

CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



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April 9, 2008

Sent Via Electronic Mail & Facsimile

Arthur G. Baggett
Board Member and Hearing Officer
P.O. Box 2000
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Brief of Sierra Club Re: Scope of Hearing On Draft Cease and Desist Order Regarding the Continued Unauthorized Diversion of Water from the Carmel River in Monterey County

Dear Hearing Officer Baggett:

As a party to the above-matter, Sierra Club submits this letter-brief, as the Board has authorized, concerning the scope of the scheduled hearing on the Board's proposed Cease and Desist Order, to be issued against Cal-Am.

- I. The Notice and Cover Letter Make It Clear That the Scheduled Hearing Concerns Appropriate Remediation for Cal-Am's Continued Trespass (Unlawful Diversion of Water in Violation of Water Code § 1052) To Protect Public Trust Resources of the State of California in the Carmel River

It is anticipated that Cal-Am will argue that the scheduled hearing should, on the basis of the January 15, 2008 cover letter from James Kassel, Assistant Deputy Director for Water Rights, be limited solely to the determination of whether Cal-Am has complied with Condition 2 of Order 95-10, and if it is determined that it has, the proposed CDO should not issue. If Cal-Am's perception is correct, no evidence would be admissible concerning the continuing substantial injuries occurring to the public fishery resources in the Carmel River due to Cal-Am's unlawful diversions. The cover letter and the proposed CDO, however, considered in light of Orders 95-10, 98-04, and 2002-02, indicate clearly that the intended scope of the hearing is much broader than Cal-Am may argue.

The cover letter recites its subject matter is the "Draft Cease and Desist Order Regarding the Continued Unauthorized Diversion of Water from the Carmel River in Monterey County." The subject matter of the hearing is whether the Board's proposed remediation of Cal-Am's unauthorized diversions (which constitute a continuing trespass under Water Code §1052) is appropriate, effective, and adequate to reduce ongoing damage to public trust resources and whether, if not, the proposed CDO could be modified in such a manner as to fulfill the duties of the Board under applicable law (Fish and Game Code §5937, the public trust, and the Endangered Species Act, 16 USC 1531 et seq.) to protect the public fishery resources of the Carmel River and prevent unlawful "takings" of a threatened species. The January 15, 2008 letter further points out:

"Since 1995, Cal-Am has annually diverted approximately 7,150 acre-feet from the Carmel River in excess of the legitimate water right amount recognized by the State Water Board in Order 95-10. This continued unauthorized diversion of water in excess of existing water rights is a [continuing] trespass under Water Code §1052. Additionally Cal-Am's continued illegal diversions are causing continued harm to public resources of the Carmel River. (emphasis added).

Through the cover letter alone Cal-Am is indisputably on notice that this hearing involves much more than whether it has complied with Condition Two of Order 95-10. It involves determining what constitutes, under applicable law relating to the conservation and preservation of the threatened steelhead population in the River, appropriate and effective remediation of Cal-Am's continuing trespass. The letter clearly contemplates submission of evidence relating to the harm attributable to Cal-Am's unlawful diversions that has occurred since the Board's evidentiary hearing in 1995 and currently is occurring. Finally the letter contemplates that the Board, in considering the evidence, will consider applicable law to fulfill its responsibilities as trustee under California law of the people's on fishery resources.

The Draft Cease and Desist Order, attached to Mr. Kassel's letter is, of course, the primary document giving notice to Cal-Am of the Board's intentions. The first paragraph of the proposed Order recites the Board's authority under Water Code §1831 to issue a cease and desist order. It also characterized Order 95-10 in the following fashion:

At that time [1995, through Order 95-10] the Board deferred enforcement action and instead established water conservation goals and other actions Cal-Am could take as it sought to obtain an adequate legal water supply (emphasis added).

This characterization notifies Cal-Am that an integral feature of Order 95-10 related to the actions set forth in the Order required to reduce the effects of its diversions on public trust resources, as it sought to obtain an alternative water supply. Whether Cal-Am has proceeded diligently in this regard is but a collateral issue. If the Board determines, as its proposed findings reflect, that the effects of Cal-Am's illegal diversions have not been sufficiently reduced, and the River's public resources (particularly its steelhead population) continue to diminish, then the Board is obligated, under applicable law, no longer to defer enforcement action, but instead to order further remedial actions, including the reduction of unlawful diversions that adversely affect steelhead, through a cease and desist order.

Thus even if Cal-Am demonstrates that it has made good faith efforts to obtain water from other sources, the Board has plenary authority to mitigate and reduce continuing adverse impacts on the threatened steelhead (SCCC DPS) arising from Cal-Am's unpermitted diversions. Nothing in Order 95-10 confers "immunity" from Board Cease and Desist Orders reducing its unlawful diversions in the event of continuing (even augmented) damage to the threatened steelhead.

The Board recites it has enforcement authority under Water Code §1831 to issue a CDO in response to a violation of "the prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to Division 2...of the Water Code." This authority is broad, plenary, and distinguishable from its authority to regulate permitted uses of water. In Order 95-10, the Board has already determined that Cal-Am has no permit to divert 10,730 acre-feet of water, and is in violation of section 1052.

The Board also has enforcement authority under Water Code §1831(d) to issue a CDO in response to violation of any decision or order of the State Board issued under part 2...of Division 2 of the Water Code. Sierra Club construes the proposed Cease and Desist Order to be principally concerned with the prohibition set forth in §1052 against the unauthorized diversion or use of water subject to Division 2 of the Water Code. It is not a proceeding solely to adjudicate Cal-Am's compliance with conditions or requirements set forth in Order 95-10, or its subsequent orders modifying Order 95-10.

With respect to the issue of continuing harm (since 1995), Facts and Information, Paragraph 8 states:

"There continues to be a n annual drawdown or drying of the Carmel River in the area upstream of the Highway 1 bridge. Because Cal-Am is the largest diverter of water on the river, this drawdown of the river is attributable, at least in part, to Cal-Am's illegal diversions from the Carmel River. Cal-Am's pumping from the subterranean stream contributes to the reduction of surface flow. This reduction of flows creates segregated small pools of water that trap and strand steelhead and other fish which inhabit the river.

Facts and Information Paragraph 17, recites that "[t]he current water management strategy used by Cal-Am/MPWMD, however, has not resulted in any significant reduction of unlawful diversions from the Carmel River since 1998. Instead, it appears that water savings resulting from conservation efforts have been redirected to support marginal increases in development."¹This additionally makes it clear that the issues in the hearing involve issues in addition to compliance with Condition 2 relating to replacement water. Examination of the Proposed Findings (p. 5) clearly indicates as well that the subject matter of the hearing principally involves remediation of the effects of Cal-Am's continuing trespass:

- a. Continuing illegal diversion of water will occur in order to meet current levels of water use.

¹ The Board proposes a finding that Cal-Am has illegally diverted at least 7,164 afa from the Carmel River (CDO, p.5).

- b. That these unlawful diversions continue to have adverse effects on the public trust resources on the Carmel River and should be reduced
- c. That Cal-Am has not complied with condition 2 of Order 95-10, has not terminated its unlawful diversions from the Carmel River, and has not made any significant reductions in its diversions beyond the initial 20% reduction required by condition 3(b) of Order 95-10.

These proposed findings contemplate that the Board will entertain additional evidence pertaining to these proposed findings, including evidence relating to the continuation of adverse effects on public trust resources. The proposed findings unambiguously state that the continuation of the unlawful diversions virtually unabated since 1995, causing adverse effects on public trust resources, and how to remediate these effects, are the principal subject matters of the scheduled hearing.

II. The Board Has Broad Enforcement Authority to Regulate, Prohibit, and Mitigate the Adverse Resource Effects of Unlawful Diversions.

The diversion of water without first obtaining a permit from the Board constitutes a trespass within the meaning of Water Code §1052. People v. Shirokow, 26 Cal.3d 301 (1980). The State is authorized to seek injunctions against such trespasses. Id. At 304. After reciting that since 1923 the statutory procedure became the exclusive means of acquiring appropriative rights, the Court declared:

“These declarations of policy, together with the comprehensive regulatory scheme set forth in section 1200 et seq., demonstrate a legislative intent to vest in the Board expansive powers to safeguard the scarce water resources of the state.” 26 Cal.3d at 309.

The Court also restated the long-standing rule that property held by the state in trust for the people cannot be lost through adverse possession, citing Hoadley v. San Francisco (1875), 50 Cal.265, 274-276. 26 Cal.3d at 311. See also Santa Clarita Water Co. v. Lyons (1984) 161 Cal.App.3d 450 (where a water company never applied for a permit or license from the Board to take water from the subject property, it is “not an appropriator...[but] merely a negligent trespasser” in violation of Water Code §1052).

Sierra Club attaches hereto (Attachment A) a copy of the Notice of Violation of the Endangered Species Act for Take of Threatened Steelhead Resulting from Illegal Diversion by California American Water Company (16 USC § 1538), which was served on Board’s chief executive officer on or about March 18th. This Notice of Intent to Sue, directed to Cal-Am, alleges that Cal-Am is engaged in unlawful takings of the South Central California Coast Steelhead Distinct Population Segment, a threatened species listed under the Endangered Species Act, in violation of the takings prohibition 16 USC § 1538.²

² In Board Order 2002-02, the Board ordered:

Sierra Club requests the Board, at the scheduled hearing, to receive evidence concerning the violations of the "takings" provision of the ESA by Cal-Am arising from its unlawful diversions and its operation of San Clemente and Los Padres Dams in such a manner as to cause steelhead mortality through adverse modification of its habitat that impair passage of fish through the dams. (See sixty-day notice letter at p.6). [**Inadequate passage facilities and water quality issues.**] Sierra Club requests the Board, at the scheduled hearing, to receive evidence as well of damage to steelhead caused by Cal-Am's failure to provide adequate fish-passage facilities at Los Padres and San Clemente Dams, which violate the requirement in Fish and Game Code §5937 that:

"The owner of any dam shall allow sufficient water at all times to pass through a fish-way, or in the absence of a fish-way, allow sufficient water to pass over, around, or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

The express purpose of Section 5937 is "to keep in good condition any fish that may be planted or exist below the dam." As the court in California Trout, Inc. v. State Water Resources Control Board (1989) 207 Cal.App.3d 585, 629 ("Cal-Trout I") explained, Section 5937's requirement that water be released to the stream below a dam "is enacted for the benefit of fish populations." Id. at 606. "Section 5937 is addressed to the release of water from dams. ..[I]t requires that dam owners must 'at all times' release sufficient water 'to keep in good condition any fish that may be planted or exist below the dam' whether that is accomplished by means of a fish-way or other means of release." Id. At 605.

The Sierra Club urges the Board as well to consider the public trust with respect to the fishery resources of the River in connection with remediation for the unlawful diversions and the reduction of unlawful takings of steelhead. The public trust is to be construed liberally for the benefit of all people of the State Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks. (1967) 67 Cal.2d 408, 417. See California Trout, Inc. v. State Water Resources Control Bd. (1989) 207 Cal.App.3d 585 ("Cal-Trout I"); National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 437, cert. denied, 464 U.S. 977, and People v. Truckee Lumber Co. (1897) 116 Cal. 397. These decisions and others have found that the State owns the fish and wildlife and waters of California in trust for the people, and either it, or the people, can assert that public trust as necessary to protect these resources and their public uses.

"The Chief is also delegated the authority to modify the flow requirements of this order, in response to any changes in the requirements imposed under the Endangered Species Act, as necessary to prevent this order from being in violation of the Endangered Species Act, or unreasonably interfering with efforts to comply with the ESA." Board Order 2002.02 recognized the interplay between requirements of the ESA and the Board's Orders. **Here the Board is being requested to remediate damage caused by conduct that involves illegal takings under the ESA, as well as unlawful diversions under state law. See Attachment A.**

The wild fish and game of this State belong to the people in their collective, sovereign capacity. In re Phoedovius (1918) 177 Cal. 238, 242, (citing Geer v. Connecticut, 161 U.S. 519, 529 (1896)); See also, Fish and Game Code § 711.7, sub div. (a) (“[I]he fish and wildlife resources are held in trust for the people of the State”); Fish & Game Code § 1600 (fish and wildlife are “the property of the people”). The State can protect and preserve wild fish, wherever they are found:

The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state...and the right and power to protect and preserve such property for the common benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law.

People v. Stafford Packing Co. (1924) 193 Cal. 719, 727 (citations and emphasis omitted); see also People v. Monterey Fish Products Co., (1925) 195 Cal. 548, 563 (“[t]he title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state”).

The courts have specifically held that the public trust pertains to fish in non-navigable waters and waters flowing over privately owned streambeds. Peoples v. Truckee Lumber Co. (1897) 116 Cal. 397; California Trout, Inc. v. State Water Resources Control Board, (1989) 207 Cal.App.3d 585 (“Cal-Trout I”).³

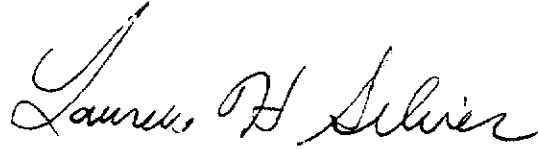
III. Conclusion

Sierra Club asks the Hearing Officer to order that evidence may be submitted at the hearing concerning continuing impacts to public trust resources caused by Cal-Am’s unlawful diversions and that it may introduce evidence concerning appropriate revisions or modification to the proposed CDO to remediate the resource damage in the Carmel River and to reduce and minimize incidental take of the SCCC steelhead.

Sierra Club requests the Hearing Officer to entertain evidence pertaining to the implications of Cal Am’s continued unlawful diversions with respect to the Board’s duty to enforce the public trust and Fish and Game Code § 5937, and not to aid and abet Cal-Am in its unlawful taking of SCCC steelhead in the Carmel River.

³ Fish and Game Code §1600 states that protection and conservation of the state fish and wildlife are of “utmost public interest.” The Salmon, Steelhead Trout, and Anadromous Fisheries Program Act of 1988 (Fish and Game Code §§ 6900-6924) declares that “it is the policy of the State to significantly increase the natural production of salmon and steelhead trout habitat by the end of this century” and that “it is the policy of the state that existing natural salmon and steelhead trout habitat shall not be diminished further without offsetting the impacts of the lost habitat.”

Sierra Club additionally requests the Hearing Officer not to limit the scheduled hearing to questions concerning Cal-Am's compliance with conditions imposed by the Board in its various orders, and not to bifurcate the hearing as to "compliance" versus "enforcement" issues.



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See Additional Service List Attached

CALIFORNIA ENVIRONMENTAL LAW PROJECT
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Attachment A

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March 14, 2008

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**Re: Notice of Violation of the Endangered Species Act for Take of Threatened Steelhead
Resulting from Illegal Water Diversions by California American Water Company, 16 U.S.C.
§1538**

Dear Sirs and Madam:

We are writing on behalf of Sierra Club, and Carmel River Steelhead Association to notify you of ongoing and recurrent violations of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, resulting from illegal diversions from the Carmel River by California-American Water Company ("Cal-Am"), and from inadequate fish passage facilities at Los Padres Dam, which is owned and

operated by Cal-Am. As set forth in detail below, during the dry seasons, juvenile and post-spawning adult South-Central Coast California steelhead suffer significant mortality due to the unlawful diversions by Cal-Am from the Carmel River and its alluvium. Steelhead also are denied effective access to critically needed habitat by the inadequate passage facilities at Los Padres Dam. Such severe losses to the South-Central California Coast steelhead attributable to habitat loss caused by unlawful diversions and the inadequate fish passage facilities constitute unlawful takings in violation of Section 9(a)(1)(B) of the ESA, and the regulations promulgated thereunder.

This letter constitutes the notice required by Section 11(g)(2)(A)(i) of the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), prior to commencement of legal action. As such, it is intended to make clear that the above-listed organizations intend to take whatever legal steps may be necessary to prevent an unauthorized take of steelhead by Cal-Am in 2008 and subsequent years.

General Factual Background

Carmel River Steelhead

Steelhead is the name commonly applied to the anadromous form of *Oncorhynchus mykiss*, an iteroparous species of Pacific salmon; the non-anadromous or resident form of this species is commonly called rainbow trout. Steelhead in the Carmel River are part of the South-Central California Coast DPS, which the National Marine Fisheries Service ("NMFS") first listed as threatened on August 18, 1997. 62 Fed.Reg. 439437 (listing the SCCC Evolutionary Significant Unit), and again in 2006. 71 Fed.Reg. 834 (Jan. 5, 2006) (listing the SCCC Distinct Population Segment ("DPS")) (codified at 50 C.F.R. §223.102 (c)(15)). NMFS designated critical habitat for South Central California Coast steelhead on September 2, 2005. 70 Fed. Reg. 52488, 52516-17 (codified at 50 C.F.R. § 226.211).

The status of Carmel River steelhead was most recently reviewed by NMFS in Boughton (2005) and Waples (2005)¹, using data through 2002. More recent data are now available, and show a decline in the number of steelhead passing San Clemente Dam to approximately 200. Although population estimates are not available, it is clear from historical data that in the early 20th Century the run was much larger than it is now (Williams 1983; 1989).²

The Carmel River:

Flow in the Carmel River is highly variable within (Figure 2) and between years (Figure 3). The river was perennial until diversions began at the old Carmel Dam at about river mile (rm) 18 in 1882. A larger but still small concrete arch dam, San Clemente, was built in 1921 at rm 18.6, approximately in the middle of the watershed, and a somewhat larger earth-fill dam, Los Padres, was built in 1948 at rm 23.5. The initial storage capacities of the dams were 1,300 acre feet (af) at San Clemente, and 3,200 af at Los Padres. Water stored at Los Padres is released into the river, and re-diverted for use at San Clemente. Beginning in the 1950's, diversions from the dam were augmented

¹ Boughton, David. 2005. South-Central California Coast Steelhead ESU. Pages 268-276 in T. P. Good et al. (Eds.) Updated status of federally listed ESUs of West Coast salmon and steelhead, NOAA Tech. Mem. NMFS-NWFSC-66. Waples, Robin. 2005. Steelhead BRT conclusions. Pages 300-306 in T. P. Good et al. (Eds.), *supra*.

² Williams, J. G. 1983. Habitat change in the Carmel River Basin, Carmel River Watershed Management Plan Working Paper No. 1. Monterey Peninsula Water Management District. See also Historical changes at the Carmel River lagoon and vicinity. Philip Williams & Associates, San Francisco, Report # 509.

by diversions from wells in Carmel Valley. The average unimpaired annual flow in the river is approximately 100,000 acre feet, and diversions by Cal-Am are now approximately 11,000 acre feet. Other diversions are approximately 2,000 af. Flow is highly variable within and between years, however, and in some years all of the flow is diverted. Moreover, surface storage is dwindling. The pool behind San Clemente is now almost entirely filled with sediment, and the pool behind Los Padres is about half full.

The seasonal dry periods in the river below San Clemente Dam increased with diversions. In the early 1960's, as diversions from wells increased, riparian vegetation began to die, with consequent bank erosion during wet winters. This erosion peaked in 1983. For many years, the only summer flow in the river below San Clemente Dam was ~1 cfs seepage around the dam, plus inflow from minor tributaries. Beginning in 1983, the Monterey Peninsula Water Management District ("MPWMD") began requiring Cal-Am to release some water from San Clemente Dam for re-diversion by the wells, and over time the required releases increased until the SWRCB effectively prohibited dry season diversions from San Clemente in 2002. However, the river continues to go dry each summer at some point downstream from about rm 9, and the flows above that point are reduced by the diversions.

Steelhead habitat in the Carmel River has been studied by Snider (1983)³ and by Dettman and Kelley (1986). Rearing habitat for steelhead in the Carmel River extends from migration barriers on the upper river and its tributaries to the seasonally dry reach of channel in the Carmel Valley. Snider (1983) reported that about half the available spawning habitat was above Los Padres Dam. Dettman and Kelley (1986) estimated that there are 14.38 miles (or ~423,000 square feet) of good to excellent rearing habitat there. As they noted (p. 44):

Most of the steelhead habitat in the Carmel River above Los Padres is within the confines of the Ventana Wilderness Area. The river's flow is unregulated, roads have not caused erosion, and the physical steelhead habitat probably looks much like it did before the arrival of European man. The river's configuration is controlled by its steep gradient (320 ft/mile), numerous rock outcrops, and large boulders that have lodged in the channel. Deep pools, separated by short, shallow glides and long, cobble/boulder riffles and runs are numerous throughout the upper Carmel River. The stream is heavily shaded by a dense canopy of riparian trees, including white alder, sycamore, big leaf maple, California bay laurel, canyon live oak, and sometimes by steep canyon walls.

However, Dettman and Kelley found that most of the *O. mykiss* present above Los Padres were non-anadromous, and that the total population was less than half of what they had found in comparable habitat in other coastal streams.

Factors for Decline

The factors for decline for Carmel River steelhead are typical of those for South-Central California Coast steelhead; these are, as summarized by Boughton (2005):

³ Snider, W.M. 1983. Reconnaissance of the steelhead resource of the Carmel River drainage, Monterey County. Calif. Dept. of Fish and Game, Environmental Services Branch Administrative Rept. 83-3.
Dettman, D.H. and D.W. Kelley. 1986. Assessment of the Carmel River steelhead resource. Vol. 1. Biological Investigations. D. W. Kelley & Ass.; (report to MPWMD).

Numerous minor habitat blockages were considered likely throughout the region. Other typical problems were thought to be dewatering from irrigation and urban water diversions and habitat degradation in the form of logging on steep erosive slopes, agricultural and urban development on floodplains and riparian areas, and artificial breaching of estuaries during periods when they are normally closed off from the ocean by a sandbar.

The State Water Resources Control Board recognized many of these same factors regarding the Carmel River in WRO 95-10, which found that:

When San Clemente Dam was constructed in 1921 (RM 18.5), a fish ladder was also built. (MPWMD:289,8-8.) Access to a major portion of the steelhead spawning and rearing habitat was effectively eliminated in 1949 with the construction of Los Padres Dam at RM 23.5. (CRSA:5,2.) Although a fish trap was installed downstream of the dam and captured adults transported into the reservoir, the facility proved ineffective at maintaining steelhead populations. (MPWMD:289,8-8.)

Annual counts of steelhead passing through the San Clemente fishway began in 1961. The critical dry years of 1976-77 and 1987-92, drought, and diversion by Cal-Am from its wells have combined to reduce water available to steelhead and have also reduced the steelhead population to remnant levels. Only one fish was recorded in 1991 and 15 fish in 1992. (MPWMD:337,49.) Past reviews of Carmel River environmental problems have identified flow reduction and habitat alteration as major factors associated with steelhead decline. (SWRCB:42,III-44.)

Paralleling the declining steelhead population during this period was the rising urban demand for water. Originally, the Monterey Peninsula water supply was diverted entirely from the two reservoirs and from surface flow. When demand exceeded the developed surface resources, wells drilled in the Carmel Valley alluvium aquifer were added to supplement supply. In recent times, dry season surface flows below the Narrows at RM 10 have been depleted in most years as a result of heavy ground water pumping. This results in the stranding and death of many juvenile fish as surface flow recedes. (DFG:4,32.)"

State Water Resources Control Board, WRO 95-10, at 27-28 (July 6, 1995).

Dewatering the river.

An obvious factor in the decline of Carmel River steelhead is dewatering of the river by Cal-Am's diversions. The effect of groundwater pumping on surface flows, steelhead, and riparian vegetation is documented in many MPWMD reports,⁴ as well as in the scientific literature, for example in Kondolf and Curry (1986) and Kondolf *et al.* (1987).⁵

⁴ For examples: Williams, J. G. 1983. Habitat change in the Carmel River basin, Carmel River Watershed Management Plan Working Paper No. 1, Monterey Peninsula Water Management District. McNeish, C. M. 1986, effects of production well pumping on plant stress in the riparian corridor of the lower Carmel Valley. Dettman, D.H. and D.W. Kelley. 1986, Assessment of the Carmel River steelhead resource. Vol. 1. Biological Investigations. D. W. Kelley & Ass.; report to MPWMD. MPWMD 1990. Water Allocation Program Environmental Impact Report (EIR), and annual reports of the

According to a 2006 report by the MPWMD⁶:

“As in other central California streams, juvenile steelhead in the Carmel River move downstream into lower reaches of the river well ahead of the peak emigration of smolts. Depending on river conditions and diversions during the previous dry season, there is some risk that pre-smolts and other juvenile steelhead will be stranded following early fall and winter storms, which increase flows and stimulate the fish to move downstream into habitats that are subsequently dewatered after the storm peak passes. This risk occurs primarily from October through February, although during severe droughts, the risk period may extend into March...

About 1.5 miles of habitat between Boronda Road and Robles del Rio and up to nine miles of habitat below the Narrows may dry up, depending on the magnitude of streamflow releases at San Clemente Dam, seasonal air temperatures and water demand. Beginning as early as April or May of each dry season, the District rescues juvenile steelhead from the habitat in these reaches. The goal of this program is to help maintain a viable steelhead population by transplanting juveniles to permanent river habitats downstream of San Clemente Dam (if it is available), and/or rearing juvenile steelhead at the Sleepy Hollow Steelhead Rearing Facility, located just downstream of San Clemente Dam, if habitat is not available.”

In response to the dewatering of the river, the MPWMD and the CRSA conduct annual fish rescues, and the MPWMD operates a rearing facility, as noted above. According to the 2005-2006 MPWMD report, supra:

- **MPWMD Annual Rescue Totals** – During July 2005 through September 2005 a total of 20,821 steelhead were rescued from the mainstem Carmel River, including 20,289 young-of-the-year (YOY), 489 older juveniles, one smolt, and 42 mortalities in July through September 2005 (Table IX-1). In comparison to previous rescue seasons, rescues in the 2005 dry season were above the average number of steelhead rescued from 1989 through 2005 (Figure IX-3).
- **Carmel River Steelhead Association (“CRSA”) Annual Rescue Totals** – During the July 2005 to June 2006 reporting period, a total of 15,214 steelhead were rescued from the mainstem Carmel River and Carmel River Lagoon, including 13,778 young-of-the-year (YOY), 724 older juveniles, and 712 mortalities.

MPWMD mitigation program; Hanna, B. M. 1995, Carmel River spawning gravel project: gravel and redd survey results 1994-1995, MPWMD Tech. Mem. 95-03.

⁵ Kondolf, G. M. and Curry, R. R. 1986, Channel erosion along the Carmel River. *Earth Surface Processes and Landforms* 11:307-319. Kondolf, G. M., Maloney, L. M., and Williams, J. G., Effects of bank storage and well pumping on base flow, Carmel River, Monterey County, California. 1987. *Journal of Hydrology* 91:351-369.

⁶ MPWMD 2006. Annual mitigation report .

Although the fish rescue efforts are helpful, they do not prevent the death of an unknown but presumably large number of juvenile steelhead that perish as flows decline to the level at which rescues occur, or that avoid capture. The mortality figures given above represent fish that perish during the course of the rescue.

Inadequate passage facilities and water quality issues at Los Padres Dam.

As noted by the SWRCB in WRO 95-10, a second principal factor in steelhead decline is the operation of the fish passage facilities at Los Padres Dam. Adult steelhead migrating upstream pass the dam by entering a trap, from which they are trucked past the dam. The current passage facilities have been described by a California Department of Fish and Game ("CDFG") engineer as not in accord with modern principles and design parameters.

While incremental improvements can be made to either of these traps, a comprehensive passage system, with multiple entries and sufficient capacity to operate over the range of passage flows is what is really called for. NOAA has stated that this system maintains the largest adult run of steelhead in this ESU. I would expect a comprehensive system to result in passage improvement similar to those we have seen at ACID dam on the Sacramento or the series of dams on Butte Creek when they were upgraded.⁷

When Los Padres is spilling, downstream migrants pass down the spillway. The spillway and the pool below have been modified in order to reduce harm to downstream migrants, but the modifications have by no means minimized harm to the steelhead. When Los Padres Dam is not spilling, water is released into the channel below by one of two conduits, neither of which is designed for fish passage. CDFG's engineer concluded, regarding downstream passage facilities, that:

There seem to be a number of known or suspected problems that have existed at this site for decades. Both confirmation/characterization of the suspected problems and remedy of the known problems are within the current abilities of the science of fish passage and have been successfully applied to other sites.⁸

The existing defects in the fish passage facilities are manifested in fish passage records; on average, fewer than a third of the steelhead passing San Clemente Dam also pass Los Padres (Figure 4). This is despite the excellent habitat upstream from the dam, and the inference from historical information that in the first decades after construction of San Clemente Dam, most of the sizable steelhead population must have been supported by that habitat.

Additional problems affecting Carmel River steelhead caused by Cal-Am facilities are coarsening of the streambed below the dams (MPWMD 2004), and episodic elevated levels of hydrogen sulfide in Los Padres reservoir and the river below the dam, resulting from decomposition of vegetation within the reservoir.

⁷ Marcia Whitman, hydraulic engineer, CDFG, Memorandum to the Supervisor, CDFG Native Anadromous Fish Team, dated 4 May 2006.

In short, since Cal-Am's diversions have not been significantly reduced since 1998 although moved farther downstream, and passage over Los Padres Dam has not been sufficiently improved, it is clear that Cal-Am's dams and its, diversions, account for most of the decline of the steelhead population in the river.⁸

Legal status of Cal-Am diversions and previous regulatory actions:

A. SWRCB Water Rights Orders

In 1995, in response to complaints by the CRSA and the Sierra Club, the SWRCB ruled in Order WRO 95-10 that water in the Carmel Valley alluvial aquifer is "flowing in a known and definite channel" and therefore legally is part of the river. Therefore, Cal-Am's Carmel Valley wells require a permit from the SWRCB, which Cal-Am to this date has not obtained. Accordingly, the SWRCB found that Cal-Am is diverting water unlawfully from the Carmel River.

In Order WRO 95-10, the SWRCB also found that Cal-Am did not have a permit for San Clemente Dam, and has rights to divert only 3,376 acre-feet annually (afa).⁹ The SWRCB also found that Cal-Am's diversions were "having an adverse effect on: the riparian corridor along the river below San Clemente Dam at RM 18.5, wildlife which depend on the instream flows, and riparian habitat, and steelhead which spawn in the river." Accordingly, Order WRO 95-10 ordered Cal-Am to reduce its diversions from the river by 20%, and to divert water as far downstream as practicable.

Details of WRO 95-10 have since been modified by WRO 98-04 and WRO 2002-02-, but the essence of the order remains unchanged. In particular, in WRO 2002-02, the SWRCB ordered Cal-Am to take additional steps to move its diversions downstream during "low flow periods," that is, during times when stream flow in the Carmel River at the Don Juan Bridge (RM 10.8) gage is less than 20 cfs for five consecutive days. However, the Orders allowed Cal-Am to continue to divert 11,285 afa. In other words, although Condition 2 in WRO 95-10 ordered Cal-Am to "diligently implement" one or more actions "to terminate its unlawful diversions from the Carmel River", the SWRCB allowed Cal-Am to continue to divert about 7,900 afa unlawfully.

Recently, however, the SWRCB has released a draft cease and desist order¹⁰ to Cal-Am that, if adopted, would require Cal-Am to reduce its unlawful diversions. Among the "facts and information" upon which the draft order is based is that:

"Order 95-10 condition 2 intended that Cal-Am would make one-for-one reductions in the unlawful diversions from the Carmel River for water obtained from other sources, such as conservation. The current management strategy used by Cal-Am/MPWMD, however, has not resulted in any significant

⁸ Another factor relates to mismanagement of the Carmel River lagoon.

⁹ Arguably, Cal-Am's existing water rights should be reduced by the extent of sedimentation in Los Padres Dam since the order was issued. Order No. WRO 95-10 assumed 2,790 af of storage behind the dam, but in 2000 the storage was estimated at only 1,569 acre feet. See Entrix 2000, cited in Smith et al. 2004, Physical and hydrologic assessment of the Carmel River watershed, California. The Watershed Institute, CSUMB, report to Carmel River Watershed Conservancy.

¹⁰ Cease and Desist Order WRO 2008 00XX-DWR, circulated with a cover letter from James Kassel, dated 15 January 2008.

reduction of unlawful diversion from the Carmel River since 1998. Instead, it appears that water savings resulting from conservation efforts have been redirected to support marginal increases in development.”

B. Cal-Am-NMFS Settlement Agreement:

In addition to failing to obtain a permit from the SWRCB to bring its diversions into conformity with California law, despite recurrent significant mortality to the threatened steelhead caused by its diversions and inadequate fish passage, Cal-Am has never submitted an application to NMFS for an incidental take permit or habitat conservation plan regarding the effects of its diversion and dam operations on this species. Rather, Cal-Am has attempted to work informally with NMFS, CDFG, and other agencies to develop annual operating plans with the objective of providing more water in the Carmel River by pumping water as far down-stream as possible.

On September 18, 2001, NOAA and Cal-Am entered into a Conservation Agreement ("Conservation Agreement"), which required Cal-Am to implement certain measures to reduce the impact of its operations in the Carmel River on steelhead and their habitat. Since September 2001, Cal-Am has implemented the measures set forth in Phase I of Tier I of the Conservation Agreement. These measures include ceasing surface water diversions at San Clemente Dam during low flow periods, ceasing diversions from the Upper Carmel Valley Wells during low flow periods, and installing a booster station to move water from the lower Carmel Valley to the Upper Carmel Valley.

Phase II of Tier I of the Conservation Agreement required Cal-Am to maintain a continuous surface flow in the Carmel River as far downstream as possible in AQ3 (a defined area of the Carmel Valley Aquifer) by offsetting its water diversions in upstream sections of AQ3 with expanded diversion capability in AQ4, in the lowermost reaches of AQ3, and the Seaside aquifer storage and recovery ("ASR") expansion. Phase II required Cal-Am to increase well capacity downstream of and including the San Carlos Well by 3.0 to 5.0 cfs. Cal-Am retrofitted the Rancho Canada Well and increased its capacity initially by 140%. The reconditioned well was put into service on March 31, 2003. At about the same time, the California Department of Health Services determined that extractions from the nearby San Carlos Well constitute groundwater under the influence of surface water. The San Carlos well was therefore taken out of service, as there is no means of providing surface water treatment at that location. This resulted in no net gain in pumping capacity in the lower aquifer.

These measures have not however, resulted in sufficient improvement to steelhead mortality caused by Cal-Am's diversions.

In a Supplemental Agreement signed June 29, 2006, Cal-Am and NOAA agreed that in light of Cal-Am's need to focus its financial and personnel resources on a long-term water supply project, rather than those interim measures in the Carmel River, Cal-Am would not be obligated to proceed with the additional measures set forth in the 2001 Conservation Agreement.

Under the supplemental Agreement with NMFS, Cal-Am agreed to continue to implement all of the measures described in Phase I of Tier I of the Conservation Agreement and to provide funding for projects "to improve habitat conditions for, and production of, SCCC steelhead and/or otherwise aid in the recovery of SCCC steelhead in the Carmel River watershed."

In the Supplemental Agreement Cal-Am obligated itself to pursue a long-term water supply for

the Monterey Peninsula through the State Water Project to replace the 10,730 afa of water that Cal-Am diverts from the Carmel Valley Aquifer.¹¹

In return for Cal-Am's agreement to the terms and conditions of the June 29, 2006 Agreement, NOAA agreed to "exercise enforcement discretion relative to any potential violation of the ESA committed by CAW involving its pumping operations or water withdrawal from the Carmel River."

Endangered Species Act Violations:

1. Section 9 of the ESA - Prohibited Take of Steelhead in the South- Central California Coast DPS.

Section 9(a)(1)(B) of the ESA provides that it is unlawful for any person - including federal agencies and private entities - to "take" any endangered species. 16 U.S.C. § 1538(a)(1)(B). By regulation, NMFS has extended this take prohibition to threatened species, such as the SCCC steelhead DPS. See 16 U.S.C. § 1533(d); 50 C.F.R. §§ 223.101. The §4(d) rule contains no applicable exceptions from the take prohibitions with respect to Cal-Am's diversions and operations that impact the SCCC steelhead. See 50 C.F.R. §223.203.

16 U.S.C. § 1532 defines "take" as meaning, to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 50 CFR §222.102 defines "harm" (in the definition of "take") as meaning an act which actually kills or injures fish or wildlife. The definition of "harm" goes on to recite:

Such an act may include significant habitat modifications or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Id.

As set forth above, Cal-Am's diversions and fish passage facilities kill or injure steelhead by significantly impairing essential behavioral patterns, including breeding, spawning, migrating, feeding, and sheltering.

ESA Section 10(a)(1)(B) provides an exception to the Section 9 prohibition for takings that are "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). Such an exemption requires the issuance by the Secretary of Commerce, acting through NMFS, of an "incidental take permit." Id. Before an incidental take permit can be issued, the party seeking it must submit to NMFS:

- a conservation plan that specifies --
 - (i) the impact which will likely result from such taking;
 - (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
 - (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

¹¹ SWRCB Order 95-10 already obligates Cal-Am to pursue a long-term water supply. Cal-Am's promise in the June 29, 2006 Agreement adds nothing to its existing legal obligations.

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

16 U.S.C. § 1539(a)(2)(A)

If NMFS finds, with respect to the submitted application and conservation plan, that the taking will be incidental, that the applicant will minimize and mitigate the impacts of the taking to the maximum extent practicable, that the applicant will ensure adequate funding to implement the plan, and that the taking will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild," an incidental take permit shall be issued. 16 U.S.C. § 1539(a)(2)(B).

Here, Cal-Am has neither submitted an application for an incidental take permit nor a Section 10 habitat conservation plan regarding the effects of the operation of its diversions. In consequence, Cal-Am does not have an incidental take permit for its operation of the Project and is strictly liable under Section 9 and the regulations promulgated under ESA for any taking of threatened steelhead in the SCCC DPS that results from such operation. 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. §§ 223.101, 223.203.

In sum, Cal-Am has not received an exemption from the prohibition on taking a threatened species contained in Section 9 and the regulations thereunder. 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. § 223.101 *et seq.* Any death of steelhead¹² caused by the Project's operation constitutes a prohibited take and gives rise to Section 9 liability. It remains highly likely that prohibited takes will occur again in 2008.¹³

In its preface to rule-making governing take of 14 threatened steelhead ESUs, NMFS stated that activities like those of Cal-Am's diversions and dam operations are likely to result in "takings" of listed steelhead.

"NMFS agrees that water diversions and ... may have other deleterious effects on salmonid habitat. These may include impacts on sediment transport, turbidity, and stream flow alterations. ... NMFS has revised the take guidance. One change is the water withdrawals have been added to the list of activities that are likely to injure or kill salmonids." 65 Fed. Reg. at 42429.

2. Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs). 65 Fed. Reg. 42422, 42429 (July 10, 2000).

In this Take Guidance, NMFS listed the following categories of activities most likely to result in injury or harm to listed salmonids:

¹² In its rule-making for listing the SCCC steelhead DPS, NMFS identified "Destruction/alteration of the steelhead habitats for any listed DPS, such as ... draining ... diverting ... altering stream channels or surface or groundwater flow" as an activity that could potentially harm steelhead and result in a violation of the take prohibition in Section 9. 71 Fed. Reg. 834, 858 (Jan. 5, 2006).

¹³ In its January 5, 2006 rule-making NMFS concluded: "We conclude that protective efforts collectively do not provide empirical evidence of sufficient certainty of implementation effectiveness to substantially ameliorate the level of assessed extinction risk for all but one of the steelhead DPS' s" 71 Fed. Reg. at 855.

- A. Constructing or maintaining barriers that eliminate or impede a listed species access to habitat or ability to migrate...
- D. Removing or altering rocks...gravel...that are essential to the integrity and function of a listed species habitat.
- E. Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding, or other essential behavioral patterns. 65 Fed. Reg. 42472.

At the State Water Resources Control Board hearing on September 17, 2001 relating to reconsideration of WRO 2002-02, (a reconsideration of WRO 2001-04-DWR) a NMFS representative (Jos. Blum) testified that implementation of Cal-Am's and NMFS's proposed Phase I of the Conservation Agreement (as set forth in the Board's Order) would result in the continued "take" of steelhead. The California Department of Fish and Game likewise concluded there would be continued take of steelhead. In a letter dated October 12, 2001 to Arthur Baggett, Chairman, State Water Resources Control Board from Nancee Murray, Senior Staff Counsel, California Department of Fish and Game, at p. 1, counsel for CDFG went on to conclude:

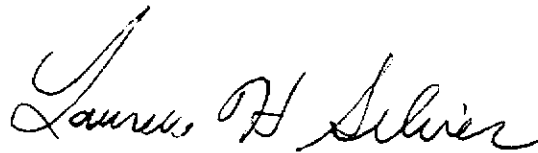
"The existing ongoing "take" now occurring due to Cal-Am's current practices requires an annual fish rescue of thousands of steelhead...A SWRCB Order that incorporates only Phase 1 or Phase 2 would not in itself minimize "take" of steelhead trout or adequately protect public trust resources..." Id.

Relief Requested

Cal Am has been operating, and continues to operate, its diversions and dam facilities in a manner that is likely to result in the unlawful taking of steelhead in violation of Section 9 of the ESA. Unless these violations are cured within 60 days hereof, the signatories to this notice intend to take appropriate legal action to seek injunctive relief against further takings by Cal-Am and will seek Court Orders establishing minimum flows along the River during low flow periods to minimize and reduce take of the threatened Carmel River steelhead. The signatories will additionally request the Court to impose certain operational procedures on Cal-Am with respect to Los Padres Dam.

1. The signatories will request a federal district court to order Cal-Am to reduce its Carmel River diversions to the degree necessary to preserve the breeding, spawning, rearing, migrating, feeding and sheltering patterns of South Central California Coast steelhead and to order Cal-Am to take such actions as are necessary to eliminate the unlawful take of South California Central Coast steelhead. See Appendix A.
2. The signatories will request the court to order Cal-Am to construct fish passage facilities at Los Padres Dam for adult and juvenile steelhead that meet standards set by NMFS, in consultation with CDFG. Cal-Am shall also be ordered to improve the ladder at San Clemente Dam to meet standards set by NMFS, in consultation with CDFG, unless work on removal of San Clemente Dam begins within three years. Cal-Am shall also be ordered to remove the Old Carmel Dam, or construct passage facilities that meet standards set by NMFS, in consultation with CDFG, within three years.

3. Within one year, Cal-Am shall be ordered to develop and implement a plan to pass coarse sediment around Los Padres Dam and San Clemente Dam to reverse the effects of the dams on spawning and rearing habitat below the dam.
4. Within one year, Cal-Am shall be ordered to develop and implement a plan to prevent nuisance levels of hydrogen sulfide from developing in Los Padres Reservoir or in water released from Los Padres Reservoir.
5. Within one year, Cal-Am shall be ordered to install and maintain fish screens on the outlet works on Los Padres Dam to prevent juvenile or adult steelhead from being entrained into the works.
6. Cal-Am shall be ordered to contribute to and cooperate with efforts to improve water quality in the Carmel River lagoon by providing water from wells in the lower valley and through any other methods as are necessary.
7. Signatories will ask the court to retain continuing jurisdiction to supervise compliance with its orders.



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Appendix A

On advice of their expert hydrologist, Dr. John Williams, the signatories believe the following flow regime is required (subject to revisions as additional data becomes available) to minimize and reduce the current level of "take":

In the first year after the order is issued, require a 20% reduction from base production during periods of low flow, a 15% reduction during periods of marginal flow, and no reductions in periods of high flow. In each following year, the required reduction would be increased by 2% of base production for each situation, such that, in the second year, the required reductions would be 22%, 17%, 2%, etc.

Define Base production levels" are defined as the median of Cal-Am production amounts for the years 1998-2007. On a daily basis (calculated from monthly totals¹), these are, in acre feet:

| | | | | | | | |
|------|------|------|------|------|------|-------|------|
| Oct | 33.0 | Nov. | 26.7 | Dec. | 23.8 | Jan. | 23.1 |
| Feb. | 23.3 | Mar. | 24.6 | Apr. | 27.7 | May | 34.1 |
| June | 37.8 | July | 40.5 | Aug. | 40.1 | Sept. | 36.4 |

(Base production for each day in the year could be defined by fitting a smooth curve to these points, with each point placed in the middle of the month.)

"Low flows" are defined as flows less than 20 cfs at the MPWMD's Don Juan Bridge gage.

"Marginal flows" are defined as flows greater than 20 c.f.s at the Don Juan Bridge gage, but less than the minimum flow requirements set out in Table A of Amended Permit 20808A

Appendix B

FIGURES:

Figure 1. Counts of adult Carmel River steelhead at San Clemente Dam. Data from MPWMD.

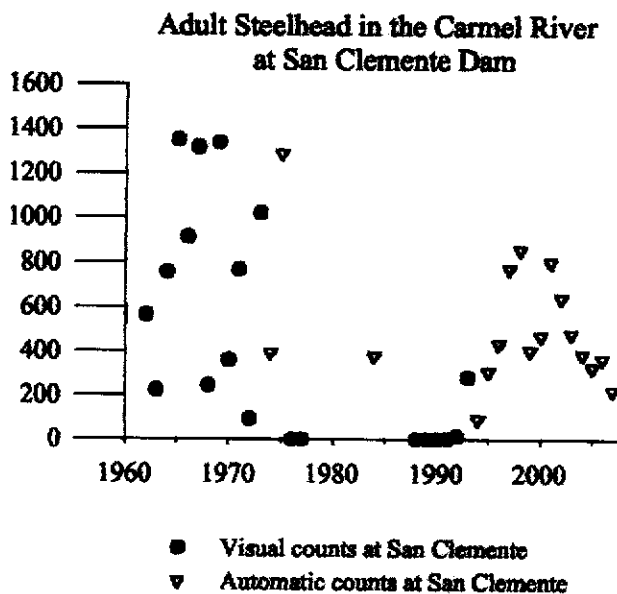


Figure 2. Mean flow by year in the Carmel River at Robles del Rio gage (rm 14.4). Data for 1976 and 1977 are not missing; they are simply too low to be visible at this scale.

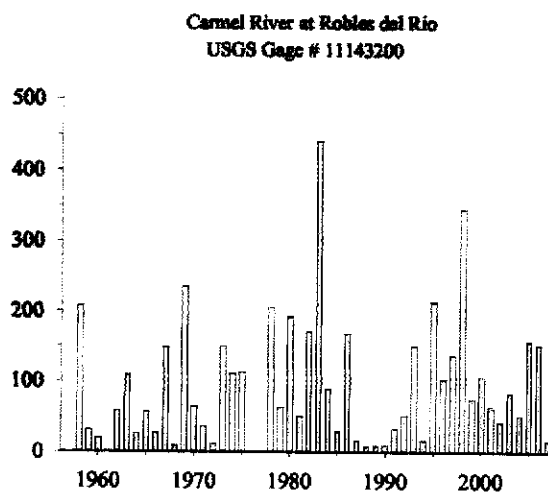


Figure 3. Mean flow by day at the Don Juan Bridge gage (rn 10.8) for water years 2006 and 2007. Dotted line shows the criterion for low flow conditions given in SWRCB Order WRO 2002-02. The vertical axis is on a log scale to show low flows. Data from the MPWMD.

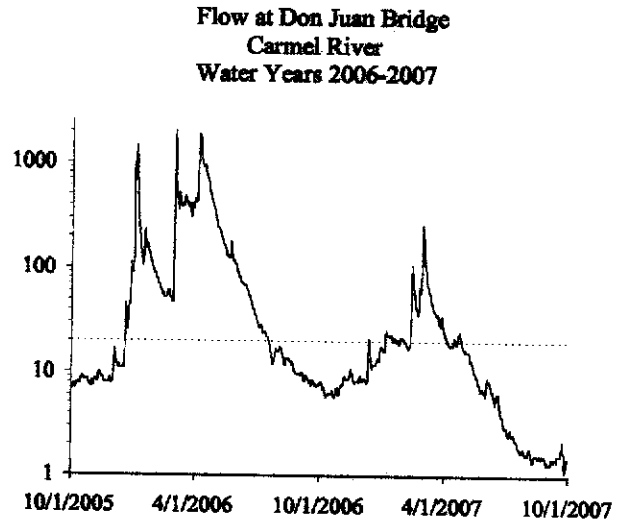
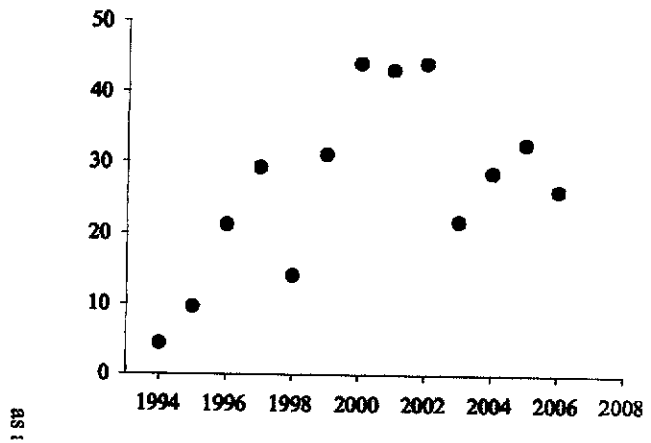


Figure 4: Counts of adult steelhead passing Los Padres Dam as a percentage of the counts at San Clemente Dam. Data from MPWMD.



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