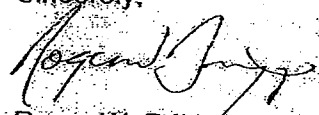
August 31, 2009

State Water Resources Control Board
Attn: Kathy Mrowka
Division of Water Rights
1001 I Street, 14th 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, or Burton Chadwick at 805-542-4786.

Sincerely,



Roger W. Briggs
Executive Officer

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

cc:

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10

August 31, 2009

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