

JUN 26 2008

CONSERVATION AGREEMENT BETWEEN  
CALIFORNIA-AMERICAN WATER COMPANY AND  
NATIONAL MARINE FISHERIES SERVICE  
DEALING WITH STEELHEAD IN THE CARMEL RIVER, CALIFORNIA

Office of Enforcement

Introduction

The National Marine Fisheries Service ("NMFS") and California-American Water Company ("Cal-Am") have, over the past months, been meeting to develop agreements on short-, mid- and long-term conservation actions needed to minimize "take" of Endangered Species Act ("ESA") listed Steelhead in the Carmel River. They will continue to meet through at least December 31, 2001, in an effort to develop appropriate agreements and implementation plans, to conserve listed steelhead in the Carmel River.

NMFS and Cal-Am recognize that many mid-term and the long-term solutions involve other parties and regulatory agencies, and also present unique technical problems that need to be addressed. Accordingly, they have arrived at a tiered process that will require Cal-Am to implement immediately certain short-term and some mid-term actions, with other mid-term and long-term solutions to be addressed within a process and timetable geared at resolving these mid- and long-term issues.

Adherence to the short- and mid-term actions outlined in this Conservation Agreement and the timetable and framework to resolve remaining mid- and long-term problems demonstrate both commitment and good faith progress toward reaching the long-term objective.

This Conservation Agreement is organized around three tiers. Tier I includes short- and mid-term actions that will be taken to conserve Steelhead in the Carmel River. Tier II describes the process that will be followed to address the dam safety issues associated with San Clemente Dam and other mid-term measures to conserve Steelhead in the Carmel River. Tier III describes the process that will be followed to address the long-term implementation of actions that will meet the goals of the parties.

AGREEMENT

It is agreed that the following are the goals and objectives of this Agreement:

1. NMFS' goal and objective are to protect and conserve Steelhead in the Carmel River, including maximizing the Carmel River Basin's substantial contribution toward recovering this south central California Coast Steelhead ESU and to enforce the ESA.
2. Cal-Am's goal and objective are to supply water in accordance with its CPUC Certificate in a manner that complies with the Federal ESA and other regulatory obligations.

It is agreed that these goals and objectives will be pursued and obtained through implementation of the following actions:

**I. Tier I: Short- and Mid-Term Activities:**

**Phase I**

In direct response to the issues raised in Condition 6 of SWRCB W.R. Order 95-10, as amended, and W.R. Order 2001-04, the following has been agreed to by Cal-Am and NMFS:

Objective: During the low flow season, except for 0.5 cfs, all water diverted to Carmel Valley Village will be water that originates from the Begonia Zone. The Begonia Zone includes water well production facilities in AQ3, AQ4 and Seaside Groundwater Basin.

- A. Cal-Am will immediately upon execution of this Conservation Agreement 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 pump failure, main breaks or fires. Hot weather demand alone will 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 will be undertaken in a manner that is least damaging to the fishery resources, and these emergency operations will be for the shortest practicable time. Cal-Am will notify and consult with NMFS prior to implementation of emergency operations. If there is no time for consultation, Cal-Am will notify NMFS of its emergency operation as early as practicable after the emergency. For the purpose of this agreement, "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.
- B. Upon the execution of this Conservation Agreement, Cal-Am will reduce diversions during low flow periods, from Garzas Wells Nos. 3 and 4, Panetta Wells Nos. 2 and 4, the Robles Well, the Scarlett 8 Well, and Los Laureles Wells Nos. 5 and 6. Current diversions are 5-7 days per month at each well. Diversions at these wells will be reduced to a maximum of 1-2 eight-hour days per month. This reduction will 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 will be completed by October 31, 2001. To the maximum degree practicable, Cal-Am will operate these wells at night. In consultation with NMFS and the California Department of Fish and Game ("CDFG"), Cal-Am can operate the Scarlett 8 Well incrementally to meet Maximum Daily Demand after using other available sources to their maximum capacity.

- A. Cal-Am will increase well capacity downstream of and including the San Carlos Well. Well capacity shall be increased by an initial minimum of 3.0 cfs up to a maximum 5.0 cfs. Increasing well capacity may include expansion of existing wells or construction of additional wells in the vicinity of the Odello field or any location between the San Carlos Well and the Odello field. An Engineer's Assessment for increasing production capacity at existing wells shall be completed by Cal-Am by December 1, 2001. Subject to all appropriate permitting, the target completion date for increasing capacity of existing wells to meet the minimum 3.0 cfs (hereinafter referred to as "additional pumping" or "experimental pumping") is March 31, 2002. If a new well or wells are required to meet the minimum 3.0 cfs additional pumping, the target date for completion is March 31, 2003. Utilizing the increased well capacity between the San Carlos well and the Odello field, Cal-Am shall offset the water production from the most upstream wells in AQ3.
- B. Cal-Am will evaluate the need for process modification within the Begonia Iron Removal Plant ("BIRP") to accommodate the treatment of water produced as part of the additional pumping of the 3-5 cfs, utilizing the increased well capacity provided for in Phase II, Paragraph A. above. Completion date for this evaluation shall be not earlier than six months from the date that the additional pumping begins and not later than December 31 at the end of the first low flow river season. If the evaluation shows that the BIRP cannot accommodate the treatment needs associated with the additional pumping of the 3-5 cfs, Cal-Am will expedite modification of the treatment process at the BIRP in order to provide the treatment of the additional water produced as part of the increased well capacity dealt with herein. In order to properly undertake the evaluation, the additional water pumped cannot be discharged into the Carmel River and may need to be run through the BIRP. As a consequence, the process modification may need to take place in an adaptive manner during the evaluation period or in advance of it, thereby affecting target dates for completion of the evaluation and the BIRP process modification. Subject to this qualification, the target date for the process modification of the BIRP, if necessary, is March 2004.
- C. Cal-Am will experimentally pump water, utilizing the increased well capacity provided for in Phase II, Paragraph A. above, to the BIRP for twelve months from the date that the additional pumping begins.
- D. During the experimental pumping, utilizing the increased well capacity provided for in Phase II, Paragraph A. above, Cal-Am will monitor the effects of pumping on aquifer drawdown (including impacts on senior water rights), salt water intrusion, impacts on lagoon water quality and riparian habitat. Cal-Am, NMFS, CDFG, and the United States Fish and Wildlife Service ("USFWS") will jointly develop a monitoring plan.
- E.1. If pumping under Phase II, Paragraphs B and D causes salt water intrusion, adverse impacts to lagoon water quality or riparian habitat or adverse impacts to senior water rights during 2002, Cal-Am will conduct a similar experiment, in consultation with NMFS, CDFG and USFWS, at a location in the area

downstream of River Mile 4.5. This follow-up activity, if necessary, would be conducted in 2003.

- E.2. If pumping under Phase II, Paragraphs B. and D. does not cause salt water intrusion, adverse impacts to lagoon water quality or riparian habitat or adverse impacts to senior water rights, but does not produce 5.0 cfs during 2002, Cal-Am, in consultation with NMFS, CDFG and USFWS, will conduct an experiment to further increase well capacity to a maximum of 5.0 cfs at a location in the area downstream of River Mile 4.5. This follow-up activity, if necessary, would be conducted in 2003.
- F.1. If pumping of a second experimental well to accomplish Phase II, Paragraph E. causes salt water intrusion, adverse impacts to lagoon water quality or riparian habitat or adverse impacts to senior water rights during 2003, Cal-Am will conduct a similar experiment, in consultation with NMFS, CDFG and USFWS, at a third site at a location in the area downstream of River Mile 4.5. This follow-up activity, if necessary, would be conducted in 2004.
- F.2. If pumping of a second experimental well to accomplish Phase II, Paragraph E. does not cause salt water intrusion, adverse impacts to lagoon water quality or riparian habitat or adverse impacts to senior water rights, but does not produce 5.0 cfs during 2003, Cal-Am, in consultation with NMFS, CDFG and USFWS, will conduct an experiment to further increase well capacity to a maximum of 5.0 cfs at a third site at a location in the area downstream of River Mile 4.5. This follow-up activity, if necessary, would be conducted in 2004.
- G. Assuming that the effort outlined in Phase II, Paragraphs A., E., or F. is not successful, then Cal-Am will not be required to locate additional sites and NMFS and Cal-Am will meet to further discuss the then existing situation. In the event that the effort outlined in Phase II, Paragraphs A., E., or F. is successful, then Cal-Am will continue to utilize the increased well capacity to offset water production from the wells in the upper half of AQ3 up to an aggregate maximum reduction of 5.0 cfs from one or both of the following wells: Berwick 8, and Begonia.
- H. Cal-Am and NMFS will work with other appropriate parties to implement, as early as possible, an ASR project.
- II. Tier II: Mid- and Long-Term Activities:
  - A. NMFS and Cal-Am shall, not later than December 31, 2001, develop an agreed-upon set of actions to address the dam safety and steelhead conservation issues associated with the San Clemente Dam. Those actions will need to appropriately address a variety of fish life history issues including fish passage and address risks associated with sediment transport and related problems, including the risk to the fishery and to life and property downstream of San Clemente Dam.

- B. NMFS and Cal-Am may jointly propose to the California Division of Dam Safety the adoption and implementation of the actions developed and agreed upon in Paragraph II.A. above.

**III. Tier III: Long-Term Actions:**

- A. NMFS and Cal-Am shall, not later than December 31, 2001, develop an action plan that sets forth specific steps to be taken by both parties and include an agreed upon time frame to address, over the long term, their mutual goals and objectives (identified above).
- B. NMFS and Cal-Am shall together undertake financial and engineering feasibility studies, as needed, to determine the ability to implement the long-term solutions identified in Paragraph III.A. above. NMFS' participation will be as appropriate and within Agency and OMB guidelines.
- C. Cal-Am shall investigate the availability of funding to assist in the implementation of the long-term solutions identified in Paragraph III.A. NMFS, as appropriate and within Agency and OMB guidelines, will support Cal-Am's efforts in this regard.
- D. Cal-Am shall seek regulatory and other permitting to facilitate the long-term solutions identified in Paragraph III.A. above. NMFS, as appropriate and within Agency and OMB guidelines, will support Cal-Am's efforts in this regard.

**IV. Coordination with United States Fish and Wildlife Service**

It is not the intent of Cal-Am or NMFS to proceed in a manner that violates the provisions of the ESA as it may apply to species within the jurisdiction of the USFWS. As a consequence, Cal-Am and NMFS will coordinate activities under this agreement with the USFWS and where necessary will modify the provisions of the Agreement in order to accommodate the concerns of the USFWS.

**V. Prosecutorial Discretion:**

It is the responsibility of the National Oceanic and Atmospheric Administration ("NOAA") and NMFS to investigate and take appropriate enforcement action with respect to violations of the ESA. Assuming compliance with the commitments described in this Conservation Agreement, prosecution of violations of the ESA committed by Cal-Am is not the preferred course of action.

Accordingly, NOAA and NMFS will exercise enforcement discretion relative to any potential violation of the ESA committed by Cal-Am prior to May 1, 2002, in the following manner:

- A. NOAA and NMFS will investigate and document each apparent violation.

- B. NOAA will exercise enforcement discretion in prosecuting such violations, if in the sole view of NOAA and NMFS, Cal-Am has fully complied with all obligations under this Conservation Agreement. In the event of any enforcement action Cal-Am reserves the right to introduce in that enforcement action any admissible evidence it believes supports its compliance with this Conservation Agreement.
- C. This exercise of enforcement discretion will not apply to intentional violations of the ESA.
- D. This exercise of enforcement discretion shall not apply to violations of the ESA committed by Cal-Am prior to the execution of this Conservation Agreement. In the event of an enforcement action for actions taken by Cal-Am prior to execution of this Conservation Agreement the parties agree that Cal-Am may introduce its efforts under this Conservation Agreement for purposes of determining any penalties or sanctions that may otherwise be imposed.

**Signatures**

NATIONAL MARINE FISHERIES SERVICE

By \_\_\_\_\_

CALIFORNIA-AMERICAN WATER COMPANY

By 

Date of Last Signature: 9/18/01

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- A. NOAA and NMFS will investigate and document each apparent violation.
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- C. This exercise of enforcement discretion will not apply to intentional violations of the ESA.
- D. This exercise of enforcement discretion shall not apply to violations of the ESA committed by Cal-Am prior to the execution of this Conservation Agreement. In the event of an enforcement action for actions taken by Cal-Am prior to execution of this Conservation Agreement the parties agree that Cal-Am may introduce its efforts under this Conservation Agreement for purposes of determining any penalties or sanctions that may otherwise be imposed.

#### Signatures

NATIONAL MARINE FISHERIES SERVICE

By *Rodney R M Green 9-18-61*

CALIFORNIA-AMERICAN WATER COMPANY

By

**SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT ("Agreement") is made by and between California American Water Company ("CAW") and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"). Throughout this Agreement, CAW and NOAA are collectively referred to as the "Parties."

**Recitals**

A. CAW is the owner and operator of the public drinking water system for the Monterey Peninsula, which serves approximately 40,000 customers. CAW is regulated by the California Public Utilities Commission ("CPUC") and is mandated by California law to serve potable water to its customers and to comply with federal and state safe drinking water laws and regulations, as well as the Federal Endangered Species Act. A major source of CAW's water supply is diversions from the Carmel Valley Aquifer. CAW is currently working to develop an alternative long-term water supply to replace a significant portion of that water supply.

B. CAW's operations on the Carmel River are regulated by a number of agencies pursuant to certain orders and agreements. State Water Resources Control Board Order 95-10 mandates that CAW find an alternative supply for 10,730 acre-feet ("AF") of water and, pending the implementation of an alternative water supply, limit its diversions from the Carmel Valley to 11,284.8 AF. Order 95-10 was amended in 2002 to incorporate certain provisions of the Conservation Agreement (described below) relating to additional limitations on CAW's diversions at San Clemente Dam and upstream wells during low flow periods. CAW's operation of Los Padres and San Clemente Dams is controlled by an annual agreement among CAW, the Monterey Peninsula Water Management District and the California Department of Fish & Game. CAW's operation of San Clemente Dam is further constrained by a mandate issued by the California Division of Safety of Dams ("DSOD") to institute interim safety measures that include lowering the water levels in the reservoir behind San Clemente Dam during the dry season (approximately seven months each year).

C. On September 18, 2001, NOAA and CAW entered into a Conservation Agreement ("Conservation Agreement"), which required CAW to implement certain measures to reduce the impact of its operations in the Carmel River on steelhead and their habitat.

D. The goals and objectives of the Conservation Agreement were as follows:

1. NMFS' goal and objective are to protect and conserve Steelhead in the Carmel River, including maximizing the Carmel River Basin's substantial contribution toward recovering this [S]outh [C]entral California Coast Steelhead ESU ["SCCC steelhead"] and to enforce the ESA [Endangered Species Act].

2. Cal-Am's [CAW's] goal and objective are to supply water in accordance with its CPUC Certificate in a manner that complies with the Federal ESA and other regulatory obligations.