



**California Office**

1303 J Street, Suite 270 | Sacramento, CA 95814 | tel 916.313.5800 | fax 916.313.5812  
[www.defenders.org](http://www.defenders.org)

June 19th, 2008

Ms. Tam Doduc, Chair  
Board Members  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Re: DRAFT CEASE AND DESIST ORDER ISSUED TO CAL-AM REGARDING  
CARMEL RIVER DIVERSIONS

Dear Ms. Doduc and Board Members:

Thank you for allowing Defenders of Wildlife the opportunity to submit a policy statement regarding the Cal-Am Draft Cease and Desist Order. We commend the State Water Resources Control Board (“Board”) for issuing this Cease and Desist Order and protecting our public trust resources. It is imperative that the draft order be amended with greater reductions in diversions to protect Steelhead in the Carmel River.

As the draft Cease and Desist Order issued in January alleges, California American Water Company is not in compliance with Condition 2 of Water Right Order 95-10, requiring that the company either obtain appropriative rights for 7,150 acre-feet of water being diverted from the Carmel River in excess of appropriative water rights, obtain water from alternative sources and make one-for-one reductions in unlawful diversions, or contract with another agency having appropriative rights to the Carmel River.

The draft Cease and Desist Order also alleges a violation of Water Code section 1052, which states that the diversion or use of water subject to this division other than as authorized in this division is a trespass and allows civil liability to be administered for such a trespass. It is important to put the above-referenced violations in the context of the impact they have had on public trust resources.

In 1997, NMFS listed the South-Central California Coast Steelhead Evolutionary Significant Unit (ESU) of Steelhead as threatened. NMFS also designated the Carmel River as Critical Habitat for the threatened Steelhead in 2005. The final rule promulgated for this listing specifically prohibited any take of Steelhead and also enumerated the following category of activities as those that would likely result in a take:

- Constructing or maintaining barriers that eliminate or impede a listed species access to habitat or ability to migrate...
- Removing or altering rocks...gravel...that are essential to the integrity and function of a listed species habitat.

**National Headquarters**

1130 17th Street, N.W.  
Washington, D.C. 20036-4604  
tel 202.682.9400 | fax 202.682.3331

- Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding, or other essential behavior potential.

Cal-Am has engaged in every single one of the above-referenced activities. Cal-Am diverts water from the Carmel River pursuant to a water right license issued by the SWRCB. Although this license only authorizes the diversion of 3,376 acre-feet annually, Cal-Am has diverted approximately 7,150 afa above that amount since 1995. The total annual diversion, a staggering 11,285 afa, has taken a toll on threatened Carmel River Steelhead, particularly in dry years when flow in the river is greatly diminished. Additionally, Cal-Am operates inadequate fish passage facilities at Los Padres dam. Adult Steelhead migrating upstream to breed must pass Los Padres Dam by entering a trap, at which point they are trucked past the dam. This system is obsolete and does not optimally maintain the Steelhead population. Conversely, adult Steelhead migrating downstream must travel through either a spillway or conduit, neither of which is sufficient for Steelhead survival. Inadequate fish passage and flow impairments, much of which is attributable to Cal-Am's diversions, have adversely impacted the threatened Carmel River Steelhead's survivability.

As stated in the final rule listing the Steelhead as threatened, "water diversions for agriculture, flood control, domestic, and hydropower purposes (especially in the Columbia River and Sacramento-San Joaquin Basins) have greatly reduced or eliminated historically accessible habitat." *Listing of Several Evolutionary Significant Units (ESUs) of West Coast Steelhead*, 62 Federal Register 109 (18 August 1997), pp. 43937 - 43954. The rule also states that "analyses of steelhead abundance indicate that across the species' range, the majority of naturally reproducing steelhead stocks have exhibited long-term declines in abundance" and stocks in the South-Central California ESUs "appear to have declined significantly, with widespread stock extirpations." *Id.* The total combined estimates for Steelhead in the Pajaro, Salinas, Carmel, Little Sur and Big Sur Rivers is less than 500 fish. *Id.*

In lieu of seeking an incidental take permit for impacts to Carmel River Steelhead resulting from its diversions and dam operations, Cal-Am has attempted to work informally with NOAA, California Department of Fish and Game ("CDFG") and other agencies to develop annual operating plans to augment stream flow in the Carmel River. Cal-Am and NOAA entered into a conservation agreement in 2001, containing three tiers of activities designed to protect Steelhead. The agreement required, among other things, that Cal-Am cease dam diversions and well pumping during low flow periods, maintain continuous surface flow in the River at all times and construct a new well in the lower Carmel Valley. Cal-Am eventually claimed that the new well construction was cost prohibitive because it would necessitate construction of a surface water treatment plant as well. The parties subsequently executed a settlement agreement in 2006 that modified Cal-Am's obligations under the conservation agreement in the following way:

- 1) Cal-Am shall provide funding to improve habitat conditions for Carmel River Steelhead - \$3.5 Million initially and \$1.1 Million annually thereafter.
- 2) Cal-Am shall continue to pursue environmental review and permitting for a desalination facility to replace 10,730 afa of Carmel River diversions.

The conservation agreement and settlement agreement are unsatisfactory substitutes for an incidental take permit, which is required by section 10(a)(1)(B) of the Endangered Species Act. 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, in violation of section 9 of the Endangered Species Act. Cal-Am has not applied for an incidental take permit under section 10(a)(1)(B) for these activities. Therefore, Cal-Am cannot claim exemption to the take prohibition in section 9.

The draft Cease and Desist Order is currently drafted to require Cal-Am to reduce its illegal diversions on a sliding scale (15% the first year and 50% by 2014). These reduction amounts are not sufficient to protect Steelhead. It is crucial that the order be amended to require greater reductions in the first year, particularly as we face drought conditions and a further strained Steelhead population. Cal-Am should be required to immediately seek alternative supplies and reduce illegal diversions by at least 50% in the first year.

Defenders of Wildlife appreciates the opportunity to submit these comments. We strongly support the Board's mission to preserve, enhance and restore the quality of California's water resources.

Sincerely,

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Joshua Basofin  
California Representative  
Defenders of Wildlife