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

In the Matter of the
Application of California-
American Water Company
for Approval of the Monterey
Peninsula Water Supply
Project and Authorization to
Recover All Present and
Future Costs in Rates

Application 12-04-019

**MOTION OF SIERRA CLUB TO BECOME A PARTY (RULE 1.4(a)(4))
AND PREHEARING CONFERENCE STATEMENT OF INTEREST AND
FACTUAL AND LEGAL CONTENTIONS OF SIERRA CLUB (Rule 1.4(b))**

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May 22, 2012

I. MOTION OF SIERRA CLUB TO BECOME A PARTY

Sierra Club, pursuant to PUC Rule 1.4 (a)(4), requests the PUC to permit it to become a party to the above proceeding. Sierra Club sets forth its interest in this proceeding below, and sets out its legal and factual contentions pertaining to this proceeding.

II. SIERRA CLUB'S STATEMENT OF INTEREST

The Sierra Club has had a long history of involvement in water disputes in Monterey County over the last 20 years. Water supply is a critical factor constraining growth in Monterey County. See Save Our Peninsula Committee v. Monterey County Board of Supervisors, 87 Cal.App 4th 99 (2001). Sierra Club was a party-plaintiff in that case. Monterey County receives no imported water from the State Water Project, or the Bureau of Reclamation. Agricultural and domestic uses are dependent entirely upon two sources – the Carmel River (and its alluvium) and the Seaside Aquifer (ground-water pumping).

Most significantly, however, the Sierra Club initiated a complaint before the State Water Resources Control Board in 1992, that led to a critical water supply decision by the Board that determined that Cal-Am's ground-water pumping from the alluvium of the Carmel River was illegal, since no appropriation permit had ever been obtained. Order 95-10 found that California-American was diverting approximately 7700 AFY without a claim of right. In response to the Complaint of the Sierra Club, the Board, by Order 95-10, required that Cal-Am minimize its diversions from the Carmel River, mitigate the environmental effects of its diversions, and prepare a plan setting forth specific actions to develop or obtain a legal supply of water. The Board imposed strict limitations on the timing and location of ground-water pumping by Cal-Am in the Carmel River alluvium. The Board found that Cal-Am's diversions were having an adverse effect on wildlife which depend on instream flows and riparian habitat, and steel-head which spawn in the river. Under Condition 4 of Order 95-10 Cal Am was directed to maximize production from the Seaside aquifer solely for the purpose of serving existing connections, honoring existing commitments, and to reduce diversions from the Carmel River to the greatest practicable extent. Cal Am's diversions remain illegal, as it has not to date obtained

requisite permits from the SWRCB. Presently, California-American is still pumping over 7000 AFY from the Carmel River.

Since the Board's Order 95-10 various measures have been taken by the MPWMD and Cal Am to promote conjunctive use of the River and the Seaside Basin. (Seaside Aquifer). To protect against Basin overdraft and to prevent salt-water intrusion pumping from the River alluvium has been increased during heavy flow months and transported by pipeline to the Basin for storage and consumptive use during low-flow months in the Carmel River. (Aquifer Storage and Recovery). However, the amount of water currently in storage is less than 1100 acre feet, and is not a dependable source of supply for a series of dry water years.

In October 2009, the State Board issued a Cease and Desist Order that further curtailed Cal-Am's unlawful diversions and directed Cal-Am to obtain alternative water supplies. The Board also imposed a moratorium on new service connections, and the CPUC subsequently ordered California-American to implement the moratorium. The moratorium is now in effect.

The Cease and Desist Order directed California American, by 2016, to obtain an alternative supply of water to supplant its unlawful diversions from the Carmel River.

Sierra Club is a party to pending litigation initiated by California-American in the Superior Court in Monterey County challenging the validity of the SWRCB CDO. As a respondent intervenor, Sierra Club has successfully defended the CDO.. In April 2010 the Superior Court of Santa Clara County denied California American's Motion for Preliminary Injunction and dissolved the stay of the CDO grated by the Monterey County Superior Court in October 2009.

Sierra Club is a party in Application 010-01-012 (In the Matter of the Application of CAW for an Order Authorizing Collection and Remittance of the Monterey Water Management district User Fee) and is there supporting MPWMD's request that Cal-Am collect a user fee sufficient in amount to maintain and support the District's mitigation program on the Carmel River.

Sierra Club has also participated in other matters involving California-American activities and applications before the CPUC. It supported California-American's Application

requesting CPUC direction to implement the moratorium ordered by the SWRCB by submitting several amicus letters to the Commission.

Additionally, in the proceeding relating to the Regional Water Project (Application 04-09-019) it submitted “Comments of Sierra Club Seeking Modification of the Proposed Decision with Respect to its Recommendations as to Composition of the Advisory Committee.” These comments are attached hereto as Appendix A.

III. CONTENTIONS OF SIERRA CLUB.

A. Sierra Club will Argue that the Motion of MCWD to Dismiss A12-04-019 should be denied. The Motion seeks relief that will retard progress toward a regional water supply solution for the Peninsula. MCWD’s interest in requesting dismissal of this proceeding is not consistent with the public interest, and is tainted by self-interest (insofar as it enjoys significant collateral water supply benefits at low cost as part of the Regional Water Project.) Moreover as a non-applicant for the California-American MPWSP application at issue, MCWD has no standing to hijack this proceeding by moving to dismiss California-American’s new application for a MPWSP that could be a better and more feasible solution than the previously approved RWP.

B. Sierra Club herein Incorporates by Reference its “Comments, “ attachment A hereto, with respect to governance issues that would pertain to any Regional Water Project solution. There must be accountability to the rate-payers and oversight by an agency like MPWMD with general regulatory jurisdiction over water use on the Monterey Peninsula.

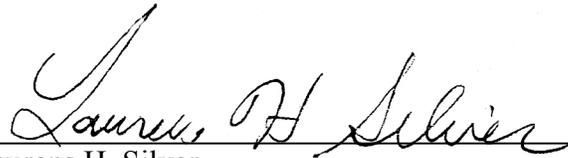
C. Any regional water solution must eliminate California American’s unlawful diversions from the Carmel River but must not allow for growth that in the event adequate water is not produced through desalination and reclamation, will cause to the Peninsula to resort once again to producing water from the Carmel River or increasing production from the Seaside Basin.

D. Sierra Club believes that a workshop for the parties would be appropriate.

E. Prospects for timely and productive settlement discussions are contingent on a prompt denial of MCWD’s Motion to Dismiss. MCWD’s Motion to Dismiss is calculated to

prevent any appropriate solution to the water crisis on the Peninsula. MCWD should not be allowed to use the CPUC to advance any claims it may make against California-American for breach of contract. Nor should it employ the previously approved RWP project as a “hostage” to force on Peninsula water users a “solution” that would benefit the MCWD and its ratepayers at the expense of Peninsula ratepayers. The RWP is a “corpse” and should be treated as such for the purpose of this proceeding.

Dated: May 23, 2012

A handwritten signature in cursive script, reading "Laurens H. Silver". The signature is written in black ink and is positioned above a horizontal line.

Laurens H. Silver
CALIFORNIA ENVIRONMENTAL LAW PROJECT
Attorney for Movant, Sierra Club

ATTACHMENT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water
Company (U 210 W) 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

Application 04-09-019
(Filed September 20, 2004;
Amended July 14, 2005)

**COMMENTS OF SIERRA CLUB SEEKING MODIFICATION OF THE
PROPOSED DECISION WITH RESPECT TO ITS RECOMMENDATIONS AS TO
COMPOSITION OF THE ADVISORY COMMITTEE**

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Sierra Club Amicus Brief

Sierra Club urges that the Monterey Peninsula Water Management District is an appropriate entity to serve on the Advisory Committee, with full voting rights,. The purpose of the Advisory Committee is “to provide a formal means for the parties to coordinate the design, permitting, constructions, operations, maintenance, repairs and replacement of the various components of the Regional Project, in consultation with the Selected Project Manager” [Draft Opinion at 101, emphasis added). Sierra Club agrees with DRA that it is important for the District to have voting rights on the Advisory Committee because it possesses “different areas of technical and managerial expertise and can offer differing political perspectives.” (Draft Opinion at 102). Such participation is particularly critical with respect to input by the District as to the “timing, quantity, and quality of water delivered by Cal-Am or the MCWD to the ASR system.” (Draft Opinion at 102). Sierra Club believes that MPWMD will provide protection to Cal-Am ratepayers and has special competence in addressing, pursuant to statutory duties, water supply and water management needs of the Monterey Peninsula. Because Cal-Am ratepayers on the Peninsula directly elect five representatives to the MPWMD Board of Directors, the addition of the MPWMD to the Advisory Committee would ensure the necessary ratepayer protection and also provide assurance that the public trust resources of the Carmel River were taken into account in connection with operation of the Project. See Water Code Appendix 610, §203.

I. SIERRA CLUB HAS A LONGSTANDING COGNIZABLE INTEREST IN REGULATION AND PRESERVATION OF THE PUBLIC TRUST WATER RESOURCES AND ASSOCIATED NATURAL HABITATS OF MONTEREY COUNTY

The Sierra Club has had a long history of involvement in water disputes in Monterey County over the last 20 years. Water supply is a critical factor constraining growth in Monterey County. See *Save Our Peninsula Committee v. Monterey County Board of*

1 *Supervisors*, 87 Cal.App. 4 99 1 (2001).¹ Sierra Club was a party-plaintiff in that case. The
2 Monterey Peninsula receives no imported water from the State Water Project, or the Central
3 Valley Project. Agricultural and domestic uses are dependent entirely upon two sources – the
4 Carmel River (and its alluvium) and the Seaside Aquifer (ground-water pumping).

5 In 1991, the Sierra Club initiated a complaint before the State Water Resources Control
6 Board, that led to a decision by the Board that Cal-Am’s ground-water pumping from the
7 alluvium of the Carmel River was illegal,² since Cal-Am had never obtained a permit for its
8 diversions. In response to the Complaint of the Sierra Club, the Board, by Order 95-10,
9 required that Cal-Am minimize its diversions from the Carmel River, mitigate the environmental
10 effects of its diversions, and develop or obtain a legal supply of water. The Board found that
11 Cal-Am’s diversions were having an adverse effect on wildlife, particularly steelhead, which
12 depend on instream flows³ and riparian habitat, and which spawn in the river. The Board later
13 imposed additional limitations on the timing and location of ground-water pumping by Cal-Am
14

15 ¹ In *Save Our Peninsula Committee*, the Court summarized the water supply crisis in the
16 County as follows:

17 “It is well documented that water availability is a critical problem throughout
18 Monterey County (the County) and Carmel Valley in particular. In 1988, the
19 County passed Ordinance No. 3310, finding that because of expanded water
20 usage “the potential exists that Monterey County’s allocation of water will be
21 exhausted so as to pose an immediate threat to the public health, safety, or
22 welfare.” In 1995, the State Water Resources Control Board issued Order No.
23 95-10 and related Decision No 1632. Order No. 95-10 found that the
24 California-American Water Company (Cal Am), which was the principal
25 supplier of water and diverted excess water from the Carmel River basin [was]
26 “without a valid basis of right,” causing environmental harm. Cal Am was
27 ordered to substantially limit its diversions, to mitigate the environmental
28 effects of its excess usage, and to develop a plan for obtaining water legally.
Decision No. 1632 similarly found that “[e]xisting diversions from the Carmel
River have adversely affected the public trust resources in the river.” (87
Cal.App.4 at 108).

27 ² Most of the water diverted from the Carmel River is pumped from the alluvial flow of the
28 River by Cal Am for domestic and municipal uses on the Peninsula. Most of this water is
being diverted without a permit from the SWRCB, and therefore without a “claim of right.”

³ The South Central California Coast District Population Segment (“DPS”) of steelhead is
listed as a threatened species under the Endangered Species Act, 16 U.S.C. §1531 et seq.
The steelhead population in the Carmel River is a major component of that DPS.

1 in the Carmel River alluvium. Orders 2002-02 and 98-04. Under Condition 4 of Order 95-10
2 Cal Am also was directed to maximize production from the Seaside aquifer solely for the
3 purpose of serving existing connections, honoring existing commitments, and to reduce
4 diversions from the Carmel River to the greatest practicable extent.

5 **II. THE LEGISLATURE ESTABLISHED THE MPWMD TO REGULATE**
6 **WATER USE IN THE DISTRICT THROUGH INTEGRATED**
7 **MANAGEMENT OF GROUND AND WATER RESOURCES OF THE**
8 **PENINSULA**

9 In 1977, the Legislature found that the Monterey Peninsula Water Management
10 District should be formed for the purpose of providing integrated and comprehensive
11 management over the Monterey Peninsula's regional water resources, which consist of
12 the Carmel River and its alluvium and the Seaside Aquifer. The Legislature created the
13 District based on its determination that "water problems in the Monterey Peninsula
14 area require integrated management" and that "there is need for conserving and
15 augmenting the supplies of water by integrated management of ground and surface
16 supplies." Water Code App. §§ 118-1, 118-2.⁴ The Legislature found and declared
17 that: "In order to serve the people of the Monterey Peninsula efficiently, to prevent
18 waste or unreasonable use of water, and to conserve and foster the scenic values,
19 environmental quality, and native vegetation and fish and wildlife and recreation in the
20 Monterey Peninsula and the Carmel River Basin, it is hereby declared that the
21 enactment of this special law is necessary for the public welfare and for the protection
22 of the environmental quality and health and property of the residents therein." Water
23 Code App. §118-2.

24 The Legislature found that there was a need for conserving and augmenting water
25 supplies and vested the District with a number of powers and responsibilities, including
26 inter alia, coordinating and integrating ground-water supplies and surface water supplies.
27 (Water Code App. §18-341), and allowing no person or operator to establish, extend,
28

⁴ The Legislature's creation of the District was made pursuant to Article X, Section 2 of the California Constitution, which empowers the Legislature to prevent the waste or unreasonable use of water

1 expand or create a water distribution system within its boundaries unless approved by the
2 Board of the MPWMD in writing (Water Code App. § 118-363.)

3 In *Central and West Basin Water Replenishment District v. Southern California*
4 *Water Company* (2003), 109 Cal.App.4 891, the Court of Appeal held that where the
5 legislature has created a limited purpose agency to manage (for replenishment purposes) a
6 ground-water basin, the Court in approving a proposed physical solution, as part of a
7 general adjudication, should not sanction a special master committee whose authority
8 would conflict with powers vested by the Legislature in the limited purpose agency,
9 created by special law. The District likewise was created by special law and vested with
10 certain powers to integrate the management of surface and groundwater of the Carmel River
11 and the groundwater in the Seaside Basin. See §118.2 creating MPWMD (“the enactment
12 of this special law is necessary for the public welfare, and for the protection of the
13 environmental quality and the health and property of the residents therein”). The PUC
14 should not impose obstacles to the District in exercising its coordination and integrated
15 management functions that are related to operation of the Coastal Water Project, especially
16 where production from the Project could affect the Carmel River and its resources, and the
17 ASR project.

18 In *Save Our Carmel River v. Monterey Peninsula Water Management District*, 141
19 Cal.App.4th 677, 684 (2006), the court gave a detailed description of water problems in the
20 Monterey Peninsula. The Court stated: “The Monterey Peninsula Water Management
21 District was created by the State Legislature in 1977, based on findings that integrated
22 water management was necessary because of severe water shortages in the area. The
23 mandate of the Water District is to conserve and augment existing water supplies and to
24 prevent waste and unreasonable use of those supplies. (Water Code Appendix, Chapter
25 118, § 118-2.)”

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2 **III. THERE IS CURRENTLY INTEGRATED AND CONJUNCTIVE**
3 **MANAGEMENT OF THE WATER RESOURCES OF THE BASIN BY**
4 **THE DISTRICT, WHICH WILL BE THWARTED IF THE PUC GIVES**
5 **THE MPWMD NO ROLE IN MANAGING THE CWP.**

6 In Order 95-10 the SWRCB determined that “by more fully utilizing water available
7 in the Seaside Aquifer, Cal-Am can reduce its diversions from the Carmel River and the
8 effects of such diversions on public trust values.” In Condition 4 of Order 95-10, the
9 SWRCB ordered Cal-Am to “maximize production for the Seaside Basin for the purpose of
10 serving existing connections, honoring existing commitments (allocations), and to reduce
11 diversions from the Carmel River⁵ to the greatest possible extent.” (Order at 41). Id. Since
12 Order 95-10, various measures have been taken by the District and Cal Am to promote
13 conjunctive and coordinated use of the River and the Seaside Aquifer.⁶ To protect against
14 Basin overdraft and to prevent salt- water intrusion Cal-Am has increased pumping from
15 the River alluvium during heavy flow (winter) months and transports the pumped water by
16 pipeline to the Seaside Basin to be used for groundwater recharge and municipal purposes.⁷
17 The water is transported via existing Cal-Am pipelines for injection into the Seaside
18 groundwater basin. This joint Aquifer Storage and Recovery Project is intended to reduce
19 demand on the Carmel River for water production during summer and fall months when
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21
22 ⁵ Order 95-10 found that Cal-Am’s diversions caused the lower 9 miles of the Carmel River
23 to dry up during mid-summer. This annually causes harm to juvenile steelhead that are
24 trapped in isolated river pools. The steelhead are a threatened species under the Endangered
25 Species Act, 16 U.S.C. §1531 et. seq. and are a protected public trust resource.

26 ⁶ Order 95-10 was amended by Orders 98-04 and 2002-02. Order 2002-02 imposed
27 additional constraints on Cal-Am’s pumping in the lower Carmel River during times when
28 flow in the River is low.

⁷ “Conjunctive use describes a management technique which involves the coordinated use of
both surface water and groundwater resources...Benefits of conjunctive use include
conservation, reduction in surface storage facilities, and storage of water for periods of
drought....Artificial recharge requires forcing surface water into available storage space in an
underground basin through percolation ponds or injection wells.” *Central and West Basin
Replenishment District v Southern California Water Company* (2003) 109 Cal.App.4 891,
898.

1 River volume is low and diminishing.⁸ Water from the Coastal Water Project may be
2 stored in the ASR wells.

3 Sierra Club requests that the PUC require that the MPWMD be given a seat on
4 the Advisory Committee with full voting rights and the power to seek dispute
5 resolution. To do otherwise is to thwart the Legislature’s purpose in establishing the
6 District, especially with respect to operation of the CWP insofar as it affects
7 MPWMD’s integrated management functions.

8
9 The Monterey County Water Resources Agency, in its Brief, accuses the
10 MPWMD of inconsistency, ineptness, and vacillation, and states it is a superior
11 guardian of the public interest. This is indeed an unfounded statement – especially
12 since that Agency has powers that parallel those of MPWMD. In the *Seaside Basin*
13 *Adjudication Decision (California American Water v. City of Seaside, M66343, March*
14 *27, 2006)*, the Court noted that the Legislature “created the Monterey County Water
15 Resources Agency and endowed it with many of the powers granted to the
16 MPWMD. Rather, in creating the MCWRA, the Legislature mandated that the two
17 agencies cooperate with one another (Water Code Appendix Section 52-85).”
18 (Decision at p.48).

19 The MCWRA has stood by passively and done nothing to assert its regulatory
20 powers. Certainly, it has not cooperated with the MPWMD. Meanwhile, the
21 District, with a mandate to protect the public trust resources of the Carmel River, and
22 constrained by laws protecting the environment and endangered species, has not been
23 able to proceed with or approve projects that would have involved increasing the
24 storage capacity of existing dams or building new dams on the Carmel River.

27 ⁸ The Basin Phase I ASR Project, which operates under SWRCB Amended Permit 20808A,
28 involves diverting “excess” winter flows from the Carmel River for treatment, transmission,
and injection into the Seaside Basin. This excess water is temporarily stored in the Seaside
Basin and recovered during the summer and fall months to meet customer demand, thereby
offsetting CAW’s need to pump this amount of water from the Carmel River and its
alluvium during its lowest flow period.

1 This is a classic case posing the inevitable question. “Quis custodiet ipsos
2 custodies?” (“Who should be the guardians of the guardians?”) Since SWRCB Order
3 95-10, the cities and the County have continued to approve developments for which
4 there is inadequate water. As a custodian of the public interest, MCWRA is “missing
5 in action.” It has failed to exercise its statutory powers and blames the District for
6 not solving an intractable water shortage problem. Its conduct is irresponsible and its
7 allegations groundless. Cal-Am is a proprietary utility interested in maximizing profit
8 and the subject of SWRCB Cease and Desist Order, because it has been diverting 7700
9 acre feet of water unlawfully from the Carmel River alluvium without an
10 appropriation permit. It is a trespasser under state law.⁹

11 The District has five publicly elected members on its seven member board.
12 Clearly, it is an appropriate entity to serve on the Advisory Committee, with full
13 rights of participation. Relative to MCWRA (and Cal-Am), it stands out as a
14 responsible guardian not only of the rate-payers but of the public interest.

15 _____
16 Laurens H. Silver
17 Counsel for Sierra Club

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⁹ The diversion of water without an appropriation permit constitutes a trespass under Water Code §1052 – *People Shirikow*, 26 Cal.3d 301 (1980).