

1 CHRISTOPHER A. KEIFER
United States Department of Commerce
2 National Oceanic & Atmospheric Admin.
Office of General Counsel, Southwest Region
3 501 W. Ocean Blvd., Ste. 4470
Long Beach, CA. 90802
4 Tel.: (562) 980-4076
Fax: (562) 980-4084

5 Attorney for NOAA Fisheries
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7 **STATE OF CALIFORNIA**

8 **STATE WATER RESOURCES CONTROL BOARD**

9 In the Matter of:

10 Unauthorized Diversion of Water
by the California American Water Company,
11 d.b.a. California American Water;
draft Cease and Desist Order WR 2008-00XX-DWR,
12 Carmel River, Monterey County, California

PRE-HEARING BRIEF OF
NOAA FISHERIES

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17 **INTRODUCTION**

18 This matter concerns a proposed action by the State Water Resources Control Board
19 (SWRCB or Board) to issue a Cease and Desist Order (CDO) requiring the California American
20 Water Company (CalAm) to make further reductions in its unauthorized diversions from the Carmel
21 River, located in Monterey County, California, as required under prior Board Order WR95-10, as
22 amended. The National Marine Fisheries Service (NOAA Fisheries)¹ is the agency of the federal
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26 ¹The National Marine Fisheries Service is part of the National Oceanic and Atmospheric
Administration (NOAA), which in turn is part of the United States Department of Commerce.
27 NOAA also comprises the National Ocean Service, which has jurisdiction over the National Marine
Sanctuary system, among other responsibilities; the National Environmental Satellite, Data and
28 Information Service, which operates a fleet of satellites; and the National Weather Service, the best
known NOAA sub-agency. See Reorganization Plan No. 4 of 1970, 80 Stat. 2090, codified at 5
U.S.C. 903 App.

1 government that has been directed by Congress to protect marine species² listed under the federal
2 Endangered Species Act (ESA). NOAA Fisheries' interest in this matter stems from the presence
3 of anadromous fish species in the Carmel River, which include a population of *Onchorynchus*
4 *mykiss*, specifically, South-Central California Coast (SCCC) steelhead. SCCC steelhead are a
5 species of anadromous fish under NOAA's care and jurisdiction that is listed as a threatened species
6 pursuant to the ESA. 50 Code of Federal Regulations 223.102.

7 On March 5, 2008, the Board issued a Notice of Public Hearing, Meeting to Receive Public
8 Policy Statements and Pre-Hearing Conference (Notice of Public Hearing) in this matter. On March
9 13, 2008, counsel for NOAA Fisheries timely filed a Notice of Intent to Appear in this proceeding
10 before the Board. A pre-hearing conference of all parties was conducted on March 19, 2008. NOAA
11 appeared by telephone through the under-signed agency counsel. During the pre-hearing conference,
12 the Board's hearing officer requested that all parties file pre-hearing briefs to identify issues in
13 dispute to be decided at the hearing in this matter. Briefs were requested to be filed by not later than
14 5 PM (local time) on April 9, 2008. This NOAA Fisheries prehearing brief is therefore timely filed.

15 The Notice of Public Hearing issued on March 5, at page 3, identified three "key issues" to
16 be decided in this proceeding:

- 17 1) Should the State Water Board adopt the draft CDO?
- 18 2) If the draft CDO should be adopted, should any modifications be
19 made to the measures in the draft order?
- 20 3) What is the basis for each modification?

21 **NOAA Fisheries supports action by the Board to adopt the draft CDO, subject to certain**
22 **modifications, as described below, that NOAA Fisheries expects will help to ensure that the water**
23 **diversion reductions required under the CDO are implemented in a manner that will be most**
24 **beneficial to ESA-listed SCCC steelhead.**

25 **NOAA Fisheries recommends that the Board implement the reduction of unauthorized**

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27 ²Through agreement with the United States Fish and Wildlife Service, the "marine species"
28 *Oncorhynchus mykiss* which spend a majority of their life cycle in a marine environment.

1 diversions such that the reductions respond to the biological needs of listed steelhead. To meet the
2 needs of steelhead, the majority of the reductions should occur in the spring, summer and fall seasons
3 in order to allow for the outmigration of steelhead smolts in the spring and limit the amount of river
4 dewatering and dryback in the summer that occurs annually due to CalAm's excessive water
5 withdrawals.

6 More specifically, NOAA Fisheries recommends that the CDO be amended to provide that
7 the annual reduction in water diversion be implemented by reducing the daily mean diversions
8 during the period of April through October by the same percentage as the annual diversion reduction
9 percentage specified in the order. As an example, under the proposed CDO, in the first year, 2008-
10 09, CalAm must reduce its annual diversions by a total of 15%. Under the revision proposed by
11 NOAA Fisheries, the CDO would further specify that during the months of April through October,
12 CalAm must reduce their mean daily diversion amount by at least 15%, and then implement the
13 remainder of the required annual percentage reduction during the remainder of the year. NOAA
14 Fisheries believes that shaping the annual diversion reductions in this manner will help ensure that
15 most of the water diversion reduction occurs during times of the year when flows in the Carmel
16 River are low and SCCC steelhead are most likely to be adversely affected by excessive water
17 diversions.

18 CONCLUSION

19 For the foregoing reasons, NOAA Fisheries requests that the Board adopt the proposed CDO,
20 subject to incorporating the modifications described above to regulate the timing and extent of the
21 reductions in CalAm's water diversions from the Carmel River during each year covered by the
22 order.

23 Respectfully submitted,

24
25 /s/ Christopher Keifer

26 Christopher Keifer
27 National Oceanic and Atmospheric Administration
28 Office of General Counsel, Southwest Region

Dated: April 9, 2008