

Laurens Silver, California Environmental Law Project
PO Box 667, Mill Valley California 94942
Response Letter from Sierra Club and PCL



December 22, 2015
Barbara Evoy
Deputy Director, Division of Water Rights
SWRCB
PO Box 1000
Sacramento, CA. 95812

Re: MPWMD December 14, 2015 Response to November 19, 2015 letter from
Planning and Conservation League and Sierra Club, Ventana Chapter

Dear Ms. Evoy:

PCL and Sierra Club wish to respond to the December 14, 2015 letter sent to you by the MPWMD responding to the November 19, 2015 letter sent to you by PCL and Sierra Club with respect to the November 20, 2015 joint Application for an Order Modifying WRO 2009-0060. PCL and Sierra Club urged you to consider an effective diversion limit of 7659 afy, based upon the three most recent years of Cal-Am production from the Carmel River.

Generally, PCL and Sierra Club believe that it is not consistent with the public trust responsibilities of the Board to permit Cal Am to continue illegally diverting up to 8310 afy through 2020. To the extent this amount is substantially above the average amount actually diverted from the Carmel River during the last three years, the 8310 afy effective diversion limit would be a step backward in terms of protecting and restoring public trust resources in the River.

Diversions from the River have decreased from 11,285 afy in 2009 to 7659 afy (the average of the last three years). The MPWMD letter claims that "since Order 95-10 the Monterey Peninsula has reduced its demand for water almost 6000 afy or 38%." Letter at p. 1. Clearly, the Urquhart testimony given at the 2008 hearings on the CDO demonstrates that cumulatively, since 2009, the curtailment of Cal Am production, as ordered by this Board, together with the decreased demand that has brought about sharply reduced diversions from the Carmel River, has likely produced substantial cumulative benefits to the SCCC DPS steelhead in the River. (Total Carmel River Cal Am water production was 10,658 af in 2007-2008, 8559 af in 2010-2011 (includes 1117 af for ASR injection), 7646 af in 2011-2012 (131af

Laurens Silver, California Environmental Law Project

PO Box 667, Mill Valley California 94942

Response Letter from Sierra Club and PCL

for ASR injection), and 7228 af for 2014-15 (includes 215 af ASR injection). See Eric Sabolstice e-mail to Laurens Silver, 12/22/2015, attached.

These cumulative yearly benefits, which include reduction of mortality and enhanced survival of juveniles, all pointed out in the Urquhart testimony, should not now be possibly eroded by permitting Cal Am to continue its illegal diversions at a level substantially above the three year average. Given the perilous state of the fishery, with no counted adult returns the last two years, now is not the proper time to be conducting an experiment, at the possible expense of the steelhead, that could substantially reduce the water in the River at a critical time of the year, and as well reduce potential recharge to the alluvium.

The Application contains a provision for an annual state of the fishery report to be prepared by NMFS. Based on that report, in subsequent years of any extension there is no bar to the District seeking from staff or the Board an increase in diversions up to 8310 afy, if NMFS and staff believe such an increase in diversions will not harm the fishery. The burden should rest on the District, not on the staff or the Board, to prove that an increase in diversions will not harm the fish, or result in dissipation of habitat gains made at the previous three year average (7659 afy) diversion level.

The District also argues that the PCL and Sierra Club recommended diversion levels are "flawed" because they ignore the two years of production from the Seaside Basin that exceeded authorized production from the Basin "due to emergency Carmel River failures, in order to meet health and safety demands on the Monterey Peninsula." As is set forth in the DEIR for the MPRWP, Cal-Am intends to "pay back" the Seaside Aquifer once the desal plant is operational, by providing desalinated water to replace the water produced from the Seaside Aquifer in excess of the production limits set forth in the Adjudication.

Neither PCL nor Sierra Club sees any compelling need at the present time, within the context of the Application, to provide an effective diversion level that through 2020 will provide a cushion to Peninsula customers sufficient to avert overproduction from the Seaside Basin before the desal plant is operational.

The District provides no evidence for the proposition that "higher level of production in the Seaside Basin is unsustainable" or for the proposition that "production must return to the Carmel River until a new supply is completed." This matter, to the best of our knowledge, has not been addressed by the Watermaster, and the remedial measures set forth in the Adjudication, which include a replenishment assessment in the event of overproduction, appear to be adequate at the present time. In any event, other producers in the Basin have not chosen to attempt to remedy this matter and are not alleging harm to their water rights as primary producers.

Laurens Silver, California Environmental Law Project
PO Box 667, Mill Valley California 94942
Response Letter from Sierra Club and PCL

PCL and Sierra Club are impressed with the Peninsula's drought response efforts, and have commended this effort in our joint letter in partial support of the Application. However as the Board has noted, it is incumbent on all Californians to permanently improve water use efficiency and not fall back to wasteful practices. Therefore it would not be appropriate to permit an increase in illegal diversions over the three year average to allow a "bounce back" of usage.

The District's claim that the operation of its steelhead raising facility constitutes "mitigation" for the effects of Cal Am's diversions from the River is specious. As the data attached demonstrates (Results for the SHFRF 2009-2015), several conclusions can be drawn. First the number of fish put in the facility compared to the number rescued shows fish relocation, but is not itself mitigation. Second, the chart shows that the fewer fish put into the facility the higher are the survival rates. Crowding induces mortality. For example in 2008-2009 46,635 were relocated to the SHFRF but only 14,932 were released. Apparently 31,000 may have perished. The number of fish not surviving relative to the number of relocatees is significant.

Though during the last five years there have been improved survival rates, there is no demonstration at present that this has led to any improvement in the number of adult returnees, which has been quite low (or possibly) non-existent in the last three years. Thus, in the opinion of Sierra Club and PCL, as well as CRSA, claims that the SHFRF has resulted in significantly mitigating the effects of Cal Am's illegal diversions from the River on steelhead are at best speculative. Certainly it is not appropriate for the staff to accept these claims as providing a basis for recommending an effective diversion level substantially higher than the average of the last three years.

For these reasons, PCL and Sierra Club urge that the staff recommend to the Board an effective diversion level no greater than 7659 afy.

Respectfully submitted,



Jonas Minton,
Senior Water Policy Advisor, Planning and Conservation League



Larry Silver, Esq.
Counsel to Ventana Chapter, Sierra Club