

# CALIFORNIA ENVIRONMENTAL LAW PROJECT

A Non-Profit Legal Corporation



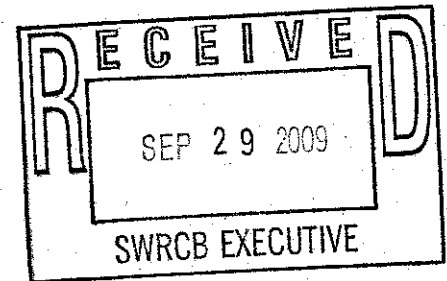
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September 30, 2009

Sent Via Electronic Mail

Jeanine Townsend, Clerk of the Board  
State Water Resource Control Board  
1001 I Street  
Sacramento, CA 95814



Re: Comment Letter: Cal-Am Second Draft CDO

Dear Clerk Townsend and Board Members:

This comment letter is submitted on behalf of Sierra Club and the Carmel River Steelhead Association.

I. The table in Attachment 1 should be modified to be consistent with its footnote 2, which states: "2.) Reduction in 2009 is initial amount of 5% (549 ac-ft). Starting in 2010 add 121 af each year until 2014 when the annual reduction becomes 242 afa." In particular, the mandatory cumulative annual reductions for 2016 and 2017 should be 1759 and 2001 acre feet, not 1517 and 2001 acre feet, and other columns should be adjusted accordingly. Currently, the table shows no mandatory reduction in diversions from 2015 to 2016.

II. Providing more water in the River during low flow months would provide substantial habitat benefits to steelhead. Therefore, if the Board is declining the requests of Sierra Club and NMFS to maximize diversion curtailments during low flow periods, the draft CDO should have emergency provisions that allow the Deputy Director to order maximum benefits for steelhead during low flow months in future years by ensuring that reductions in diversions occur to the maximum extent practicable consistent with public health and safety, in the event the Carmel River Steelhead population is in jeopardy of extirpation.

Many steelhead fry rear in the habitat below the Narrows. Maintaining flow through the summer in more of this habitat will allow such fish to rear to the smolt life-stage in the river, and avoid the stress and mortality associated with rescue and rearing in an artificial habitat. Even for parts of the

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river that do eventually go dry, keeping water in the river longer will allow fish more time to grow before they are subjected to rescue. In addition, larger sized steelhead with better swimming ability, are better able to move on their own away from the dry sections of the stream either into the lagoon downstream or into the perennially watered habitat upstream. Some of these larger and more mature steelhead will tend to disperse on their own in search of better habitat, thus saving them from the traumatic stress of handling during rescue. According to the MPWMD fish rescue data, the majority of fish that are rescued come from the AQ3 zone. See Ambrosius testimony, PT 39, passim.

All of the experts, (Dr. Williams (Sierra Club) Urquhart (MPWMD) and Ambrosius (NMFS)), agree that a significant curtailment of diversions during low flow periods will bring about habitat improvement that will promote recovery of the SCCC steelhead DPS, or at least that will enhance the prospects for survival of a viable population of steelhead in the River.

In his testimony Mr. Urquhart stated: "The number of days that any flow regime is extended at the USGS near Carmel Gage illustrates how long one may be able to delay the initiation of fish rescues, as once the river begins to dry at that location, the continuous dryback process has inexorably begun for that water year and fish rescues are required from thereon. Delaying fish rescues allows more time for juvenile steelhead to emerge from their redds (nests), and might increase fish available for rescue. Also, the longer rescues are delayed, the larger the fish are allowed to grow in their natural environment, and larger fish survive the rescue process better, as well as survive and resist disease outbreaks better while being reared by the District at the SHSRF, until release the following winter." MPWMD, KU Exhibit I at 8. Urquhart stated as well: "Therefore, if the final CDO could keep any significant amount of additional stream habitat in this area [the reach below the Narrows] wet throughout the summer and fall, it would likely result in additional fall production of juvenile steelhead for the watershed as a whole." Id.<sup>1</sup>

The California Department of Parks and Recreation (DPR), in cooperation with the Carmel River Steelhead Association, is currently pumping approximately 500 gallons per minute of water into the lagoon from park property east of the lagoon. This has increased the water level in the lagoon by about 0.5 ft, and tends to mitigate the effects of Cal-Am's illegal diversions on steelhead habitat in the lagoon. However, it is unclear how long DPR will be able to continue to bear the cost of this activity.

III. There is a need in the Final Order to have an expeditious and available procedure for providing greater habitat benefits to the steelhead during river low flow periods in late spring, summer, and fall when the population of returning adults declines to levels that threaten the viability of the Carmel River population of the SCCC DPS of steelhead. This is particularly critical in light of the apparent disinclination of the Board to tailor the relief set forth in the CDO in such a manner as to maximize benefits to the steelhead during low flow periods in the River in all future years during low flow periods.

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<sup>1</sup> See Sierra Club's closing brief at 4-7.

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During the 2008 hearings, Joyce Ambrosius, NMFS fisheries biologist, urged on behalf of NMFS and the Prosecution team that:

...the CDO be amended to provide that the annual reduction in water diversion be implemented by reducing the daily mean diversions during the period of April through October by the same percentage as the annual diversion reduction percentage specified in the Order... Under the revision proposed by NMFS, the CDO would further specify that during the months of April through October, CAW must reduce the mean daily diversion amount by at least 15% and implement the remainder of the required annual percentage reduction during the remainder of the year." PT 39 at 10.

Testifying on behalf of Sierra Club, Dr. John Williams proposed the following modification of the proposed February 2008 CDO with respect to the curtailment of diversions:

"[B]y focusing the reduction in diversions on periods when flows in the river are low [less than 20 cfs at the Don Juan Bridge gage], ... incremental increases in flow will provide greater benefit to steelhead and other public trust resources. Then, initially require a 25% reduction from base unlawful production during periods of low flow, a 15% reduction during periods of marginal flow, and no reduction in periods of high flow. In each following year, the required reduction would be increased by 2% of base unlawful production for each situation, such that, in the second year, the required reductions would be 27%, 17%, 2%, etc., until illegal diversions no longer occur. (SC20 at 29).<sup>2</sup>

Sierra Club and CRSA therefore urge the Board to include in its Final Order a procedure for modifying the CDO to maximize habitat benefits to the steelhead in the event of a steelhead population emergency:

**Upon application by a party, or on its own motion, the Deputy Director for Water Rights shall determine whether an emergency exists that could threaten the viability of the Carmel River population of the SCCC steelhead DPS, taking into account the numbers of returning adults as counted by MPWMD. In making his/her decision, the Deputy Director shall consult with the DFG and NMFS. In determining whether an emergency exists, the Deputy Director shall make a risk of extinction analysis, based upon Table 1 of Lindley et al.<sup>3</sup>**

<sup>2</sup> "Marginal Flows" and "Base Unlawful Production" are defined in the Williams Testimony at p.28.

<sup>3</sup> Lindley, S.T., R.S. Schick; E. Moro, B.P. Adams; J.J. Anderson; S. Greene, C. Hanson, B. May, D. McEwen, B. MacFarlane, C. Swenson, and J. G. Williams. "Framework for assessing viability of threatened and endangered Chinook salmon and steelhead in the Sacramento-San Francisco Estuary and Watershed." Science, Volume 5, Issue 1, Article 4. (<http://respositories.edlib.org/jmie/sfews/vol5/Issue1article4>).

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**In the event the Deputy Director for Water Rights determines such an emergency exists and that decreased diversions would promote steelhead survival and recovery, the Deputy Director is delegated the authority to modify the diversion curtailments of this Order. The Deputy Director shall also be delegated the authority to modify the diversion curtailments prescribed under this Order, in the event of an emergency, to minimize "take" of steelhead incidental to Cal-Am's unlawful diversions from the River, consistent with Section 9 of the ESA, 16 USC §1538. These delegations include, but are not limited to, maximizing habitat benefits by requiring reductions in diversions during low flow periods in the River. Low flow periods are defined as times when stream flow in the Carmel River at Don Juan Bridge (CM 10.8) gage is less than 20 cfs for five consecutive days. (See Order 2002-02, at 5). Such authority will also include requiring Cal-Am to cause sufficient flow to the Lagoon to remediate water quality conditions that would impair steelhead survival in the Lagoon, in the event the Department of Parks and Recreation ceases pumping water into the Lagoon from park property east of the Lagoon to improve water quality during low river flows.<sup>4</sup>**

IV. The Sierra Club believes that the draft CDO underestimates the outdoor water usage in the Cal-Am service area and thus underestimates the reductions in outdoor water savings that could be achieved. See Statement of Peter Vorster, consulting hydrologist, attached with exhibits to Sierra Club August 26, 2009 comments. Mr. Vorster estimates that the total outdoor water use of Cal-Am Monterey service area customers could be as much as 3000 acre feet per annum, rather than the 500 afa estimate that is used in the proposed CDO.

Sierra Club requests that the Board order Cal-Am to submit information to the Deputy Director in order that the Deputy Director can establish an accurate baseline for outdoor water use.<sup>5</sup> Based on evaluation of that data the Deputy Director shall have authority to determine whether the 500 afy baseline reflects actual outdoor water use. If the recomputed baseline was, for example, 3000 afy rather than 500 afy, then the outdoors water use savings would be 600 acre-feet, not 100 acre feet, and the annual savings increment would be 75 af instead of 12 af.

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<sup>4</sup> Sierra Club would support a condition in the CDO that would protect health and safety concerns of the community. This would provide for authority in the Chief Division of Water Rights to allow for an adjustment in diversions ordered to abate steelhead population emergencies in the event of justifiable, reasonable anticipation of deficits in supply that would threaten health and safety.

<sup>5</sup> The Board may wish to specify that Cal-Am provide such information based on landscape water audits it has performed, and that it submit additionally monthly water use data submitted to DWR in connection with the Public Water Systems Survey. PWSS records for the Cal-Am Monterey Division Service Area for 2004-2008 are attached to the Vorster Statement, which was attached to Sierra Club's comments dated August 26, 2009.

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The Order should provide that the Deputy Director shall make his/her determination concerning baseline outdoor water use for the water year prior to the effective date of the Final Order, within one year from the effective date of the CDO. If the baseline outdoor water use figure exceeds 800 afy, the Deputy Director will redetermine the baseline for outdoor water use, and revise the annual diversion reductions (based on a 20% reduction in use over an eight years period) required under the Order.

V. The Order should include the following express prohibition (in §16.5 of the proposed Order):

"Cal-Am shall not increase its diversions from the Carmel River to offset any loss in production from the Seaside Basin."

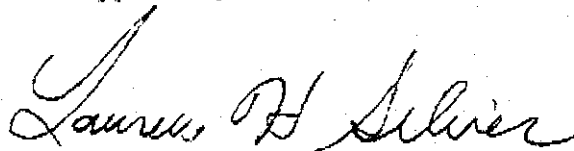
This will reflect the intent of the Board set forth in §16.1, at p.39. This intent should be reflected in the text of the Final CDO.

VI. Miscellaneous Comments, Corrections.

Paragraph 6.2, p. 14:

The correct citation of Rule 14.1 is "Monterey District Rule 14.1.1" "Water Conservation and Rationing Plan." [Remove "MPWMD"]

CRSA and Sierra Club appreciate the opportunity to comment on the revised Draft CDO.



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Suggested language.