



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

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

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Dated: October 22, 2010

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**I. INTRODUCTION**

At its core, this matter involves a single factual question—whether the proposed moratorium is just and reasonable—and a single legal question—whether the California Public Utilities Commission (“Commission”) has an independent duty to determine whether the moratorium is just and reasonable irrespective of the Cease and Desist Order’s (SWRCB WR Order 2009-0060 (“CDO”)) prohibition of the use of Carmel River water for new or expanded service by the California American Water Company (“Cal-Am”). Cal-Am has not presented any evidence or argument to sustain a finding that the moratorium is just and reasonable, but instead merely cites to the CDO’s water service prohibition as justification for the moratorium. Cal-Am apparently believes that the State Water Resources Control Board (“SWRCB”) has tied the Commission’s hands with respect to its traditional power to determine whether a service moratorium is appropriate. The legal analysis demonstrates that the Commission’s hands are not tied, but rather it maintains an independent duty to determine whether a moratorium is just and reasonable. The factual analysis demonstrates that the proposed moratorium is not just and reasonable, and thus the appropriate action is denial of Cal-Am’s application.

## **II. IMPOSITION OF A MORATORIUM IS NOT JUST AND REASONABLE.**

In making its just and reasonableness determination, the Commission must evaluate whether specific benefits of a moratorium justify its costs to the community. As discussed in the Cities' opening brief, there is no benefit to the Carmel River and no material benefit to existing customers. (See Cities' Opening Brief, filed October 8, 2010, pp. 7-8.) The impacts of Cal-Am's diversions to the river habitat are addressed by the CDO's provisions limiting Cal-Am's withdrawals from the river. (CDO, pp. 57-60.) Existing customers will also not be materially harmed if the Commission does not impose a moratorium because there is no present supply shortage, and the burden on existing customers will not be materially increased if future rationing is required because of the small amount potential new use authorized by the MPWMD's allocation program. The full use of the 91 acre-feet left in the MPWMD allocation program would require less than 1% of additional rationing by existing users. (Cities' Opening Brief, p. 8.)

On the other hand, the Cities submitted evidence to show the significant harm to their communities that will result if a moratorium eliminates their ability to access the small amount of remaining allocation. (Cities' Request for Official Notice, filed October 8, 2010, Exhibits A through F attached thereto.) The Cities have relied on this small amount of remaining allocation to support plans for essential in-fill development projects. (*Id.*; Cities' Opening Brief, pp. 9-10.)

If the potential for new water demand were hundreds of acre-feet, the rationale for a moratorium would be more compelling because the addition of significant additional demand could make water supply reductions meaningfully more difficult to accommodate if future rationing is required. But with only 91 acre-feet of additional demand possible, a sober analysis does not reveal a rational basis for the proposed moratorium.

The only basis alluded to in the CDO for the SWRCB’s inclusion of the prohibition of new or expanded water service is the premise that a water service moratorium would create an added sense of urgency within the community to develop a new water supply. (CDO, pp. 54 and 56.) Still, a reasoned analysis must consider whether any additional incentive is required to hasten progress towards a replacement water supply, particularly when balanced against countervailing considerations of compromised community health, safety, and welfare.

There is no evidence to demonstrate a need for an additional “incentive” to prompt the community to support a new water project, and the current circumstances suggest otherwise. The Regional Water Project is widely supported by the community and is pending for approval by the Commission in CPUC Proceeding A0409019. On the other hand, the record now includes evidence of the attendant harm that the moratorium would inflict on essential community interests, including affordable housing, county health services, tourism, employment, and municipal revenue. (See Cities’ Request for Official Notice, Exhibits A through F attached thereto.) A rational balancing of the costs and benefits demonstrates that the proposed moratorium is not justified.

**III. THE CDO’S WATER SERVICE PROHIBITION MUST BE INTERPRETED TO BE SUBJECT TO THE COMMISSION’S INDEPENDENT DUTY TO DETERMINE WHETHER A MORATORIUM IS JUSTIFIED**

The respective opening briefs filed by Cal Am and the Cities cite the same case, *Orange County Air Pollution Control District v. Public Utilities Commission* (“*Orange County*”) (1971) 4 Cal.3d 945, to support opposite conclusions. *Orange County* sets forth the appropriate analysis to harmonize overlapping concurrent jurisdiction of sister state agencies. (*Id.*, at pp. 951-53.) Cal-Am’s argument, however, is inconsistent with analysis required by *Orange County*. Cal-Am states: “[C]onsistent 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.” (Cal-Am’s Opening Brief, filed October 8, 2010, at p. 9.) To the contrary, the CDO’s prohibition of new or expanded water service must be interpreted as (1) being subject to the Commission’s independent jurisdiction to determine whether a moratorium is justified, and (2) non-applicable if the Commission denies the pending application.

*Orange County* requires a comparison of the statutes that establish the jurisdiction of the respective agencies. (*Orange County, supra*, 4 Cal.3d at 951-52.) Here, the SWRCB’s jurisdiction concerns enforcement of unauthorized diversions of water (Wat. Code §§ 1052; 1831). The subject of how water is used by a utility is primarily the Commission’s jurisdiction.<sup>1</sup> The control and regulation of public utilities is vested in the Commission, which possesses administrative and judicial powers conferred on it by the constitution and statute. (*People v. Western Air Lines* (1954) 42 Cal.2d 621; Cal. Const., art. XII, § 5.) To this end, the primary purpose of the Commission under the Public Utilities Act is to ensure the public receives adequate utility service at reasonable rates without discrimination. (*City and County of San Francisco v. P.U.C.* (1971) 6 Cal.3d 119, 126; *In re San Diego Gas and Electric Co.* (1994) 55 C.P.U.C. 2d 592; see also Pub. Util. Code, §§ 451, 701, 1001.)

To illustrate the point, consider the result if the CDO ordered Cal-Am to impose more aggressive tiered rates to reduce water demand among Cal Am’s customers. Would such an order tie the hands of the Commission with respect to one of its most basic functions – establishing utility rates? The Commission would not be required to cede its authority over this

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<sup>1</sup> The SWRCB has jurisdiction to place conditions on how water is used, but the purpose is principally to ensure that the state’s water is beneficially used and not wasted. (*See e.g.*, Cal. Const. art. X, § 2; Wat. Code, § 1253.) There is no question that the use of water within Cal-Am’s service territory is beneficial. (*See* Wat. Code, § 106 [domestic water use the highest use of water].)

principal regulatory function. (*Orange County, supra*, 4 Cal.3d at 953-54.)<sup>2</sup> The Commission's duty to determine the reasonableness of a proposed moratorium is likewise an essential function of the Commission. The legal result here should be no different: the CDO's water service prohibition must be interpreted as conditioned on the Commission's discretion to determine whether a moratorium is warranted.

The Commission's ruling in Decision 00-03-053 is also illustrative of the proper balancing of overlapping statutory jurisdiction. There, the Commission reviewed a stipulated settlement that would allow Cal-Am to comply with MPWMD's service restrictions, including MPWMD's water conservation and allocation program under MPWMD Ordinance No. 92. (Decision 00-03-053, slip copy, pp. 1, 6-7.) Even though the MPWMD has specific statutory authority to establish conditions of water service within its jurisdictions (Wat. Code Appx., § 118-325 et seq.), the Commission independently reviewed the merits of the stipulated settlement. (Decision 00-03-053, slip copy, pp. 17, 19, 22-24.) The Commission determined that Cal-Am's compliance with MPWMD's conservation ordinance was justified under the circumstances, and that the settlement was just and reasonable. (Decision 00-03-053, slip copy, pp. 26-27.) The Commission's independent authority to determine whether the proposed moratorium in this application is warranted is no different. However, in this case, the proposed moratorium is not just and reasonable for the reasons stated.

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<sup>2</sup> We can structure the hypothetical in the inverse as well to support the point. If the Commission ordered Cal-Am to divert water from a stream to serve its customers, which by law requires a diversion permit from the SWRCB (Wat. Code, §§ 1250 et seq.), such order would necessarily be subject to and conditioned on a successful application by Cal-Am for the necessary diversion permit. (*Orange County, supra*, 4 Cal.3d at 953-54.)

**IV. CONCLUSION**

For the foregoing reasons, the Cities respectfully request that the Commission deny Cal-Am's Application for an unnecessary moratorium that would substantially impair the community's welfare.

Dated: October 22, 2010

Respectfully submitted,



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**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 22, 2010, I served the foregoing document described as:

**REPLY 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 22, 2010.



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MARIA KLACHKO-BLAIR  
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**A. 10-05-020**

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