



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

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](mailto:rmcglathlin@bhfs.com); [rdrake@bhfs.com](mailto:rdrake@bhfs.com)

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

Dated: February 14, 2011

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OF THE STATE OF CALIFORNIA**

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**I. INTRODUCTION**

Pursuant to Rule 14.3 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, the Cities of Carmel-by-the-Sea, Del Rey Oaks, Monterey, Pacific Grove, Sand City and Seaside (collectively, the “Cities”) respectfully submit the following comments to the Proposed Decision Directing Compliance With State Water Moratorium Order and Relieving Utility of Obligation to Serve, mailed on January 25, 2011 (“Proposed Decision”). The Cities urge the Commission to reconsider the Proposed Decision, specifically, the legal conclusion that the Commission is obligated to defer to the State Water Resources Control Board’s (“SWRCB”) decision to require California American Water Company (“Cal-Am”) to impose a moratorium as a component of the Cease and Desist Order (SWRCB WR Order 2009-0060 (“CDO”)), and the factual conclusion that imposition of a moratorium is just and reasonable.<sup>1</sup> For the reasons stated in these comments and within the Cities’ prior briefs, these legal and factual conclusions are incorrect.

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<sup>1</sup> These legal and factual conclusions are set forth at Section 5.2 (p.23) of the Proposed Decision:

## II. DISCUSSION

### A. The Commission is Not Obligated to Defer to the SWRCB and Can Exercise Its Own Independent Discretion Concerning the Merits of the Proposed Moratorium

The Proposed Decision concludes at Section 5.2 that the Commission should defer to the SWRCB's inclusion of Condition 2 in the CDO, requiring Cal-Am to impose a service moratorium because "an order of a sister state agency carries a presumption of validity" and "a determination made by one [state] agency within its area of expertise must be respected by the other [state] agencies." (Proposed Decision, p. 23.) The Proposed Decision cites Decision 98-06-025, Application of California-American Water Co., 80 CPUC 2d 476 (1998) ("D.98-06-025") for this conclusion. Decision 98-06-025 provides that where the Commission and another state agency possess concurrent jurisdiction over a matter, agencies should defer to the agency with greater specialization and expertise. (D.98-06-025, pp. 3-5.)

In Decision 98-06-025, the Commission deferred to the SWRCB with respect to legal classifications of groundwater within the Carmel River Valley, and water rights issues because such matters fell squarely within the SWRCB's specific expertise. (D.98-06-025, pp. 3, 5.) The

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[W]e take the position that an order of a sister state agency carries a presumption of validity. This record persuades us that there is a reasonable basis for finding that Condition 2 is valid and that it is just and reasonable for the Commission to authorize Cal-Am's compliance with it by our lifting its obligation to serve new connections and uses prohibited by Condition 2.

A footnote to this text further explains:

Decisions of this Commission have long enjoyed such a presumption of validity; see *Market St. Ry Co. v. Railroad Com.* (1944) 24 Cal. 2d 378, 399, aff'd 324 U.S. 548 (1944). We believe that orders of the SWRCB are no less deserving unless and until proven otherwise. As we said in D.98-06-025 at 11-12: Under the doctrine of concurrent jurisdiction [*Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 C.3d 945, 953-54], a determination made by one such agency within its area of expertise must be respected by the other agencies. [footnote omitted] Were all such determinations to be subject to collateral attack before other agencies, the jurisdictional wrangling would be endless, forum-shopping would be encouraged, and the finality of any agency's decisions would always be open to doubt.

Proposed Decision does not, but should, perform a similar analysis here to evaluate which agency possesses greater specialization concerning governance of service connections by a regulated utility. That entity is the Commission. Just as the SWRCB is the agency with more specific expertise concerning groundwater classifications and water rights (D.98-06-025), the Commission is the agency with more specific expertise concerning utility service matters, including the propriety of a moratorium on extension of service. (See Pub. Util. Code, §§ 451, 701; *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 CPUC 2d 592, p. 8.)

The doctrine of concurrent jurisdiction does not simply require deference to the state agency that acts first, but rather requires a comparison of the respective expertise and administrative role of each agency. (*Orange County Air Pollution Control District v. Public Utilities Commission* (“*Orange County*”) (1971) 4 Cal.3d 945, 951-53.) If deference were required regardless of comparative expertise and proper administrative roles, the doctrine of concurrent jurisdiction could expand or limit the jurisdiction of state agencies in manners inconsistent with legislative and constitutional intent. The hypothetical set forth by the Cities at pages 5-6 of their October 22, 2010 Reply Brief is instructive. Would the Commission’s hands be tied if, instead of a moratorium, the SWRCB ordered Cal-Am to adopt more aggressive tiered rates as a means of incentivizing conservation and thus reduced diversions by Cal-Am? Would the Commission be obligated to apply a presumption of validity and defer to the SWRCB’s mandate for higher water rates? We suspect the Commission would not find itself obligated to defer to the SWRCB as to such a central feature of its jurisdiction. Here, like rate setting, matters of service extension by an investor-owned utility are within the principal jurisdiction and specific expertise of the Commission. (See Cities’ Opening Brief, October 8, 2010, p. 6; Cities’

Reply Brief, October 22, 2010, pp. 5-6.) Therefore, the Commission should exercise its own independent discretion to determine whether a moratorium is appropriate.

The SWRCB possesses jurisdiction over the use of water, but that jurisdiction is targeted at ensuring that all water is used for beneficial purposes through reasonable means (i.e., is not wasted) as required by article X, section 2 of the California Constitution. (See Cities' Reply Brief, p. 5, fn. 1.) The SWRCB also possesses jurisdiction to control water use as is necessary to affect other aspects of its jurisdiction such as the control of stream diversions. Some might argue that is what occurred here; that the SWRCB ordered a moratorium as an ancillary measure to control Cal-Am's diversions from the Carmel River. However, for the reasons discussed next, that is not the case. The moratorium is not necessary for the SWRCB to control diversions from the Carmel River or to avoid waste of water, matters within the SWRCB's jurisdiction. Instead, the moratorium extends well beyond matters germane to the SWRCB's jurisdiction and intrudes into matters that are the traditional province of the Commission to decide.

**B. A Moratorium is Not Just and Reasonable**

The Proposed Decision states, without further analysis, that the "record persuades us that there is a reasonable basis for finding that Condition 2 is valid and that it is just and reasonable for the Commission to authorize Cal-Am's compliance with it...." (Proposed Decision, p. 23.) But a comparison of the benefits and harms of a moratorium demonstrates that a moratorium is not just or reasonable. As discussed in the Cities' Opening Brief at pages 7 and 8, a moratorium provides no benefit to the Carmel River because diversions are independently limited by Condition 3 of the CDO (pp. 57-60), and provides no material benefit to existing customers because the maximum new or expanded water service that could occur within all of Cal-Am's Monterey District is just 91 acre-feet under the Monterey Peninsula Water

Management District's water allocation program set forth in the District's Regulation XV.<sup>2</sup> This amount is less than one percent of Cal-Am's annual water deliveries. The use of the remaining 91 acre-feet of allocation would not meaningfully affect Cal-Am's ability to meet its future water supply limitations nor significantly impact existing customers, and thus a moratorium is not necessary.

In fact, the Commission concluded that the CDO in its entirety was not appropriate in a comment letter that it filed with the SWRCB commenting on the propriety of the draft CDO before it was made final. (Letter from Paul Clanon, CPUC Executive Director, August 20, 2009, attached as "Exhibit A" to the Cities' Request for Official Notice, filed concurrently with these comments.) Specifically, the Commission urged the SWRCB not to adopt the CDO. "Instead of taking a punitive action against Cal-Am and thereby against its customers, we urge the Board to work out a realistic timeline cooperatively with Cal-Am and ourselves to align the effective date of the CDO with the completion of the Commission's current proceeding to authorize a new water supply project." (*Id.*, p. 5.)

The only basis set forth in the CDO for requiring a moratorium on the 91 acre-feet of remaining water allocation is to impose development restraints that could add an additional incentive for the community to pursue and develop a replacement water supply. (CDO, p. 56.) The record before the Commission contains no evidence that such an additional "incentive" is necessary to hasten efforts towards development of a replacement water supply. The

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<sup>2</sup> See the District's August 2010 Monthly Allocation Report, attached as Exhibit F to the Cities' Request for Official Notice, October 8, 2010. The Proposed Decision improperly denied judicial notice of this official record of the District. Rule 13.9 of the Commission's Rules of Practice and Procedure allows for official notice of such matters as may be judicially noticed pursuant to Evidence Code section 450 et seq. Pursuant to Evidence Code section 452, subdivision (c), a Court may take judicial notice of a public agency's regulations and official documents. (See *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 375, fn. 4 [Judicial notice of administrative agency records proper under section 452, subdivision (c)]; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518 ["Official acts [for which judicial notice may be taken] include records, reports, and orders of administrative agencies".]) The Cities respectfully request that the ALJ reconsider and grant official notice for the District's Monthly Allocation Report, which is an official record of the District, for the reasons stated in the Cities' Request for Official Notice.

Commission recently approved a Certificate of Public Convenience and Necessity for development of the Regional Water Project, and the community has come together in support of that project. (See docket in A.0409019.) More importantly, the CDO does not even discuss the harm to the community from a moratorium, which must be compared to any putative benefits of a moratorium if the public welfare is to be adequately considered and protected. Simply stated, imposing a moratorium that is not needed to address the riparian needs of the Carmel River nor necessary to protect existing customers is not reasonable in light of the prospective harm to the community and the diligent progress underway towards a full replacement water supply. The Cities urge the Commission to reconsider the record in this respect.

C. **The Cities Collectively Join In the Individual Comments Submitted by the City of Sand City to Urge the Commission to Exempt New Connections Served by the Sand City Water Entitlement from the Moratorium, If Adopted**

As set forth in separate individual comments filed by the City of Sand City, Sand City has constructed a desalination project that both compensates for its proportion of Cal-Am's unauthorized diversions from the Carmel River and generates additional water for new connections within Sand City. The SWRCB acknowledged the same in the CDO. (See Comments by the City of Sand City, p. 2.) The collective Cities join with Sand City in urging the Commission to recognize Sand City's investment in this project and exempt service extensions served by the Sand City Water Entitlement from any moratorium that is adopted.

**III. CONCLUSION**

For the reasons stated above, the Cities respectfully request that the Proposed Decision be modified to address the concerns stated herein. The Commission should exercise its independent discretion, and based on its own informed review of the merits, find that a moratorium is not just and reasonable. Such a conclusion will maximize the public welfare, but will not impair the

operation of the CDO's other provisions designed to protect the Carmel River ecosystem or otherwise thwart development of a water supply solution for the Monterey Peninsula.

Dated: February 14, 2011

Respectfully submitted,



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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 February 14, 2011, I served the foregoing document described as:

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

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 February 14, 2011.



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MARIA KLACHKO-BLAIR  
TYPE OR PRINT NAME

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**A. 10-05-020**

**SERVICE LIST**

**Service by Email:**

<b>Name</b>	<b>Email Address</b>
Jason Rettere	<a href="mailto:jason@lomgil.com">jason@lomgil.com</a>
David C. Laredo	<a href="mailto:dave@laredolaw.net">dave@laredolaw.net</a>
Allison Brown	<a href="mailto:aly@cpuc.ca.gov">aly@cpuc.ca.gov</a>
Lori Anne Dolquest	<a href="mailto:ldolqueist@manatt.com">ldolqueist@manatt.com</a>
Sheri L. Damon	<a href="mailto:sldamon@covad.net">sldamon@covad.net</a>
Robert G. MacLean	<a href="mailto:robert.maclean@amwater.com">robert.maclean@amwater.com</a>
Timothy J. Miller	<a href="mailto:tim.miller@amwater.com">tim.miller@amwater.com</a>
Frances M. Farina	<a href="mailto:ffarina@cox.net">ffarina@cox.net</a>
Anthony L. Lombardo	<a href="mailto:tony@lomgil.com">tony@lomgil.com</a>
Glen Stransky	<a href="mailto:glen.stransky@loslaureleshoa.com">glen.stransky@loslaureleshoa.com</a>
John S. Bridges	<a href="mailto:JBridges@FentonKeller.com">JBridges@FentonKeller.com</a>
David P. Stephenson	<a href="mailto:dave.stephenson@amwater.com">dave.stephenson@amwater.com</a>
Gary Weatherford	<a href="mailto:gw2@cpuc.ca.gov">gw2@cpuc.ca.gov</a>
James A. Boothe	<a href="mailto:jb5@cpuc.ca.gov">jb5@cpuc.ca.gov</a>
Max Gomberg	<a href="mailto:mzx@cpuc.ca.gov">mzx@cpuc.ca.gov</a>
Heidi A. Quinn	<a href="mailto:heidi@laredolaw.net">heidi@laredolaw.net</a>
Bob McKenzie	<a href="mailto:bobmac@qwest.net">bobmac@qwest.net</a>
James Heisinger, Jr.	<a href="mailto:jim@carmellaw.com">jim@carmellaw.com</a>
David Sweigert	<a href="mailto:dsweigert@fentonkeller.com">dsweigert@fentonkeller.com</a>
Lloyd W. Lowrey, Jr.	<a href="mailto:llowrey@nheh.com">llowrey@nheh.com</a>
Michael Bowhay	<a href="mailto:generalmanager@mpccpb.org">generalmanager@mpccpb.org</a>
Olivia Para	<a href="mailto:Olivia.para@amwater.com">Olivia.para@amwater.com</a>
Sarah E. Leeper	<a href="mailto:sarah.leeper@amwater.com">sarah.leeper@amwater.com</a>