

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



FILED

10-08-10
04:59 PM

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 No. 10-05-020
(Filed May 24, 2010)

**OPENING BRIEF OF THE CITIES OF CARMEL-BY-THE-SEA, DEL REY OAKS,
MONTEREY, PACIFIC GROVE, SAND CITY, AND SEASIDE**

RUSSELL M. MCGLOTHLIN (SBN 208826)
RYAN C. DRAKE (SBN 262580)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101
Telephone: (805) 963-7000
Facsimile: (805) 965-4333
Email: rmcglathlin@bhfs.com; rdrake@bhfs.com

Attorneys for Cities of Carmel-By-The-Sea, Del
Rey Oaks, Monterey, Pacific Grove, Sand City, and
Seaside

Dated: October 8, 2010

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

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 No. 10-05-020
(Filed May 24, 2010)

**OPENING BRIEF OF THE CITIES CARMEL-BY-THE-SEA, DEL REY OAKS,
MONTEREY, PACIFIC GROVE, SAND CITY, AND SEASIDE**

I. INTRODUCTION

The Monterey Peninsula Cities of Carmel-by-the-Sea, Del Rey Oaks, Monterey, Pacific Grove, Sand City, and Seaside (“Cities”) oppose this application (“Application”) by California-American Water Company’s (“Cal-Am”) for authorization from the California Public Utilities Commission (“Commission”) to impose a moratorium on new or expanded water connections in Cal-Am’s Monterey District. Cal-Am’s Application was filed in response to the cease and desist order (“CDO”) issued by the State Water Resources Control Board (“SWRCB”) against Cal-Am on October 20, 2009. (SWRCB WR Order 2009-0060.)

Paragraph No. 2 of the CDO’s order, at page 57, provides that 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....” Because of the operational requirements of Cal-Am’s main water distribution system, water served by Cal-Am to new or expanded service connections will, at least partially, include water withdrawn from the Carmel River. Thus, Paragraph No 2 effectively orders Cal-Am to impose a water service moratorium. Despite this order, the Cities urge the Commission to deny the Application because: (1) the SWRCB has no jurisdiction to

require a regulated water utility to impose a water service moratorium, that power is exclusively vested with the Commission; (2) the Commission has an independent duty to determine, pursuant to its own discretion, whether a water service moratorium is just and reasonable under the circumstances; and (3) the proposed moratorium would not be just and reasonable because it is neither necessary for Cal-Am to comply with the CDO's water diversion limitations, nor appropriate when considering a balance of public interest considerations.

II. THE SWRCB LACKS JURISDICTION TO REQUIRE CAL-AM TO IMPOSE A WATER SERVICE MORATORIUM

A public water utility is obligated to provide adequate service within its service territory without discrimination. (Cal. Pub. Util. Code § 761; *In re Edwards to be Included in Service Area of Cal-Am Water Co.* (1979) 1 Cal.P.U.C.2d 587, slip copy, at *3; see also *Inv. into Energy and Fuel Requirements of Electric Utilities* (1973) 75 Cal.P.U.C. 713.) Consistent with this obligation, a water utility may only impose a moratorium on new or expanded water service if so ordered by the Commission following a hearing. (Cal. Pub. Util. Code § 2708; see Decision 88-01-025, *In Re Southern California Water Co.* (1988) 27 Cal.P.U.C. 2d 285, slip copy, at *6-7.) Section 357 of the California Water Code similarly states that any water utility regulated by the Commission must secure Commission approval before restricting water service or imposing a moratorium on service connections pursuant to Water Code sections 350 *et seq.* These statutes reveal the legislature's intention to vest in the Commission the exclusive authority to determine when a water service moratorium by a public utility is appropriate. The Commission has also held that it has the exclusive jurisdiction to determine whether a water service moratorium is necessary. (Decision 91-04-022, *In Re Southern California Water Co.* (1991) 39 Cal.P.U.C. 2d 507, 514 [authorizing a water utility to institute a moratorium on new service connections, but

imposing a penalty on the utility for an unapproved moratorium previously implemented without Commission approval].)

Although the SWRCB has authority to issue a CDO to address unlawful diversions from the Carmel River, it has no authority to require Cal-Am to impose a moratorium on new or expanded service connections without concurrence by the Commission. (*See City of Anaheim v. Pacific Bell Telephone Co.* (2004) 119 Cal.App.4th 838, 842-43 [explaining that the exclusivity of jurisdiction of the Commission in matters it controls provides uniformity throughout the state and eliminates conflicting regulations].) Because the Commission possesses exclusive jurisdiction to authorize a moratorium by Cal-Am, the SWRCB's inclusion of Paragraph 2 in the CDO without conditioning the provision on prior Commission approval was an *ultra vires* act.

On page nine of its Amended Application, Cal-Am argues that the Commission must grant the Application because General Order 103A, *Rules Governing Water Service, Including Minimum Standards for Operation, Maintenance, Design and Construction*, requires public utilities to comply with permit requirements and regulations of the SWRCB. Although Section II.1.C of General Order 103A states that each water utility must ensure that it complies with SWRCB and County Health Department permit requirements and all applicable regulations, nothing in General Order 103A or the Water Code abrogates the Commission's authority to independently determine whether a moratorium by a public utility is appropriate.

A. If the Commission rejects the Application, enforcement of Paragraph 2 of the CDO would also be *ultra vires*

Where the jurisdiction of two agencies overlaps, jurisdiction is concurrent. (*San Diego Gas & Electric Company v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 793.) In such cases, one agency may not displace another agency's jurisdiction. (*Orange County Air Pollution*

Control District v. Public Utilities Commission (1971) 4 Cal.3d 945, 950-51; *see also In re Provisions of Public Utilities Code 761.3* (Cal.P.U.C. May 06, 2004) 2004 WL 1092248, 117.)

Consistent with these principles, the SWRCB's cannot override the Commission's authority. However, this is precisely the effect of the CDO. By prohibiting Cal-Am from using Carmel River water for new or expanded service connections, the CDO requires Cal-Am to impose a moratorium without preserving any opportunity for the Commission to exercise its independent authority to determine whether a moratorium is appropriate. The SWRCB therefore exceeded its jurisdiction with respect to Paragraph 2 of the CDO.

The Supreme Court's holding in *Orange County, supra*, 4 Cal.3d 945 is instructive. In that case, an electric utility applied to the Commission for a certificate of public convenience and necessity to construct and operate a power generation facility, and also applied to the county air pollution control district ("APCD") for a permit to authorize the air emissions that would be a necessary consequence of the proposed facility. (*Id.*, at 949-950.) The APCD denied the emissions permit on the grounds that the facility would not comply with air pollution standards. However, the Commission nonetheless granted the company's application and directed it to begin construction immediately. (*Id.*, at 950.) The Court examined the applicable statutes governing the Commission and the APCD and determined that the Health & Safety Code prohibited the Commission from interfering with the APCD's jurisdiction to regulate air quality. The court held that where the APCD ruled that a proposed or existing facility did not comply with applicable regulations, the Commission could not order the utility to take action that would violate the APCD's ruling. (*Id.*, at 954.) Thus, the Commission's order was in excess of its jurisdiction and was *ultra vires*. (*Id.*; *see also, Pacific Lumber Company v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 934 [Department of Forestry and Fire Protection's approval of a timber harvest plan did not preclude the SWRCB from issuing an

order under its jurisdiction to require the company to monitor water quality where the plain language of the Forest Practice Act's savings clause provided that the Act would not limit other agencies' enforcement jurisdiction].)

The analysis in *Orange County* is applicable to this proceeding. Just as the Commission's order in *Orange County* was *ultra vires* because it served to override the APCD's jurisdiction over air emission permitting, Paragraph No. 2 of the SWRCB's CDO is *ultra vires* because it requires Cal-Am to impose a moratorium without regard for the Commission's jurisdiction to determine whether or not a moratorium is appropriate. Looking to the statutory scheme—as the Supreme Court did in *Orange County*—sections 2708 and 731 of the Public Utilities Code and section 357 of the Water Code, discussed above, reveal that the legislature intended for the Commission to act as the sole agency to determine the appropriateness of a proposed service connection moratorium by a water utility. The SWRCB's exclusive jurisdiction to enforce unauthorized surface water diversions is revealed by sections 1052 and 1831 of the Water Code. Thus, the statutes illustrate the appropriate roles of the Commission and SWRCB in relation to Cal-Am's diversions from the Carmel River. While the SWRCB has plenary discretion to enforce and limit surface water diversions that it deems illegal, as it did at Paragraph No. 3, pages 57-60 of the CDO, it exceeded its jurisdiction by ordering Cal-Am to impose a service connection moratorium without regard for prior Commission approval. It therefore cannot legally enforce Paragraph 2 against Cal-Am unless the Commission approves Cal-Am's application for a moratorium.

III. IMPOSITION OF A MORATORIUM IS NOT JUST AND REASONABLE

The Commission may only approve Cal-Am's request for a moratorium if doing so is just and reasonable under the pertinent circumstances. (Decision 91-04-022, *In Re Southern California Water Co.* (1991) 39 Cal.P.U.C. 2d 507, slip copy, at *7-9.) As discussed above, the

CDO's requirement that Cal-Am impose a water service moratorium without regard for prior approval by the Commission is *ultra vires*, and therefore does not bind the Commission's discretion to determine whether the proposed moratorium is just and reasonable. The Commission must make that determination pursuant to its independent discretion. The Cities urge the Commission to rule that the proposed moratorium is not just and reasonable for the reasons discussed next.

A. **A moratorium is not necessary for Cal-Am to comply with the CDO's limitations upon Carmel River diversions and a failure to impose a moratorium will not materially harm existing Cal-Am customers**

Cal-Am's recent annual water service to the main Monterey District totals have averaged roughly 14,000 acre-feet, with roughly 75 percent from Carmel River diversions and 25 percent from groundwater extracted from the Seaside Groundwater Basin.¹ The CDO requires Cal-Am to limit its Carmel River diversions to 10,978 afy until October 2011. Thereafter, an additional reduction of 121 afy must occur each year. Cal-Am's extractions of groundwater from the Seaside Basin are also limited and subject to a gradual ramp-down pursuant to the judgment entered in the Seaside Basin adjudication. (*California-American Water Company v. City of Seaside et al.* (2007), Monterey Superior Court Case No. M66343.)

Cal-Am was able to satisfy all demands for the 2009-2010 water year despite the water supply restrictions now in effect, and the same is anticipated for the 2010-2011 water year. Thus, there is presently no water supply deficit, and no need for water rationing. However, Cal-Am may need to ration water within its Monterey District in the future. Whether rationing will be necessary will depend on various factors including the pace of development of the Coastal Water Project, which is the subject of separate Commission proceedings (A.04-09-019), the

¹ As demonstrated by MPWMD's *California American Water Production by Source for Customers in its Main System Water Years 1996-Present*, submitted to the SWRCB during the hearing on the CDO and attached as Exhibit E to the concurrently-filed Request for Administrative Notice. The average yearly production from 1996 to 2008 is approximately 14,000 afy.

outcome of a pending petition for writ of mandate challenging the legality of the CDO, and the scope of conservation and other water supply augmentation efforts.

Failure to adopt the proposed moratorium will not significantly harm Cal-Am's existing customers even if Cal-Am must ration water to its Monterey District customers in the future. New and expanded service by Cal-Am is restricted by the Monterey Peninsula Water Management District's water allocation program set forth in the District's Regulation XV. The Commission previously authorized Cal-Am to comply with the District's water allocation program. (Decision No. 00-03-053.) Under the District's water allocation program, the total new or expanded water service that could occur within Cal-Am's Monterey District is approximately 91 acre-feet.²

Compared to Cal-Am's recent system-wide service of roughly 14,000 acre-feet annually, the 91 acre-feet of remaining allocation equates to a maximum additional demand of roughly 0.7 percent. Thus, should water rationing be necessary in the future, and even if all possible allocation were put to use (an unlikely prospect given the slow pace of historical use), the additional reduction required of Cal-Am's existing customers because of the use of the remaining allocation would be less than one percent. In sum, the use of the remaining allocation would not meaningfully affect Cal-Am's ability to meet its future water supply limitations nor significantly impact existing customers. Also, because Cal-Am's diversions from the Carmel River are restricted by the CDO, the moratorium is irrelevant to habitat and in-stream flow considerations.

² See MPWMD's August 2010 Monthly Allocation Report, attached as Exhibit F to the concurrently-filed Request for Administrative Notice.

B. Imposition of a moratorium would materially harm the community

Imposition of the proposed moratorium would cause significant harm to community interests, including municipal revenue and essential development projects. Evidence presented by the Cities to the SWRCB during the hearing on the CDO demonstrates these adverse impacts. For example, the City of Seaside's city manager testified that the planned infill development that would be suspended as a result of a moratorium would include 150 affordable senior housing units, a community health clinic, and expansions to the City Library and City Hall.³ The city manager's testimony further explained that a moratorium would likely foreclose the city's ability to achieve its redevelopment goals set forth in the Seaside General Plan, and its state-imposed housing element. The City of Seaside also submitted a report and a declaration from an expert economic consultant that explained that an inability to proceed with future planned infill development reliant on the city's remaining allocation would cause a loss of up to \$2.7 million in future General Fund Revenue (9% of Seaside's anticipated 2012 revenue), and would foreclose the creation of approximately 900 new permanent jobs and 1,620 one-time jobs associated with the construction of the planned development.⁴

The City of Monterey submitted testimony from its mayor explaining that a moratorium would reduce Monterey's transient occupancy tax, property tax, and sales tax revenues, which account for 56% of its total revenue.⁵ The mayor testified that as a result of a moratorium, several redevelopment projects could not move forward, including development of 25 affordable housing units, public restrooms, various public infrastructure projects, and a downtown redevelopment site. The redevelopment site is a half block of the City's central

³ See Declaration of Ray Corpuz, July 9, 2008, p. 3-5, attached as Exhibit A to the concurrently-filed Request for Administrative Notice.

⁴ See Declaration of David Zehnder in Support of Proposed Modifications to the Draft Cease and Desist Order, July 9, 2008, p.3, attached as Exhibit B to the concurrently-filed Request for Administrative Notice.

⁵ See Declaration of Chuck Della Sala in Support of Proposed Modifications to the Draft Cease and Desist Order, July 8, 2008, pp. 2-3, attached as Exhibit C to the concurrently-filed Request for Administrative Notice.

downtown area that was destroyed by fire.

The City of Carmel submitted similar testimony from its mayor explaining that a moratorium would prevent needed development and construction of public service infrastructure essential to its visitor revenue, which accounts for up to 63% of the City of Carmel's total revenue.⁶ The mayor also declared that a moratorium would prevent construction of future projects including at least 14 affordable senior housing units, and approximately 10 to 12 additional (non senior) affordable housing units.

The pertinent circumstances demonstrate the moratorium is unnecessary because the MPWMD's water allocation program already prohibits all but 91 acre-feet of additional demand. However, the Cities have planned essential community development on the expectation that they could access this small amount of remaining allocation. Elimination of this allocation would be particularly unfair, and would effectively penalize, those communities that have been diligent in their efforts to conserve and carefully allocate their fixed water allocations. The proposed moratorium would hinder efforts by the Cities to recover from the current economic cycle, and particularly burden the City of Seaside and nearby communities that have struggled for several decades to adapt to the economic consequences of Fort Ord's closure. For these reasons, imposition of the proposed moratorium would not be just and reasonable. The Cities urge Commission to exercise its independent discretion to deny the Application as counter to the public interest.

⁶ See Declaration of Sue McCloud, July 7, 2008, p. 3, attached as Exhibit D to the concurrently-filed Request for Administrative Notice.

Dated: October 8, 2010

Respectfully submitted,



Russell M. McGlothlin

Ryan C. Drake

BROWNSTEIN HYATT FARBER SCHRECK, LLP
Attorneys for Cities of Carmel-By-The-Sea, Del Rey Oaks,
Monterey, Pacific Grove, Sand City, and Seaside

PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On October 8, 2010, I served the foregoing document described as:

**OPENING BRIEF OF THE CITIES OF CARMEL-BY-THE-SEA, DEL REY OAKS,
MONTEREY, PACIFIC GROVE, SAND CITY, AND SEASIDE**

on the interested parties in this action.

- by emailing the document(s) listed above to the email addresses set forth below on this date before 5:00 p.m.
- BY MAIL: I am “readily familiar” with this firm’s practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at 21 E. Carrillo Street, Santa Barbara, California 93101, with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at Brownstein Hyatt Farber Schreck LLP, 21 E. Carrillo Street, Santa Barbara, California 93101.
- (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on October 8, 2010.

MARIA KLACHKO-BLAIR
TYPE OR PRINT NAME



SIGNATURE

**A. 10-05-020
SERVICE LIST**

Service by Email:

Name	Email Address
Jason Rettere	jason@lomgil.com
David C. Laredo	dave@laredolaw.net
Allison Brown	aly@cpuc.ca.gov
Lori Anne Dolquest	ldolqueist@manatt.com
Sheri L. Damon	sldamon@covad.net
Robert G. MacLean	robert.maclean@amwater.com
Timothy J. Miller	tim.miller@amwater.com
Frances M. Farina	ffarina@cox.net
Anthony L. Lombardo	tony@lomgil.com
Glen Stransky	glen.stransky@loslaureleshoa.com
John S. Bridges	JBridges@FentonKeller.com
David P. Stephenson	dave.stephenson@amwater.com
Gary Weatherford	gw2@cpuc.ca.gov
James A. Boothe	jb5@cpuc.ca.gov
Max Gomberg	mzx@cpuc.ca.gov