

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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In the Matter of the Application of
California-American Water Company
(U210W) for an Order Authorizing and
Imposing a Moratorium on Certain New or
Expanded Water Service Connections in its
Monterey District.

Application 10-05-020
(Filed May 24, 2010)

OPENING BRIEF OF CALIFORNIA-AMERICAN WATER COMPANY

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OPENING BRIEF OF CALIFORNIA-AMERICAN WATER COMPANY

I. INTRODUCTION AND SUMMARY

Pursuant to Rule 13.11 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), California-American Water Company (“California American Water”) respectfully submits its opening brief in support of its application for a moratorium on certain service connections in its Monterey District. California American Water is currently subject to an order of the California State Water Resources Control Board (“State Water Board”) prohibiting California American Water from delivering Carmel River water to new service connections or increased use of water at existing service addresses resulting from a change in zoning or use, if such new connections or change in zoning or use was entitled after October 20, 2009. California American Water is seeking the authority it requires from the Commission to implement this prohibition.

California American Water proposes to include a moratorium condition in the appropriate service schedule(s) in the Monterey District allowing California American Water to deny service pursuant to the State Water Board’s order. Water allocation in California American Water’s Monterey District is, however, complex. Accordingly, California American Water also requests that the Commission, in its decision, to: (1) recognize that the moratorium does not apply to

certain service areas, (2) clarify the term “expanded use,” and (3) limit the exceptions to the moratorium to those already identified in the State Water Board’s Order. The intent of these requests is to ensure that there are a minimum of future disputes regarding the terms of California American Water’s service schedules.

II. BACKGROUND/HISTORY

From July 1995 to October 2009, California American Water operated its Monterey District under the terms of Order No. 95-10 issued on July 6, 1995 by the State Water Board (“Order 95-10”).¹ Order 95-10 found, *inter alia*, that California American Water did not have legal water rights to 69 percent of the water it historically appropriated from the Carmel River. Order 95-10 prohibits California American Water from appropriating more than 14,106 acre-feet of water per annum [afa] from the Carmel River. Order 95-10 also requires California American Water to implement conservation measures with a goal of achieving a 20 percent reduction in demand from that limit. Compliance with that conservation goal would reduce river diversions to 11,285 afa. Except for the water year that ended September 30, 1997, California American Water has met the 11,285 afa conservation goal every year.

In addition to limiting California American Water’s diversions from the Carmel River, Order 95-10 requires California American Water to address the legality of its water supply.

Condition No. 2 of Order 95-10 states:

Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful extractions from the Carmel River: (1) obtain appropriative permits for water being unlawfully extracted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful

¹ California American Water attached a true and correct copy of Order 95-10 as issued on July 5, 1995 to the *Amended Application of California-American Water Company (U210W) for an Order Authorizing and Imposing a Moratorium on Certain New or Expanded Water Service Connections In Its Monterey District*, filed May 27, 2010 (“Amended Application”) as Exhibit B. Order 95-10 was subsequently amended by State Water Board orders 98-04, 2001-04, and WRO 2002-02.

extractions from the Carmel River, provided that water pumped from the Seaside aquifer shall be governed by condition 4 of this Order not this condition, and/or (3) contract with another agency having appropriate rights to extract and use water from the Carmel River.

At the time this condition was adopted, the Monterey Peninsula Water Management District (“MPWMD”) was pursuing construction of a dam that would have provided a new source of supply consistent with Condition 2. In November 1995, MPWMD’s electorate voted down a bond measure to construct that dam. Shortly thereafter, California American Water sought to construct the Carmel River Dam and Reservoir Project as the replacement water supply required by Condition No. 2 of Order 95-10 and filed Application A.97-03-052 seeking authorization from the Commission to construct that project. Later in 1997, the National Marine Fisheries Service listed the South Central California Coast Steelhead as threatened pursuant to the federal Endangered Species Act,² and included the Carmel River as part of the Steelhead’s critical habitat. The National Marine Fisheries Service issued correspondence contending that the construction of the Carmel River Dam and Reservoir project would result in the “take” of Steelhead in violation of the Endangered Species Act.³

On September 23, 1998, California’s Governor signed into law AB 1182 directing the Commission to prepare a long-term contingency plan describing the program or combination of programs to provide water to the Monterey Peninsula if for any reason the Carmel River Dam and Reservoir project was not approved. In August 2002, the Commission issued the contingency plan – known as the “Plan B Report” – which proposed a desalination facility with aquifer storage and recovery and associated transmission facilities, as the combination of programs to provide the Monterey Peninsula with a long-term water supply.

² 16 U.S.C. § 1531, et seq.

³ 16 U.S.C. § 1538 prohibits the “take” of a listed species. 16 U.S.C. § 1532(19) states that “take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

In response to the Plan B Report and assertions by the National Marine Fisheries Service that the Carmel River and Dam and Reservoir project would violate the Endangered Species Act, California American Water shifted its focus from the dam and reservoir project to a desalination facility with aquifer storage and recovery and associated transmission facilities. This became the Coastal Water Project, which is the subject of Application 04-09-019. In that proceeding, the Commission certified an environmental impact report that analyzed three projects that could solve the Monterey Peninsula's water supply deficit, including a regional desalination project.⁴ California American Water entered into a settlement agreement with the Marina Coast Water District, the Monterey County Water Resources Agency, Surfrider, Citizens for Public Water and the Public Trust Alliance for a regional desalination plant. A proposed decision is expected this fall.⁵

A. Cease and Desist Order Proceedings Before the State Water Board And California Superior Court

On October 20, 2009, the State Water Board adopted Order No. 2009-0060, a cease and desist order against California American Water (the "CDO"). Included in the CDO is Ordering Paragraph No. 2, which states:

Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing

⁴ D.09-12-017, *In the Matter of the Application of California-American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates*, 2009 Cal. PUC LEXIS 764 ("D.09-12-017, 2009 Cal. PUC LEXIS 764"), **20-28, 34, Ordering ¶1.

⁵ Additional history of California American Water's efforts to comply with Condition No. 2 of Order 95-10 is discussed in Commission Decisions D.03-09-022, D.06-12-040, and D.09-12-017. D.03-09-022, *In the Matter of the Application of California-American Water Company (U 210 W) for a Certificate that the Present and Future Public Convenience and Necessity Requires Applicant to Construct and Operate the 24,000 acre foot Carmel River Dam and Reservoir in its Monterey Division and to Recover All Present and Future Costs in Connection Therewith in Rates*, 1997 Cal. PUC LEXIS 1279, **1-4; D.06-12-040, *In the Matter of the Application of California-American Water Company for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates. (U 210 W)*, 2006 Cal. PUC LEXIS 422, **2-4; D.09-12-017, 2009 Cal. PUC LEXIS 764, **1-6.

service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.

On October 27, 2009, California American Water filed its petition for writ of administrative mandamus and complaint for declaratory relief in Monterey County Superior Court challenging the CDO and seeking to have it set aside . MPWMD also filed suit.⁶ On October 30, 2009, MPWMD filed an *ex parte* motion to stay the CDO. The Monterey County Superior Court granted that motion, the effect of which was to suspend California American Water's obligation to comply with the State Water Board's order.⁷ On February 25, 2010, the State Water Board filed a motion to dissolve the stay. California American Water filed a motion for a preliminary injunction to enjoin the operation of the State Water Board's order pending a decision on the merits of the lawsuits, and opposed the State Water Board's motion to dissolve the stay. On April 22, 2010, the Superior Court of Santa Clara County⁸ found that extraordinary relief was not warranted, dissolved the earlier stay, and denied California American Water's motion for preliminary injunction. The effect of the April 22, 2010 ruling is that California American Water must now comply with the State Water Board's order.

As discussed in the testimony of Craig Anthony, since the State Water Board issued the CDO on October 20, 2009, California American Water has continued to receive requests for new connections or larger meters for existing customers by way of Water Connection Permits issued

⁶ A true and correct copy of California American Water's petition for writ of mandate is attached to the Amended Application as Exhibit E. A true and correct copy of the Monterey Peninsula Water Management District's petition for writ of mandate is attached to the Amended Application as Exhibit F.

⁷ A true and correct copy of the Monterey County Superior Court's order issued November 3, 2009 imposing a stay is attached to the Application as Exhibit G.

⁸ On November 3, 2009 the State Water Board moved the Monterey Superior Court for an order changing venue. On January 8, 2010 that motion was granted, and the court proceedings were transferred to Santa Clara Superior Court.

by MPWMD.⁹ When a customer presents California American Water with one of these permits, California American Water understands that it must connect those customers pursuant to its obligation to serve under Commission rules until the Commission authorizes a moratorium.

B. SWRCB Decisions Interpreting the CDO

On November 19, 2009, Quail Lodge, Inc., CVR HSGE, LLC, and Baylaurel, LLC (collectively “Carmel Valley Resorts”) each filed a motion for reconsideration requesting the State Water Board reconsider the CDO. The Carmel Valley Resorts claimed they had expended money to implement certain water conservation practices, which MPWMD recognized in the form of a “Water Use Credit” under its rules and regulations. The Carmel Valley Resorts contended that each of those resorts had performed significant work and incurred significant liabilities in good faith reliance on the rules and regulations of MPWMD and representations from MPWMD staff. The Carmel Valley resorts also contended that these Water Use Credits constituted a vested water entitlement, and Condition No. 2 of the CDO interfered with these contractually vested water rights. On this basis, the Carmel Valley Resorts requested the State Water Board modify Condition No. 2 of the CDO to exempt new connections or increases of water use that are based on approved MPWMD water allocations or water credits.

In Order WR 2010-001, the State Water Board rejected these claims and found that possession of water credits from MPWMD does not justify exemption from the prohibitions in the CDO. The State Water Board reasoned:

[C]redits allocated by MPWMD do not provide Cal-Am with the right to supply water illegally diverted from the river. Nor does Order WR 2009-0060 [the CDO] extinguish the credits. It simply recognizes, consistent with California water right law, that agreements entitling a party to receive deliveries from Cal-Am do

⁹ *Direct Testimony of Craig Anthony in Support of California American Water's Application for Authority to Impose a Moratorium on Certain New or Expanded Water Service Connections*, served May 24, 2007 ("Craig Anthony Direct Testimony"), p. 4

not authorize Cal-Am to divert any more water than it has valid water rights to divert, and requires Cal-Am to curtail its illegal diversions accordingly. We conclude, therefore, that Order WR 2009-0060 [the CDO] does not deprive Petitioners of the water credits received from MPWMD.¹⁰

On this basis, the State Water Board refused to modify Condition No. 2.

III. ISSUES

A. The Commission Should Relieve California American Water of its Obligation to Serve Connections Prohibited by the CDO.

1. The CDO Requires A Moratorium

Condition No. 2 of the CDO provides the basis for this application for a moratorium. It states:

Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.

As set forth in the direct testimony of Craig Anthony in support of California American Water's application, at various times throughout the year California American Water delivers only Carmel River water to customers connected to the main Monterey system.¹¹ California American Water must operate its system in this way due to requirements in State Water Board orders, limitations created by the order of the Monterey County Superior Court in *California American Water v. City of Seaside* ("Seaside Adjudication"), and requirements imposed by the National Marine Fisheries Service and the California Department of Fish and Game intended to protect the South Central California Coast Steelhead and its habitat. Because of this integrated

¹⁰ State Water Resources Control Board Order 2010-001, p. 13.

¹¹ Craig Anthony Direct Testimony, p. 3.

nature of the main system, it is not possible for California American Water to operate its main Monterey system in a manner that prevents it from delivering some Carmel River water to all customers at some time during the year.¹² Accordingly, if California American Water were to connect a new customer to the main Monterey system or serve increased water for a different use at an existing service address after October 20, 2009, California American Water would violate the CDO.

2. The Commission and the State Water Board Have Concurrent Jurisdiction Over Water Utility Operations

Where two statutory enactments give two different agencies jurisdiction over a matter of statewide concern, those agencies must exercise concurrent jurisdiction.¹³ In the *Orange County Air Pollution Control District v. California Public Utilities Commission* case, Southern California Edison Company, an electric utility regulated by the Commission, sought for a new generating unit both a Certificate of Public Convenience and Necessity (“CPCN”) from the Commission and an air pollution control permit from the Orange County Air Pollution Control District. The Orange County Air Pollution Control District (“APCD”), acting under State law and local rules adopted under that State law, denied the air pollution control permit because the proposed generating unit did not comply with the APCD’s local regulations. Subsequently, the Commission held evidentiary hearings regarding the CPCN, during which the Orange County

¹² Under the recently issued water distribution system permit issued by MPWMD, California American Water is allowed to deliver water from its main Monterey system to Security National Guaranty’s proposed development. California American Water will be wheeling Security National Guaranty’s adjudicated water rights to its proposed development consistent with Superior Court orders in *California American Water v. City of Seaside*, et al. (Superior Court of California, Monterey County, Case No. M66343.) Based on these court orders, provided California American Water complies with the accounting requirements in MPWMD’s water distribution system permit, California American Water will not be delivering Carmel River water to Security National Guaranty’s development. Regarding the Sand City Desalination Plant, that desalination plant will produce approximately 271,000 gallons per day, while the main Monterey distribution system delivers approximately 10 million gallons per day. Accordingly, California American Water will still need to appropriate some water from the Carmel River when the Sand City Desalination Plant is operational, but the appropriations will be reduced.

¹³ See *Orange County Air Pollution Control District v. Public Utilities Commission*, (1971) 4 Cal.3d 945 (Commission exceeded authority when it ordered utility to construct plant denied a permit by a local agency exercising power under State law.)

Air Pollution Control District presented evidence against issuing the CPCN because the proposed generating unit did not comply with the APCD's rules. The Commission, nevertheless, issued the CPCN and directed Southern California Edison Company to commence construction immediately, holding that the Commission's jurisdiction was paramount over the APCD's "local interests."

The California Supreme Court vacated the Commission's decision, finding that the APCD, while having local jurisdiction, was exercising power granted by State law over a matter of statewide concern – air quality.¹⁴ The California Supreme Court held that where two agencies exercise concurrent jurisdiction regarding matters of statewide concern, those agencies must share jurisdiction, and one agency cannot order the violation of another agency's order.¹⁵

The use of water is a matter of statewide concern, and the State Water Board is empowered by the Water Code to exercise adjudicatory and regulatory functions of the state in the field of water resources, just as the Orange County Air Pollution Control District was regulating air pollution in the *Orange County Air Pollution Control District* case.¹⁶ The Commission has previously recognized the authority of the State Water Board over water allocation.¹⁷ Accordingly, both the Commission and the State Water Board have concurrent jurisdiction over the operation of water utilities that divert water under the State Water Board's jurisdiction, including California American Water's operations on the Carmel River. Consistent with this principle of concurrent jurisdiction, the Commission cannot place California American Water in a position where it must violate the State Water Board's order to comply with the duty to serve imposed by the Commission.

¹⁴ *Orange County Air Pollution Control District*, 4 Cal.3d at 952.

¹⁵ *Id.* at 953-954.

¹⁶ See Cal. Const., art. X, § 2; Wat. Code §§ 100, 174.

¹⁷ See D.99-04-061, *Sierra Club, Angeles Chapter, Complainant, vs. Valencia Water Company, Defendant*, 1999 Cal. PUC LEXIS 199 ("D.99-04-061, 1999 Cal. PUC LEXIS 199"), **6-7.

Other Commission decisions recognize the concurrent jurisdiction of state agencies, including previous decisions relieving water utilities of their obligation to serve when necessary to comply with the orders of a sister state agency.¹⁸ In reaching its decision in D.03-03-037, the Commission relied on the requirement in General Order 103 that water utilities comply with Department of Health Services (now Department of Public Health) regulations and orders.¹⁹ The Commission, thus, has recognized the concurrent jurisdiction of the Department of Public Health with regard to water quality. The Commission should similarly recognize the concurrent jurisdiction of the State Water Board with respect to water allocation.

Under the *Orange County Air Pollution Control District* case, the Commission cannot overrule the State Water Board's concurrent jurisdiction over the appropriation of water. Consistent with the State Water Board's concurrent jurisdiction over California American Water's Carmel River operations, the Commission should relieve California American Water from its obligation to serve to the extent necessary to comply with the CDO.

B. The Commission is Empowered to and Should Determine in This Proceeding Whether Particular Connections or Types of Connections Come Within the Moratorium.

1. Authority to Determine Applicability of Moratorium

The Commission is mandated by Public Utilities Code section 761 to ensure public utilities provide proper and adequate service to customers in the utility's service area and by Public Utilities Code section 453 to ensure that service is available without unreasonable

¹⁸ See D.10-05-004, *Application of Del Oro Water Company (U61W) to Impose a Moratorium on New Service Connections in its River Island District*; D.03-03-037, *In the Matter of the Application of California Water Service Company for an Order Establishing a Moratorium on New Service Connections in Excess of 250 Service Connections in the Coast Springs Water System Division of the Redwood Valley District*, 2003 Cal. PUC LEXIS 170 ("D.03-03-037, 2003 Cal. PUC LEXIS 170"); D.91-04-022, *In re Southern California Water Company's Application for Authority to Establish a Moratorium on New Services and Service Extensions in the Ojai District*, 1991 Cal. PUC LEXIS 125.

¹⁹ D.03-03-037, 2003 Cal. PUC LEXIS 170, **6-11.

difference in service.²⁰ California American Water has requested in its application that the Commission exercise its authority under subdivision (c) of Public Utilities Code section 453 to find that denying service in accordance with the CDO is a reasonable difference in service based on California American Water's obligation to comply with the CDO.

As noted previously, the Commission's authority and the State Water Board's authority are concurrent; neither is paramount over the other.²¹ Accordingly, there may be obligations of a utility under the Commission's jurisdiction that the CDO may only partially affect. To ensure that prospective customers are denied service only to the extent necessary to comply with the CDO, and to avoid the Commission ceding its mandate under Public Utilities Code sections 761 and 453 to another agency, the Commission can and should ensure that it narrowly tailors any order it issues to ensure compliance with the CDO, and nothing more. This requires the Commission to reconcile those aspects of its jurisdiction unaffected by the CDO with those areas where the State Water Board has exercised concurrent jurisdiction.

Here, the State Water Board has broad jurisdiction over water flowing through known and definite channels, such as the Carmel River.²² In crafting the CDO, the State Water Board limited Condition No. 2 to prohibiting Carmel River water from being delivered to new connections in recognition of this jurisdictional limitation. California American Water's application to the Commission for a moratorium, however, needs to address the provision of utility service generally, and specifically that any differences in utility service are reasonable. Thus, in exercising its concurrent jurisdiction, the Commission should narrowly tailor the moratorium to relieve California American Water of its service obligation only to the extent

²⁰ See D.90376, *Application of Evan Edwards to be Included in the Service Area of Cal-Am Water Co. (Monterey Peninsula District) Granted*, 1979 Cal. PUC LEXIS 560.

²¹ See *Orange County Air Pollution Control District*, 4 Cal.3d 945, *supra*.

²² Wat. Code § 1200.

necessary to meet the requirements of the CDO.

2. The Commission Should Determine The Applicability of Moratorium

While the Commission has concurrent jurisdiction to determine the applicability of the moratorium in the context of reasonable differences in utility service, the Commission can and should work with the State Water Board to resolve any issues regarding interpretation or intent of the CDO. Indeed, as stated in a letter dated September 16, 2010 from California American Water's President, Robert MacLean to Paul Clanon, Executive Director of the Commission, the State Water Board has indicated its willingness to respond, through its Executive Director, to any requests by the Commission for clarification of the CDO. In light of the ability of the Commission to seek clarification from the State Water Board regarding the applicability of the moratorium, the Commission can and should determine the applicability of Condition No. 2 of the CDO to ensure that any order it issues granting California American Water relief from its duty to serve is narrowly tailored to fit the prohibition in the CDO.

3. Applicability of Moratorium to Particular Connections or Types of Connections

The elements of the moratorium as set forth in Condition No. 2 of Order the CDO are:²³

A prospective customer seeks a new connection, i.e., California American Water must install a meter at an address has not previously received service; or

A prospective or existing customer seeks to increase the use of water at an existing service address due to a change in zoning or use; and

The prospective or existing customer had not obtained all necessary written approvals required for project construction and connection to the California American Water system prior to October 20, 2009; and

²³ The distinction between "applicability" and "exceptions" is based on the terms of Order WR 2009-0060. If proposed service does not fall within these elements expressed in Ordering Paragraph No. 2, the moratorium does not apply in the first instance. The CDO has carved out exceptions in provisions outside Ordering Paragraph No.2 that allows California American Water to provide service to a connection that otherwise meets these elements. California American Water considers such service an exception to the moratorium, as discussed in Section III.C. of this brief.

California American Water’s water distribution system will deliver Carmel River water to that service address.

All but the second element appear straightforward. The second element – an increase in use of water at an existing service address due to a change in zoning or use – could benefit from clarification of the phrase “change of use.” A “change of use” taken literally could mean any change in the type of activity occurring at an existing service address that will increase the use of water.²⁴ Alternatively, it could be viewed in context adjacent to the word “zoning,” refer back to local government ordinances, and mean that if the prospective business falls within a different category of businesses as defined by a city’s or the County’s land use designations, then the prohibition in Condition No. 2 is implicated.²⁵ California American Water respectfully urges the Commission to seek clarification of this provision from the State Water Board to ensure any differences in service are reasonable and to avoid later disputes.

In light of the foregoing, California American Water must clarify the relief sought in the Application and its reply to Security National Guaranty’s response. California American Water initially sought an “exception” for its Ambler Park, Bishop, Chualar, Hidden Hills, Ralph Lane, Ryan Ranch, and Toro subsystems (“satellite systems”). California American Water also supported Security National Guaranty’s request for the Commission to find that the moratorium does not apply to it. As clarified above, the moratorium does not apply to the satellite systems because these systems do not receive Carmel River water. Similarly, the water distribution system permit approved by MPWMD after California American Water applied for this

²⁴ See *Southern Pacific Pipelines v. State Board of Equalization*, (1993) 14 Cal.App.4th 42 (Meaning and effect of judgments and orders is determined according to the rules governing the interpretation of writings generally); see also, Civ. Code §1644 “(The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.)”

²⁵ Under the rule of interpretation “*nocitur a sociis*” or “a word is known by its associates,” the use of the word zoning adjacent to the word “use” could connote a reference to land use law terminology. See *Martin v. Holiday Inns, Inc.*, (1988) 199 Cal.App.3d 1434, 1437 (interpreting Code of Civil Procedures § 341a to exclude a vehicle and trailer as being outside the class of personal property covered by that statute).

moratorium makes clear that California American Water will not deliver Carmel River water to Security National Guaranty's development. Accordingly, the moratorium applies neither to new connections or increased use of water within the satellite systems, nor to Security National Guaranty's development. Therefore, California American Water is not seeking "exceptions" for these areas but rather recognition that the moratorium does not apply to them in the first place.

Because the Commission has concurrent jurisdiction over California American Water's operations, the Commission should exercise its authority to ensure that it narrowly tailors any moratorium it grants to meet but not exceed the requirements of the CDO. Except for what constitutes a "change of use" at an existing service address, the applicability of the moratorium is a straightforward analysis; however, to the extent that the Commission requires assistance in interpreting the CDO, that assistance is available from the State Water Board upon request.

C. The Commission is Empowered to and Should Authorize California American Water to Except Particular Connections or Types of Connections From the Moratorium.

1. Authority to Create Moratorium Exceptions

For the same reasons the Commission has authority to determine the applicability of the moratorium, as previously discussed in Section III.B., the Commission has the authority to determine the extent to which the moratorium should apply. The Commission can, therefore, issue an order excepting particular connections or types of connections from the moratorium, provided such exceptions are consistent with the requirements of the CDO. This authority, in summary, is to ensure that the resulting moratorium is consistent with the Commission's concurrent jurisdiction, narrowly tailored, and sufficiently clear to minimize future disputes over the terms of California American Water's service schedules.

2. The Commission Should Not Create Its Own Moratorium Exceptions.

As previously discussed, the distinction being made between the scope of the moratorium

and an exception to the moratorium is that an exception allows a connection that otherwise meets the elements of the moratorium, but is necessary because of other requirements in the CDO.

Hence, California American Water – unlike other parties to this proceeding – is not asking the Commission to create new exceptions. Instead, California American Water is requesting that the Commission’s order be consistent with the State Water Board’s order and recognize that the State Water Board exercised its discretion to allow certain new connections or increased uses of water to occur for policy reasons expressly set forth in the CDO. The exceptions that should be included are as follows.

a. Sand City Desalination Plant Exception

In Section 16.3 of the CDO, the State Water Board noted that, once the Sand City Desalination Plant is operational, the City of Sand City would “no longer receive water illegally diverted from the Carmel River.” On this basis, Section 16.3 of the Order allows new connections within the City of Sand City of up to 206 acre feet per year. Thus, any order issued by the Commission granting California American Water a moratorium should also allow such connections.

b. Del Monte Forest Exception for Pebble Beach Company Water Entitlement

Similar to the City of Sand City, the Pebble Beach Company expended significant sums of money to develop a water treatment facility that treats the wastewater from the Pebble Beach Company’s developments and uses the resulting effluent to irrigate golf courses instead of using potable water. Pebble Beach Company has guaranteed the public financing of that treatment facility, both as originally constructed and when certain improvements were made in 2005 and 2006, and that guarantee is supported by Pebble Beach Company selling development rights to property in the Del Monte Forest served by California American Water. Based on the reduced

potable water demand that has resulted from the operation of the treatment plant, the State Water Board stated in Section 19.1 of the CDO “the State Water Board should not prohibit any increased diversions from the river by Cal-Am for deliveries made under [Pebble Beach Company’s] entitlement from MPWMD. Because the State Water Board has excepted new connections and increased water use in the Del Monte Forest based on the Pebble Beach Company entitlement, the Commission should recognize this exception in any order it issues granting California American Water a moratorium.

Because the Commission has concurrent jurisdiction with the State Water Board over California American Water’s Carmel River operations, the Commission should include within any order it issues authorizing a moratorium those exceptions that are expressly intended by the CDO based on specific language set forth in the CDO. Those exceptions are for new connections or increased water use at existing service addresses due to a change in zoning or use within the City of Sand City and for development within the Del Monte Forest using Pebble Beach Company’s entitlement.

D. The Commission Should Not Impose a Service Connection Moratorium on Subsystems Within its Monterey County District that are Physically Unconnected to its Main System and That Receive No Water from the Carmel River.

While the Commission has broad authority to consider various issues in pending proceedings,²⁶ the Commission should not broaden the scope of this proceeding beyond the issues raised in California American Water’s application.

California American Water filed this application to obtain the necessary authority to comply with the CDO issued by the State Water Board. California American Water has requested, and the assigned Commissioner and ALJ have recognized a need to proceed

²⁶ See, e.g., D.03-03-037, 2003 Cal. PUC LEXIS 170, **23-24, Ordering ¶5 (ordering utility to file a new service area map).

expeditiously here to ensure California American Water can comply with the State Water Board's order. Except for the Division of Ratepayer Advocates' ("DRA") protest, all other filings and notifications in this case have focused solely on the issues arising out of the terms of the CDO.

First, if the Commission were to accept DRA's request to broaden the issues in this proceeding, the number of interested persons will likely exceed those interested in the instant application. This is the case because the State Water Board's order does not implicate service unrelated to the Carmel River, and accordingly customers unconnected to the main Monterey System may not have taken interest in the application. Additional customers, however, might be interested in an expanded proceeding like that proposed by DRA. Thus, there may be due process issues relating to notice and the opportunity for those affected customers to be heard that could require additional noticing and hearings. These additional notices and hearings, in turn, may result in an expansion of the issues. All of this would delay the Commission issuing a decision on this application and delay California American Water's ability to comply with the State Water Board's order in a manner that is consistent with its utility obligations.

Second, at the same time, the adequacy of a utility's service is an issue in the utility's general rate case proceeding.²⁷ California American Water recently concluded a general rate case for its Monterey district, and has a general rate case pending at this time, both of which are or were appropriate venues for this issue. DRA should raise this issue in that forum in the first instance.

Alternatively, Commission precedent recognizes that some water allocation issues are

²⁷ *Citizens Utilities Company of California v. Superior Court*, (1976) 56 Cal.App.3d 399, 410 (adequacy of service is an issue in general rate cases); *see also* D.99-04-061, 1999 Cal. PUC LEXIS 199, *16 (Commission's jurisdiction over water supply planning exclusive to general rate cases and service territory expansion requests.)

local issues best addressed by local government.²⁸ The Commission has recognized that MPWMD has a direct role in allocating water in California American Water's Monterey district,²⁹ and DRA's issue may be just as appropriate, or possibly more appropriate, for that agency as opposed to the Commission.

Because the "equity issue" raised by DRA will likely expand the number of interested parties and issues, which, in turn, will likely delay a decision in this proceeding, and because there are more appropriate forums for DRA to litigate its "equity issue," the Commission should decline DRA's invitation to address water allocation issues that are not directly related to the CDO in this proceeding.

IV. CONCLUSION

California American Water filed this application seeking a moratorium on new or increased service connections in its Monterey District solely for the purpose of complying with the CDO issued by the State Water Board Order prohibiting California American Water from serving Carmel River water to new service connections or increased water use based on a change in zoning or use. Consistent with the Commission's and the State Water Board's concurrent jurisdiction in this area, the Commission should approve this request for a moratorium and relieve California American Water of its obligation to serve new customers or the increased water use associated with a change in zoning or use at an existing service address, to the extent necessary to comply with the CDO. In doing so, the Commission should appropriately tailor the moratorium to exclude areas not served by Carmel River water, or specifically exempted by the

²⁸ D.99-04-061, 1999 Cal. PUC LEXIS 199, **12-16 (Discussing roles of various agencies in water supply planning.)

²⁹ See D.09-02-006 *Application of California-American Water Company (U210W) for an Order Authorizing a Special Conservation Program and Modifications to its Rate Design in its Monterey District, and Authorization to Increase its Rates for Water Service in its Monterey District*, 2009 Cal. PUC LEXIS 46, *33 ("[W]e recognize that MPWMD is charged by legislative statute with the responsibility to manage and conserve the water resources within the Monterey Peninsula Water Resource System.")

language of the State Water Board's Order. The Commission should not expand the proceeding to embrace service issues that are beyond the scope of the State Water Board's Order, such as the "equity" issue that DRA raised. An expansion of this proceeding will both duplicate issues that fall within other proceedings pending before the Commission, and unnecessarily delay California American Water's ability to comply with the CDO.

CALIFORNIA-AMERICAN WATER
COMPANY

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Timothy J. Miller
Timothy J. Miller

By: /s/ Lori Anne Dolqueist
Lori Anne Dolqueist

Date: October 8, 2010

PROOF OF SERVICE

I, Cinthia A. Velez, declare as follows:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, One Embarcadero Center, 30th Floor, San Francisco, California 94111-3719. On October 8, 2010, I served the within:

Opening Brief of California-American Water Company

on the interested parties in this action addressed as follows:

See attached service list

- (BY CPUC E-MAIL SERVICE)** By transmitting such document electronically from Manatt, Phelps & Phillips, LLP, San Francisco, California, to the electronic mail addresses listed above. I am readily familiar with the practice of Manatt, Phelps & Phillips, LLP for transmitting documents by electronic mail, said practice being that in the ordinary course of business, such electronic mail is transmitted immediately after such document has been tendered for filing. Said practice also complies with Rule 2.3(b) of the Public Utilities Commission of the State of California and all protocols described therein.

- (BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, San Francisco, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 8, 2010, at San Francisco, California.

/s/ Cinthia A. Velez

Cinthia A. Velez

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