

**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 11A (PT-11A)**

**AMENDED WRITTEN TESTIMONY OF JOHN W. COLLINS, ENVIRONMENTAL SCIENTIST**

**Introduction**

My name is John W. Collins, I am an Environmental Scientist with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). I have been working for the Division since August 1, 2007 in the Compliance and Enforcement Unit. From 2000 to 2007 I worked at the Regional Water Quality Control Board in Rancho Cordova. My position at the Regional Board focused on enforcement of dairies violating Title 27 of the California Code of Regulations. I developed Clean Up and Abatement Orders and Administrative Civil Liability Orders regarding dairies in the Central Valley for off property discharges of wastewater into waters of the State. I also worked with the Northern Valley Environmental Crimes Task Force and the California District Attorney's Association in the prosecution of dairies in the Central Valley for off property discharges of wastewater into waters of the State. My experience to date in this unit includes field inspections of reservoirs in the Russian River Watershed in Sonoma County. I have reviewed water rights licenses to assure compliance with license terms and conditions. I was given the task of evaluating California American Water Companies (Cal-Am) illegal diversions of water from the Carmel River. A copy of my resume is attached. (PT-12).

The hearing notice regarding Cal-Am dated May 13, 2008 identifies two hearing issues. My testimony, addresses the first key hearing issue and my personal knowledge of evidence and actions leading to the Division's Notice of the Cease and Desist Order for the illegal diversion of water from the Carmel River.

**Why the Division pursued a CDO for Cal-AM?**

I was directed by my first line supervisor Mark Stretars to evaluate Cal-Am's responsibilities in accordance with Order 95-10. I reviewed all files associated with Cal-Am which included WR Order 95-10. After reading 95-10 and reviewing annual monitoring reports, I noticed that Cal-Am was diverting in excess of its actual legal right of 3,376 afa in each water year since the issuance of Order 95-10. Additionally, I noticed Cal-Am was not in compliance with certain conditions of the Order. I read condition 2 of Order 95-10 and noticed the word "terminate." After further review, it became apparent that Cal-Am was both diverting in excess

of its actual legal right and that it was not in compliance with condition 2 of Order 95-10.

My findings were then discussed with the members of the Prosecution Team and it was decided to move forward in the drafting of the Cal-Am CDO, and issuance of the Notice of CDO in January of 2008.

### **Issue 1: Is Cal-Am illegally diverting from the Carmel River?**

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).

Cal-Am diverts some of its water from the Carmel River at San Clemente and Los Padres Dams. San Clemente Dam originally had a storage capacity of approximately 2,140 acre-feet (AF). Water is stored in this facility under claim of pre-1914 appropriative right. (PT - 13, Statement of Water Diversion and Use No. 8538). Los Padres Dam is operated pursuant to License 11866 and authorizes maximum annual withdrawal of 2,950 AF. (PT - 13, State Board Staff - 1a, Application 11674). Stored water is released from Los Padres to the river and it is rediverted for use at San Clemente Dam or any one of the 18 wells located downstream of San Clemente Dam and adjacent to the river. Sedimentation has reduced the combined usable storage in the reservoirs to about 2,600 AF, about one-half of its combined original capacity. (State Board Staff-2). The reservoirs supply about 15 percent of Cal-Am's estimated normal year customer demand. (PT - 14, State Board Staff - 2).

Since the adoption of Order 95-10, Cal-Am has continually diverted over its legal entitlement of 3,376 AFA. At the time of Order 95-10's adoption, Cal-Am was diverting 14,106 AFA. The Order directed Cal-Am to reduce the annual diversions by fifteen percent in 1996 and by twenty percent in every year thereafter. Since 1997, Cal-Am has reduced its annual diversion by 20%, from 14,106 AFA to 11,285 AFA. Since the issuance of Order 95-10, Cal-Am has diverted on average of 10,978 AFA, but has never diverted less than 10,152 AFA.

I created Table 1 (PT- 15) from Cal-Am's annual progress reports pursuant to Condition 13, of Order 95-10 to show the annual diversions Cal-Am reported from the Carmel River for water years 1996-2007. I developed Table 1 by reviewing all of the Fourth Quarter Annual Reports Cal-Am is required to submit to the Division. Cal-Am is required to submit quarterly reports to the Division pursuant to condition 13 of Order 95-10. (State Water Board Staff - 2). Each fourth quarter report is from water years 1995-96 to 2006-07.

The reported annual diversions (AFA) are Cal-Am's reporting numbers directly from the fourth quarter annual reports. The legal rights are referenced in Order 95-10. (State Water Board Staff – 2, footnote 16, page 25). The unauthorized diversion (AFA) is the difference between the reported diversions and legal rights. For each water year, I subtracted Cal-Am's legal rights recognized by Order 95-10 from its reported diversion to show the amount of unauthorized diversions. The table shows that Cal-Am's average annual actual diversion for the past twelve years is 10,978 afa and the average annual unauthorized diversion is 7,632 afa.

Table 1: Reported Annual Diversions From The Carmel River Water Years 1996-2007<sup>1</sup>

Water Year	Reported Annual Diversion (AFA)	Legal Rights (AFA)	Unauthorized Annual Diversion (AFA)
1995/96	11,755	3,376	8,739
1996/97	12,847	3,376	9,471
1997/98	10,152	3,376	6,776
1998/99	10,383	3,376	7,007
1999/00	11,178	3,376	7,802
2000/01	10,738	3,376	7,362
2001/02	10,756	3,376	7,380
2002/03	11,131	3,376	7,755
2003/04	11,095	3,376	7,719
2004/05	10,674	3,376	7,298
2005/06	10,540	3,376	7,164
2006/07	10,485	3,376	7,109
<b>Avg. Annual Diversion</b>	<b>10,978</b>		<b>7,632</b>

On November 30, 2007, the State Water Board approved Amended Permit 20808A for the diversion of water from the Carmel River to underground storage in the Seaside Groundwater Aquifer. The Aquifer Storage and Recovery (ASR) Project, a joint project between Cal-Am and Monterey Peninsula Water Management District (MPWMD), is authorized to divert at a rate of up to 6.7 cubic feet per second (cfs), not to exceed 2,426 AF during the period from December 1 to May 31 of the succeeding year. (PT – 16, Amended Permit 20808A). The conditions of Amended Permit 20808A require Cal-AM/MPWMD to comply with the NOAA fishery bypass flow requirements in the Carmel River prior to diversion of any water to storage in the Seaside Groundwater Basin. (PT – 17).

<sup>1</sup> Refer to PT – 37 and to individual exhibits by reference PT 25 – 36 (PT Exhibits and Evidence by Reference)

**Conclusion:** In my opinion, even with Cal-Am's diversion and use of the ASR project, Cal-Am would still be diverting in excess of any valid basis of right.

**Issue 2: Is Cal-Am violating condition #2 of Order 95-10?**

In 1995, the State Water Board adopted WR Order 95-10. The State Water Board found that Cal-Am was extracting, on average 14,106 AFA of water from the alluvial aquifer along the Carmel River, whereas, Cal-Am's authorized water rights amounted to only 3,376 AFA. (State Board Staff – 2). Therefore, Cal-Am was diverting about 10,730 AFA of water from the Carmel River or its underflow without a valid basis of right.

At page 40, Condition 2 of Order 95-10 states, "*Cal-Am shall diligently implement one or more of the following actions to **terminate** its unlawful diversions from the Carmel River: (1) obtain appropriate permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside Aquifer shall be governed by condition 4 of this Order not this condition, and/or (3) contract with another agency having appropriate rights to divert and use water from the Carmel River.*" (State Board Staff – 2).

- 1) As required in item 1 of Condition 2, Cal-AM has not obtained an appropriate water right for all water unlawfully diverted from the Carmel River. However, there are applications that Cal-Am has on file with the Division to appropriate future water from the Carmel River.

Cal-Am initially reduced its diversions from the Carmel River to 10,152 AFA in 1997-98, but since then has increased its diversions above the 10,152 AFA with over 11,000 AFA being diverted in 1999/00, 2002/02, and 2003/04. Although Cal-Am's diversions have met the 20% conservation goal established in Order 95-10, there has not been a continual consistent reduction by Cal-Am to terminate unauthorized diversions from the Carmel River in the past ten years. The issuance of Permit 20808A has the ability to *reduce* Cal-Am's unlawful diversion of water from the Carmel River, however, Permit 20808A would not eliminate Cal-Am's illegal diversions in excess of 3,376 AFA.

- 2) As required in item 2 of Condition 2, Cal-Am has not obtained water from other sources of supply, however, based on submitted information it appears that a reduction in the amount of water pumped from the Carmel River has occurred. By the same token, with the connection increases and population increases, the one for one reduction requirement has not been totally complied with.

In 1995, Cal-Am served approximately 105,000 persons with water service supplied from the Carmel River. (State Board Staff – 2, page 6, para. 1). In testimony presented by MPWMD during the September 24, 2007, State Water Board hearing to consider MPWMD Petitions to Change Permits 7130B and 20808 (Applications 1167B and 27614), Hydrologist Darby Fuerst, stated that based on recent census figures, approximately 112,000 people reside within the MPWMD boundaries (PT - 20). This is an increase of 7,000 people, or a 6.25% increase in the population in the Monterey area. Although it is recognized that Cal-Am is not the only water purveyor in Monterey County, they serve the largest area, therefore, they would likely see the largest increase in population in its service area.

MPWMD Technical Memo 2006-02, Cal-Am and Non Cal-Am Existing Water Needs, reported that Cal-Am's average annual production in its main system during the period for water years 1996-2006, increased from 14,710 AFY to 15,858 AFY, which represents an increase in 1,148 AFY. (PT-21). MPWMD stated that the estimated long term water need to satisfy build-out projections of the various municipal jurisdictions (Airport District, Carmel, Del Rey Oaks, Monterey, Pacific Grove, Sand City, Seaside, and Unincorporated County) within its service area would require an additional 4,454 AFA. (PT – 22). Cal-Am is the largest water purveyor in Monterey County, therefore, Cal-Am would likely be required to supply the majority of this required future water need of 4,454 AF.

3) As required in item 3 of Condition 2, to date, there is no record showing that Cal-Am has contracted with any other agency with appropriate rights to divert and use water from the Carmel River.

Therefore, I conclude that Cal-Am has not complied with Condition 2 of Order 95-10 by implementing actions that actually terminate the unlawful diversions from the Carmel River. Additionally as mentioned above, Cal-Am is illegally diverting water from the Carmel River in excess of its valid legal right.