

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2002 – 0002

In the Matter of Reconsideration of WR Order 2001-04-DWR
Implementing Condition 6 of Order WR 95-10 as Modified by
Order WR 98-04 Regarding Diversions by
California-American Water Company

SOURCE: Carmel River

COUNTY: Monterey

ORDER RECONSIDERING WR ORDER 2001-04-DWR

BY THE BOARD:

1.0 BACKGROUND

On July 6, 1995, the State Water Resources Control Board (SWRCB) adopted Order WR 95-10 regarding complaints filed against the California-American Water Company (Cal-Am) concerning Cal-Am's operations on the Carmel River in Monterey County. Petitions for Writ of Mandate were filed challenging Order 95-10. As part of the settlement of the litigation, on February 19, 1998, the SWRCB adopted Order WR 98-04, which amended Order WR 95-10. Condition 6 of Order WR 95-10, as modified by Order WR 98-04, (Condition 6) requires Cal-Am to evaluate whether its existing diversions to the Carmel Valley Filter Plant (CVFP) can be changed to maintain more surface flow in the Carmel River.

Condition 6 states:

“Cal-Am shall conduct a study of the feasibility, benefits and estimated costs of supplying water to the areas now served by the CVFP from its more nearby wells downstream of the plant and shall also conduct a similar study of utilizing the existing or expanded Begonia Treatment Plant or other facilities located further downstream in lieu of the Carmel Valley Filter Plant. This latter study shall be completed within one year of the date of entry of this Order. Petitioners shall have an opportunity to comment on the scope of the study. The study shall be

under the direction of the Division of Water Rights, and will be conducted by a consultant approved by the Division. If the Chief, Division of Water Rights, finds that the measures identified in the studies are feasible, Cal-Am must implement supplying water from the facilities identified by the Division according to a schedule approved by the Division of Water Rights.

“The objective of supplying water from the wells is to maintain surface flow in the stream as far downstream as possible by releasing water from San Clemente Dam for maintenance of fish habitat. The results of the study and recommendations shall be provided to the District and DFG for comment.”

Cal-Am completed two studies pursuant to Condition 6. The petitioners and others were given an opportunity to comment on the scope of the studies, were provided copies of the studies upon request, and were given an opportunity to comment on the completed studies. On April 18, 2001, in WR Order 2001-04-DWR (Order), the Chief, Division of Water Rights, ordered a modification of the diversion practices of Cal-Am in accordance with Condition 6. The Order requires Cal-Am to comply with Condition 6 as follows:

- “1. Unless Cal-Am notifies the Chief of the Division of Water Rights as required by Paragraph 2, below, Cal-Am shall within 40 days of issuance of this order divert the water presently diverted at San Clemente Dam from the Carmel River subterranean stream between river miles 9.0 and 17.2. Cal-Am shall satisfy the water demands of its customers by extracting water from its most downstream wells between river miles 9.0 and 17.2 to the maximum practicable extent, except that Cal-Am may divert up to 1.25 cubic feet per second (cfs) to serve the Carmel Valley Village using the wells in AQ1.
- “2. Within 30 days of the date of this order, Cal-Am shall conduct a hydrologic study for the limited purpose of determining whether the conditions specified in Paragraph 1, above, cause localized hydrologic impacts in the Carmel River in the vicinity of the wells used to divert the water which is presently diverted at San Clemente Dam. Cal-Am shall notify the Chief of the Division of Water Rights within 10 days of completing the study if adverse hydrologic impacts are expected to occur.
- “3. Paragraph 1 may be modified by the Chief of the Division of Water Rights if new information becomes available which shows that further expansion of downstream pumping is feasible and beneficial for maintenance of fish habitat in the lower Carmel River. Any changes to Paragraph 1 shall occur after notice and an opportunity to comment on the proposed change.”

Petitions for Reconsideration of the Order were received from Cal-Am, the Monterey Peninsula Water Management District (District), the Carmel River Steelhead Association (CRSA) and the Ventana Chapter of the Sierra Club (Sierra Club), and the National Marine Fisheries Service (NMFS). On June 21, 2001, in Order WR 2001-13, the SWRCB granted the petitions for reconsideration and ordered the Chief, Division of Water Rights, to schedule a hearing for the limited purpose of receiving evidence on whether WR Order 2001-04-DWR should be modified to accomplish the objective stated in Condition 6, and, if so, how the Order should be modified. The SWRCB held the hearing on September 17 and 18, 2001.

2.0 RECOMMENDATIONS OF THE PARTIES

Cal-Am, NMFS, the District, the California Department of Fish and Game (DFG), CRSA and the Sierra Club appeared as parties to the hearing. At the end of the hearing, the Hearing Officer gave the parties an opportunity to file closing statements that could include proposed draft orders or settlement agreements for the SWRCB to consider. All of the parties submitted closing statements that commented on the proposed order submitted jointly by Cal-Am and NMFS or that suggested other options for the SWRCB to pursue. Their recommendations are set forth below.

2.1 Cal-Am and NMFS

Cal-Am and NMFS prepared a joint submission to the SWRCB that includes a proposed order (Cal-Am Exhibits 18A and 18B) that they recommend be adopted by the SWRCB. The proposed order is a slightly modified version of Phase I of a Conservation Agreement that has been signed by both Cal-Am and NMFS. Cal-Am and NMFS oppose including the remainder of the Conservation Agreement in this order of the SWRCB. The proposed order states:

- “1. Cal-Am shall immediately upon issuance of this order cease withdrawal of water from the San Clemente Dam during low flow periods except during an emergency. ‘Emergency’ means a system failure that jeopardizes the public health and safety, such as a pump failure, main breaks or fires. Hot weather demand alone shall not *per se* be an ‘emergency,’ but it is recognized that after taking appropriate conservation measures, if levels in the Clear Well fall below nine feet from the bottom of the tank, an emergency may exist and diversions at San Clemente or the utilization of other facilities may be necessary. Nine feet from the bottom of the tank is a minimum requirement established by California Department of Health Services regulations. In all

cases, diversions at San Clemente Dam or the utilization of other facilities shall be undertaken in a manner that is least damaging to the fishery resources, and these emergency operations shall be for the shortest practicable time. Cal-Am shall notify and consult with the State Water Resources Control Board (SWRCB), National Marine Fisheries Service (NMFS), Fish and Wildlife Service (FWS), California Department of Fish and Game (DFG¹), and the Monterey Peninsula Water Management District (District) prior to implementation of emergency operations. If there is no time for consultation, Cal-Am shall notify the SWRCB, NMFS, FWS, DFG, and the District of its emergency operation as early as practicable within eight (8) hours after Cal-Am first becomes aware of the emergency. For the purpose of this order, 'low flow periods' are defined as times when stream flow in the Carmel River at the Don Juan Bridge (RM 10.8) gage is less than 20 cfs for five consecutive days. The definition of 'low flow periods' may be modified by NMFS, pursuant to the Federal Endangered Species Act, in conjunction with and in consultation with Cal-Am, FWS, DFG, and the District.

- “2. Upon the issuance of this order, Cal-Am shall reduce diversions during low flow periods, from Garzas Wells Nos. 3 and 4, Panetta Wells Nos. 1 and 2, the Robles Well, the Scarlett 8 Well, and Los Laureles Wells Nos. 5 and 6. Current diversions are 1-7 days per month at each well. Diversions at these wells shall be reduced to a maximum of two eight-hour days per month except that those wells that currently operate only one eight-hour day per month shall continue to operate at not more than one eight-hour day per month. This reduction shall be undertaken in stages to enable Cal-Am to monitor water quality to ensure that this reduction can be maintained. Monitoring to ensure compliance with California Department of Health Services requirements and mechanical reliability shall be completed by October 31, 2001. To the maximum degree practicable, Cal-Am shall operate these wells at night. In consultation with NMFS, FWS, the District and DFG, Cal-Am can operate the Scarlett 8 well incrementally to meet Maximum Daily Demand after using all other available sources at maximum capacity.
- “3. Cal-Am shall install, not later than March 31, 2002, a pump that delivers water from the Begonia Zone to Carmel Valley Village Zone. The “Begonia Zone” is defined to include water well production facilities in AQ3, AQ4, and the Seaside Groundwater Basin. The ‘Carmel Valley Village Zone’ is defined to include all Cal-Am users upstream from the Del Monte Regulating Station. The pump size shall have the capacity, in conjunction with the operation of the Clear Well and the 0.5 cfs flow to be pumped from one of the Russell Wells, to meet the maximum daily demand of the Carmel Valley Village Zone. This shall minimize the emergency conditions described in

¹ The acronyms for the agencies have been changed to be consistent throughout this order.

Paragraph 1 above. The pump shall be sized within the physical constraints of the vault. Cal-Am shall make arrangements, not later than March 31, 2002, with appropriate contractor(s) to provide and have operational within twenty-four hours of the time that it is needed necessary back-up equipment to insure continued operations in the case of an outage associated with the Del Monte booster station facility.

- “4. The Russell Wells shall be limited to a combined total instantaneous diversion rate of not more than 0.5 cfs during low flow periods. These actions at the Russell Wells and the modifications at the Del Monte facility shall be evaluated during the period of January through December 2002. The evaluation shall address and focus on the adequacy of Cal-Am’s plumbing system and the Del Monte facility to accommodate (pump) the water supply needs of the Carmel Valley Village Zone from the Begonia Zone (except 0.5 cfs from the Russell Wells).
- “5. During the low flow season, except for 0.5 cfs, all water diverted to Carmel Valley Village Zone shall be water that originates from the Begonia Zone. The Begonia Zone includes water well production facilities in AQ3, AQ4 and Seaside Groundwater Basin.
- “6. If the evaluation provided for in 4 above indicates that Cal-Am’s plumbing system cannot accommodate (pump) the water supply needs of the Carmel Valley Village Zone from the Begonia Zone, Cal-Am shall take all necessary actions to achieve the Phase I Objective by June 2003. Necessary actions for meeting the Carmel Valley Village Zone water needs shall be developed in consultation with the Agencies identified in paragraph 1, and an implementation plan shall be completed by December 31, 2002, to achieve the Phase I Objective by June 30, 2003.”

2.1.1 NMFS

NMFS made two submittals, the joint submittal set forth in section 2.1 above and an additional submittal in which it recommends that it be given authority to determine minimum stream flows below San Clemente Dam to be released during higher flow periods to protect adult steelhead and smolt migrations and steelhead spawning and incubation lifestages. The authority to determine flows would include a requirement to consult with biologists from DFG, the District, and Cal-Am. NMFS also requested that the date for achieving the Phase I objective should be changed from June 30, 2003 to June 1, 2003.

2.2 The District

The District recommends that the SWRCB adopt the proposed order submitted by Cal-Am and NMFS with the inclusion of two additional paragraphs that:

1. States that the SWRCB's order is not intended to supersede or limit the ongoing annual Memorandum of Understanding (MOU) process involving Cal-Am, DFG, and the District regarding water production from Cal-Am's facilities.
2. Requires that:
 - (a) Cal-Am be a regular and cooperative participant in the ongoing regulatory coordination process implemented by the District.
 - (b) To the extent feasible, Cal-Am share available data in a timely manner.
 - (c) Cal-Am coordinate its Carmel Valley operations and activities with management and regulatory requirements set by NMFS, FWS, DFG, and the District.

2.3 DFG

DFG recommends that both Phase I (the proposed order recommended by Cal-Am and NMFS) and Phase II of the Conservation Agreement be included in an order adopted by the SWRCB.

DFG also proposes modifications to Phase I which include:

1. Changing the definition of "emergency" to include multiple pump failures rather than a single pump failure.
2. Changing the notification requirement regarding emergency operations to within 24 hours after the start of the emergency rather than as early as practicable within eight hours after Cal-Am first becomes aware of the emergency.
3. Changing the definition of "low flow periods" from times when stream flow in the Carmel River at the Don Juan Bridge gage is less than 20 cfs for five consecutive days to times when stream flow in the Carmel River at the Don Juan Bridge gage is less than 20 cfs between May 1 and November 30 or when stream flow at the Highway 1 Bridge is less than 20 cfs between December 1 and April 30 for two consecutive days.
4. Changing the numbering of the Panetta wells from 1 and 2 to 2 and 4.

5. Requiring Cal-Am to consult with and obtain written approval from NMFS, DFG, and the District to operate the Scarlett 8 well to meet maximum daily demand.
6. Requiring Cal-Am to install a valve between the Carmel Valley Filter Plant and San Clemente Dam that will preclude the siphoning of water from the dam when the Russell wells are run at less than full capacity.
7. Requiring Cal-Am, in consultation with NMFS, DFG, and the District, to evaluate the diversions at the Russell wells and the modifications at the Del Monte facility during the period January through December 2002.
8. Requiring NMFS, DFG, and the District to agree that the evaluation to be conducted pursuant to paragraph 4 of the proposed order indicates that Cal-Am's plumbing system cannot accommodate the water supply needs of the Carmel Valley Village from the Begonia Zone.
9. Adding a paragraph that states that the SWRCB's order is not intended to supersede the MOU, that the SWRCB's order incorporates the terms of the MOU executed in 2001, and requires a similar MOU be negotiated on an annual basis among Cal-Am, DFG, and the District and submitted to the SWRCB.

2.4 CRSA and the Sierra Club

Although the CRSA and the Sierra Club submitted a joint Petition for Reconsideration and Notice of Intent to Appear, they have submitted separate recommendations to the SWRCB.

2.4.1 CRSA

CRSA recommends the following:

1. That Cal-Am be prohibited from diverting water from the Carmel River in AQ1, AQ2, or AQ3 when stream flow is below 150 cfs as measured at the Highway 1 Bridge;
2. When stream flow is below 150 cfs all diversions shall be made from high volume subsurface collectors located in AQ4 until surface flow stops at the collector. When surface flow stops at the collector, CRSA recommends that a new deeper well or collector or other new wells in AQ4 could be used to satisfy demand.

3. That monitoring for salt water intrusion occur and that salt water intrusion be prevented by allowing use of wells in upper AQ4 and AQ3 starting with the lowest well and using reclaimed water.
4. That Cal-Am use Clint Eastwood's five-acre parcel in AQ4 for a new treatment facility.
5. That the new high volume collector, upper wells in the Carmel River Subterranean Stream, and San Clemente Dam provide water for the Seaside aquifer injection project when stream flow in the Carmel River exceeds 150 cfs at the Highway 1 Bridge.
6. That the SWRCB should make legal all water diverted from below river mile 1.
7. That the SWRCB should require some type of advisory group regarding Cal-Am operations that includes the CRSA.

2.4.2 *Sierra Club*

The Sierra Club recommends that "maintenance diversions" through the Carmel Valley Filter Plant should be returned to the Carmel River in the vicinity of the Russell wells. The Sierra Club recommends that the definition of "low flow" should be increased from 20 to 25 cfs. Finally, the Sierra Club recommends that Cal-Am should fund a study that would focus on the feasibility of using Ranney collectors or other high-volume methods of subsurface diversion in AQ4 when there is enough flow in the Carmel River to supply the diversion. The Sierra Club recommends that the study be supervised by the District and that it be carried out during Phase II of the Conservation Agreement.

3.0 DISCUSSION AND FINDINGS

Most of the parties are in general agreement that the proposed order submitted by Cal-Am and NMFS is appropriate; however, they ask for certain modifications as described in section 2 above. Cal-Am and NMFS oppose including "implementation guidelines" or multi-agency agreements or task forces as suggested by some of the other parties. The SWRCB agrees that most of the proposed order is appropriate but believes a few modifications are necessary. The basis for the proposed modifications as well as the reasons for not making some of the modifications suggested by the parties are set forth below.

3.1 Discussion and Findings Regarding Paragraph 1 of the Proposed Order Submitted by Cal-Am and NMFS

The proposed order defines an “emergency” to be “a system failure that jeopardizes the public health and safety, such as pump failure, main breaks or fires.” The SWRCB finds that it would be inappropriate to change the definition of “emergency” to require multiple pump failures, as recommended by DFG, because a single pump failure, depending on its location and the circumstances of the failure, could constitute an emergency. The proposed order should be clarified, however, to make clear that pump breaks or other system failures do not constitute an emergency unless public health or safety is jeopardized.

The proposed order provides for notification of the SWRCB, NMFS, FWS, DFG, and the District of its emergency operation “as early as practicable within eight hours after Cal-Am first becomes aware of the emergency.” The SWRCB finds that changing the notification period to “within 24 hours after the start of the emergency,” as recommended by DFG, is not as beneficial because, as a practical matter, Cal-Am is likely to become aware of an emergency very soon after the start of the emergency. Cal-Am has computerized monitoring of its system 24 hours per day, 365 days per year, as well as personnel constantly monitoring its system (T, I, pp. 86-87), so the shorter time period for notification is preferred. However, notification of the Chief of the Division of Water Rights by telephone or telefax shall be within 24 hours of the start of the emergency, or by noon of the first business day following the incident.

The proposed order defines “low flow periods” to be “times when stream flow in the Carmel River at the Don Juan Bridge (RM 10.8) gage is less than 20 cfs for five consecutive days.” The SWRCB finds that this definition is appropriate.

The Board finds that low flow periods based on dates do not account for all periods of low flow in the Carmel River. Therefore, it is appropriate to base the definition on flow rather than

calendar dates since this would be most protective of steelhead, a federally listed threatened species found in the Carmel River.

The Board finds that it is appropriate to measure flow at the Don Juan Bridge rather than the Highway 1 Bridge. The Don Juan Bridge is located in AQ2 just above the Narrows. The most critical spawning reaches of the Carmel River are located just above the Narrows. Upstream of the Narrows is where most of the riffles occur and where low flows would have the most significant impacts on steelhead. Below the Narrows is primarily a passage reach for steelhead. Therefore, the Don Juan Bridge is a better location than the Highway 1 Bridge for measuring actual flow conditions in the critical reaches of the Carmel River.

Evidence in the record shows that 20 cfs is protective of the steelhead redds, supports juvenile fish, and maintains flow over riffle habitat. (T, I, pp. 109 and 136.) Therefore, the SWRCB finds that defining the low flow period as 20 cfs is adequate to protect steelhead in the Carmel River.

There is no evidence in the record to support a finding that flow of 150 cfs at the Highway 1 Bridge should be used as the definition of a low flow period. There is no evidence that under unimpaired conditions, flows of 150 cfs would be present at the Highway 1 Bridge. Further, high flows are not beneficial for all life stages of steelhead, and in fact could be detrimental. The Carmel area often experiences significant water supply shortages. Therefore, in addition to being unsupportable, defining low flow periods to be 150 cfs may be unreasonable.

Cal-Am and NMFS recommend that the SWRCB authorize NMFS to unilaterally modify the definition of “low flow periods” in the proposed order. NMFS recommends that the SWRCB authorize NMFS to determine the flows required to be released below San Clemente Dam during higher flow periods. The SWRCB finds that these recommendations are inappropriate.

If the SWRCB gave authority to NMFS to modify the SWRCB’s order, without SWRCB approval, the SWRCB would be abdicating its public trust responsibilities and potentially be depriving other interested persons of their right to due process. The SWRCB would have no

control over the process used to modify either the definition of “low flow periods” or to determine flows required to be released below San Clemente Dam during higher flow periods. NMFS has authority pursuant to the Endangered Species Act to take enforcement action against Cal-Am, and NMFS may modify its agreement with Cal-Am regarding the definition of “low flow periods” or to add additional flow requirements to protect threatened and endangered species as it deems appropriate.

Pursuant to its continuing authority over the public trust, the SWRCB may amend this order to modify the definition of “low flow periods” or to add additional flow requirements to protect steelhead in the Carmel River. New information may become available which shows that the definition of “low flow periods” should be modified or that additional flow requirements are needed to protect steelhead. The Chief of the Division of Water Rights (Chief) should be delegated the authority to modify the definition of “low flow periods” and the authority to add flow requirements after finding that any proposed change to the order would better protect steelhead in the Carmel River. The Chief should also be delegated the authority to modify the flow requirements of this order, in response to any changes in the requirements imposed under the Endangered Species Act, as necessary to prevent this order from being in violation of the Endangered Species Act or unreasonably interfering with efforts to comply with the Endangered Species Act. Prior to making any change to the order, the Chief should provide notice to the parties to this hearing and give them an opportunity to comment on the proposed change.

3.2 Discussion and Findings Regarding Paragraph 2 of the Proposed Order Submitted by Cal-Am and NMFS

According to the transcript of the hearing, there is an error in the numbering of the Panetta Wells. The SWRCB finds that the Panetta Wells should be labeled two and four instead of one and two. (T, I, p. 62.)

The proposed order requires that “monitoring to ensure compliance with California Department of Health Services requirements and mechanical reliability” be completed by October 31, 2001. Because that date has passed, the SWRCB finds that the compliance date should be changed to “within 15 days of the adoption of this order.”

The proposed order authorizes Cal-Am, in consultation with NMFS, FWS, DFG, and the District, to operate the Scarlett 8 Well incrementally to meet maximum daily demand after using all other available sources at maximum capacity. The SWRCB finds that adding a requirement of obtaining written approval from each agency as recommended by DFG is too cumbersome and time consuming to be effective. Consultation is adequate for this purpose.

3.3 Discussion and Findings Regarding Paragraph 3 of The Proposed Order Submitted by Cal-Am and NMFS

The proposed order requires Cal-Am to install a pump that delivers water from the Begonia Zone to the Carmel Valley Village Zone. Pumping from the Begonia Zone to the Carmel Valley Village Zone would result in an increase in flow that improves the quality and quantity of steelhead habitat in the upper reaches of the Carmel River. (T, I, p. 191.)

The SWRCB finds that there is no support in the record for also requiring Cal-Am to install a valve between the Carmel Valley Filter Plant and San Clemente Dam that will preclude the siphoning and diversion of water from the Dam whenever the Russell Wells are run at less than full capacity, as recommended by DFG. There is no evidence of the feasibility or cost of installing such a valve. Nor is there any evidence regarding the necessity of doing so or whether there are other alternatives available. Further, the SWRCB does not usually specify engineering alternatives or equipment to be used to meet a particular goal or requirement.

3.4 Discussion and Findings Regarding Paragraph 4 of the Proposed Order Submitted by Cal-Am and NMFS

The proposed order requires the diversions at the Russell Wells and the modifications at the Del Monte facility to be evaluated, but does not specify by whom. DFG recommends that Cal-Am conduct the evaluation in consultation with DFG, NMFS, and the District. The SWRCB finds that the proposed order should specify that Cal-Am should evaluate the diversions and modifications and that the evaluation should be submitted to the Chief of the Division of Water Rights within ten days of its completion.

3.5 Discussion and Findings Regarding Paragraph 5 of the Proposed Order Submitted by Cal-Am and NMFS

No significant changes to Paragraph 5 of the proposed order were recommended by the parties.

The SWRCB finds that no changes to Paragraph 5 are necessary.

3.6 Discussion and Findings Regarding Paragraph 6 of the Proposed Order Submitted by Cal-Am and NMFS

The proposed order requires Cal-Am to take all necessary actions to achieve the Phase I objective if the evaluation required in Paragraph 4 indicates that Cal-Am's plumbing system cannot accommodate the water supply needs of the Carmel Valley Village Zone from the Begonia Zone. The SWRCB finds that oversight is necessary in this matter. Therefore, it is appropriate to require concurrence from the Chief of the Division of Water Rights regarding the conclusion reached in Cal-Am's evaluation of the ability of its plumbing system to accommodate the water supply needs of the Carmel Valley Village Zone from the Begonia Zone.

The proposed order is inconsistent and non-specific regarding the establishment of a June deadline for achieving the Phase I objective. The SWRCB finds that the deadline should be June 1, 2003, as recommended by NMFS.

The proposed order requires that necessary actions for meeting the water needs of the Carmel Valley Village Zone be developed in consultation with the SWRCB, NMFS, FWS, DFG, and the District. The proposed order also requires that an implementation plan shall be completed by December 31, 2002. The SWRCB finds that oversight is required by the SWRCB in addition to the consultation requirement. Accordingly, the order should require that the implementation plan should be submitted to the Chief of the Division of Water Rights by December 31, 2002. The Chief should review and modify, if necessary, the implementation plan within 45 days following receipt of the plan. Upon approval of the implementation plan by the Chief, Cal-Am should take all steps identified in the plan.

3.7 Discussion and Findings Regarding Adding Paragraphs to the Proposed Order Submitted by Cal-Am and NMFS

For the past several years, Cal-Am, the District, and DFG have entered into a Memorandum of Understanding (MOU) regarding production from Cal-Am's facilities. The District and DFG recommend that the SWRCB add a paragraph (Paragraph 7) to the proposed order that states that nothing in the order adopted by the SWRCB is intended to supersede either the MOU or the MOU process. DFG also recommends that the SWRCB's order incorporate the terms of the 2001 MOU and require that a similar MOU be negotiated annually and submitted to the SWRCB. While the SWRCB has been supportive of the MOU process, it has never been a party to the MOU. The SWRCB finds there is no need to incorporate the terms of the 2001 MOU in the SWRCB's order or to require the negotiation of an annual MOU. Cal-Am's witness testified that the MOU process is complementary to the proposed order and does not supersede it. (T, I, pp. 84-85.) Cal-Am, the District, and DFG have worked together over the past ten years in negotiating and implementing an annual MOU. The SWRCB encourages all of the parties to continue to work together if they believe that the MOU continues to be necessary.

The District recommends that the SWRCB add a paragraph (Paragraph 8) that would require Cal-Am "to be a regular and cooperative participant in the ongoing regulatory coordination process" implemented by the District, share available data in a timely manner, and coordinate its Carmel Valley operations with NMFS, FWS, DFG, and the District. The SWRCB finds that the recommended language is too subjective and too vague to be enforceable. Further, all of the parties need to assume responsibility for behaving in a cooperative and professional manner and to work together to solve the problems of the Carmel River.

3.8 Discussion and Findings Regarding Other Proposals Submitted by the Parties

CRSA and the Sierra Club recommend that the use of Ranney collectors or other high-volume methods of diversion be studied and implemented. Condition 6 does not require another study to be done and we decline to order yet another study. The parties are free to study new methods of diversion to achieve the objective of Condition 6. New diversions of water by Cal-Am from the Carmel River or the Carmel River subterranean stream will require water right permits from the SWRCB. It is beyond the scope of this proceeding to speculate whether high-volume methods of

diversion are feasible, whether Cal-Am would file new applications to appropriate unappropriated water from the Carmel River or the Carmel River subterranean stream using high volume methods of diversion, and what action the SWRCB might take in response to those applications.

CRSA recommends monitoring for seawater intrusion. The District already monitors for seawater intrusion. (T, I, pp. 204-205.) Further, CRSA claims that seawater intrusion is not a problem. (T, I, p. 274.) Therefore, the SWRCB finds that it is not necessary to require monitoring for seawater intrusion in this order.

CRSA recommends that the SWRCB require Cal-Am to use Clint Eastwood's five-acre parcel in AQ 4 for a new water treatment facility. It is for Cal-Am and Clint Eastwood to decide whether to use Clint Eastwood's parcel for a new treatment facility, not the SWRCB. The SWRCB does not dictate the location of new facilities, it only acts on applications before it.

CRSA recommends that a new high volume collector, upper wells in the Carmel River subterranean stream, and San Clemente Dam provide water for the Seaside aquifer injection project when stream flow in the Carmel River exceeds 150 cfs at the Highway 1 Bridge. The Seaside aquifer injection project is outside the scope of this proceeding and may be the subject of future proceedings before the SWRCB.

CRSA and the Sierra Club recommend that the SWRCB require some type of advisory group regarding Cal-Am operations, an advisory group that includes CRSA and the Sierra Club. CRSA does not specify what the recommended advisory group would do or how the SWRCB would enforce actions of such a group. The Sierra Club's description of an advisory group is set forth in its Exhibit 13 and would apply to the District, not the SWRCB. In its closing statement at the hearing, the Sierra Club recommended a different type of advisory group that would include SWRCB staff. The group would determine the process and guidelines under which it would operate and would propose a solution to the problems on the Carmel River. (T, II, pp. 324-326.) The SWRCB finds that it is not necessary to require an advisory group. The proposed order requires consultation with the appropriate governmental agencies with authority related to Cal-

Am's diversions from the Carmel River. The consultation requirements are sufficient to accomplish the objectives of the order without causing undue delay in implementation of the order. To wait for an advisory group to determine solutions to recommend for adoption by the SWRCB, as recommended by the Sierra Club, is not acceptable although the parties are free to form their own advisory group and provide recommendations to the SWRCB for its consideration.

Finally, the SWRCB notes that CRSA was one of four complainants alleging the unauthorized diversion of water from the Carmel River by Cal-Am that resulted in Orders WR 95-10 and WR 98-04 and years of proceedings that include this one. To now recommend that the SWRCB "make legal all water diverted from below river mile 1 as motivation for Cal-Am to divert water from that location" is inappropriate and contrary to law. The diversion is still without a legal basis of right. Moving unlawful diversions to a different location on the Carmel River does not create a legal basis of right. The SWRCB has no authority to grant a legal basis of right when the facts clearly show that the diversion of water is without a legal basis. If Cal-Am submits applications to divert water below river mile 1, the SWRCB will process them in accordance with the provisions of Part 2 of Division 2 of the Water Code.

3.9 Phase II of the Conservation Agreement

DFG and CRSA recommend that the SWRCB include Phase II of the Conservation Agreement in the SWRCB's order. Phase II addresses issues of concern to NMFS while long-term solutions to the issues involving the Carmel River are being developed. The SWRCB finds that Phase II is premature to include in this order because it involves experiments, evaluations, and development of solutions to the Carmel River issues by Cal-Am in consultation with NMFS and others. NMFS has the ability to enforce Phase II and it is not necessary to require the SWRCB to enforce it also. Phase II ultimately will require Cal-Am to apply to the SWRCB for the necessary permits and change orders to implement Phase II, so the SWRCB maintains oversight over the implementation of Phase II.

ORDER

IT IS HEREBY ORDERED that WR Order 2001-04-DWR is rescinded.

IT IS FURTHER ORDERED that Cal-Am shall comply with Condition 6 of Order WR 95-10, as modified by Order WR 98-04 as follows:

1. Cal-Am shall immediately upon issuance of this order cease withdrawal of water from the San Clemente Dam during low flow periods except during an emergency. “Emergency” means a system failure such as a pump failure, main breaks or fires, that jeopardizes the public health and safety. Hot weather demand alone shall not *per se* be an “emergency,” but it is recognized that after taking appropriate conservation measures, if levels in the Clear Well fall below nine feet from the bottom of the tank, an emergency may exist and diversions at San Clemente or the utilization of other facilities may be necessary. Nine feet from the bottom of the tank is a minimum requirement established by California Department of Health Services regulations. In all cases, diversions at San Clemente Dam or the utilization of other facilities shall be undertaken in a manner that is least damaging to the fishery resources, and these emergency operations shall be for the shortest practicable time. Cal-Am shall notify and consult with NMFS, FWS, DFG, and the District prior to implementation of emergency operations. If there is no time for consultation, Cal-Am shall notify NMFS, FWS, DFG, and the District of its emergency operation as early as practicable within eight (8) hours after Cal-Am first becomes aware of the emergency. Cal-Am shall notify, by telephone or telefax, the Chief of the Division of Water Rights within 24 hours of the emergency or by noon of the first business day following the incident. For the purpose of this Order, “low flow periods” are defined as times when stream flow in the Carmel River at the Don Juan Bridge (RM 10.8) gage is less than 20 cfs for five consecutive days. Pursuant to its continuing authority over the public trust, the SWRCB may amend this order to modify the definition of “low flow periods” or to add additional flow requirements to protect steelhead in the Carmel River. The Chief of the Division of Water Rights (Chief) is delegated the authority to modify the definition of “low flow periods” and the authority to add flow requirements based on new information, after finding that any proposed change to the order would better protect steelhead in the Carmel River. The Chief is also delegated the authority to modify the flow requirements of this order, in response to any changes in the requirements imposed under the Endangered Species Act, as necessary to prevent this order from being in violation of the Endangered Species Act or unreasonably interfering with efforts to comply with the Endangered Species Act. Prior to making the finding and prior to making any change to the order, the Chief shall provide notice to the parties to this hearing and give them an opportunity to comment on the proposed change.
2. Upon the issuance of this order, Cal-Am shall reduce diversions during low flow periods, from Garzas Wells Nos. 3 and 4, Panetta Wells, the Robles Well, the Scarlett 8 Well, and Los Laureles Wells Nos. 5 and 6. Current diversions are 1-7 days per month at each well. Diversions at these wells shall be reduced to a maximum of two eight-hour days per month except that those wells that currently operate only one eight-hour day per month shall continue to operate at not more than one eight-hour day per month. This reduction shall be undertaken in stages to enable Cal-Am to monitor water quality to ensure that this reduction can be maintained. Monitoring to ensure compliance with California Department of Health Services

requirements and mechanical reliability shall be completed within 15 days of the adoption of this order. To the maximum degree practicable, Cal-Am shall operate these wells at night. In consultation with NMFS, FWS, DFG and the District, Cal-Am can operate the Scarlett 8 well incrementally to meet maximum daily demand after using all other available sources at maximum capacity.

3. Cal-Am shall install, not later than March 31, 2002, a pump that delivers water from the Begonia Zone to the Carmel Valley Village Zone. The “Begonia Zone” is defined to include water well production facilities in AQ3, AQ4 and the Seaside Groundwater Basin. The “Carmel Valley Village Zone” is defined to include all Cal-Am users upstream from the Del Monte Regulating Station. The pump size shall have the capacity, in conjunction with the operation of the Clear Well and the 0.5 cfs flow to be pumped from the Russell Wells, to meet the maximum daily demand of the Carmel Valley Village Zone. This shall minimize the emergency conditions described in Paragraph 1 above. The pump shall be sized within the physical constraints of the vault. Cal-Am shall make arrangements, not later than March 31, 2002, with appropriate contractor(s) to provide and have operational within twenty-four hours of the time that it is needed necessary back-up equipment to insure continued operations in the case of an outage associated with the Del Monte booster station facility.
4. The Russell Wells shall be limited to a combined total instantaneous diversion rate of not more than 0.5 cfs during low flow periods. These actions at the Russell Wells and the modifications at the Del Monte facility shall be evaluated by Cal-Am in consultation with NMFS, FWS, DFG, and the District during the period of January through December 2002. The evaluation shall address and focus on the adequacy of Cal-Am’s plumbing system and the Del Monte facility to accommodate (pump) the water supply needs of the Carmel Valley Village Zone from the Begonia Zone (except 0.5 cfs from the Russell Wells).
5. During the low flow periods, except for 0.5 cfs, all water diverted to Carmel Valley Village Zone shall be water that originates from the Begonia Zone (as defined in Paragraph 3 above).
6. If the evaluation provided for in Paragraph 4 above indicates that Cal-Am’s plumbing system cannot accommodate (pump) the water supply needs of the Carmel Valley Village Zone from the Begonia Zone, and the Chief of the Division of Water Rights of the SWRCB concurs, Cal-Am shall take all necessary actions to achieve the Phase I Objective by June 1, 2003. Necessary actions for meeting the Carmel Valley Village Zone water needs shall be developed in consultation with the Agencies identified in paragraph 1, and an implementation plan shall be completed by December 31, 2002, to achieve the Phase I Objective by June 1, 2003. The implementation plan shall be submitted to the Chief, Division of Water Rights, by December 31, 2002. The Chief shall review and modify, if necessary, the

implementation plan within 45 days following receipt of the plan. Upon approval of the implementation plan by the Chief, Cal-Am shall take all steps identified in the plan.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 21, 2002.

AYE: Arthur G. Baggett, Jr.
 Peter S. Silva
 Richard Katz

NO: None

ABSENT: None

ABSTAIN: None

/s/
Maureen Marché
Clerk to the Board