

Before the Hearing Officers of the State Water Resources Control Board
California American Water Company
Draft Cease and Desist Order
Proposed Hearing
Carmel River

Pre-Hearing Briefing Comments by the
California Salmon and Steelhead Association

1. Long after Board Order 95-10 the steelhead species of the Carmel River were listed as "threatened" under the protection of the provisions of the federal Endangered Species Act. The threatened steelhead species of the Carmel River are public trust assets that are owned by the people of the State of California. The California Salmon and Steelhead Association are part owners of the people's steelhead fishery assets of the Carmel River. We have standing before the Board regarding Board Order 95-10 because of our joint ownership of said people's public trust steelhead assets of the Carmel River.
2. The federal agency that is required by federal law to protect the threatened steelhead species of the Carmel River, pursuant to the federal ESA, is the United States National Marine Fisheries Service (aka NOAA Fisheries). The state agency that has the authority and duty to issue water rights permits and licenses and carrying out the provisions of the California Water Code is the State Water Resources Control Board (hereinafter known as the "Board"). The Board has a duty and responsibility to protect the people's public trust fishery assets of California when issuing water rights to diverters and also issuing Cease and Desist Order for unlawful diversions pursuant to the Mono Lake Decision and other applicable state statutes. We reference the Mono Lake Decision.
3. The Carmel River from the Carmel River Lagoon to above the Los Padres Dam is "critical" habitat for threatened steelhead and the federal Endangered Species Act specifically protects that "critical" habitat in the Carmel River. Harm and damage the critical habitat and you harm and damage the threatened steelhead species.
4. The Carmel River watershed has threatened California Red Legged Frogs species and their critical habitat. The California Red Legged Frogs species were listed as threatened for protection under the provisions of the federal Endangered Species Act. The US Fish and Wildlife Service is the federal agency responsible for the protection of California Red Legged Frogs species and their critical habitat. We believe the Board has a duty and responsible to protect California Red Legged Frogs species and their critical habitat when issuing

- water right permits, licenses, and orders. Board Order 95-10 failed to order surface flows for threatened steelhead species and their habitat and consequently adversely affected California Red Legged Frog Species and their critical habitat in the Carmel River watershed.
5. The Carmel River is over appropriated resulting from the authorized and unauthorized pumping of the Carmel River because of the lack of daily year-round surface flows resulting from pumping the underflow of the river by all diverters.
 6. There are water right applications before the Board requesting authorization for more water being pumped from the underflow of the Carmel River. Some of those applicants are: Quail Lodge; Carmel Valley Ranch; Hacienda Carmel; Clint Eastwood; and Holman Holdings. Also the Board recently approved water rights to the Monterey Peninsula Water Management District for their ASR Project that will divert 2,426 AF of water from the Carmel River for storage in an out of basin ground water basin, of which the California American Water Company is a party to that project. See Board Order WR 2007-0042-DWR.
 7. More water right applications will be filed with the Board and more water right permits will be approved by the Board because of the proposed reduction in the unauthorized pumping and use by the California American Water Company. i.e. MPWMD ASR Project and water right applications filed under Table 13 in Board Order 1632.
 8. The over appropriations of the state's waters of the Carmel River has adversely harmed and damaged the steelhead species and their critical habitat resulting from the lack of surface flows in the river to protect all life stages of steelhead and their critical habitat.
 9. The pumping of the underflow of the Carmel River occurs during the summer months in all water years types, which effects surface flows and adversely effects threatened steelhead species and their habitat. See reference: The effects of summer dams on salmon and steelhead in California Coastal Watersheds and recommendations for mitigating their Impacts; US National Marine Fisheries Service; July 2001. The pumping of the underflow of the Carmel River acts similar to summer dams diverting surface flows on coastal rivers and streams in the summer.
 10. The Board made an illegal decision when it approved Board Order 95-10. The Board did not have the authority to approve the unlawful diversion and use of the state's water by the California American Water Company. By giving an illegal free pass to the California American Water Company for pumping water illegal from the Carmel River, the Board also jeopardized, harmed, and damaged the steelhead species and their critical habitat of the Carmel River. We reference Sections 1052 and 1825 of the California Water Code and also Article X, Section 2 of the California Constitution.

- 11. Under the expansion of the proposed Cease and Desist Order and also the recommended amendment to Board Order 95-10, the Board must declare the Carmel River watershed fully appropriated because of the lack of surface flows in the Carmel River due to the authorized and unauthorized pumping of the underflow of the Carmel River by the California American Water Company and other diverters that adversely effects surface flows and adversely affects the threatened steelhead and their critical habitat in the river.**
- 12. The Cease and Desist Order must be expanded and a hearing for Board Order 95-10 must be scheduled by the State Water Board because of new pertinent information since Board Order 95-10 regarding the harm and damages to threatened steelhead species and their critical habitat in the Carmel River resulting from the unauthorized diversion and use of the state's water by the California American Water Company, and also the authorized pumping and use of the Carmel River by other parties.**
- 13. The Board hearing must not be limited to 1994 because of new information. All up to date evidence (documents) through the year 2008 must be allowed into the hearing records by the Board for the re-opening of Board Order 95-10 and the hearing to expand the Cease and Desist Order against the California American Water Company. That would be fair and reasonable to the people of California who own the public trust assets of the Carmel River.**
- 14. The Key Questions for the expansion of Board Order 95-10 and a hearing to amend Board Order 95-10 must include the harm and damages to the threatened steelhead species and their critical habitat of the Carmel River resulting from the unauthorized diversion and use of the state's water by the California American Water Company and also the authorized pumping of the underflow of the Carmel River by other parties. Clearly the must examine and evaluate the cumulative effects to the environment of the Carmel River.**
- 15. The amended Board Order 95-10 must declare the Carmel River watershed is fully appropriated because of the lack of surface flows in the Carmel River due to the unauthorized pumping of the underflow by the California American Water Company and also the pumping of the underflow by other parties that adversely effects surface flows and all life stages of threatened steelhead and their critical habitat in the river.**
- 16. Board Order 95-10 did not include any specific surface flow requirements that protected steelhead species and their habitat in the Carmel River and provided surface flows for all life stages of steelhead species and their habitat. For that reason the steelhead species of the Carmel River were listed for protection under the federal Endangered Species Act and are now in danger of being extinguished by pumping the underflow of the river similar to the extermination by major water projects of spring-run Chinook salmon**

- species of the San Joaquin River. i.e. Main stem San Joaquin River; Tuolumne River; Merced River; Calaveras River; Stanislaus River.
17. The re-opening and amendment of Board Order 95-10 must include terms and conditions that provide surface flows and also provide specific protection measures for threatened steelhead species (all life stages) and their critical habitat (all life stages) in the Carmel River. Some of the necessary protection measures that must be ordered by the State Water Board in the re-opening of Board 95-10 are as follows:
 18. A continuous daily flow of surface water to the Carmel River Lagoon that prevents harm and injury to threatened juvenile steelhead species and also threatened adult steelhead species that exist in the Carmel River Lagoon.
 19. Specific protection measures for the threatened steelhead species habitat in the Carmel River Lagoon that are consistent with the Carmel River Lagoon Long Term Study Plan developed by local, state, and federal agencies (17 members), of which the State Water Board and its staff is not a member.
 20. Board Order 95-10 must be reopened and amended, and Monterey County and its departments et al must be mandated by the Board to cease breaching the Carmel River Lagoon because of the harm and damage to threatened steelhead species and their critical habitat in the Carmel River Lagoon.
 21. A continuous daily flow of surface water into the Carmel River from Los Padres Dam that protects all life stages of threatened steelhead species and their critical habitat below the dam pursuant to California Fish and Game Code Section 5937. The Board is mandated to carry out California Fish and Game Code 5937. We reference California Fish and Game Code 5937.
 22. Board Order 95-10 must be amended to require the California American Water Company to prepare and implement a Los Padres Fish Passage and Fish Spillway Management Plan that will provide and require safe passage for threatened steelhead species to their historic critical spawning and rearing area above the dam and also safe passage from their historic and critical rearing habitat above the dam to and from Los Padres Reservoir to the Carmel River Lagoon.
 23. A continuous daily flow of surface water into the Carmel River from San Clemente Dam that protects all life stages of threatened steelhead species and their critical habitat below the dam pursuant to California Fish and Game Code Section 5937.
 24. The protection of water quality in the state's waters of the Carmel River below Los Padres Dam, pursuant to California Fish and Game Code 5937 and also pursuant to state water quality statutes, that prevents the releases of deadly hydrogen sulfide into the state's waters of the Carmel River from Los Padres Dam that adversely affects all life stages of threatened steelhead species and their

- critical habitat, including other aquatic life below the dam for about one (1) mile.
25. A continuous flow of surface water below all underflow pumping locations (19) on the Carmel River that are maintained and operated by the California American Management Company to prevent harm and injury to all life stages of threatened steelhead species and their critical habitat of the Carmel River.
 26. Board Order 95-10 must be reopened and amended to require the California American Water Company to develop and implement a Gravel Recruitment Management Plan for the river reaches below San Clemente Dam to replace valuable spawning and rearing habitat that was obstructed for downstream recruitment by the dam for threatened steelhead species and their critical habitat from the dam to the Carmel River Lagoon.
 27. The implementation of the Sediment Removal from Freshwater Salmonids Habitat Policy adopted by the USNMFS for the Carmel River to prevent harm and damage to steelhead species and their critical habitat. i.e. Removal of San Clemente Dam and Reservoir; sediment management activities for San Clemente Dam and Reservoir; and also sediment management activities for Los Padres Dam and Reservoir; including the Carmel River Lagoon.
 28. The implementation of the Steelhead Restoration and Management Plan for California for the Carmel River and the threatened steelhead species and their habitat to restore and help manage the threatened steelhead species and their critical habitat of the Carmel River.
 29. Board Order 95-10 mandated that either the California American Water Company or the Monterey Peninsula Management District to carry out specific measures to assist the threatened steelhead species of the Carmel River. Neither party ever carried out the measures. That is a direct violation of Board Order 95-10 with the Board not monitoring their own directives in Board Order 95-19 for about 13 years. We reference pages 30 and 31 under Water Allocation Mitigation Programs under Fisheries - Board Order 95-10.
 30. The amended Board Order 95-10 and also the expansion of the Cease and Desist Order must require that all restoration and management plans for the people's public trust steelhead resources must be funded by the California American Water Company until the threatened steelhead species have recovered and their critical habitat repaired to historic conditions.
 31. Fish need water to survive. While the California American Water Company was illegally diverting the people's water from the Carmel River and selling the illegal water for profits, volunteers from the Carmel River Steelhead Association for many, many years have been rescuing the people's juvenile steelhead from the river before the river became dry. All volunteer work conducted by the Carmel River

Steelhead Association and other parties for rescuing juvenile steelhead species in the Carmel River in past years and in future years must be paid for by the California American Water Company at a reasonable rate acceptable to the volunteers.

- 32. The California American Water Company must be fined by the Board for the unauthorized pumping and use of the state's water and said fine money must be spent on the restoration of the damages and harm to threatened steelhead and their critical habitat in the Carmel River.**
- 33. The California American Water Company must be denied by the Board the continued unauthorized pumping of the Carmel River underflow in the future with the reduction of unauthorized pumping be reduced to zero (0) illegal pumping pursuant Section 1825 of the California Water Code and also Article X, Section 2 of the State Constitution. That is state law. See Article X, Section 2 of the State Constitution.**
- 34. The California American Water Company must recommend several alternatives to provide water to their customers and carry out one alternative and be prevented by the Board from diverting the underflow of the Carmel River so that the people's public trust assets are restored.**
- 35. Criminal charges must be charged against the officials of the California American Water Company by the Board and/or the California Department of Justice because of the willful and knowing unauthorized pumping of the Carmel River by the company that caused harm and damage to the people's public trust resources and assets (steelhead). The customers of the California American Water Company must not be assessed the monetary fines to be paid by the company. The company's stockholders must pay the fine money and not the water users. i.e. Rob a bank, get caught, and go to jail. Break and damage a window of a Court House, get caught, go to jail and pay restitution. Rob the people's water bank, get caught, damage the trust assets, and you must go to jail and must pay restitution.**

Please place these comments into the records and please advise me what the Board proposes to do with this matter. Thank you.

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Respectfully Submitted

Signed by Bob Baiocchi

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March 20, 2008

**cc: All Parties (Board's Service List)
Other Parties (bcc)**

Attachments: electronic service to all parties

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Submitted References

1. **Use it or Lose It; Published Law Review Article; California Fish and Game Code 5937; UC Davis; Joel C. Balocchi;**
2. **Steelhead Restoration and Management Plan for California; Department of Fish and Game; February 1996;**
3. **Instreamflow Needs for Steelhead in the Carmel River; US National Marine Fisheries Service; June 2002;**
4. **Study Plan for Long Term Adaptive Management of the Carmel River State Park and Lagoon; April 4, 2007; TAC Members: California Coastal Commission; California Department of Fish and Game; California State Parks; Monterey County Public Works Department; Monterey County Water Resources Agency; Monterey Peninsula Water Management District; NOAA Fisheries (USNMFS – Threatened Steelhead); US Army Corps of Engineers; US Fish and Wildlife Service (Threatened California Red Legged Frogs); and 8 stakeholders (Carmel River Steelhead Association et al);**
5. **Sediment Removal Policy; US National Marine Fisheries Service; April 19, 2004;**
6. **Gravel Extraction Policy; US National Marine Fisheries Service; August 1996;**
7. **California Red Legged Frogs Critical Habitat; Threatened; US Fish and Wildlife Service; 2006; See Monterey-2, Carmel River;**
8. **Recovery Plan for California Red Legged Frogs; US Fish and Wildlife Service; May 2002;**
9. **Summer Dams (Summer Diversion), The effects of summer dams on salmon and steelhead in California Coastal Watersheds and recommendations for mitigating their Impacts; US National Marine Fisheries Service; July 2001.**