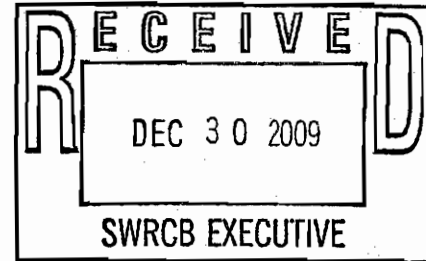


CALIFORNIA ENVIRONMENTAL LAW PROJECT
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December 30, 2009

Sent Via Electronic Mail
commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk of the Board
State Water Resource Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Comments on Draft Order Denying Reconsideration of Cease and Desist Order WR
2009-060

Dear Ms. Townsend and Board Members:

Sierra Club and CRSA urge the Board to include in its final Order Denying Reconsideration of Cease and Desist Order WR 2009-060 a provision conferring on the Deputy Director for Water Rights authority to reduce illegal diversions by Cal-Am during low flow periods in the Carmel River to enhance survival prospects for juvenile fish in the event of continuing declining trends in returning spawning adults (as counted at San Clemente Dam). Sierra Club and CRSA propose that the Final Order should provide:

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 the event the Deputy Director for Water Rights determines such an emergency exists and that a decreased or an adjusted schedule of diversions would promote steelhead survival and recovery, and/or minimize "takings" of steelhead incidental to Cal-Am's unlawful diversions from the River, consistent with Section 9 of the ESA, 16 USC §1538, the Deputy Director is delegated the authority to modify the diversion curtailments of this Order. These delegations include, but are not limited to, maximizing habitat benefits by requiring reductions in diversions during low flow periods in the River or adjusting the schedule of required diversion reductions by concentrating such ordered reductions during low river flow periods. 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). The Chief, Division of Water Rights, may allow for an adjustment or modification of diversions ordered to abate steelhead population emergencies in the event of justifiable, reasonable anticipation of deficits in supply that would threaten health and safety.

In its Draft Order Denying Motions for Reconsideration, the Board reiterates its finding in Order 2009-060 that "Cal-Am's illegal diversions continue to have an adverse impact on fish, wildlife, and the riparian habitat of the river and that the listing of the California Central Coast Steelhead as a threatened species and the river as critical habitat for steelhead recovery underscores the importance of reducing and terminating Cal-Am's illegal diversions at the earliest possible date." (Draft Order at 7). The Board also states in its Draft Order:

It is also clear that illegal diversions cause harm, and the more [water] diverted the greater the harm." (Draft Order at 7).

In their September 30, 2009 letter to the Board, concerning the Second Draft CDO, Sierra Club and CRSA detailed the habitat benefits that accrue to steelhead as a results of curtailment of Cal-Am's unlawful diversions, if such curtailments occur during low flow events in the River. See September 30, 2009 letter at pp.1-3 (citing the Record).

In its draft Order the Board recognizes that:

"The fact that the illegal diversions are having an adverse effect on public trust resources underscores the importance of adopting an Order curtailing Cal-Am's illegal diversions and curtailing these illegal diversions without undue delay." Proposed Order at 13.

In National Audubon Soc'y. v. Superior Ct. Of Alpine Cty., 33 Cal.3d 419, 446, 454-55; (1983), cert. denied, 464 U.S. 977 (1983), the Court held "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (emphasis added). Under National Audubon consumptive uses of water may be subordinated to the restoration and maintenance of fragile and vulnerable ecosystems.

The Board makes a determination in its Proposed Order that "under Order WR 2009-060 there will be 106 gallons per person per day for use by Cal-Am customers, a 5% reduction from the quantity of water available to Cal-Am during water year 2006-2007." Draft Order at 13. The Board further finds: "There is no evidence in the record that public health and safety was a problem during water year 2006-2007."¹ (Id.). Finally, the Board finds that pursuant to its regulations pertaining to reasonably necessary beneficial use, "between 55-75 gallons per person per day are reasonably necessary to supply the needs of fully plumbed homes." (Id., citing 23 CCR 697(b)).

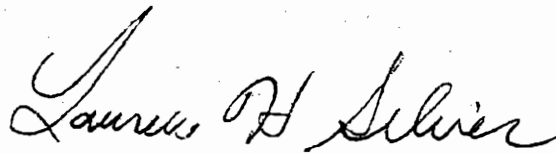
The Board findings imply that no harm would occur to public health and safety if diversions were somewhat further curtailed to provide habitat benefits to steelhead during periods of low flow in

¹ The Board finds that in 2006-2007 there were 112 gallons per day per person available

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the River in the event of an emergency (at least during the first several years of curtailment of diversions).

The Board's duty under National Audubon is to protect public trust uses "whenever feasible." Under the Board's findings in the Proposed Order it appears feasible, in the event of an emergency, to curtail diversions during low flow periods, in an amount greater than the diversion curtailment ordered by the Board (at least for the next few years), or, alternatively, to order the annual curtailment to take place principally during low flow months. Sierra Club and CRSA believe that in furtherance of its public trust obligation, the Board has a duty to reserve authority in the Deputy Director for water rights to further curtail or adjust diversions during low flow months to protect steelhead in a manner consistent with health and safety standards.²



Laurens H. Silver, Esq.
California Environmental Law Project
Attorney for Sierra Club and Carmel River Steelhead Association

² The Board's finding that there will only be a 5% reduction in diversions from 2006-2007 production (and that health and safety was not jeopardized) clearly implies a degree of latitude in scheduling diversion reductions that could produce habitat benefits when needed. To the extent individual water consumption increases during low flow months due in large measure to outdoor water use, preservation of a trust resource is clearly the legally mandated preferred feasible objective. See Sierra Club's August 26, 2009 letter to Jeanine Townsend, Exhibits 1-6. Exhibit 1 is a Statement of hydrologist expert Peter Vorster, and is attached hereto. In Exhibit 1 Vorster concludes that outdoor water use by Cal-Am Monterey service area customers is about 3000 acre feet per annum (total residential and non-residential).

The MPWMD has proclaimed Stage 5 rationing (but has stayed it in light of a court imposed stay of Order 2009-060). Under Stage 5 rationing, the District Board shall:

adopt restrictions on outdoor water use that include any or all of the following and any other conservation method deemed feasible: Limit outdoor watering and irrigation to one day per week or one day every other week; prohibit outdoor watering and irrigation with water from the affected water resource system(s); prohibit irrigation of turf areas with water from the affected water resource system(s); discontinue irrigation of Public Landscaped areas; reduce Golf Course irrigation from the affected Water Distribution System(s) to a percentage of the amount required to water tees, greens and landing areas only; prohibit the use of water to wash any motor vehicle, motorbike, boat, trailer, airplane or other vehicle unless done at a facility that recycles water; prohibit the use of water from hydrants for construction purposes or any other purposes other than fire fighting.

MPWMD Regulation 165-9 (L).

Water savings related to reduction in outdoor water use can be allocated to the River to enhance and protect habitat for the threatened steelhead.

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Attachment 1

Statement of Peter Vorster

1. My name is Peter Vorster. I am a consulting hydrologist with over 33 years experience in water resources management. A copy of my vitae and biography is attached. One of my specialties is the analysis of urban water use and management including developing indicators of urban water use and water conservation. I have been asked by Sierra Club to review the State Water Resources Control Draft Cease and Desist Order against the California American Water Service Company unauthorized diversion of water from the Carmel River in Monterey County, issued on July 27, 2009 (Draft CDO).
2. The focus of my review is on the water conservation actions that the State Board determined could reduce the need to divert water from the Carmel River. The Draft CDO significantly underestimates the outdoor water usage in the California American Company Monterey Division service area (Cal Am) and thus underestimates the reductions in outdoor water savings that could be achieved. On Page 41, the Draft CDO states "Outdoor water usage is estimated to be about 500 afa; less than 5 percent of total potable water use. (RT, Ph. 2, Vol. IV, p. 1062, 8-23.)". Based upon my analysis of the monthly water use data that Cal Am submits to the California Department of Water Resources Public Water Systems Survey (PWSS), I estimate that the total outdoor water use of Cal Am Monterey service area customers is about 3000 acre-feet per annum (afa); the outdoor water use of residential customers is estimated to be about 1700 afa. Those estimates are derived by assuming that water demand in the winter months is largely indoor water use and if that value is projected out for 12 months, the difference between that value and the total annual use can be largely attributed to outdoor water use.¹ Although winter time usage may include a small amount of landscape irrigation and the usage above the minimum in other months may include increased indoor use in the commercial sector (e.g. increased occupancy of tourist accommodations), this minimum month method is commonly used as a means to estimate outdoor water use. Table 1 shows the estimated outdoor water use for single family residential, single and multi-family residential, and the total for all sectors.² The PWSS records for the years 2004 to 2008 are attached.
3. If the Draft CDO assumed that the outdoor water use was 3000 afa and applied the Monterey Peninsula Water Management District (MPWMD) potential savings estimate of 20% (MPWMD-SP12, p. 8, 6-9.), then the outdoor water use savings would be 600 acre-feet not 100 acre-feet and the annual savings increment could

¹ The winter usage was an average of the two lowest months of use except for 2007, which was an average of January through March (3 months) because the data for January and February did not reflect a full months use due to change in the billing.

² The estimated outdoor use is less than the calculated use shown in the Table to account for the possibility that some of the total increase in the summer months may be due to increased indoor use.

be 72 afa instead of 12 afa. Even greater outdoor water savings are possible given recently adopted best management practices and incentives to reduce landscape water budgets. Also the recent (July 30) promulgation by the California Building Standards Commission (BSC) of new code language for residential graywater reuse should allow for greater outdoor water savings. The new rules ease permitting requirements for certain types of graywater systems and should allow residential users to develop much less expensive greywater systems water for outdoor irrigation.

4. The Draft CDO determination for indoor water savings is also underestimated. Starting on Page 40 the Draft CDO describes the logic for estimating future indoor savings and assumes the future savings for accounts not retrofitted will be proportional to savings already achieved since 1987. The savings that will be achieved with the remaining accounts should be greater than the past savings since the efficiency of the water using appliances (toilets, washing machines, and dishwashers) have increased over time and will continue to increase. For example beginning in 2010, the plumbing code standard for toilets will begin to switch over to a 1.28 gallons per flush, 20% less than the 1.6 gallons per flush requirement that has been in place since 1992. High efficiency toilets that use 1.28 gallons per flush or less are already on the market and will become even more common as the standard is fully promulgated. Similarly washing machines and dishwashers have greatly increased their water efficiency over the last 20 years. Also, the Draft CDO did not take into account that accounts that were retrofitted in the past will be replacing their appliances with more efficient water using appliances over time.

Table 1

California American Water
Monterey Service Area
Annual Outdoor Water Use
(all values in acre-feet)

Year	SFR	SFR + MFR	All sectors
2004	2,086	2,264	4,292
2005	1,979	2,159	3,705
2006	1,545	1,640	3,234
2007	1,505	1,682	2,801
2008	1,822	1,977	3,404
2004-2008 Average	1,787	1,945	3,487
2006-2008 Average	1,624	1,767	3,146

SFR- Single Family Residential

MFR- Multi- Family Residential

All sectors - all water using sectors, residential and non-residential

Note- Water use data prior to 2006 may include areas that are served by Cal Am but are outside the Carmel River supply area.