



State Water Resources Control Board



Division of Water Rights

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Linda S. Adams

Secretary for

Environmental Protection

Arnold Schwarzenegger

Governor

MAILED June 7, 2006

In Reply Refer
to:334:KDM: 262.0 (27-01)

California-American Water Company
c/o Stuart L. Somach
Somach, Simmons & Dunn
813 Sixth Street
Sacramento, CA 95814

David A. Berger
Monterey Peninsula
Water Management District
P.O. Box 85
Monterey, CA 93942-0085

Dear Messrs. Somach and Berger:

CALIFORNIA-AMERICAN WATER COMPANY (CAL-AM) AND MONTEREY PENINSULA
WATER MANAGEMENT DISTRICT (DISTRICT), CARMEL RIVER IN MONTEREY COUNTY,
262.0 (27-01)

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) has been monitoring compliance with Order WR 95-10 for 10 years. Order WR 95-10 requires Cal-Am to diligently develop and implement actions to terminate its unlawful diversions from the Carmel River. To date, neither Cal-Am nor the District has developed and implemented projects to reduce Carmel River diversions, other than temporary measures. The Division is not satisfied with progress in complying with the terms of the order. As you are aware, the Division has foregone annual monetary fines for illegal diversions from the Carmel River to provide opportunity to expend available resources on developing solutions. Absent substantial progress, however, the Division will evaluate whether it should proceed differently in this matter. Cal-Am and the District are requested to report back to the State Water Board by July 5, 2006 regarding progress in working together to reduce Carmel River diversions. There are a number of matters requiring your attention, described below.

Cal-Am Complaint

Cal-Am filed a complaint with the Division on November 3, 2005 regarding the District's non-use under Permits 20808 and 7130B (Applications 27614 and 11674B). The complaint is not accepted.

To be acceptable, a complaint must assert alleged harm associated with either an unauthorized or unreasonable water diversion and use or adverse impacts to public trust resources. Since the District does not divert water pursuant to these rights, Cal-Am has not demonstrated that has occurred. (Cal. Code of Regs., tit. 23, (CCR), § 820.) Moreover, pursuant to the March 30, 2006 Agreement between Cal-Am and the District, Cal-Am has agreed to withdraw the complaint.

San Clemente Dam Water Right

The Division has no record of a water right for storage at San Clemente Dam. It is our understanding that storage at this facility is being restricted pursuant to requirements of the Division of Safety of Dams. If, however, any unauthorized storage is occurring or will occur in the future as a result of dam buttressing and subsequent refill, the unauthorized storage may be subject to Administrative Civil Liability fines pursuant to Water Code section 1052.

District Permits 7130B and 20808

A. Due Diligence

Although not a suitable subject for a complaint, Cal-Am raises the issue of whether the District is diligently pursuing its water rights. Permit 7130 was issued on July 7, 1948, and Permit 7130B was subsequently issued when the right was split on May 2, 1984. There has been no water diversion and use under Permit 7130B and it appears that the right should be revoked for non-use. The Division intends to issue a Notice of Proposed Revocation for Permit 7130B.

Permit 20808 was issued pursuant to Decision 1632 on July 6, 1995. There has been no water use under this permit in 10 years. A showing of due diligence will be required in any proceeding on time extension for this permit.

B. Jointly Held Versus Separately Held Water Rights

In accordance with the court order settling litigation regarding Order WR 95-10 and Decision 1632, neither Cal-Am nor the District can divert water pursuant to Decision 1632 or Permit 7130B until the State Water Board conducts a public hearing to: (1) review any changes in the project as permitted under Decision 1632 and Permit 7130B, (2) review the information in the supplemental Environmental Impact Report, (3) review whether public trust values are adequately protected, and (4) determine whether the permits should be modified.

The hearing may also consider whether any permits for diversion from the Carmel River should be jointly held by the District and Cal-Am. At issue will be whether the Division should split the water right and (1) assign Permit 20808A to Cal-Am to cover a portion of its illegal diversions during periods when adequate flows are available to satisfy the National Marine Fisheries Service (NMFS) flow requirements for the Carmel River, and (2) assign Permit 20808B to the District for future growth.

Pursuant to the March 30, 2006 Agreement, Cal-Am and the District will jointly hold the water rights for only the Phase I Aquifer Storage and Recovery Project.

C. Time Extension Required

Permits 7130B and 20808 require that construction be completed by December 31, 2005. The Division's February 27, 2006 letter advised the District that the permits cannot be maintained without a valid time extension. Any time extension request must show cause for further extension pursuant to CCR section 844.

D. Change Petitions for Permits 7130B and 20808

2002 Petitions Overview

The District filed petitions dated April 19, 2002 to change Permits 7130B and 20808 to initiate a direct diversion project to divert 7,909 acre-feet per annum (afa) at San Clemente Dam.

Permit 7130B authorizes storage at New Los Padres Reservoir, with water rediverted at San Clemente Dam and Cal-Am's downstream wells from October 1 of each year to May 31 of the succeeding year. The permit does not authorize direct diversion. The District petitions to allow direct diversion at San Clemente Dam.

Permit 20808 authorizes storage in New Los Padres Reservoir and direct diversion from November 1 of each year to June 30 of the following year at Cal-Am's wells downstream of San Clemente Dam. The District petitioned to add direct diversion at San Clemente Dam.

The District requested that the Division suspend 31 of the 53 existing permit conditions of Permits 7130B and 20808 in order to implement the direct diversion project, including the following requirements of each permit:

- Maintain specified instream flows for steelhead.
- Install and maintain stream gages to measure the required instream flows.
- Limit surface diversions from San Clemente Dam to the Cal-Am filter plant.
- Mitigation measures related to reservoir construction and operation.
- Construction shall be completed by December 31, 2005.
- Prior to construction, obtain permits from the Department of Fish and Game, Regional Water Quality Control Board and Division of Safety of Dams.
- Provide documentation that the District has committed adequate long-term financial resources to fund all mitigation measures identified in the permit.
- Mitigate for impacts to cultural resources.
- Modify the permit condition stating that the District shall not divert water unless and until Cal-Am has obtained an alternate supply of water for its illegal diversions.

Protests

The Division accepted the following protests: National Marine Fisheries Service (NMFS), Department of Fish and Game, Carmel River Steelhead Association, Homestead Homeowners Association, Quail Lodge, Roy Kaufman, Clint and Margaret Eastwood Trust, JEM Partners, Rancho Cañada, Carmel Valley Ranch, Edwin Lee and Cal-Am. The protests have not been resolved.

Water Availability Analysis for Petitions

The Division requested that the District submit a water availability analysis that takes into account the flows recommended by NMFS in its 2002 report on fishery requirements for the Carmel River. The District's November 17, 2003 analysis used NMFS fishery bypass requirements for the reach between river mile 5.5 and the lagoon.

The diversion period analyzed is November 1 of each year to June 30 of the succeeding year. The District's analysis assumes that Cal-Am diverts no more than 3,376 afa and non Cal-Am annual diversions from the Carmel River were no more than 2,936 afa. The District utilized the 2002 well reports for non-Cal-Am pumpers, adjusted to reflect Table 13 reservations. The District did not, however, include the Cal-Am Table 13 diversions in the analysis. Cal-Am has senior water rights to the District for its Table 13 diversions. Accordingly, this is an error in the analysis and over-reports water available for diversion under the District's permits by 2,964 afa.

The analysis reduces Cal-Am's recognized water rights by 1,925 afa. Order WR 95-10 recognized 2,179 afa of storage in Los Padres Reservoir under License 11866 (the licensed quantity was reduced to reflect siltation). The District's analysis factors in ongoing siltation and assumes that the reservoir capacity was initially 1,569 afa but will ultimately be reduced to 254 afa over time. Since Cal-Am could take action to restore lost reservoir capacity, the analysis should assume that Cal-Am at least maintains the existing capacity. This element of the analysis is unacceptable.

The District estimated that on a median annual basis 6,734 afa of excess flow is available. During dry years, approximately 1,712 af would be available. During wet years, approximately 11,297 af would be available. The median monthly flows are: November - 18 af; December - 168 af; January - 643 af; February - 1,440 af; March - 2,087 af; April - 874 af; May - 0 af; and June - 323 af.

Factoring in Cal-Am's existing diversion facilities and water treatment capacity limits, the District's analysis identifies the maximum quantity of excess flows that could be diverted in the lower reach of the Carmel Valley alluvial aquifer during the November 1 through June 30 period as approximately 4,020 af (242 days x 16.61 afd = 4,020 af).

The District's water availability analysis is not accepted for the reasons listed above. Moreover, the analysis does not support approval of the petitions to directly divert 42 cfs, with a maximum annual limit of 7,909 af. The petitions may be denied if the District is unable to document that there is sufficient water available to serve them. A revised water availability analysis should be submitted to the Division within 60 days of the date of this letter. The analysis is requested pursuant to Water Code section 1701.3. Failure to submit the requested analysis may result in petition cancellation pursuant to Water Code section 1701.4.

CEQA

The District has not completed a CEQA document for the petitions. The District is requested to submit a work plan for completion of the CEQA document within 60 days of the date of this letter.

2003 Petitions Overview

The District filed petitions dated September 12, 2003 to change Permits 7130B and 20808 to divert Carmel River water to offstream storage in the Seaside groundwater basin. The project is designed in phases. During the first phase, 2,022 afa would be diverted from December 1 of each year to May 31 of the succeeding year. In phase two 3,234 afa would be diverted, and during phase three 7,300 afa would be diverted.

The petition was noticed April 15, 2005. The Division accepted protests filed by DFG and NMFS. Protest resolution is ongoing.

CEQA

The District has circulated a draft Environmental Impact Report for the first phase of the project. The District has not withdrawn its petitions for phases two and three of the project. Therefore, the Division requests that the District submit a workplan listing the dates for completion of any studies required for the CEQA document for the subsequent project phases, the date of completion of the Initial Study and the date of completion of the draft and final CEQA document within 60 days of the date of this letter. The District should also provide a water availability analysis for the petitions at the same time.

Cal-Am Applications 30215A, 30215B, 30644 and 30715

Cal-Am filed four applications to divert water from the Carmel River. Applications 30215A and 30215B, combined, request authorization to directly divert 46.71 cfs. Application 30644 requests authorization to divert 21 cfs and collect 24,800 afa to storage. Application 30715 requests authorization to directly divert 16.1 cfs.

A. Conflict with Declaration of Fully Appropriated Streams

The applications, except Application 30215A, conflict with the Declaration of Fully Appropriated Streams (Declaration) listing. By letter dated December 17, 1999, Cal-Am requested that the State Water Board lift the declaration that the Carmel River is fully appropriated in order to process Cal-Am's applications. The Division's January 21, 2000 response accepted the December 17 letter as a petition for modification of the Declaration and agreed to hold the matter in abeyance as requested by Cal-Am. Cal-Am was informed at that time that all petitions to modify the Declaration must be accompanied by the information specified in CCR section 871. The Division also advised Cal-Am that it would be expected to furnish information to address section 871 prior to activating the petition. The practical effect of this action was that Cal-Am was not required to amend its applications to conform them to the limited four-month season of availability listed in the Declaration.

Cal-Am is requested to: (a) submit the information required by section 871 within the next 60 days, or (b) revise the applications to conform to the Declaration. This information is requested pursuant to Water Code section 1275. Applications 30215B, 30644 and 30715 may be cancelled without further notification for failure to respond or if the Division is unable to find that cause exists for revision of the Declaration.

B. Memorandum of Understanding (MOU)

Cal-Am must demonstrate the availability of unappropriated water for its applications. Cal-Am has entered into an MOU with the Division for preparation of the water availability analysis and the CEQA document. Cal-Am must proceed in a timely manner in pursuing its filings in accordance with an approved work plan pursuant to the MOU.

If Cal-Am is unable to demonstrate the availability of unappropriated water for its filings, the applications may be cancelled. Since much of the water that Cal-Am seeks to appropriate is currently assigned to the District's permits, Cal-Am and the District should cooperatively address the outstanding issues.

C. Due Diligence Required

All applicants must exercise due diligence in pursuing their applications. If Cal-Am is unable or unwilling to pursue its filings, the applications will be cancelled for lack of due diligence.

Stuart Somach
David A. Berger

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Katherine Mrowka is the senior staff person presently assigned to this matter. Ms. Mrowka can be contacted at (916) 341-5363.

Sincerely,

ORIGINAL SIGNED BY JAMES W. KASSEL FOR

Victoria A. Whitney
Division Chief

bcc: Steve Herrera, Barbara Katz, Megan Sheely

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