

**IN THE MATTER OF THE CONSIDERATION OF A CEASE AND DESIST  
ORDER AGAINST CALIFORNIA AMERICAN WATER (CAL AM) FOR  
UNAUTHORIZED DIVERSION OF WATER FROM THE CARMEL RIVER IN  
MONTEREY COUNTY**

**DIVISION OF WATER RIGHTS PROSECUTION TEAM EXHIBIT 2 (PT 2)**

**WRITTEN TESTIMONY OF KATHERINE MROWKA, SENIOR ENGINEER**

Resume and Professional Background

My name is Katherine Mrowka. I am a Senior Engineer responsible for supervision of Watershed Unit 3. Previous to this assignment, I was a Senior Engineer assigned to the Hearings Unit of the Division of Water Rights (Division), State Water Resources Control Board (State Water Board). I have a Bachelors of Science degree in Environmental Resources Engineering and Master of Science degree in Civil Engineering. I am a registered civil engineer. I have been employed in the Division for 22 years. A true and correct copy of my resume is attached as Division Prosecution Team (PT) Exhibit 1. (PT 1.)

Description of the Watershed

The Carmel River drains a 255-square mile watershed tributary to the Pacific Ocean. Its headwaters originate in the Santa Lucia Mountains at 4,500 to 5,000-foot elevations, descend and merge with seven major tributaries along a 36-mile river course, and discharge into Carmel Bay about 5 miles south of the City of Monterey. Above the confluence of Tularcitos Creek, the Carmel River constitutes about 65 percent of the watershed. Downstream from RM 15, the river has a 40-foot per mile gradient where the river flows to the bay over and within an alluvium-filled Carmel Valley floor. Carmel River flow is in a well-defined channel. The channel in the lower 15 river miles ranges from 20 to 150 feet wide. Downstream from RM 17.2, alluvial deposits comprise a groundwater basin which underlies the river flow in the Carmel Valley portion of the watershed. Diversion from the alluvium is subject to the permitting jurisdiction of the State Water Board. (State Water Board Staff - 2-10, 9.0, item 1; State Water Board Staff - 4, item 1.)

Background and History leading up to Order 95-10

In 1994, there were two pending matters before the State Water Board affecting the Carmel River in Monterey County. First, Cal Am was diverting 14,106 acre-feet per annum (afa) from the Carmel River primarily for use on the Monterey Peninsula. (State Water Board Staff - 2, p. 6.) Cal Am stored water at Los Padres Reservoir under License 11866 (Application 11674A). Cal-Am also used 21 wells located exclusively in the Carmel River alluvium and diverted surface flows at San Clemente Dam. (State Water Board Staff - 2, pp. 8, 13, and 14; PT 3, Figure 3.) The wells were located throughout a 15-mile reach of river, from the

confluence of the Carmel River with Tularcitos Creek to Highway 1 near the terminus of the river at the Pacific Ocean. (PT 3, Figure 4.)

River flow downstream of river mile 3.2 ceased between April 1987 and March 1991. (State Water Board Staff - 2, p. 10; PT 3, Figure 4.) By 1991, the steelhead population in the Carmel River had been reduced to remnant levels, with one fish recorded in 1991. (State Water Board Staff - 2, p. 28.) Between 1987 and 1991, the State Water Board received four complaints regarding Cal Am's operations in the Carmel River watershed. The complaints alleged that Cal Am diversions from the underflow of the Carmel River were unauthorized and were destroying the public trust resources of the river, including steelhead. (State Water Board Staff - 2, pp. 7 & 8.)

### The New Los Padres Project

The second matter was the Monterey Peninsula Water Management District's (District) proposal to build New Los Padres Dam and Reservoir (Reservoir Project) located slightly downstream of the existing Los Padres Dam. The new facility would inundate the old dam. The District was pursuing this project under Application 27614 and Change Petition on Permit 7130B (State Water Board Staff -1c, Application 11674B). The locations of the existing dam and the proposed new dam are shown on Figure 1, as indicated by the dots labeled Application 27614 (new dam) and Application 11674A (existing dam). (PT 3, Figure 1.)

### Order 95-10 and Decision 1632

The State Water Board considered both matters during a hearing on August 24, 25, 26, 31, September 1, 8, and 9, October 19 and 21, and November 7, 8 and 22, 1994. I was responsible for assisting the State Water Board during the proceeding and was also responsible for assisting with the preparation of Order WR 95-10 and Decision 1632 as a result of the hearing. Order WR 95-10 finds that Cal-Am has legal rights to only 3,376 afa. (State Water Board Staff – 2, p. 25.) The Order requires Cal Am to cease and desist from diverting any water in excess of 14,106 afa from the Carmel River, until unlawful diversions from the Carmel River are ended. (State Water Board Staff - 2, p. 40, condition 1.) Moreover, the Order requires Cal Am to diligently implement actions to terminate its unlawful diversion from the Carmel River. (State Water Board staff - 2, p. 40, condition 2.)

Decision 1632 approved issuance of a permit pursuant to Application 27614. Development of the Reservoir Project was seen as a method to curtail illegal diversions by Cal Am. Condition 11 of Decision 1632 states:

“Permittee shall not divert water under this permit unless and until California American Water Company (Cal-Am) has obtained an alternate supply of water for its illegal diversions from the Carmel River. A contract with permittee to obtain water made available under this permit is one

means by which Cal-Am can obtain a legal supply of water in lieu of its existing diversions.”

#### Amendments and Modifications to Order 95-10

Subsequently, I was responsible for assisting the State Water Board in preparation of the following two items: (1) Order WR 98-04, which amends Order WR 95-10 pursuant to settlement of litigation, and (2) Order 2001-04 DWR which is an Order Pursuant to Condition 6 of Order WR 95-10 as modified by Order WR 98-04.

Order 98-04 approved the Change Petition on Permit 7130B, subject to the same conditions as the permit on Application 27614 (except the diversion season). Order 98-04 also modified the District's rights for the Reservoir Project by allowing diversion throughout the year, provided that the fishery requirements established in Decision 1632 for operation of the proposed New Los Padres Reservoir Project were met. Therefore, summer diversion was contingent on maintenance of specified surface flows. The Order also states, however, that until the Reservoir Project authorized by Permit 20808 becomes fully operational, no water may be diverted pursuant to Permit 20808 either by direct diversion or diversion to storage except between November 1 and the following June 30; provided further that until the project authorized by Permit 20808 becomes fully operational no water may be diverted pursuant to Permit 7130B except between October 1 and the following May 31. (State Water Board Staff - 4, p. 2.)

The Reservoir Project has not been built. Consequently, no summer diversions are allowed under either permit. Inasmuch as Cal Am requires a summer water supply to serve its customers, the permits cannot be used at this time to end the illegal diversions.

#### Intent of Order WR 95-10, as Amended by Order WR 98-08

Order WR 95-10 requires Cal Am to cease and desist from diverting any water in excess of 14,106 afa from the Carmel River, until unlawful diversions from the Carmel River are ended. (State Water Board Staff - 2, p. 40, condition 1.) The Order also requires Cal Am to implement conservations measures to achieve 20 percent conservation in every year from 1997 forward, as measured against a base of 14,106 afa, until the unlawful diversions are ended. (State Water Board Staff - 2, pp. 40, 41, condition 3.) The purpose of the conservation measures was to: (a) minimize diversions from the Carmel River and (b) mitigate the environmental effects of the diversions. (State Water Board Staff - 2, pp. 39 & 40, item 4.)

When Order 95-10 was issued, there was no intent to allow the unauthorized diversion to continue. Conversely, the State Water Board's primary concern was to require Cal Am to: (a) prepare a plan setting forth specific actions which will be taken to develop or obtain a legal supply of water and (b) identify the dates

specific actions will have occurred so that progress on the plan could be objectively monitored. (State Water Board Staff - 2, pp. 39 & 40, item 4.)

The requirement to fully comply with the law and obtain legal rights for all diversions is reiterated in the Synopsis of Order WR 95-10, which states that the order directs Cal-Am to: (a) diligently proceed in accord with a time schedule to obtain rights to cover its existing diversion and use of water and (b) implement measures to minimize harm to public trust resources. Measures to minimize harm to public trust resources require Cal-Am to reduce the quantity of water that is currently being pumped from the river. Because water is not available for appropriation by direct diversion in the river during summer months, Cal-Am must either obtain the right to additional water supplies from: (a) sources other than the river, (b) a storage project similar to the Reservoir Project proposed by the District, or (c) contract with the District for supply from the proposed Reservoir Project.”

In addition to the plain language of Order WR 95-10 requiring Cal Am to cease its unauthorized diversions from the Carmel River, the Division has continued to inform Cal Am that its diversions in excess of its legal rights are unauthorized. I was the author of the six documents cited herein. On October 20, 1997 and on August 19, 1998, the Division issued Administrative Civil Liability Complaints (ACLs) to Cal Am<sup>1</sup>. These were ACL Nos. 262.10-03 and 262.5-6. (PT 4; PT 5.) The ACLs advised Cal Am that the Division was enforcing based on illegal diversion in excess of the 3,376 afa of legal rights held by Cal Am<sup>2</sup>.

The District and Cal Am have both sought to have the 11,285 af diversion limit increased, to allow additional diversions. The Division's June 5, 1998 response to the District's April 16, 1998 request to allow increased diversion reminded the District (copy to Cal Am) that the State Water Board order is only an interim measure to provide some relief during development of a water supply project, and does not provide a basis of right for continued diversion of water. Failure to quickly address the water supply situation could result in the need for further action by the State Water Board. (PT 6.)

The Division responded to Cal Am's April 28, 1998 request to allow additional diversions on June 29, 1998. The Division referred to the June 5, 1998 response to the District's earlier request to increase the diversion limit in Order WR 95-10, and stated that the most important task that must be accomplished in order to comply with the order is development of water supply project(s) for the Monterey Peninsula. (PT 7.) The Division's letter reminded Cal Am of the imminent need to develop, rather than plan for eventual development of, alternate water supply projects to eliminate unlawful diversions.

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<sup>1</sup> ACL No. 262.5-6 superceded ACL No. 262.10-03.

<sup>2</sup> These actions took into consideration the fact that Los Padres Reservoir had a reduced capacity from the capacity listed in Order WR 95-10 due to additional silt accumulation.

The Public Utilities Commission (PUC) is responsible for determining whether Cal Am can charge its ratepayers for improvements to the Cal Am water supply system. In July of 1998, the State Water Board advised the PUC (copy to Cal Am) that Cal Am has water rights for only a small fraction of the water it diverts each year. Diversion or use of water without a water right is a trespass against the State. The State Water Board advised the PUC that even if the conservation goal<sup>3</sup> is achieved, Cal Am continues to divert substantial amounts of water each year without sufficient water rights. (PT 8.)

On April 26, 1999, the Division again advised Cal Am that the 11,285 afa diversion limit is an interim measure until Cal Am obtains legal rights for all of its diversions. In this instance, Cal Am was copied on correspondence to the District regarding the delays in preparing the Supplemental Environmental Impact Report (SEIR) for the Carmel River Dam and Reservoir Project. This is the same project as approved in Decision 1632; the facility was renamed. The April 26, 1999 letter reminds the recipients that Order WR 95-10 requires Cal Am to diligently implement actions to terminate its unlawful diversions from the Carmel River. During the interim period, Cal Am is required to implement water conservation measures with the goal of limiting Carmel River diversions to 11,285 afa. Cal-Am is expected to comply fully with this requirement until it obtains legal rights for all of its diversions. (PT 9.) The SEIR was not completed and certified. Neither the District nor Cal Am has funded a Reservoir Project. The Order requires diligent "implementation" of actions to terminate unlawful diversions. (State Water Board staff – 2, p. 40, condition 2.) Unsuccessful projects do not meet this requirement.

#### Exceptions to the 11,285 af Diversion Limit Established in Order WR 95-10

The Division has authorized only limited exceptions to the diversion limit established in Order WR 95-10. The exceptions are summarized in a June 5, 1998 letter to the District. I was the author of the June 5 letter. As explained in the June 5 letter, Order WR 95-10 requires Cal Am to 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. Order WR 95-10 delegated authority to the Chief of the Division of Water Rights to make specified modifications to the water conservation requirement that results in the 11,285 afa diversion limit. (State Water Board staff 2, pp. 40 & 41, item 3(b).) The June 5 letter clarifies that the delegation of authority only pertains to those District commitments in place prior to the July 6, 1995 adoption of Order WR 95-10. The purpose for including the provision about existing commitments in the Order was to ensure that a partially completed hotel project under construction at the time of adoption would have a water supply available to it.

As noted in the June 5 letter, the State Water Board had already acted favorably regarding development of the Pebble Beach Wastewater Reclamation Project,

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<sup>3</sup> Diversion limited to 11,285 afa.

which sought approval to utilize 380 cfs of Carmel River water made available as a result of developing the wastewater reclamation project. Since the Pebble Beach interests use treated wastewater in lieu of potable water from the Carmel River; the State Water Board found that the net diversion from the Carmel River to serve project lands would be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus, on March 27, 1998, the State Water Board determined that Order WR 95-10 provided for development of this project. (PT 6.)

#### Compliance with Order WR 95-10

Per condition 13 of Order WR 95-10, Cal Am must submit quarterly reports of:

- (a) monthly total amounts being: (1) pumped from wells; and (2) diverted from the Carmel River
- (b) progress being made in complying with the schedule submitted to comply with condition 11, and
- (c) progress being made in complying with conditions 6, 7, 8 and 9.

I have been responsible for evaluating the compliance submittals since the Order was issued. Upon receipt of the final quarterly compliance report for each water year, except for 2007, I routinely write Cal Am regarding its compliance. Although the letters generally state whether Cal Am has complied with Order WR 95-10, in fact, the letters are not as comprehensive as they may appear to be. The letters address compliance with the quarterly report submissions and not necessarily the substantive requirements specified in Condition 2 of the Order. The limits of my review pursuant to items (a), (b) and (c) is explained below.

#### *Compliance with Item (a)*

I evaluate compliance with item (a). I routinely write Cal Am and confirm whether Cal Am has complied with the 11,285 cfs diversion limit. In the 1996-97 water year, Cal Am went over the diversion limit, which resulted in the previously referenced ACL Nos. 262.10-03 and 262.5-6.

#### *Compliance with Item (b)*

As explained below, compliance with condition 11 is not an action item at this time. Accordingly, the annual letter that I write regarding compliance with Order WR 95-10 does not address this issue.

Condition 11 requires Cal Am to implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the District after June 30, 1996. To the best of my knowledge, the District has continued to implement the required mitigation measures. Consequently, Cal Am has not had to implement any of the mitigation measures. Therefore, this is not an action item at this time.

*Compliance with Item (c)*

As explained below, compliance with conditions 6, 7, 8 and 9 is not an action item at this time. Accordingly, the annual letter that I write regarding compliance with Order WR 95-10 does not address these conditions.

Condition 6 requires Cal Am to conduct a reconnaissance level study of the feasibility, benefits and costs of supplying water to the Carmel Valley Village Filter Plant from its more nearby wells downstream of the plant. The required study was conducted and a new operation plan for the uppermost service area of Cal Am was approved in Order 2001-04 DWR, which is an Order Pursuant to Condition 6 of Order WR 95-10 as modified by Order WR 98-04. Subsequent to issuance of Order 2001-04 DWR, Cal Am modified its operations.

Condition 7 requires Cal Am to evaluate the feasibility of bypassing early storm runoff at Los Padres and San Clemente Dams to recharge the subterranean stream below San Clemente Dam in order to restore surface water flows in the river at an earlier date.

Condition 8 requires Cal Am to conduct a study of the feasibility, benefits, and costs of modifying critical stream reaches to facilitate the passage of fish.

Condition 9 requires that the studies required by conditions 6, 7 and 8 be carried out by qualified professionals and establishes timelines for submittal of the studies.

The State Water Board has not issued any supplemental Orders requiring Cal Am to institute new operating protocols as a result of conditions 7, 8 or 9, nor has the Division done so under the delegated authority established in condition 9.

*Compliance with Condition 2*

The quarterly reports required by Condition 13 do not require an evaluation of whether Cal Am has complied with condition 2 and terminated its unlawful diversions. Consequently, I have not specifically responded regarding compliance with condition 2 in my letters. Condition 2 requires Cal Am to: (i) obtain appropriate permits for water being unlawfully diverted from the Carmel River, (ii) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, and/or (iii) contract with another agency having appropriate rights to divert and use water from the Carmel River.

My letters regarding Cal Am's compliance with Order 95-10 should not be construed as concurring that Cal Am has complied with Condition 2. Rather, references to "compliance" in my letters refer to Cal-Am's compliance with the quarterly report submission requirements specified by Condition 13. It is my opinion that in order to comply with condition 2, Cal Am must meet the

requirements of items (i), (ii), and/or (iii). Cal Am has not met these requirements and therefore, is violating Condition 2 of Order 95-10.

Regarding item (i), on November 30, 2007 Permit 20808A (State Water Board Staff – 1e, Application 27614A) was issued to Cal Am and the District for the Seaside Aquifer Storage and Recovery Project (Seaside Project) to store surface flows from the Carmel River in the Seaside groundwater basin. I have not written any compliance response letters since Permit 20808A was issued. However, since the water available for use by Cal Am under this permit is insufficient to fully terminate Cal Am's unauthorized diversions from the Carmel River, it does not satisfy Condition 2. Prior to obtaining Permit 20808A, the District obtained temporary permits for the testing phase of the Seaside Project to determine the groundwater basin characteristics. A temporary permit is only in effect for a maximum of 180 days and does not result in a vested water right. The temporary permits were both too small to fully address Cal Am's compliance issue and did not result in a permanent solution to the problem.

Regarding item (ii), Cal Am's compliance submittals do not report use of water from any other sources of supply that it has used to offset its Carmel River diversions. Cal Am has recently contracted to operate a desalination facility in Sand City on behalf of the City of Sand City. The facility will produce a maximum of 300 afa of potable water, which Cal Am will purchase until Sand City grows and utilizes the product water from the desalination facility. On January 31, 2006, the Division advised Cal Am that it must comply with Order WR 95-10, including the requirement to terminate its unlawful diversions from the Carmel River. Sand City's proposed project will not be counted toward offsetting illegal diversions because it only temporarily reduces Carmel River diversions and is not a permanent solution. (PT 10.)

Regarding item (iii), the only other agency having appropriative rights to divert and use water from the Carmel River is the District for its Reservoir Project pursuant to Permits 20808B and 7130B (Application 11674B). The District has not built the Reservoir Project. Consequently, I have not acknowledged that Cal Am has met the requirements of item (iii).

Based on my expertise on Order WR 95-10, I conclude that Order WR 95-10 does not allow Cal Am to divert water from the Carmel River in excess of its legal water rights. I also conclude that Order 95-10 was not intended to preclude further enforcement action as long as the unauthorized diversion and use of water from the Carmel River occurred. Finally, Cal Am continues to make unauthorized diversion and use of water from the Carmel River and is in violation of Condition 2 of Order WR 95-10.