

**CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER HEARING –
CLOSING BRIEF of the CARMEL RIVER STEELHEAD ASSOCIATION**

I. STATE BOARD AUTHORITY TO RULE ON PROPOSED CDO

By statute, the SWRCB “shall exercise the adjudicatory and regulatory functions of the state of California in the field of water resources.” Water Code section 174; Imperial Irrigation District v. SWRCB (1990) 225 Cal.App3d 548, 558-559. The SWRCB is authorized to enforce vigorously SWRCB permit and license decisions and to preclude waste and the unlawful diversion of water. Water Code sections 275 and 1052; *see* In the Matter of Administrative Civil Liability Fetzer Vineyards (2003) WR 2003-05. Where a violation of an order like 95-10 has occurred, the SWRCB may issue notice and conduct a hearing to determine whether a cease and desist order should be issued. Water Code Section 1831.

II. THE WEIGHT OF THE EVIDENCE

The evidence submitted by the Prosecution team in this CDO hearing proved that, in the twelve years since Order 95-10 was adopted, the California American Water Company (hereinafter Cal-Am) has not complied with Condition 2 of 95-10. The water company did not present any evidence of compliance other than a unique argument that the SWRCB had granted the company an interim water right by not previously enforcing Condition 2 of Order 95-10. Condition 2 requires Cal-Am to terminate its unauthorized diversions from the river. Evidence in the hearing submitted by the Prosecution Team, the interested parties, and others proved that Cal-Am has been unwilling to find another water source and has continued to divert more water than its right from the Carmel River,

thereby continuing to dewater the river and harm the fish. This illegal diversion has averaged 7,150 ac/ft more than the legitimate water rights granted to Cal-Am by the SWRCB in Order 95-10. Cal-Am's continued unauthorized diversion of water in excess of its existing rights is a trespass under Water Code Section 1052, and testimony by John Williams, Roy Thomas, Brian LeNeve, and the Prosecution Team proves that the diversion is causing continuing harm to public resources.

III. HARM TO PUBLIC RESOURCES

In Order WR 95-10, the State Water Board found that Cal-Am's diversions were having an adverse effect on: (a) the riparian corridor downstream of river mile 18.5; (b) wildlife dependent upon the corridor; and (c) steelhead and other fish that inhabited the river. (Order WR 95-10, pp. 25-8, 33-34.) There continues to be an 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. The potential for substantially higher steelhead mortality is mitigated by volunteers from the local community, members of the Carmel River Steelhead Association, who make two sweeps of the river annually to rescue stranded steelhead. Nevertheless there are continuing adverse effects on steelhead and other fish caused by the river drawdown.

Evidence from the CDO hearing, from the National Marine Fisheries Service, and from witnesses from the Sierra Club and the Carmel River Steelhead Association, proved that conditions have not changed or improved for the Carmel River since the hearing on 95-10. Order 95-10 imposed several conditions on Cal-Am's continued unauthorized diversion from the Carmel River. (Order 95-10, p. 40) Condition number 2 of Order 95-10 states:

“Cal-Am shall diligently implement one or more of the following actions to **terminate** its unlawful diversions from the Carmel River: (1) obtain appropriate permits for water being unlawfully diverted from the Carmel River; (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside aquifer shall be governed by condition 4 of the Order which was to maximize production from the Seaside wells to honor servicing the existing connections and honoring existing commitments and to reduce diversions from the Carmel River.”
(Emphasis added) WR Order 95-10.

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 or alternative supplies. The evidence in the CDO hearing clearly indicated that Cal-Am has not diligently attempted to find other water sources. The current water management strategy used by Cal-Am/MPWMD 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.

95-10 also requires Cal-Am to implement measures to achieve 20 percent conservation in every year from 1997 forward until the unlawful diversions are ended. According to testimony from Katherine Mwroka, SWRCB Enforcement Team, that has

not happened. No witness in the hearing testified otherwise. The Division of Water Rights previously issued Administrative Civil Liability Complaints to Cal-Am informing the Company of the continuing illegal diversions, but to no avail. ACL Nos. 262.10-03 and 262.5-6 (PT exhibits 4 and 5).

In the face of this draft CDO notice from the SWRCB Division of Water Rights reminding Cal-Am it was required to find another water source, Cal-Am has continued its illegal diversions from the Carmel River and has continued to harm the Carmel River Steelhead. Cal-Am made no attempt to propose a plan for compliance in this hearing. The only offered solution is more years of delay and damage to public trust resources. The testimony of Joyce Ambrosius of the National Marine Fisheries Service [NMFS] is but one example of ample evidence that the steelhead are still being harmed by Cal-Am's illegal diversions:

“Although all the numerous diverters in the Carmel River are contributing to the decline of the steelhead population in the river to some degree, California American Water is responsible for approximately 85% of the total water diversions from the Carmel River system and its associated subterranean flow (PT-45) As a result of direct diversions of water by Cal-Am and others, the Carmel River goes dry downstream from the Narrows (River Mile 9.5) usually by July of each year.”

NMFS testified herein in support of the SWRCB enforcement team's draft CDO and recommended modifications designed to make it even better, by asking that the “majority of the reduction of the unauthorized diversions should occur in the spring, summer, and fall seasons in order to allow for the outmigration of steelhead smolts in the spring and to limit the amount of river dewatering that occurs in the summer annually “due to Cal-Am's excessive water withdrawals.” (PT- 39)

IV. CONCLUSION

The State Board needs to enforce the law against illegal diverters. Cal-Am is an illegal diverter. The draft CDO, amended as suggested by NFMS, is a fair compromise

for the State Board to follow and is well balanced. It gives some time for water to be found by Cal-Am and other local water purveyors. It allows these local water interests time to band together to solve their mutual problem. But it is a short enough time-frame for the message to be clear: the State Board means to enforce the law, and thirteen years without doing anything to resolve Order 95-10 is far too long.

Dated October 7, 2008

s/ Michael B. Jackson
Michael B. Jackson
for the Carmel River Steelhead Association