



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

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4 In the Matter of the Application of
5 California-American Water
6 Company (U 210 W) for an Order
7 Authorizing and Imposing a
8 Moratorium on Certain New or
9 Expanded Water Service
10 Connections in its Monterey District.

Application No. A.10-05-020
(filed May 24, 2010)

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REPLY BRIEF OF SHAN SAYLES

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Date: October 22, 2010

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8 **REPLY BRIEF OF SHAN SAYLES**

9 **I. INTRODUCTION**

10 Shan Sayles has made a substantial investment to implement water conservation
11 measures on his residential property in Carmel in order to make a portion of the water conserved
12 available for limited new development on his property. In so doing, Mr. Sayles reasonably relied
13 on the stringent rules and regulations of the Monterey Peninsula Water Management District
14 (“MPWMD”) allowing use of water credits on the same site. Those rules were designed to
15 encourage water conservation measures while ensuring that no increase in water use results on
16 the site.

17 By his participation in this proceeding, Mr. Sayles asks the Commission to protect his
18 right to water service pursuant to his water credits on the same terms and conditions as other
19 property owners in the service area of California American Water Company (“Cal-Am”) who
20 have been and continue to be served pursuant to water credits. Unless carefully tailored, any
21 moratorium imposed to comply with the requirements of Order WRO-2009-0060 (“CDO”)
22 issued by the State Water Resources Control Board (“SWRCB”) has the potential to undermine
23 and discourage water conservation efforts, to prevent uses pursuant to water credits that do not
24 involve any increase in water use, and to result in unfair treatment of and significant economic
25 harm to Mr. Sayles and other similarly situated Cal-Am customers.

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1 II. ISSUES

2 A. **The Commission does not exercise concurrent jurisdiction with the SWRCB,**
3 **nor is the Commission being asked to “overrule” the CDO.**

4 Cal-Am cites *Orange County APUCD v. Public Utilities Commission* Orange County Air
5 (1971) 4 Cal.3d 945 (“*Orange County APUCD*”) for its argument that “the Commission cannot
6 overrule the SWRCB’s concurrent jurisdiction over the appropriation of water.” However,
7 *Orange County APUCD* is neither on point nor persuasive. There the Commission exercised its
8 jurisdiction to “overrule” the agency with concurrent jurisdiction. (*Id.* at 954.) Here, no
9 concurrent jurisdiction exists. The SWRCB regulates appropriation of unappropriated waters of
10 the state (Water Code §§ 1052, 1831, subd. (d)(1), §§ 1200, 1201, 1225-1259.4), while the
11 Commission regulates the basis on which service to customers is provided. (Pub. Util. Code §§
12 451, 701.) Thus jurisdiction of the Commission and SWRCB do not overlap.

13 Moreover, the Commission is not being asked here to overrule the SWRCB’s CDO.
14 Rather, the Commission is being asked to exercise its powers to harmonize its action with the
15 CDO. The California constitution confers broad authority on the Commission and its authority is
16 liberally construed. (*San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th
17 893, 914-915.) The Commission’s authority to regulate the terms under which Cal-Am provides
18 service to its customers is undisputed. In so doing, it is well within the Commission’s broad
19 constitutional and statutory authority to ensure that the basis on which any moratorium is applied
20 is fair and reasonable to all Cal-Am customers in light of the SWRCB’s mandate. This authority
21 and jurisdiction extends to resolving any ambiguities in the CDO in a manner consistent with the
22 Commission’s exclusive jurisdiction over service to Cal-Am’s customers.

23 B. **The Commission should not undermine the public’s interest and due process**
24 **considerations by seeking “requests for clarification” from the SWRCB.**

25 Cal-Am asks the Commission to “seek clarification” from the SWRCB regarding the
26 interpretation of the CDO for purposes of exercising its authority with respect to this application.
27 As discussed in more detail in Mr. Sayles’ Opening Brief, the important issues the Commission
28 is being asked to address in this proceeding cannot and must not be resolved by resorting to

1 informal consultations between Commission and SWRCB staff members. Given the importance
2 of these issues, a full public airing through formal evidentiary hearings is necessary to give the
3 SWRCB the necessary factual and legal background to address these issues in more detail.¹

4 The issues of the impact and effect of the CDO or any proposed moratorium on
5 residential water credits and other similar or related entitlements under the rules of the MPWMD
6 was not fully aired in the context of the SWRCB evidentiary hearings on the CDO. The SWRCB
7 acknowledged this in its Order Denying Reconsideration of the CDO, SWRCB Order WR 2010-
8 0001 (“ODR”).² (See ODR, p. 3, fn. 3.) Instead, the SWRCB appropriately adopted the most
9 general language in Condition 2 and left it to other agencies with actual jurisdiction over water
10 service, such as the Commission and MPWMD, to fill in the details. Thus consistent with its
11 “broad authority,” the Commission can and should reasonably determine the scope of the
12 moratorium and the particular types of connections which it would prohibit.

13 **C. The SWRCB did not rule that the CDO prohibited use of water credits but**
14 **only that the language of Condition 2 should be applied to determine**
15 **whether such uses would be prohibited.**

16 Cal-Am argues in its brief that the SWRCB found in the ODR “that possession of water
17 credits from MPWMD does not justify exemption from the prohibitions in the CDO.” (Cal-
18 Am’s Opening Brief, p. 6.) However, a close reading of the ODR reveals that the SWRCB did
19 not conclude that the CDO prevents the utilization of water credits or uses relying on water
20 credits would be prohibited in the absence of an exemption. To the contrary, the SWRCB
21 expressly stated that, in order to determine whether the CDO would prohibit water use pursuant
22 to a water credit or other entitlement, the Board would “apply the provisions of [the CDO]
23 concerning new water service connections and increased use of water at existing service
24 addresses to MPWMD water credit holders.” In other words, the express language of CDO
25 Condition 2 must be applied to determine whether the CDO would prohibit water use pursuant to

26 ¹ The SWRCB recognizes that “the factual basis for any order in this proceeding must be based
27 exclusively on evidence presented or officially noticed as part of the proceeding.” (Order
28 Denying Reconsideration of CDO at page 9, citing Gov. Code § 11425.50, subd. (c).) The
record before the SWRCB lacks any factual basis by which the SWRCB or its staff could
“clarify” the CDO’s impact on water credits and other water entitlements.

² A copy of the ODR is attached to Mr. Sayles’ brief as Exhibit “B.”

1 a water credit. Because MPWMD seldom if ever issues a water credit unless it is documented
2 that there will be no increase in water use, the CDO does not prohibit all new uses based on
3 water credits, nor should any moratorium approved by the Commission prohibit all such uses.

4 **D. Any moratorium approved by the Commission should not prohibit any new**
5 **connections or increases in water use unless such new connection or increases**
6 **in water use results from a change in zoning or major change in land use.**

7 The SWRCB could have drafted the CDO in a way that would have prohibited all new
8 connections and all increases in water use. The SWRCB did not do so. CDO Condition 2 only
9 prohibits Cal-Am from using Carmel River water for new connections and increases in water use
10 when the new connection or increases in water use “result[s] from a change in zoning or use.”³
11 In limiting its prohibition to only those new connections or increases in water use “resulting from
12 a change in zoning or use,” the SWRCB recognized the inequity and economic harm to
13 individuals and the community that would have resulted from a blanket prohibition on all new
14 connections and all increases in water use. It is appropriate for the Commission to incorporate
15 similar considerations in any moratorium it may approve and any such moratorium approved by
16 the Commission should be similarly narrow.⁴ Therefore any moratorium approved by the
17 Commission should not prohibit any new connections or increases in water use unless such new
18 connection or increases in water use results from a change in zoning or change in land use.

19 **E. “Change in Use” as used in the CDO should be narrowly interpreted to mean**
20 **a substantial change from one land use category to another or in the basic**
21 **nature of the use and not a less significant change in use within a general**
22 **land use category.**

23 In applying and interpreting Condition 2 of the CDO, there is not much dispute as to what
24 would constitute a “change in zoning.” This would clearly be limited to a project that depends

25 ³ Such use would not be prohibited under the CDO if the exception in Condition 2 applies.

26 ⁴ Note that new connections based solely on water credits would not involve any increase in use
27 regardless of whether the connection results from a change in zoning or use. For example,
28 Mr. Sayles will likely have to split his meter to serve new development on his property pursuant
to his water credits. However, his reliance on existing water credits based on proven
conservation measures under MPWMD rules ensures there is no increase in water use. The CDO
cannot and should not be interpreted to prohibit a split or second meter on a single family site to
allow water use by new development based on water credits where there is no increase in historic
use on the site, as confirmed by water credits issued by MPWMD.

1 on an action by the city or county with land use jurisdiction which changes the land use
2 designation under the applicable zoning ordinance (e.g., from residential to commercial).

3 The meaning of the phrase “change in use” is not as clear. In its broadest interpretation,
4 it could encompass any change in the way a property is used. For example, the change in use of
5 a single family home from a vacation home or part-time residence to a permanent residence
6 would constitute a prohibited change in use under such a broad interpretation. Similarly, the sale
7 of a home occupied by a couple to a large family, or the change in use of a commercial property
8 from an unpopular restaurant to a popular restaurant would constitute changes in use that would
9 be prohibited under such a broad interpretation. Such a broad interpretation would have obvious
10 issues related to practicality, fairness, and enforceability.

11 A narrower and more reasonable interpretation of the phrase “change in use” would be
12 one that limits its application to cases where there is a significant change in the nature of the use
13 of the site that does not involve a change in zoning. Under this narrower interpretation, “change
14 in use” would include, for example, a change from a pure residential use to a mixed
15 residential/commercial use or from an office use to a high water-consuming use such as a
16 carwash or laundry where the existing zoning allows both. Given its proximity in the CDO to
17 the phrase “change in zoning,” it is reasonable to interpret “change in use” to mean a more
18 substantial change in the use of the site. Under this interpretation, minor changes in residential
19 or commercial land uses, such as the addition of a caretaker’s house, conversion of a duplex to
20 two detached single family homes, or conversion of a bar to a restaurant, would not be deemed a
21 “change in use.” This narrower interpretation would not unnecessarily constrain and interfere
22 with commerce in these challenging economic times, as would the broader interpretation
23 discussed above. Furthermore, this narrow interpretation has the added advantage of fairness
24 and enforceability.

25 For the reasons discussed elsewhere in this brief, the Commission should independently
26 interpret the phrase “change in use” for purposes of any moratorium it may authorize, rather than
27 to seek clarification from the SWRCB or its staff. The Commission should exercise its broad
28 constitutional and statutory authority to narrowly interpret the phrase “change in use” to exclude

1 changes in the same general categories of land use. Given Mr. Sayles' plans to use his water
2 credits for additional residential development on his existing developed residential site, use of his
3 water credits would not relate to a "change in use" even if that use were to involve an additional
4 connection. Therefore neither the CDO nor a moratorium should apply to prevent water use on
5 Mr. Sayles' site pursuant to his water credits.

6 **F. Any moratorium should not apply retroactively.**

7
8 As Cal-Am stated in its Amended Application in this proceeding, Cal-Am continues to
9 receive requests for service pursuant to water connection permits issued by MPWMD. Many
10 ordinary Cal-Am customers such as Mr. Sayles, who were not present at and did not participate
11 in the SWRCB proceedings leading to the CDO, have continued to spend time and money under
12 currently applicable MPWMD ordinances with the understanding and expectation that they will
13 be served pursuant to water permits, water credits, and other entitlements approved by local land
14 use jurisdictions and/or MPWMD. To apply a moratorium retroactively to prohibit water use
15 pursuant to such permits, credits and entitlements would be grossly unfair to these customers.
16 Retroactive application would force many property owners like Mr. Sayles to abandon their
17 substantial investment-backed expectations and plans mid-stream and to walk away from any
18 expectation of obtaining service pursuant to the water permits, water credits, and other
19 entitlements they are authorized by law to receive under MPWMD's rules and regulations. To
20 avoid this inequity, any Commission action to approve a moratorium should expressly include a
21 condition that the moratorium shall not be applied retroactively to prohibit water uses pursuant to
22 water permits, water credits, and other entitlements issued by MPWMD before the effective date
23 of the Commission's action.

24 **III. CONCLUSION**

25 The Commission should not approve a moratorium that is broader than that necessary to
26 comply with the CDO or one that applies retroactively. To do so would harm the very residential
27 water consumers whose interests the Commission is entrusted to protect and would be
28 detrimental to the economy of the community in which those customers live. Instead, the

1 Commission should approve a moratorium that harmonizes with the CDO but protects the
2 interests and justifiable expectations of water consumers like Mr. Sayles who have relied on and
3 followed MPWMD's rules and regulations. Whether characterized as an exception or
4 clarification that the moratorium does not apply to his situation, Mr. Sayles respectfully requests
5 the Commission narrowly tailor any moratorium so as not to prevent water use by Mr. Sayles
6 pursuant to his water credits as set forth herein and in Mr. Sayles' Opening Brief.
7

8 Dated: October 22, 2010

Respectfully submitted,

9
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1 **PROOF OF SERVICE**

2 I, Tina O'Brien, declare:

3 I am a resident of the State of California and over the age of eighteen years, and not a
4 party to the within action; my business address is 2801 Monterey-Salinas Highway, Post Office
5 Box 791, Monterey, CA 93942. On October 22, 2010, I served the within document(s):

6 **REPLY BRIEF OF SHAN SAYLES**

7 by transmitting via electronic mail the document(s) listed above to the email
8 addresses listed on the attached official Service List on this date from 2801
9 Monterey-Salinas Highway, Monterey, California.

10 by placing the document(s) listed above in a sealed envelope with postage
11 thereon fully prepaid, in the United States mail at Monterey, California addressed
12 to:

13 Gary Weatherford
14 CA Public Utilities Commission
15 Division of Administrative Law Judges
16 Room 5020
17 505 Van Ness Avenue
18 San Francisco, CA 94102-3214

19 John Bohn
20 CA Public Utilities Commission
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22 San Francisco, CA 94102-3214

23 I am readily familiar with the firm's practice of collection and processing correspondence
24 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
25 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
26 motion of the party served, service is presumed invalid if postal cancellation date or postage
27 meter date is more than one day after date of deposit for mailing in affidavit.

28 I declare that I am employed in the office of a member of the bar of this court at whose
direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on October 22, 2010, at Monterey, California.



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