

PT-49

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 49 (PT- 49)

WRITTEN TESTIMONY OF MARK L. STRETARS, SENIOR WATER RESOURCE CONTROL ENGINEER

My name is Mark Stretars. I am a professional Engineer, registered in California, and a Senior Water Resource Control Engineer with the State Water Resources Control Board (SWRCB), Division of Water Rights (Division). I have 30+ years of experience in California water rights working for the Division in programs dealing with water right application acceptance, protest and hearing actions, complaint and compliance actions, and petitions for change and transfers of water. I am currently the Chief of the Compliance and Enforcement Unit. A copy of my resume as previously submitted is attached as PT-23.

Mr. Collins assisted me on this matter and has been sworn in. My testimony, herein provided, identifies my personal knowledge of the evidence and actions leading to the Division's recommendation to issue the draft Cease and Desist Order against California American Water (Cal-Am).

Mr. Collins as well as myself testified at the June 19, 2008 hearing, that the Prosecution Team of the Division made a decision to proceed with a Cease and Desist Order enforcement action against Cal-Am. With the assistance of John Collins, we evaluated and developed a rational with reasonable expectations for moving Cal-Am forward toward a goal of terminating Cal-Am's unauthorized diversion from the Carmel River.

Is Cal-Am diverting unauthorized water from the Carmel River:

Review of information presented in the Cal-Am fourth quarter reports indicated that Cal-Am was diverting an average of 10,978 acre-feet per year (AFA) from the Carmel River, not inclusive of backwash water and diversions by Cal-Am for its Aquifer Storage and Recovery (ASR) Project during the years 1996-2007 (PT11A, Table 1 on Page 3).

The existing rights for diversion from the Carmel River are summarized in Order 95-10 which states, "1,137 acre-feet per annum (AFA), pre-1914 appropriative + 60 AFA, riparian + 2,179 AFA, License 11866 = 3,376AFA." (State Board Staff - 2, footnote 16, on Page 25).

This leaves Cal-Am with an average annual unauthorized diversion in the amount of 7,602 AFA.

In addition to the 3,376 AFA defined by Order 95-10, Phase I of the Aquifer Storage and Recovery (ASR) Project under Water Right Permit 20808A, will produce an average diversion of approximately 920 AFA (PT-50). The Sand City desalination plant operated by Cal-Am will produce 300 AFA of which Cal-Am will initially make use of the majority of the water. However, over time as new development occurs in Sand City, this amount will be reduced to a defined contract amount of 94 AFA (PT-50). The use of these waters could off-set an equal amount of pumping from the Carmel River primarily during the summer low flow period when the fishery and fish habitat of the Carmel River are affected most severely.

During Phase I of this hearing, Mr. Tom Bunosky of the Cal-Am testified that the current unaccountable losses in Cal-Am's water supply system were about 12% (California American Water Draft Cease and Desist Order Phase I Hearing Transcript, Vol. II page 443, line 2). Based on an average annual diversion of 10,978 AFA, this is approximately 1,318 AFA. Mr. Bunosky also testified that Cal-Am's goal is to reduce the unaccountable losses by 20% (Id. at page 444, line 4). I calculate that Cal-Am would reduce its unaccountable losses to 9.6%, or about an average of 1,054 AFA. This effort to reduce unaccountable losses would provide an additional savings of 264 AFA ($1,318 \text{ AFA} - 1,054 \text{ AFA} = 264 \text{ AFA}$), which could offset an equal amount of pumping from the Carmel River.

However, Section G of Rule 160 of General Provisions of Monterey Peninsula Water Management District's (MPWMD) Regulation XV, Expanded Water Conservation and Standby Rationing Plan (PT- 52A) states that "Cal-Am shall maintain Unaccounted for Water Use in its MPWRS distribution system at or below seven (7) percent. Average losses of more than 7% during the most recent 12 month period shall be considered Water Waste." Therefore, Cal-Am should be reducing unaccountable losses from its current 12% to 7% as required by Section G of Rule 160. This 7% reduction of unaccountable losses is equivalent to an average amount of 769 AFA. By reducing its unaccountable losses from its current amount of 12% to 7%, I calculate this average savings to be 549 AFA ($1,318 \text{ AFA} - 769 \text{ AFA}$).

Based on the above information, Cal-Am has the potential to initially save, or reduce its Carmel River diversions by the following amounts:

- 849 AFA, through maximum use of the Sand City desalination plant (300 AFA) and improvement of Cal-Am's delivery efficiency (549 AFA). The savings may gradually reduce over the course of time to 643 AFA ($849 \text{ AFA} - 94 \text{ AFA}$) as development within the city of Sand City occurs.
- 920 AFA, by utilizing the ASR project.

These immediately achievable efforts should reduce Cal-Am's present average unauthorized diversion from the Carmel River to 5,833 AFA ($7,602 \text{ AFA} - 1,769 \text{ AFA}$). This amount may creep upward to 6,039 AFA, should Cal-Am's yield from

the Sand City Desalination production reduce to 94 AFA before other water production considerations develop.

Therefore, even with the above-mentioned projects and improvements, Cal-Am will continue to divert approximately 6,000 AF, annually in excess of its legal rights.

Over the course of time, has Cal-Am's diversion and use of water from the Carmel River been reduced in accordance with the intent of Order 95-10, which directed termination of the unauthorized diversion and use of water:

Cal-Am's fourth quarter records, MPWMD records and Table 1 of the Prosecution team's testimony (PT-15) all show that Cal-Am has not reduced its annual diversion of water from the Carmel River since 1998, when according to Table 1, it diverted 10,152 AFA. Even in 2004, when Cal-Am was forced to resort to Stage 3 of the Conservation Guidelines in order to stay below the Order 95-10 mandated water use level, Cal-Am's total annual diversion from the river was 11,095 AFA, second highest annual diversion total since 1998.

Review of the information in Cal-Am's cover letter accompanying the fourth quarter report for the year 2006-07 (PT-50), received on January 7, 2008 indicates that Cal-Am believes that the possibility exists that the Coastal Water Project could be on line as early as the year 2014. However, because of the potential cost of the Coastal Water Project, the California Public Utilities Commission, through its Division of Ratepayer Advocates is developing a comprehensive water resource plan for the Monterey Peninsula that could include an array of other water supply projects including desalination of brackish or sea water, recycled water, water conservation, and ground and surface water conjunctive management programs that may be more appropriate or cost effective for the ratepayer than Cal-Am's Coastal Water Project (PT-51). This competitive evaluation of water supply to the Monterey area could delay the 2014 timeline unless the State Water Board requires action by a date certain.

Are the provisions of Condition 1 of the Draft Cease and Desist Order, which require reduction in diversions over a period of years, as opposed to immediate termination reasonable in light of the domestic needs of the community served, the impact to the public trust resources of the Carmel River, and the continued illegal diversion:

In the Draft Cease and Desist Order, the Prosecution Team concluded that [1] Cal-Am has illegally diverted water from the Carmel River, [2] that the unauthorized diversions continues to have adverse effects on the public trust resources of the Carmel River, and [3] this continued diversion is considered a trespass under Water Code section 1052 and should be terminated. (State Water Board Staff - 7).

While an illegal diversion should be terminated in the most direct manner, the Prosecution Team recognized that abrupt termination of all unauthorized diversion by Cal-Am from the Carmel River would be unreasonable from a health and safety standpoint. Therefore, after reviewing the MPWMD's Regulation XV, Expanded Water Conservation and Standby Rationing Plan, Rules 160 through 167 (PT-52A through PT-52H), which were set up for the explicit purpose of allocating water in the event of an unforeseen drought or extended drought period, the Prosecution Team concluded that there was no practical difference between a drought, where there is a very limited amount of water available for diversion, and a water shortage where there are insufficient legal rights to allow the diversion of water.

The Prosecution Team concluded that use of MPWMD's Rationing Plan over an extended period would allow Cal-Am and the communities served by Cal-Am, time to adapt, or adjust to reductions in the water supply necessary to meet the limitations of the existing legal water rights. The Prosecution Team selected a time frame of seven years to place a sense of urgency upon Cal-Am, as well as the community of water users, to emphasize that the State Water Board expects Cal-Am to bring the Coastal Water Project, or another alternative project, to fruition within a reasonable time frame, primarily dictated by Cal-Am's statements that a project would be complete by 2014 (PT-50). However, in the interim, the Prosecution Team expects that Cal-Am incrementally reduce its illegal diversions rather than merely operating at the status quo until alternative sources of water come online.

Conditions of CDO Schedule:

Section D of Rule 160 of the General Provisions of the MPWMD's Conservation Plan (PT-52A) states that "Stages 1 through 3 Water Conservation is intended to achieve the Carmel Valley water production limits set by the State Water Board. Stage 4 Water Rationing through Stage 7 Water Rationings are intended to respond to limitations in supply caused by inadequate system inflow and storage." Section E of Rule 160 states "Stage 1 Water Conservation through Stage 3 Water Conservation shall apply to Water Users of the California American Water Distribution System where that system derives its source of supply from the Monterey Peninsula Water Resource System for as long as Cal-Am is subject to water production goals and limitations enforced by the State Water Board (emphasis added)." Section A of Rule 161 states that "[d]uring Stage 1 Water Conservation, Cal-Am shall have the goal of maintaining its annual (October 1 through September 30) water production from the Carmel Valley below 11,285 acre-feet. This quantity may be modified by the State Water Board (emphasis added)." (PT - 52A)

For the first two water years of the Draft CDO (2008 and 2009), the Prosecution Team specified a 15 percent reduction in Cal-Am's annual diversions from the Carmel River, or a total of **9,592 AFA**. (State Water Board Staff - 7, pg. 5). According to Rule 164, Stage 4 Water Rationing of the MPWMD's Conservation Plan "[f]ifteen percent reductions in the Cal-Am system are achieved through Stage 3 Water Conservation." (PT- 52E).

The Prosecution Team considers that its 15% reduction requirement is consistent with Section E of Rule 160, and is currently achievable with existing alternate supplies (i.e. the Sand City Desalination Plant) and required unaccountable loss savings of 7 percent (PT - 52A). Cal-Am's average annual diversion is currently 10,978 AFA but in some years diversions have been as low as 10,158 AF. A 1,386 AFA annual average savings is only necessary to achieve the Stage 4 Conservation levels (or Stage 3 in Cal-Am's case) specified in Rule 164 (10,978 AFA -9592 AFA).

As testified previously, Cal-Am can immediately save about 849 AFA by using Sand City facility and system loss improvements. An additional 920 AFA pumped under the ASR project would further reduce Cal-Am's summer diversions from the Carmel River. A total reduction of 1,769 AFA of unauthorized diversions should be achievable to reach the initial 15% reduction during the first two water years of the Draft CDO.

In the third and fourth water years (2010 and 2011), the Draft CDO requires a 20% reduction which is consistent with Rule 165, Stage 5 Rationing of MPWMD's Conservation Plan. (PT-52F). This would Require Cal-Am to reduce diversions from the Carmel River to **9,028 AFA**. According to Rule 165, in this rationing, reductions are achieved by water use cutbacks by User Category and by per-capita water rations and a moratorium on water permits that intensify water use.

Additionally, in years five through seven and beyond (2012 through 2014 +), the proposed CDO requires two years at a 35% reduction level with total diversion limited to 7,335 AFA and a reduction of 50% annually with total diversions limited to 5,642 AFA in all succeeding years until sufficient water rights are secured or alternative sources are brought on line to adequately supply the Cal-Am service area without exceeding the legal rights Cal-Am has to divert water from the Carmel River. The reductions are consistent with Rules 166, Stage 6 and Rule 167, Stage 7 of MPWMD's Conservation Plan, respectively (PT-52G and 52H). According to Rules 166 and 167, these reductions are achieved by water use cutbacks by User Category and by per-capita water rations and a moratorium on water permits that intensify water use.

The Prosecution Team, following review of the Title 23, California Code of Regulations (section 697(b) and discussions with California Department of Health Services and Monterey County Department of Health, concluded that a figure of 75 gallons per person per day (gppd) was a reasonable allowance for domestic use that would not jeopardize public health and safety. During Phase I of this hearing, Mr. Darby Fuerst of the MPMWD testified that approximately of 111,500 people reside within the MPWMD boundaries (Written Testimony of Darby Fuerst, pg. 4, line 18). Therefore, at 75 gppd those 111,500 people would require **9,367 AFA** of water for domestic uses (111,500 pop. x 75 gppd x 365 d/yr. / 325,851 g/afa). The water supply for this population can be derived from any of the available sources of supply operated by Cal-Am. Cal-Am could satisfy this health and safety requirement by first

fully using its 3,504 AFA allotment from the Seaside Groundwater Basin, the 300 AFA from the Sand City Desalination Project, and its 7% saving of losses of 549 AFA. The remaining water demand needed from the Carmel River, or an alternative source would total 5,014 AFA. This amount is 628 AFA less than the 50% reduction limit of 5,642 AFA set by the Prosecution Team.

Therefore, if Cal-Am enforces water conservation within its service area, the Prosecution Team concludes that Cal-Am can reasonably achieve the 35% and 50% reductions as specified in the CDO and still protect public health and safety.

Joyce Ambrosius's Recommended Changes to the CDO

In her testimony, Joyce Ambrosius of NMFS recommends that the State Water Board implement the reduction of unauthorized diversions such that the reductions respond to the biological needs of listed steelhead in the spring, summer, and fall seasons. Under the revision proposed by Ms. Ambrosius, the CDO would further specify in the first year of reduction that during the months of April through October, Cal-Am must reduce its mean daily diversion amount by at least 15%, and implement the remainder of the required annual percentage reductions during the remainder of the year. Ms. Ambrosius testifies that shaping the annual diversion reductions in this manner will help ensure that most of the water diversion reduction occurs during times of the year when flows in the Carmel River are low and steelhead are most likely to be adversely affected.

Considering my testimony as stated above regarding the reasonableness of reductions taking into account public health and safety considerations, I do not support reducing Cal-Am's diversions below an amount needed for the existing public health and safety requirements. Cal-Am should, however, to the best of its ability, meet the CDO schedule primarily by reducing its diversions during the months of April through September of each year, with the remaining reductions satisfied during the rest of the year. Consistent with MPWMD's Rationing Plan, Cal-Am should be requiring its customers to reduce or curtail their outside watering uses that occur between April and September. Also, with any reduction in Cal-Am's annual diversion amounts as prescribed by the CDO there will be an associated reduction to Cal-Am's daily diversion rate. This reduction should be most evident during the summer months. However, any reduction in daily diversion amounts should not adversely affect Cal-Am's ability to supply sufficient water to its customers for public health and safety needs.

Does the Draft CDO provide for an alteration of the time of reduction schedule for good cause:

Item 2 of the Draft CDO provides the State Water Board's Deputy Director for Water Rights shall have the authority to modify the above reduction diversion schedule upon

a showing by Cal-Am or MPWMD that such a reduction would have adverse impacts on public health and safety. (State Water Board Staff – 7, pg. 6.)

Recommendations:

Adopt the CDO with the following edits:

Page 2, Item 1 of Facts and Information, line 2, change “Monterey Bay” to “Carmel Bay”.

Page 3, Item 12, 3rd sentence, change 11,285 AFA to 10,152 AFA. Next two sentences should be changed to read: “Since 1997 Cal-Am has submitted quarterly monitoring reports of its monthly water use showing diversions between **10,383** af and 11,178 af of water annually from the Carmel River. During the same period, MPWMD reports Cal-Am’s production from the Carmel River between **10,384** afa and 11,179 afa.

