



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board



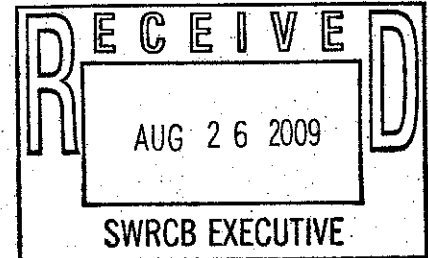
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August 26, 2008

VIA E-MAIL

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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Dear Ms. Townsend:

COMMENT LETTER: CAL-AM CDO HEARING WORKSHOP

The Prosecution Team has the following comments, suggested edits, and requests for clarification of the contents of the State Water Resources Control Board's (State Water Board) draft cease and desist order dated July 27, 2009 in the Matter of the Unauthorized Diversion and Use of Water by the California American Water Company (Cal-Am) (Draft CDO). The Prosecution Team's comments attempt to enhance the Draft CDO by making the findings and conditions clear and enforceable. The edits suggest the inclusion of a concrete time line for ceasing unlawful diversions, propose a date certain for the implementation of alternative water supply, and provide a reservation of the State Water Board's authority to take further enforcement against Cal-Am pursuant to the Water Code. Proposed deletions and additions to the actual text of the Draft CDO are made in strikeout/underline format.

State Water Board Findings:

Section 5.2 Cal-Am's Rights to Divert and Use Water from the Carmel River

The Prosecution Team believes that page 5, paragraph 2, last sentence contains typographical errors that should be corrected to read: "Thus, Cal-Am's current legal right to water in the river that may be used to supply peninsula cities is the ~~3,346~~ 3,376 afa⁷ recognized in Order 95-10 plus ~~2,246~~ 2,426 afa under Permit 20808A⁸ for a total of ~~5,562~~ 5,802 afa." Please note that we are recommending that the reference to Fn. 7 be relocated to immediately follow the "3,376 afa." Furthermore, Fn. 7 should read "~~856~~ 851 afa is subtracted from the total of 3,030 afa in License 11866 to adjust for storage loss due to siltation at Los Padres Reservoir."

California Environmental Protection Agency

Section 10.0 Order WR 95-10 Does Not Authorize Cal-Am to Divert Water from the River in Excess of its Water Rights

The Prosecution Team agrees with the legal analysis and conclusions in Section 10 of the Draft CDO finding that the conditions in Order 95-10 requiring Cal-Am to take certain actions to mitigate the adverse effects of its unlawful diversions "do not authorize Cal-Am to divert water from the river in excess of its water rights." (Draft CDO, p. 24.) Similarly, the reduction schedule and conditions set forth in the Draft CDO do not authorize Cal-Am to continue to divert in excess of its water rights regardless of whether or not Cal-Am is in compliance with the Draft CDO.

Accordingly, the Prosecution Team requests that specific findings and a reservation of authority, substantially similar to the following, be included as the last paragraph in section 10 of the Draft CDO:

Similarly, this order does not confer a water right or otherwise authorize Cal-Am to divert water in excess of its legal water rights as defined in Order 95-10 and discussed in greater detail above in Section 5.2. The State Water Board in adopting this order, specifically reserves its right to take further enforcement against Cal-Am pursuant to Water Code sections 1052 and 1055 for those unlawful diversions in excess of its legal water rights even if Cal-Am's diversions are consistent with the terms and conditions of Order 95-10 and this order. Additionally, the State Water Board may take further enforcement against Cal-Am pursuant to Water Code section 1845 for Cal-Am's failure to comply with the conditions of this order.

Section 14.2 Efforts by Cal-Am to Comply with Condition 2 of Order 95-10

The Prosecution Team believes that the 3rd sentence in the first paragraph on page 35 contains the same typographical errors as Section 5.2 discussed above and should be corrected to read: "[t]hus, Cal-Am's current legal right to water in the river that may be used to supply peninsula cities is the ~~3,316~~ 3,376 afa²⁸ recognized in Order 95-10 plus ~~2,246~~ 2,426 afa under Permit 20808A for a total of ~~5,562~~ 5,802 afa." Please note that we are also recommending that the reference to Fn. 28 be relocated to immediately follow the "3,376 afa." In addition, Footnote 28 should read "~~856~~ 851 afa is subtracted from 3,030 afa in License 11866 to adjust for storage loss due to siltation at Los Padres Reservoir."

The last paragraph on page 35 continuing onto page 36 of the Draft CDO states "it has taken far too long, and the reductions in Cal-Am's unlawful diversions to date have been too small to satisfy the requirement for diligence." Yet, the Draft CDO also recognizes

that "Cal-Am will not be able to eliminate its illegal pumping from the river before 2016, at the earliest; 21 years after the adoption of Order 95-10."

This 21-year estimate is 8 years from the current date. It was estimated by the Manager of the Monterey Peninsula Water Management District that 2016 was the time by which Cal-Am could complete the Coastal Water Project. (RT. Ph. 2, Vol. IV, p. 953, 7 - p. 954, 23.) The Prosecution Team recommends that the final order include a finding that, based on information in the record for these proceedings, it is reasonable for the State Water Board to require Cal-Am to cease its unlawful diversions from the Carmel River by a date certain. Furthermore, the Prosecution Team proposes that December 31, 2016 is a realistic date by which Cal-Am could implement the Coastal Water Project or another alternative supply project and cease its unlawful diversions. Without a date certain for termination of unlawful diversions, as discussed in more detail below in section "Condition 2.c.", the Prosecution Team estimates that the reduction schedule in the Draft CDO does not require Cal-Am to reduce diversions from the Carmel River to its legal rights until approximately water year 2034.¹

Section 16 Projects and Actions That May Affect Cal-Am's Need to Divert Water From the Carmel River

Section 16 and the subdivisions within this section discuss several projects and actions that Cal-Am can undertake to lessen its need to divert water from the Carmel River. The Prosecution Team seeks clarification on the extent to which the Draft CDO requires the alternative sources or conserved water to be applied to offset Cal-Am's unlawful diversions from the Carmel River.

Section 16.1 through 16.4 identify the ASR Project, Sand City desalinization project, reduction of system losses, and water conservation as projects and actions that Cal-Am should undertake to reduce diversions from the river. Each of these subdivisions reach the conclusion that the water developed or saved by the project or action in question should be used to reduce Cal-Am's diversions from the river. In fact, it appears from the conservation number provided in subdivisions 16.3 (Reduction of System Losses) and 16.4 (Water Conservation) that the actions identified in those subdivisions are the grounds for requiring the 121 af annual reductions called for in Draft CDO's Condition 2.c.(2).²

¹ This calculation assumes a base amount of 10,978 af with the following adjustments to the base amount in water year 2034: 549 Initial reduction, 5687 af annual reduction, 94 af from Sand City Desalinization Plant, 920 af from ASR and 500 af from small project.

² Draft Order requires the reduction of system losses of approximately 68 af a year for 8 years until 549 afa reduction is achieved through implementing a main replacement program (Section 16.3, p. 40), 41 af of additional savings per year for eight years from continued retrofitting for a total of 330 afa (Section 16.4, p. 41), 12 af per year from reduction in the use of portable water for outdoor use for total of 100 afa over eight years. (*Id.*) Added together the annual saving estimated from these actions is equal to the annual reduction required by Draft Order Condition No. 2.c.(2) (68 + 41 + 12 = 121 afa).

Nevertheless, Section 16.5 contains some statements that could be seen as contradicting the requirement that water developed or saved is to be used by Cal-Am to reduce its unlawful diversions from the Carmel River. Specifically, Section 16.5 recognizes that Cal-Am faces reduction in the availability of groundwater from the Seaside Groundwater Basin to service its customers in its main system and concludes that "[w]ater to offset the loss of groundwater production may be found by aggressively implementing: (1) the retrofit program; (2) the program to reduce the use of potable water for outdoor irrigation; and (3) the main replacement program in conjunction with reduced consumption managed by a program like MPWMD's Regulation XV, prohibiting waste and non-essential water use." Section 16.5 goes on to find that "[s]uch efforts should offset the loss of groundwater production within three years."

The Prosecution Team seeks clarification as to these last two statements in Section 16.5. Specifically, is the State Water Board finding that by aggressively pursuing the aforementioned programs Cal-Am should be able to offset the loss of groundwater production from the Seaside Groundwater Basin in addition to meeting the annual reduction requirements? Also, does this finding extend to future triennial reductions that would be imposed because of the Seaside Groundwater Basin Adjudication or is it limited to the initial 10% reduction for the first three years?

Section 19.1 Pebble Beach Company should be Subject to All Limitations Imposed upon Cal-Am's Diversion from the Carmel River

It is the Prosecution Team's interpretation of this section that diversions made from the Carmel River to satisfy the Pebble Beach Company (PBC) entitlement should be treated the same as diversions made to serve any other Cal-Am customer. If that is the State Water Board's intent, then the Prosecution Team requests some clarifying language be added to this section.

Specifically, the Prosecution Team recommends that the last paragraph of Section 19.1 be amended to read as follows:

We conclude, therefore, that the State Water Board should prohibit any increased diversion from the river by Cal-Am to satisfy deliveries made under PBC's entitlement from MPWMD. Nor should any water users who receive water under the PBC entitlement be exempted from any conservation program or other effort to reduce Cal-Am's unauthorized diversions, including but not limited to restrictions on new service connections. Accordingly, there shall be no net increase above the diversion limitations imposed by this order in the amount of water diverted from the river to satisfy PBC's entitlement. For purposes of determining compliance with this order, Cal-Am diversions from the Carmel River to satisfy PBC's entitlement shall be included in Cal-Am's reported diversions

from the river and subject to the reductions and limitations imposed herein.

Section 19.2 Any Monterey Peninsula Community that Wishes to Develop Water from a New Source for Growth Must First Apply Water from the New Source to Reduce its Share of the Water Being Unlawfully Diverted by Cal-Am; Only after its Share of Unlawful Diversions from the River is Ended may Water from the New Source be Used for Growth

The Prosecution Team would like clarification on how the State Water Board envisions this section being implemented. Specifically, what basis or criteria is to be used to determine what share of a communities water is being unlawfully diverted from the river and how will Cal-Am's compliance with this provision of the Draft CDO be determined.

For example, should a community that is planning to develop an alternative source of water request an amendment to the order finding that the proposed alternative source is of sufficient quantity to off set its share of the water being unlawfully diverted by Cal-Am and defining what quantity of water from the alternative source is available for additional growth?

Conclusion:

The Prosecution Team believes that the reference to "City of Seaside Desalination Project" in the last paragraph on page 56 should be changed to "Sand City Desalination Project." The Prosecution Team would also like clarification on how the 1,322 afa stated at the top of Page 57 as the cumulative reduction in need to divert water from the river due to previously specified projects and initiatives was calculated.

Order Schedule and Conditions:

Condition 1.

To improve the enforceability of the Draft CDO, the Prosecution Team recommends making the following changes to the Condition 1:

Cal-Am shall diligently implement actions to terminate its unlawful diversions from the Carmel River ~~as soon as reasonably possible~~. These measures shall include implementing urban and irrigation water conservation measures and obtaining alternative water supplies.

The "as soon as reasonably possible" language in Condition 1 is unnecessary and ambiguous and should be removed.

Condition 2.a.

The Prosecution Team recommends amending Condition 2.a. to read as follows:

- a. Cal-Am shall not divert provide water from the Carmel River for new service connections that were not provided a "will serve commitment" before July 27, 2009.

The Prosecution Team recommends that the State Water Board strike the reference to "divert" and "from the Carmel River." Cal-Am should not be able to use water from the Seaside Groundwater Basin or any other new source to serve new commitments while still unlawfully diverting water from the Carmel River because Condition 2. of Order 95-10 requires Cal-Am to "obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River." Furthermore, the nature of the Cal-Am system is such that water diverted from the Carmel River is intermixed with other water sources making it impossible to determine the actual source of water for new connections.

The Prosecution Team also recommends that the cut off date for providing "will serve commitments" or similar entitlements be July 27, 2009 or earlier. It is unclear to the Prosecution Team whether or not applicants for a will serve commitment or similar entitlement from Cal-Am are required to meet any substantive requirements other than property ownership within the service area, or if there are any limits to whom Cal-Am can issue such entitlements. Accordingly, it is possible that allowing for a future cut off date for providing "will serve commitments" will result in a substantial number of property owners receiving such commitments. A retroactive cut off date will prevent a race to obtain such commitments and ensure that only those persons with a pre-existing plan to develop properties in the immediate future will be permitted to obtain new water service prior to Cal-Am ceasing its unlawful diversions. Additionally, as discussed further below, an additional reporting requirement should be added to Condition 4 compelling Cal-Am to provide the State Water Board with a list of all commitments that qualify as an entitlement to service under the Draft CDO.

Condition 2.b.

The enforceability of Condition 2.b. against Cal-Am is uncertain and problematic. Cal-Am does not have land use or planning authority over its service area. It is unclear to the Prosecution Team that the local government and municipalities that would approve applications for changes in zoning or use would look first to Cal-Am for a commitment to continue providing service to such properties if such changes are approved. Accordingly, the Prosecution Team request clarification on how Condition 2.b. is to be implemented by Cal-Am and enforced by the Division of Water Rights.

If Condition 2.b. is not revised substantially, then the Prosecution Team request, for the reasons discussed above under Condition 2.a., that the State Water Board strike the reference to "divert" and "from the Carmel River" and use the July 27, 2009 date as the cut off date for providing will serve commitments.

Condition 2.c.

For the reasons discussed below, the Prosecution Team recommends the following revision to Condition 2.c.:

- c. Commencing on October 1, 2009, Cal-Am shall not divert more water from the river than the base of ~~10,978~~ 10,724 afa as adjusted by the following:
- (1) Immediate Reduction: Commencing on October 1, 2009, Cal-Am shall reduce diversions from the river by 5 percent, or ~~549~~ 536 afa.
 - (2) Annual Reduction: commencing on October 1, 2009, the base shall be further reduced by 121 afa per year . . . Commencing on October 1, 2014, annual reductions shall increase to 242 af per year. The 242 af per year reduction shall also be cumulative. Annual reductions shall continue until Cal-Am has terminated all unlawful diversions from the Carmel River.

The proposed base amount of 10,978 afa is in excess of the total annual diversions from the river by Cal-Am since 2003/04. (See table 1 below) The average annual unlawful diversion quantity of 7,632 afa provided in footnote 48 appears to include amounts diverted in excess of the conservation goals established by Order 95-10.

The Prosecution Team recommends that the base amount not include amounts diverted in 1996/97, and prior because in 1996/97, Cal-Am did not meet its 20 percent conservation goal established by Order 95-10. Instead, the Prosecution Team recommends using a base amount calculated using Cal-Am's average diversions from 1997/98 through 2007/08 which is equal to an average annual diversion of 10,724 afa.

Table 1. – Reported Annual Diversions from the Carmel River

Water Year	Reported Annual Diversion (AFA)	Legal Rights (AFA)	Unlawful Annual Diversion (AFA)
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
2007/08	10,834	3,376	7,458
Avg. Annual Diversion	10,724		7,348

If the State Water Board changes the base amount to 10,724 afa, then the Prosecution Team would agree that the initial 5% reduction required by Section 2. c.(1) should be changed to 536 afa, and not the 549 afa identified.

Condition 2.c.(2) contains annual reduction requirements. The Prosecution Team has interpreted the Draft CDO as requiring an annual cumulative reduction of 121 afa for water years 2009/2010 through to 2013/2014 with an increased in annual cumulative reductions of 242 from 2014/2015 and continuing until the unlawful diversions have ceased. The changes to the language in Condition 2.c.(2) recommended above are intended to make that interpretation clear.

The Prosecution Team recommends that the Draft CDO provide a table by water year that clearly identifies the total allowable amount of water that Cal-Am can divert from the Carmel River after application of the reductions specified by Condition 2.c. of the Draft CDO. Based on the above interpretation of the reduction schedule and known-quantifiable adjustments, the Prosecution Team estimates that the Draft CDO does not require Cal-Am to reduce diversions from the Carmel River to within its legal rights until approximately water year 2034³.

³ This calculation assumes a base amount of 10,978 af with the following adjustments to the base amount in water year 2034: 549 Initial reduction, 5687 af annual reduction, 94 af from Sand City Desal Plant, 920af from ASR and 500 af from small project.

Condition 2.c.(3)

The Prosecution Team seeks clarification on Condition 2.c.(3). Assuming that it is the State Water Board's intent that the total diversions made to underground storage under Permit 20808A are to be deducted from the base amount, the following revision should be made:

ASR Project: The amount of water diverted to underground storage under Permit 20808A (Application 27614A) as of May 31 of each year ~~and which will be supplied to Cal-Am customers after that date~~ shall be subtracted from the base . . .

Condition 2.c.(4).

The Prosecution Team recommends the following changes to Condition 2.c.(4):

Sand City Desalination Plant: Cal-Am shall annually utilize at minimum, 94 afa from the Sand City Desalination Plant to offset unlawful diversions from the Carmel River. Accordingly, 94 af shall be subtracted from the base amount each water year plus any quantity of production not served to new growth within Sand City. In addition, any other water available from the Sand City Desalination Plant that is not served to the City of Sand City shall also be subtracted from the base amount each water year.

Addition of Condition 2.c.(6).

The Prosecution Team recommends the addition of the following condition to the Draft CDO:

- (6) Compliance with Condition 2 of Order 95-10: Water which is: (1) permitted by the State Board as being lawfully diverted; (2) obtained from other sources; or (3) contracted for from other agencies shall be subtracted from the base amount each water year.

Condition 2.d.

The Prosecution Team seeks clarification on how to determine whether or not 90 percent of the 15 percent conservation requirement has been accomplished prior to Cal-Am being eligible for relief from annual reduction imposed under Condition 2.c.(2) and Footnote 51. Footnote 51 states that "for purposes of measuring compliance, the 15 percent reduction shall be measured against (sic) the adjusted base required by condition 2.c. for the year in which the conservation requirement is imposed." The Prosecution Team request clarification on: (1) the calculation of the 15% conservation

goal; (2) whether the conservation goal is applicable to Cal-Am's total diversions from all water supplies or just from the Carmel River, and (3) determination of whether or not consumption has been reduced by 90% of the 15% conservation goal .

Condition 4.

The following should be added to this condition:

(e) Monthly summary of quantity of water which is: (1) permitted by the State Board as being lawfully diverted; (2) obtained from other sources; or (3) contracted from other agencies by Cal-Am as required by Condition 2 of Order 95-10.

(f) Monthly summary of new connections to Cal-Am's distribution system that have been provided since the adoption of this order and a list of outstanding will serve commitments and the estimated quantity of water that will be required to satisfy those commitments.

(g) Each quarterly report submitted by Cal-Am shall include a statement signed under penalty of perjury that the monthly summaries are true and correct.

Condition 5 and New Condition 6.

The second sentence of Condition 5 should be made its own condition and revised as follows to permit the Deputy Director for Water Rights to modify the timing and content of all the quarterly reports required by the Draft CDO:

5. Starting six months after adoption of this order, Cal-Am shall file quarterly reports of its progress toward implementing condition 3 (small project implementations) and note specifically any problems with its schedule of implementation. ~~The Deputy Director for Water Rights is authorized to modify the timing and the content of the reporting required by all the provisions of this condition in order to more effectively carry out the intent of this order.~~

6. The Deputy Director for Water Rights is authorized to modify the timing and the content of the reporting required by all the provisions of this ~~condition~~ order ~~in order~~ to more effectively carry out the intent of this order.

Ms. Jeanine Townsend

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Condition 6.

The numbering of Condition 6 should be changed to Condition 7 to accommodate the revisions to Condition 5 discussed above.

Addition of Condition 8.

The Prosecution Team requests the addition of the following language as Condition 8. to the Draft CDO:

8. The State Board reserves the right to take any enforcement action authorized by law for the unlawful diversion of water and/or the violation of the terms and condition of this order.

The Prosecution Team requests that the State Water Board consider the above comments, suggested edits, and requests for further clarification of the contents of the Draft CDO and welcomes the opportunity to discuss these issues further at the September 2, 2009 public workshop.

Sincerely,



Yvonne West, Staff Counsel
Office of Enforcement

cc: Cal-Am Service List (attached)

Jim Kassel, Assistant Division Chief,
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**DIVISION OF WATER RIGHTS PROSECUTION TEAM'S
SERVICE LIST OF PARTICIPANTS**

August 24, 2009

**(PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS
AND OTHER DOCUMENTS.)**

**(Note: The participants whose E-mail addresses are listed below agreed to accept
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