

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**01-25-11
11:37 AM

January 25, 2011

Agenda ID #10106
Ratesetting

TO PARTIES OF RECORD IN APPLICATION 10-05-020

This is the proposed decision of Administrative Law Judge (ALJ) Gary Weatherford. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 25 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Weatherford at gw2@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:hkr

Attachment

Decision PROPOSED DECISION OF ALJ WEATHERFORD
(Mailed 1/25/2011)

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 10-05-020
(Filed May 24, 2010)

**DECISION DIRECTING COMPLIANCE
WITH STATE WATER MORATORIUM ORDER
AND RELIEVING UTILITY OF OBLIGATION TO SERVE**

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**DECISION DIRECTING COMPLIANCE
WITH STATE WATER MORATORIUM ORDER
AND RELIEVING UTILITY OF OBLIGATION TO SERVE**

1. Summary

This decision directs California-American Water Company (Cal-Am) to comply with a water moratorium in its Monterey District ordered by the State Water Resources Control Board and prohibiting new connections and increased use of water by existing customers that would be served by diversions of the Carmel River. Cal-Am is directed to file by advice letter a tariff amendment to implement Condition 2 of the 2009 Cease and Desist Order issued by the State Water Resources Control Board. Condition 2 prohibits diversions from the Carmel River for new connections or increased uses at certain types of existing service addresses. Cal-Am will be relieved of its obligation to serve the new connections and increased uses so prohibited. The direction and relief provided in this decision are to expire at the filing by Cal-Am of an advice letter with the Commission transmitting the written concurrence of the Deputy Director of Water Rights of the State Water Resources Control Board with Cal-Am's finding that a permanent supply of water is ready to serve as a replacement for the unlawful diversions of Carmel River water.

Consistent with State Water Resources Control Board orders, the decision declares that the Pebble Beach Company entitlements are outside the reach of Condition 2, as are the independent subsystems of Cal-Am that draw exclusively on the Seaside Groundwater Basin. A request that the terms of the moratorium be imposed on the Bishop, Ryan Ranch and Hidden Hills areas of Cal-Am's Monterey District is denied. The decision finds the front-loaded delivery of

water from the Seaside Basin to the Security National General Corporation to be outside the reach of the moratorium.

Cal-Am is directed to confer with the Monterey Peninsula Water Management District and thereafter seek from the State Water Resources Control Board a process or mechanism that will permit Cal-Am to serve demonstrated and compelling public health and safety needs within the Monterey District, notwithstanding the moratorium. Cal-Am is also directed to return to that Board for guidance with respect to any unresolved issues of interpretation or implementation concerning Condition 2. Cal-Am is directed to file a petition to modify this Commission decision if pending litigation testing the 2009 cease and desist order of the State Water Resources Control Board results in an outcome that conflicts with the orders in this decision.

2. Background

2.1. Water Scarcity in the Monterey District of Cal-Am

The Monterey District of the California-American Water Company (Cal-Am) has a continuing water supply deficit. It is served by scarce water resources;¹ a sizeable portion of its demand is served by water diverted from the Carmel River without a water right in order to meet customer demand pending the development of a supplemental water supply.² If it were not for graduated

¹ The two sources are the Seaside Basin and the Carmel River.

² On December 2, 2010, the Commission authorized Cal-Am to participate in the Coastal Water Project that is designed to produce 8,800 acre feet of desalinated water in a normal year for the Monterey Peninsula. See Decision (D.) 10-12-016 rendered in Application (A.) 04-09-019.

or deferred deadlines of compliance in water right orders,³ there would not physically be adequate supplies to meet current water demand in Cal-Am's Monterey District.

2.2. Many Public Institutional Players Dealing With the Scarcity

In its Monterey District, Cal-Am must deal with several public entities as it copes with water scarcity. Each of those entities is variously constraining and helping guide the steps Cal-Am takes. Each exercises jurisdiction that bears on the application Cal-Am filed to start this proceeding. A brief description of the role and involvement of the principal public agencies⁴ follows.

2.2.1. State Water Resources Control Board (SWRCB)

The SWRCB is charged with overseeing water rights within the state. Its statutory mandate includes the statewide enforcement of water right permit terms and conditions and taking action against the unauthorized use of water.⁵

³ Under the February 9, 2007 Amended Decision, at 17-22, in the Seaside Basin Adjudication, *California American Water Company v. City of Seaside*, Case No. M66343, Superior Court of Monterey County, there is a declining schedule of aquifer pumping ("operating yield") to regain safe yield ("natural safe yield"). Under the SWRCB's October 20, 2009 Cease and Desist Order, WR-2009-0060 (2009 CDO), an immediate reduction of five percent in Carmel River diversions was ordered (Condition 3), to be followed by annual cumulative reductions of 121 acre feet from 2011 to 2015 and a termination of all unlawful diversions by December 31, 2016 (Condition 3).

⁴ Other public agencies with a stake in the moratorium issue include Peninsula cities, Monterey County, the Central Coast Regional Water Quality Control Board, California Coastal Commission, U.S. Army Corps of Engineers, National Marine Fisheries Service, U.S. Fish and Wildlife Service and the California Department of Fish and Game.

⁵ E.g., Cal. Water Code, §§ 174, 275, 1200, 1250-1259; see, generally, California Code of Regulations (CFR), Title 23 (Waters), Division 3 (SWRCB).

It is the principal state agency responsible for protecting and regulating the beneficial use of water as defined in the California Constitution.⁶ As explained in section 2.3 below, Cal-Am's Monterey District has been the object of SWRCB water right orders in 1995 and 2009, the latter containing a moratorium on connections that prompted Cal-Am's application here. The SWRCB is not a party in the instant proceeding.

2.2.2. Monterey Peninsula Water Management District (MPWMD)

The MPWMD was authorized by special legislation⁷ in 1977 to become the public entity to provide integrated management of ground and surface water supplies in the Monterey Peninsula region. In creating MPWMD, the legislature was recognizing the need, among other things, for "conserving and augmenting the supplies of water" in the region.⁸ The MPWMD governs the allocation of the limited unallocated water supplies, and the recognition of both water credits resulting from water conservation and water entitlements.⁹ In regulations that apply to Cal-Am, the MPWMD has defined the stages of shortage and set out of water conservation measures.¹⁰ The MPWMD is a party here, representing that it

⁶ Art. 10, Sec. 2.

⁷ Stats. 1977 ch. 527 ("Monterey Peninsula Water Management District Law"), Water Code Appendix Section 118-2.

⁸ *Id.* at Section 2.

⁹ MPWMD Rules 30 (Determination of Water Allocation) and 11 (Definitions; "Water Credit"; "Water Entitlement").

¹⁰ MPWMD Regulation XV (Expanded Water Conservation and Standby Rationing).

has a significant interest in whether and how a moratorium on connections is implemented in Cal-Am's Monterey District.

2.2.3. Superior Court of Santa Clara County (SCSCC)

The SCSCC now presides over consolidated legal actions by Cal-Am, MPWMD and three Carmel River resorts (CVR HSGE LLC, Bay Laurel LLC and Quail Lodge, Inc.) against the SWRCB.¹¹ Those actions seek writs of administrative mandamus and declaratory relief invalidating the SWRCB's 2009 CDO, including the Condition 2 moratorium that is central to the instant proceeding. All of the petitioners, but not the respondent, in the consolidated cases are parties in the instant proceeding. The grounds for invalidation, and for declaratory and injunctive relief, alleged in these cases include arbitrary, capricious and prejudicial abuse of discretion;¹² violation of res adjudicata; collateral and equitable estoppel; violation of the California Environmental Quality Act (CEQA), and unlawful takings of property in violation of due process.

Irrespective of whether the SWRCB's 2009 moratorium order survives in whole or part at the Superior Court level, appeals and attempts at judicial reconsideration and review could delay the ultimate judicial resolution of the issue of the validity and enforceability of the SWRCB's 2009 moratorium order deeply into and beyond 2011. The exigencies of Cal-Am's situation in the Monterey District do not allow us to await that ultimate judicial resolution before

¹¹ Case No. 1-10-CV-183454, Case No. 1-10-CV-163328, and Case No. 1-10-CV-183439, respectively.

¹² The most recent setting in the consolidated cases was a case management conference.

acting. Yet the court or courts that hear the consolidated cases will have the last word on the validity and enforceability of the 2009 CDO. Our decision here, to the extent that it is dependent on the validity of the 2009 CDO, may become subject to later modification as a result of the ultimate judicial resolution of the issue of that order's validity.

2.2.4. Commission

The Commission has ongoing regulatory jurisdiction over Cal-Am. This jurisdiction extends to relieving Cal-Am of its obligation to serve where water supplies cannot accommodate new or expanded uses without unreasonably curtailing existing customers. Our jurisdiction is being exercised here in specific response to Cal-Am's amended application for an order from us authorizing and imposing a moratorium on certain new or expanded water service connections in its Monterey District. The Commission and the MPWMD have concurrent jurisdiction in regard to the conservation and use of water in the Monterey District, and we have encouraged Cal-Am and MPWMD in the past to work together in matters pertaining to rationing and moratoria.¹³ We have the authority independently to impose a moratorium after hearing¹⁴ although we are not acting under that particular authority in this instance.

¹³ E.g., D.98-08-036 at 11-14; and D.09-07-023 (adopting settlement agreement on water conservation and rationing issues) at 10-14.

¹⁴ Pub. Util. Code § 2708.

2.3. Key Events Leading up to This Application

2.3.1. SWRCB's 1995 Order 95-10

In Order 95-10 issued in 1995, the SWRCB found that 69 percent of the diversions Cal-Am was making from the Carmel River were not covered by valid water rights and therefore were not lawful. Order 95-10 prohibited Cal-Am from appropriating more than 14,106 acre feet per year from the River and imposed a 20 percent conservation goal that would bring the appropriation down to 11,285 acre feet per year.¹⁵ Order 95-10 also required that Cal-Am replace the unlawful portion of its water supply with lawful appropriative permits, other sources to achieve a one-for-one reduction in unlawful diversions, and/or contractual arrangements with agencies having appropriative rights in the River.¹⁶

2.3.2. 1998 Statute and 2002 Plan B Report

In 1997, Cal-Am filed an application with the Commission for the construction of the Carmel River Dam and Reservoir Project to provide a lawful increment of water supply in response to the SWRCB Order.¹⁷ To cover the contingency that such a project might not occur, a statute was enacted in 1998¹⁸

¹⁵ The goal has been met except for the water year ending at the end of September 1997, which cost Cal-Am a fine of \$168,000. The SWRCB had received several complaints about the impact of Cal-Am's diversions on instream and riparian values.

¹⁶ Condition No.2 of Order 95-10 (to be distinguished from Condition 2 of the 2009 CDO).

¹⁷ A.97-03-052. Cal-Am's attempts to comply with Condition 2 of Order 95-10 are described variously in D.03-09-022, D.06-12-040, and D.09-12-017.

¹⁸ Assembly Bill 1182.

mandating that the Commission develop a long-term plan for providing supplemental water to the Monterey Peninsula. The Commission as lead agency published a contingency plan, “Plan B Report,” in July 2002 proposing a desalination facility with aquifer storage and recovery, and conveyance facilities. In 2003 the Commission dismissed Cal-Am’s 1997 application (dam and reservoir project) and ordered Cal-Am to file a new application¹⁹ to construct the facilities identified in the Plan B Report, termed the “Coastal Water Project.”²⁰

2.3.3. Coastal Water Project EIR and Decision

The environmental impact report (EIR) process on the Coastal Water Project began in 2005 and ended with an EIR, certified by the Commission in December 2009, that assessed three projects capable of meeting the need for supplemental water.²¹ In April 2010, Cal-Am reached a proposed settlement with five protestants to its application and the Commission issued D.10-12- 016 on December 2, 2010, authorizing the Coastal Water Project.

2.3.4. Seaside Basin Adjudication Decision

Multiple parties, including Cal-Am, sought and in February of 2007 received from the Superior Court of Monterey County a comprehensive order

¹⁹ See D.03-09-022. The new application for the Coastal Water Project was A.04-09-019.

²⁰ Cal-Am filed a revised application and Proponent’s Environmental Assessment in mid-July of 2005.

²¹ D.09-012-017.

adjudicating their groundwater rights in the Seaside Basin,²² the other source of water within the MPWMD besides the Carmel River.

2.3.5. SWRCB's 2009 CDO

The SWRCB over time became dissatisfied with Cal-Am's efforts, in the wake of Order 95-10, at seeking supplemental water. A SWRCB staff team sought issuance of a cease and desist order under the Water Code.²³ In mid-January 2008 a SWRCB official issued a draft cease and desist order citing the ongoing unlawful diversions and threatening annual reductions in those diversions of 15 percent. Cal-Am thereupon requested a hearing which was granted and 7 days of evidentiary hearings, involving 16 intervenors, were conducted in June, July, and August 2009.

On October 20, 2009, the SWRCB issued the 2009 CDO, finding that Cal-Am "(a) failed to comply with the requirements of Order 95-10, and (b) is in violation of Water Code section 1052."²⁴ Cal-Am's position that Order 95-10 had ordered it to pursue, not necessarily implement, supplemental water solutions,

²² Amended Decision entered on February 9, 2007, in *California American Water v. City of Seaside*, No. M66343.

²³ Subsection 1831(d) provides in part:

The board may issue a cease and desist order in response to a violation or threatened violation of any of the following: (1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division. (2) Any term or condition of a permit, license, certification, or registration issued under this division.

²⁴ 2009 CDO at 2.

was rejected in the 2009 CDO.²⁵ The first two ordering paragraphs of the 2009 CDO²⁶ recite these conditions:

1. Cal-Am shall diligently implement actions to terminate its unlawful diversions from the Carmel River and shall terminate all unlawful diversions from the river no later than December 31, 2016.
2. 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 resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.

For purposes of this Condition 2, additional metering is not prohibited as long as it does not prompt an increase in water use.²⁷

The other conditions in the 2009 CDO deal with downward adjustments in the diversions,²⁸ implementation of small projects to reduce unlawful

²⁵ *Id.* at 25-27. The SWRCB stated, *Id.* at 55: "Cal-Am has not diligently implemented actions to terminate its unlawful diversions...."

²⁶ *Id.* at 57.

²⁷ *Ibid.*, fn. 47:

Multiunit residential, commercial or industrial sites may currently be served by a single water meter. The installation of additional meters at an existing service will not be viewed as a new service connection provided that the additional metering does not result in an increase in water use. Metering each unit of a multiunit building tends to increase accountability in the use of water and the effectiveness of water conservation requirements.

diversions,²⁹ quarterly reporting,³⁰ a requirement that most of the provisions of Order 95-10 remain in effect³¹ until a “permanent supply of water ... has been substituted for the water illegally diverted from the Carmel River,”³² and close monitoring by the SWRCB’s Deputy Director of Water Rights of compliance with both Order 95-10 and the 2009 CDO.³³

Petitions for the reconsideration of the 2009 CDO were filed by certain holders of water entitlements or credits³⁴ granted by the MPWMD. Except for slight changes and clarifications not relevant here, the SWRCB dismissed the petitions in Order WR 2010-0001 (2010 Order) on January 5, 2010. Relevant here, however, is the following portion³⁵ of the 2010 Order:

The entitlements amount to an agreement between MPWMD and PBC [Pebble Beach Company] for service from the water supplies available to Cal-Am. The entitlements do not provide Cal-Am with the right to supply water illegally diverted from the river.

²⁸ From a base of 10,978 acre feet per year. *Id.* at 57-60 (Conditions 3 and 4).

²⁹ *Id.* at 60 (Condition 5).

³⁰ *Id.* at 61-62 (Conditions 6, 7, and 8).

³¹ The exceptions are set out at *Id.* at 62 (Condition 9).

³² *Id.* at 62-63 (Conditions 9 and 11).

³³ *Id.* at 62 (Condition 10).

³⁴ Pebble Beach Company, Quail Lodge, CV Ranch and Bernardus Lodge. The Del Monte Forest Property Owners group, which is covered by the Pebble Beach Company’s entitlement, also sought reconsideration of the 2009 CDO, but the SWRCB found that the group’s letter to it did not meet the formal requisites for a petition. 2010 Order at 18.

³⁵ 2010 Order at 6-7.

Prohibiting Cal-Am from illegally diverting from the river does not deny PBC anything to which it is legally entitled. Nor does it terminate the entitlements.

... Order WR 2009-0060 does not contain language extinguishing the entitlements. The order leaves the entitlements in place; however, the entitlements must be served in a manner consistent with the water rights held by Cal-Am. When Cal-Am develops a new source of water that makes water available for new connections consistent with Order WR 2009-0060, the entitlements will apply to that new supply. We conclude, therefore, that Order WR 2009-0060 does not deprive petitioner of the water entitlements received from MPWMD.

Several of the parties in the instant proceeding³⁶ are invoking their status as holders of water credits or entitlements from MPWMD in their efforts to avoid the reach of Condition 2 of the 2009 CDO. Those claims are discussed below in section 5.5.2.

2.3.6. Lawsuits Against the 2009 CDO

Soon after the 2009 CDO (October 20, 2009) was issued, legal actions were brought separately by Cal-Am³⁷ and MPWMD,³⁸ and later by the three Carmel

³⁶ CVR HSGE LLC, Bay Laurel LLC, Quail Lodge Inc., Stanley Plez, Mahroom Family Partnership and Shan Sayles.

³⁷ *California-American Water Company v. SWRCB*, filed October 27, 2009, in Superior Court, County of Monterey, now designated Case No. 1-10-CV-183454 in the Superior Court, County of Santa Clara.

³⁸ *MPWMD v. SWRCB*, filed October 27, 2010, Superior Court, County of Monterey, now designated Case No. 1-10-CV-163328 in the Superior Court, County of Santa Clara.

River resorts³⁹ that are also parties here, seeking to invalidate that CDO. As requested by the MPWMD, the Monterey County Superior Court granted a stay on the 2009 CDO on November 3, 2009, which remained in place until lifted by the Santa Clara County Superior Court on April 22, 2010, in response to a motion by the SWRCB. With the lifting of the judicial stay, Cal-Am again faced the terms and conditions of the 2009 CDO, and filed the instant application.

2.4. Procedural History of This Proceeding

The application in this proceeding was filed on May 24, 2010, followed by an amended application filed on May 27, 2010. Assignment of matter to Commissioner John Bohn⁴⁰ and Administrative Law Judge (ALJ) Gary Weatherford occurred on June 1, 2010. On June 3, 2010, the proceeding received a preliminary categorization as a ratesetting matter and a preliminary determination that hearings would not be needed. On June 24, 2010, the MPWMD moved for leave to intervene. Security National Guaranty, Inc. (SNG)⁴¹ filed a response to the amended application on July 2, 2010. The Division of Ratepayer Advocates (DRA) filed a protest on July 6, 2010. The Hidden Hills Subunit Ratepayers Association (HHSRA) and Pasadera Homeowners Association (PHA) on July 8 and July 9, 2010, respectively, each filed a motion to become a party.

³⁹ *Quail Lodge, Inc., CVR HSGE LLC, and Bay Laurel LLC v. SWRCB*, Case No. M103796, filed on February 3, 2010, in the Superior Court of Monterey, now designated Case No. 1-10-CV-183439 in the Superior Court, County of Santa Clara.

⁴⁰ On January 12, 2011, the proceeding was assigned to President Michael R. Peevey.

⁴¹ Holder of water rights under the Seaside Basin Adjudication and owner of parcels in the City of Sand City.

On July 14, 2010, ALJ Weatherford issued a ruling setting a prehearing conference and requiring a joint case management statement from the parties. On July 15, 2010, separate protests to the amended application were filed by CVR HSGE LLC, Baylaurel LLC and Quail Lodge. Cal-Am filed a reply on July 16, 2010, to the various protests and responses theretofore filed. Separate motions for intervention were filed on August 12, 2010, on behalf of Stanley Pletz, the Mahroom Family Partnership and Shan Sayles.

The joint case management statement was filed on August 27, 2010, identifying those issues that the participants considered to be relevant for resolution. The transcribed prehearing conference was held in San Francisco on August 25, 2010, during which ALJ Weatherford granted the pending motions for intervention and party status. No party opposed the preliminary categorization or requested evidentiary hearings. Commissioner Bohn's Scoping Memorandum and Ruling of September 9, 2010, set out the issues, concluded that no evidentiary hearing would be required and that the final categorization would be ratesetting, laid out the remaining schedule for the proceedings and designated ALJ Weatherford as the presiding officer.

Eleven common-outline opening briefs, two requests for official notice, as well as an intervention motion by six cities (Carmel, Del Rey Oaks, Monterey, Pacific Grove, Seaside and Sand City), were filed between October 8 and 11, 2010. Three additional requests for official notice were filed on October 11, 2010. Twelve reply briefs were filed on October 22, 2010.

Two public participation hearings, drawing comments from thirty speakers, were conducted in Monterey on December 13, 2010, by ALJ Weatherford. Speakers included individual residents, parties in the proceeding, and representatives from local government entities, businesses and voluntary

associations. The concerns and opinions⁴² expressed were varied and wide-ranging, summarized here as follows:

- A de facto moratorium already exists in the form of MPWMD rules.
- Cal-Am is complying with the river diversion limits without a need for the 2009 CDO.
- MPWMD allocations yet to be used within the respective jurisdictions are a small fraction of the overdraw from the river.
- Imposing the 2009 CDO would result in a serious drop in revenues from temporary occupancy, sales and property taxes.
- Local governments are under state and federal mandates, as well as general plan directions, to build low to moderate income and senior housing.
- Community health, safety, airport, police and fire services, as well as national security facilities, need water.
- The validity of the 2009 CDO is in question in pending court cases.
- Businesses, and job rolls, already are struggling.
- Urban redevelopment and build out of infill areas require water.
- State constitution bans customer discrimination by utility or Commission.
- Individual circumstances call for equitable treatment in the form of exceptions or exclusions to a moratorium.
- Water credits and entitlements should be honored.
- The baseline for determining changes in use is unclear.
- The affected area is a state-wide leader in water conservation.
- MPWMD has continued to issue water permits since the 2009 CDO.

⁴² Speakers had their words transcribed but were not under oath.

- SWRCB conducted many days of hearings, at which arguments of opponents to a CDO were heard, before the 2009 CDO issued.
- Public trust resources in and along river, including steelhead, continue in dire straits.
- If a moratorium is not imposed, there is a potential for increased water demand, yet the Coastal Water Project (desalination) is designed only to replace what is illegally diverted from the river.
- Why did the state agencies (SWRCB and the Commission) not talk to one another before the situation got to where it is?
- Individuals, businesses and agencies have spent significant resources in reliance on the MPWMD rules and regulations.

3. Issues Presented

The Scoping Memorandum and Ruling of September 9, 2010, identified the following issues for this proceeding:

- * Should the Commission relieve Cal-Am of its obligation to serve connections prohibited by the Water Board's Order WRO-2009-0060 moratorium?
- * Is the Commission empowered to, and should it, determine in this proceeding whether particular connections or types of connections come within that moratorium?
- * Is the Commission empowered to, and should it, authorize Cal-Am to except particular connections or types of connections from the coverage of the moratorium?
- * Should the Commission authorize and order Cal-Am to impose a service connection moratorium on subsystems within its Monterey District that are physically unconnected to its Main System and that receive no water from the Carmel River?

The foregoing issues are addressed below in Section 5 (Analysis and Discussion).

4. Official Notice Taken

Several parties have requested that official notice be taken of certain documents.⁴³ Official notice of facts is allowed under our Rules of Practice and Procedure⁴⁴ as permitted in the Cal. Evidence Code, the relevant provisions of which are:

§ 450. Judicial notice may not be taken of a matter unless authorized or required by law.

§ 452. Judicial notice may be taken of the following matters to the extent that they are not embraced within [the prior section]:

- (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and the Legislature of this state.
- (b) Regulations and legislative enactments issued by or under the authority of the United States and of any state of the United States or any public entity in the United States.
- (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. ***
- (d) Records of (1) any court of this state or (2) any Court of record of the United States or of any State of the United States. ***

⁴³ See various Requests for Official Notice filed on October 8, 2010 by MPWMD and by the cities of Carmel-by-the-Sea, Del Rey Oaks, Monterey, Pacific Grove, Sand City and Seaside, and on October 11, 2010 by Baylaurel LLC, CVR HSGW LLC and Quail Lodge, Inc.

⁴⁴ Rule 13.9: "Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."

- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

§ 453. The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

- (a) Gives each adverse party sufficient notice of the requests, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
- (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Our actions, and the related statutory authority, on the requests for official notice are shown below in Table 1.

TABLE 1

**OFFICIAL NOTICE TABLE FOR A.10-05-010
(CAL-AM MONTEREY DISTRICT MORATORIUM APPLICATION)**

DOC. NO.	DOCUMENT	OFFICIAL NOTICE REQUESTED BY	ACTION TAKEN		BASIS FOR ACTION (Evidence Code §) (NC= not covered in Evidence Code) (NTA= not for truth asserted)
			GRANTED	DENIED	
1	SWRCB Order WRO-2009-0060	Cal-Am	x		452(c)
2	SWRCB Order 95-10	Cal-Am	x		452(c)
3	Kassel/Turner 1/15/08 letter	Cal-Am		x	NC
4	Rubin/Kassel 2/4/08 letter	Cal-Am		x	NC
5	Cal-Am Writ Petition	Cal-Am	x		452(d) NTA
6	Minute Order, Case # M101102	Cal-Am	x		452(d)
7	Draft Customer Notice	Cal-Am		x	NC
8	MPWMD Rule 11	MPWMD	x		452(b)
9	MPWMD Rule 20	MPWMD	x		452(b)

10	Colonel Brewer 8/26/09 letter	MPWMD	x		452(d) NTA
11	Seaside City Mgr Declaration	Six Cities		x	NC
12	Zehnder (EPS) Declaration	Six Cities		x	NC
13	Monterey City Mgr Declaration	Six Cities		x	NC
14	Carmel City Mgr Declaration	Six Cities		x	NC
15	1996-2008 Water Production	Six Cities		x	NC
16	Monthly Allocation Report (8/10)	Six Cities		x	NC
17	MPWMD Rule 25.5	Bay Laurel, Quail Lodge	x		452(b)
18	MPWMD 6/30/08 letter	Bay Laurel		x	NC
19	Plan. Comm'n Resolution 09037	Bay Laurel	x		452(b)
20	Carole Forest Declaration	Bay Laurel		x	NC
21	Lodges Writ Petition (2/3/10)	Bay Laurel, Quail Lodge, CVR	x		452(d) NTA
22	Lawson Little Declaration	Quail Lodge		x	NC
23	MPWMD Findings of Approval	Quail Lodge	x		452(b)

24	MPWMD 9/20/10 Agenda Report	Quail Lodge		x	NC
25	MPWMD Ordinance 83	Quail Lodge	x		452(b)
26	MPWMD 12/17&21/2007 letters	Quail Lodge		x	NC
27	MCWRA 1/30/08	CVR		x	NC
28	7/9/09 Recorded Deed Restriction	CVR	x		452(b) NTA
29	David Hunter Declaration	CVR		x	NC

5. Analysis and Discussion

5.1. Concurrent Jurisdiction of Commission

As noted in Section 2.2 above, several state-empowered public entities in addition to the Commission have an interest in, and some responsibility that could be intersected by, the moratorium mandated in the 2009 CDO. In this decision we define our interests and responsibilities relative to those of the other entities with respect to the implementation of the moratorium ordered by the SWRCB. We are directing Cal-Am to seek such guidance from the SWRCB as and when needed with respect to issues of 2009 CDO interpretation and implementation. If the SWRCB for any reason does not expeditiously provide guidance, we stand ready to address another application from Cal-Am. Consultation with the MPWMD, where appropriate, is also encouraged.

5.2. Validity Generally of Condition 2 Pending Final Judicial Outcome

The authority of the SWRCB to prohibit water connections by Cal-Am, not solely restrict river diversions, is being called into question in the consolidated writ actions described above and pending before the Superior Court of Santa Clara County. The judicial stay initially imposed on the 2009 CDO was lifted by the Santa Clara County Superior Court on April 22, 2010, in response to a motion by the SWRCB. Here, pending the outcome of those court cases, we take the position that an order of a sister state agency carries a presumption of validity.⁴⁵ 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. We do find Condition 2 troublesome in one particular, however. There is the possibility that there could be demonstrative and compelling water needs for public health and safety, before supplemental water is obtained, that would require a new connection or increased use and that could not be addressed because of Condition 2. We are

⁴⁵ 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.

directing Cal-Am to confer with MPWMD and seek from the SWRCB a process or mechanism that will permit Cal-Am to serve such public health and safety needs within the Monterey District.

See discussion below in Section 5.5.4.

For purposes of this decision, the SWRCB's Order 95-10,⁴⁶ 2009 CDO and 2010 Order are presumed valid and not ultra vires. If that presumption were to be ultimately rebutted judicially, Cal-Am would have available to it the processes of this Commission that provide for the review, modification or supplanting of earlier Commission decisions.

5.3. Directing Compliance With Condition 2

In the interests of both time and the avoidance of unfruitful duplication, we are not exercising here our independent authority under § 2708 to conduct a hearing and, upon adequate findings, to either allow or disallow customers to be served by Cal-Am in the Monterey District. Instead we are exercising our authority and discretion in regulating Cal-Am as an investor-owned water utility⁴⁷ to recognize the orders of the SWRCB as a legitimate basis for relieving Cal-Am of the obligation that it otherwise has to serve applicants for service within its service territory.⁴⁸

⁴⁶ Order 95-10, with a few exceptions, remains in effect. See 2009 CDO (Condition 9) at 62.

⁴⁷ E.g., § 761: "The Commission shall prescribe rules for the performance of any service ... supplied by any public utility ..." Also, see §§ 701 and 702. In Resolution W-4844 (authorizing revision of tariffs of North Gualala Water Company), October 28, 2010, we similarly deferred to a new services connection moratorium issued by the SWRCB.

⁴⁸ Section 451 requires, in part, that

Specifically, Cal-Am is relieved of its obligation to serve⁴⁹ in its Monterey District to the extent that such service would violate the terms of Condition 2 of the 2009 CDO which, again, provides:

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 resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.

Cal-Am's tariff for the Monterey District is to be modified accordingly.

5.4. Connections that Appear Outside the Reach of Condition 2

5.4.1. Pebble Beach Company (PBC) Entitlements

The SWRCB stated in the 2009 CDO that it was not prohibiting "any increased diversions from the river by Cal-Am for deliveries made under PBC's entitlement from MPWMD"⁵⁰ due to the financial guarantees for the Waste

Every public utility shall furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment and facilities... as are necessary to promote the safety, health, comfort, and convenience of its patrons...

⁴⁹ Pub. Util. Code § 453 prohibits unreasonable discrimination in rates and service. No violation of § 453 occurs with the denial of service explicitly involved in the moratorium here because the findings within Order 95-10, the 2009 CDO and the 2010 Order provide a rational basis for the differentiation of service that results from the implementation of Condition 2.

⁵⁰ 2009 CDO at 53-54, where the following caveat was included:

Footnote continued on next page

Reclamation Project that assure no net increase in river diversions. Subsequently, however, in a 2010 order denying reconsideration of the 2009 CDO, the SWRCB determined that “[a]fter December 31, 2016, Cal-Am shall not illegally divert water from the river to supply holders of PBC entitlements.”⁵¹ Through the end of 2016, then, Cal-Am is obliged to serve the holders of PBC entitlements.⁵² The status of holders of other entitlements, and of water credits, from MPWMD is discussed below in subsection 5.5.2.

5.4.2. Front-Loaded Seaside Basin Supply for Security National Guaranty, Inc. (SNG)

Under a front-loading agreement sanctioned by the Superior Court of Monterey County, which has ongoing jurisdiction through a water master over the Seaside Basin Adjudication,⁵³ the water right of SNG is serviced with ground water through Cal-Am’s Main System⁵⁴ in a manner that provides reasonable

any water users who receive water under the PBC entitlement should not be exempted from any conservation program or other effort to reduce Cal-Am’s unauthorized diversions.

⁵¹ Order WR 2010-0001, at 20. In all other respects the petitions for reconsideration (filed by PBC, Quail Lodge Inc., CVR HSGE LLC, Bay Laurel LLC and the Del Monte Property Owners) were dismissed.

⁵² We recognize, therefore, the SWRCB’s exclusion from the ban of those connections “served by the Carmel Area Wastewater District Water Entitlement pursuant to [MPWMD] Ordinances 39 and 109 and Rule 23.5.” Cal-Am also requested that exclusion in its Amended Application at 9.

⁵³ *California American v. City of Seaside*, Case No. M66343, Superior Court of Monterey County.

⁵⁴ The Main System distributes and intermingles waters from both the Carmel River and the Seaside Basin.

assurance that no additional draw from the Carmel River occurs as a consequence.⁵⁵ Given the avoidance thereby of any net increase in Carmel River diversions, notwithstanding the use of Main System conveyance, we conclude that the front-loaded service to SNG does not violate Condition 2 because it does not physically involve a Carmel River diversion.

5.4.3. Independent Subsystems: Laguna Seca Subarea

The 2009 CDO's prohibitions relate solely to those connections and uses that are dependent on the Carmel River. Connections and uses that draw exclusively upon the Seaside Basin, composed of the Coastal and the inland Laguna Seca subareas, are outside the reach of Condition 2.⁵⁶ Imposing a moratorium on new connections and expanded uses in portions of Cal-Am's service area not dependent on the Carmel River would involve a finding that Cal-Am

has reached the limit of its capacity of water supply and that no further customers of water can be supplied from the system of such utility without injuriously withdrawing the supply wholly or in part from those who have theretofore been supplied by [Cal-Am]. [Pub. Util. Code § 2708.]

⁵⁵ Agreement Between Security National Guaranty, Inc. and California American Regarding Front-Loading Delivery of Water, dated May 18, 2009, at para. 2: "CAW shall take whatever steps necessary to ensure that the amount of SNG adjudicated water produced exceeds the amount of SNG adjudicated water delivered to the SNG property (defined as 'front-loading' delivery)." See, also, Order After Hearing on SNG's Motion to Enforce and Clarify the Amended Decision, filed May 11, 2009, in *California American Water v. City of Seaside*, Case No. M66343, Superior Court of Monterey County.

⁵⁶ This means that the members of the Pasadera Homeowners' Association and residents in the Bishop, Ryan Ranch and Hidden Hills areas, who draw upon the Laguna Seca coastal ground water, are not covered by the moratorium.

Such an undertaking would require extensive discovery, expert testimony and documentary proof. All parties here, however, including DRA, refrained from requesting an evidentiary hearing. Faced with an application focused on the implementation of a sister agency's outstanding order, we independently refrained, and continue to, from ordering an evidentiary hearing.

Absent a relevant factual record we are rejecting DRA's request that we impose a counterpart moratorium on the Bishop, Ryan Ranch and Hidden Hills areas.⁵⁷ DRA notes that the subsystems dependent on the Laguna Seca subarea are part of the integrated whole that is the Monterey District of Cal-Am. Whether that warrants consideration of a moratorium on new connections or on increased uses in areas not dependent on the Carmel River, however, is an issue that we have elected not to undertake in this proceeding that focuses on the implementation of Condition 2. DRA's characterization of the Monterey District as an "integrated system" augers for the issues DRA raises here being considered, if at all, either in a General Rate Case (GRC), where all aspects of system operations, revenue requirements and rate design are taken into account, or in a separate proceeding under § 2708. In either case DRA's concerns would appear to present the challenge of exploring the grounds for a moratorium against the backdrop of MPWMD's existing staged-rationing form of regulation in which Cal-Am has participated with the encouragement of the Commission.⁵⁸

⁵⁷ For DRA's request, see Opening Brief of DRA at 2-5.

⁵⁸ MPWMD' Regulation XV provides for 7 graduated stages of water conservation. At this writing, Cal-Am and water users within the MPWMD are subject to the least restrictive level, Stage 1. For the Stage 1 restrictions, see :

<http://www.mpwmd.dst.ca.us/wdd/Conservation/STAGE%201%20WATER%20Conservation%20and%20water%20waste.htm>.

Footnote continued on next page

5.5. Other Connections for which Either an Exclusion or Exemption is Sought in this Proceeding

5.5.1. Connections Within Ambit of Allegedly Ambiguous Text

Cal-Am and the MPWMD agree that the Commission should not authorize a moratorium that goes beyond the plain terms of the 2009 CDO, yet they disagree as to the plain meaning of the phrase of Condition 2 prohibiting river diversions for “new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use.” Cal-Am reads the words “resulting from a change in zoning or use” as applying only to the “increased use of water at existing service addresses.”⁵⁹ The MPWMD sees those words of qualification as applying as well to “new service connections,”⁶⁰ which would exclude from the moratorium new connections not prompted by a change in zoning or use.

We find MPWMD’s reading of the phrase in question to be strained and incorrect. To exclude from the moratorium new connections not prompted by a change in zoning or use would be to narrow substantially Condition 2, which seeks to protect significant public trust values in the Carmel River.⁶¹ The “change in zoning or use” phrase is linked only to the “increased use” language; no comma separates the two and the two are divorced from “new service

For examples of the Commission’s acknowledgement and support of MPWMD’s concurrent jurisdiction over Cal-Am, see D.98-08-036 at 11-14; and D.09-07-023 (adopting settlement agreement on water conservation and rationing issues) at 10-14.

⁵⁹ Reply Brief of Cal-Am at 5-6.

⁶⁰ Reply Brief of MPWMD at 5; Opening Brief of MPWMD at 12-13.

⁶¹ 2009 CDO at 37-38.

connections” by the disjunctive “or.”⁶² It is clear to us that the prohibition against “new service connections” is not intended to be linked to a change in zoning or use. Rather, it is to be read as unqualified. Accordingly, in implementing Condition 2 Cal-Am should honor the prohibition against new service connections without reference to any change in zoning or use.

As to any other ambiguities that now or later may be perceived to exist⁶³ in the 2009 CDO relative to the text of Condition 2, we think that the issuer, the SWRCB, not this Commission, is best suited to clarify or resolve such matters, and therefore should be turned to by Cal-Am on an as-needed basis. Should any material interpretation of Condition 2 offered by the Commission in this decision be countered by the SWRCB or a state court, Cal-Am will have the ability to seek a modification of this decision.

⁶² An additional basis for our conclusion can be found in a guideline of statutory construction, the “last antecedent rule.” See Reply Brief of Cal-Am at 5, quoting from *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680:

[The last antecedent rule] provides that “qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.” (*Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389) ...

⁶³ Parties have cited portions of the text of the 2009 CDO that they contend are unclear for compliance purposes, e.g., Opening Brief of Cal-Am at 12-14; and of MPWMD at 8-11; and of Baylaurel at 7-9.

5.5.2. New Connections and Increased Uses Relative to Yet Unserved MPWMD Water Use Credits or Entitlements

Both the MPWMD, as the public agency recognizing water use credits⁶⁴ and granting entitlements,⁶⁵ as well as selective holders of such credits and entitlements who also are parties here, have an interest in not having Condition 2 interpreted or applied in a manner adverse to those credits and entitlements.

To possess a quantified water use credit an applicant must have successfully provided to the MPWMD staff information concerning the removal of a previous use or abandoned (e.g., demolished) use, along with evidence of a period of prior consumption.⁶⁶ In short, a water use credit is an incentive mechanism that rewards its holder with the privilege of being able to reapply on the same site the amount of water salvaged by the earlier cessation of a use. The holder of a water use credit has an initial term of 60 months, with the possibility of a 60 month extension, within which to begin to reapply that salvaged water. The cessation of the previous use, then, must be permanent but the time within which the holder can begin to gain the advantage of the salvaged water is five or at most ten years.

⁶⁴ Defined as “a record allowing reuse of a specific quantity of water upon a specific site,” MPWMD Rules and Regulations, Rule 11 (added by Ordinance No.1, February 11, 1980, as amended).

⁶⁵ Defined as “a discrete amount of water that has been set aside by the [MPWMD] for new or Intensified Water Use that shall occur on one or more specific Parcels.” *Ibid.*

⁶⁶ MPWMD Rule 25.5(E) identifies four types of actions that constitute a “permanent abandonment of capacity.” See at: www.mpwmd.dst.ca.us/rules/2010.

The SWRCB's 2010 Order (denying reconsideration of the 2009 CDO) discusses water credits and entitlements.⁶⁷ SWRCB views the water credits and entitlements recognized by the MPWMD to be only as good as the state-recognized water rights, and associated wet water, standing behind them.⁶⁸ Accordingly, it would appear to follow that until replacement supplies are available to offset the illegal diversions from the river, water credits and entitlements created before the 2009 CDO (and not converted into water permits by October 20, 2009) or after the 2009 CDO, other than any that may be wholly serviceable from the adjudicated Seaside Basin, are subject to the Condition 2 moratorium.

While that is our sense of the portent of what the SWRCB was saying in the 2010 Order relative to the parties before it there, we are not undertaking here to weigh and decide the merits of the legal and equitable water credit or entitlement claims made in this proceeding by CVR HSGE LLC, Baylaurel LLC, Quail Lodge Inc, Stanley Pletz, Mahroom Family Partnership and Shan Sayles.

⁶⁷ 2010 Order at 7, 12-13. The SWRCB, however, did not distinguish between water use credits and entitlements. See 2010 Order at 3, fn.3.

⁶⁸ Regarding water credits, for example, the SWRCB stated in the 2010 Order at 13:

[As discussed above], credits allocated by MPWMD do not provide Cal-Am with the right to supply water illegally diverted from the river. Nor does Order WR 2009-0060 extinguish the credits. It simply recognizes, consistent with California water right law, that agreements entitling a party to receive deliveries from Cal-Am do not authorize Cal-Am to divert any more water than it has valid water rights to divert, and requires Cal-Am to curtail its illegal diversions accordingly. We conclude, therefore, that Order WR 2009-0060 does not deprive Petitioners of the water credits received from MPWMD.

We summarize here those claims, but make no findings of fact concerning them. CVR HSGE, LLC, claims over 15 acre feet (water credits and a reserved water allocation) attributable variously to undeveloped lots, removal of landscape, spas and toilets, and investment in irrigation efficiencies, at a combined expense of several hundred thousand dollars.⁶⁹ Baylaurel, LLC, wanting to build an additional 16 rooms, claims a water credit of over 3 acre feet resulting from the removal of a lodge laundry at an expense of several hundred thousand dollars.⁷⁰ Quail Lodge, Inc. claims over 63 acre feet in combined water credits and entitlements for reductions in golf course pumping, landscaping and restaurant capacity. It has a use permit for a 40-room hotel.⁷¹

The Mahroom Family Partnership wants water connections for an eight-unit planned-unit-development that is backed by water credits associated with former and to-be-demolished apartment structures.⁷² It received a water permit⁷³ from MPWMD on the same day that the 2009 CDO was issued. Stanley Pletz has a water permit issued by MPWMD in 2008 for the construction of a single-family residence halted by the absence of incidental take permits for endangered plants on the property.⁷⁴ Shan Sayles continues to retrofit his single family home with

⁶⁹ CVR HSGE LLC Opening Brief at 3-4.

⁷⁰ Baylaurel Opening Brief at 3.

⁷¹ Quail Lodge Opening Brief at 3-5.

⁷² Opening Brief of Mahroom Family Partnership at 3-4.

⁷³ Under the MPWMD system, a water permit is the final approval that the water user uses to obtain a Cal-Am connection. Water credits and entitlements must be converted into water permits before a connection can occur.

⁷⁴ Opening Brief of Stanley Pletz at 3.

water conservation measures for the purpose of having water credits for contiguous parcels that he owns and plans to improve.⁷⁵

These various claims would be best resolved by Cal-Am on a cases-by-case basis after consultation with the appropriate official or officials at the SWRCB where compliance with the 2009 CDO is determined. Relief, if any, from Condition 2 for any one or more of the parties identified in the foregoing paragraph must turn on an exercise of jurisdiction by either the SWRCB, as the ordering agency, or a state court as the anvil on which the legal and equitable contours of the 2009 CDO are being shaped.

5.5.3. Post-2009 CDO Water Permits and Applications

Condition 2 does not prohibit a service connection where all necessary approvals were secured prior to the date that the 2009 CDO issued:

Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.⁷⁶ [Emphasis added.]

Therefore, Cal-Am is obligated to serve water accordingly. Approvals obtained on or after October 20, 2009, are not similarly benefitted.

⁷⁵ Opening Brief of Shan Sayles at 3.

⁷⁶ Second sentence of Condition 2.

5.5.4. Potential Connections and Increases Needed for Public Health, Safety and National Defense

Public health, public safety and national security exceptions from Condition 2 are sought by some in this proceeding.⁷⁷ In response to an allegation that the 2009 Order did not take public health and safety matters into account, the SWRCB characterized the allegation as being “based solely on economic impacts,” which the SWRCB views as being outweighed by “the public trust impacts of deliveries based on illegal diversions from the Carmel River.”⁷⁸ The SWRCB went on to suggest that a “compelling” demonstration of “a serious threat to public health and safety” might spare a new service connection that relies on an illegal diversion from being “an unreasonable use of water that should be prohibited.”⁷⁹

This suggests that the 2009 CDO could somehow accommodate a new connection or increased use to meet an urgent public health and safety water demand. Because Condition 2 expressly bans new connections and certain increased use, however, it is unclear how that would be accomplished. But for the ban on new connections, in particular, the water presumably could be found through an additional increment of conservation or rationing, as can be implied from the following statements in the 2009 CDO:

Finally, having enough water to meet user demand can also be accomplished by reducing user demand. Such reductions can be

⁷⁷ E.g., Opening Brief of MPWMD at 18.

⁷⁸ 2010 Order at 15.

⁷⁹ *Ibid.*

accomplished by water conservation and standby rationing programs similar to that administered by MPWMD.⁸⁰

Cal-Am has entered into an agreement with MPWMD for the coordinated exercise of their respective powers in order to manage user demand... Among other matters, the agreement provides that demand management or rationing may be initiated in response to a final CDO by the State Water Board. Joint Cal-Am and MPWMD efforts to manage user demand may be used to reduce Cal-Am's need to illegally divert water from the river. We conclude that Cal-Am, in conjunction with MPWMD, should undertake demand management to reduce Cal-Am's need to illegally divert water from the river.

Investor-owned water companies are bound to promote the "safety" and "health" of the public,⁸¹ and the Commission should take account of that responsibility in its decisions.⁸² We conclude that there needs to be a process or mechanism expressly identified for handling any additional institutional⁸³ public health and safety water demands (i.e., related new connections or increased uses)

⁸⁰ 2009 CDO at 48.

⁸¹ Pub. Util. Code § 451.

⁸² See *San Diego Gas & Electric Company v. Superior Court of Orange County* (1996), 13 Cal. 4th 893, 923-924.

⁸³ We are purposefully limiting the search for a process or mechanism to one that can address community-level (i.e., institutional) public health and safety needs (e.g., fire station, clinic, police station), rather than expanding the focus to include individual or household public health and safety water needs. To do otherwise could, in our judgment, open a flood gate of requests that might undercut the footing of Condition 2, creating an exception whose scale might unnecessarily threaten public trust values.

that might arise⁸⁴ before supplemental water is obtained. We are directing Cal-Am within 30 days of the effective date of this decision to confer with MPWMD on this subject and within 45 days of the effective date of this decision to request in writing of the SWRCB a process or mechanism that will permit Cal-Am to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District, notwithstanding Condition 2 of the 2009 CDO.

We are not including “national defense,” per se, as a distinct category for which relief from or within Condition 2 ought to be possible. This is because of the larger scale such demands can reach and the separate and supreme powers of the federal government to meet urgent resource needs. This should not preclude, however, a particular water demand of an armed service from qualifying as a demonstrated and compelling public health and safety need.

5.6. Contingencies Posed by the Pending Consolidated Litigation

We are rendering this decision before there is a resolution of the three consolidated cases in the Superior Court of Santa Clara County.⁸⁵ In the event that the judicial outcome of those cases clarifies, limits or nullifies the 2009 CDO in whole or part in a manner that conflicts with the orders in this decision, Cal-

⁸⁴ E.g., in statements made by representatives of the Monterey Peninsula Airport District at the Public Participation Hearing on December 13, 2010, as well as in related correspondence accessible in the correspondence file of this proceeding, claims were made that failure to complete an FAA-mandated runway modification project, requiring water for environmental mitigation, would put airline passengers at risk. Public Participation Hearing RT. 52: at 18-22.

⁸⁵ Case No. 1-10-CV-183454, Case No. 1-10-CV-163328, and Case No. 1-10-CV-183439, consolidated in Superior Court of Santa Clara County.

Am is being directed to file a petition to modify our decision here within 30 days of that judicial outcome.

5.7. Conclusion

In sum, we resolve as follows the issues previously scoped in this proceeding.

Cal-Am is directed in this decision to comply with Condition 2 of the 2009 CDO of the SWRCB. Concomitantly, Cal-Am is relieved of any obligation it may otherwise have to serve the new connections and increased use prohibited by Condition 2. That authorization and relief is to expire at the filing by Cal-Am of an advice letter with the Commission transmitting the written concurrence of the Deputy Director of Water Rights of the SWRCB with Cal-Am's finding that a permanent supply of water is ready to serve as a replacement for the unlawful diversions of Carmel River water.

The Commission reads the terms of Condition 2 as not qualifying the ban on new connections (served by Carmel River diversions) by any reference to a change in zoning or use; and as not covering PBC entitlements, SNG's front-loaded service, or the independent systems of the Laguna Seca subarea.

The Commission is refraining from purporting to create individual exceptions to Condition 2. The source of relief from Condition 2, if and where appropriate, best lies with the SWRCB as the originating authority.

To retain the focus on the specific terms of the 2009 CDO and not delay this proceeding, we are denying DRA's request to impose a moratorium on the Bishop, Ryan Ranch and Hidden Hills areas which, as examples of independent systems of the Laguna Seca subarea, are not connected to either the Main System or Carmel River diversions.

The Commission is directing Cal-Am within 30 days of the effective date of this decision to confer with MPWMD on the subject of how best to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District in light of Condition 2, and within 45 days of the effective date of this decision to request in writing of the SWRCB a process or mechanism that will permit Cal-Am to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District, notwithstanding Condition 2 of the 2009 CDO.

Finally, Cal-Am is directed to file a petition to modify this Commission decision if pending litigation testing the 2009 CDO results in an outcome that conflicts with the orders in this decision.

6. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

7. Assignment of Proceeding

President Michael R. Peevey is the Commissioner now assigned to this proceeding and Gary Weatherford is the assigned ALJ.

Findings of Fact

1. Cal-Am's Monterey District is served by scarce water resources, a sizeable portion of which continues to be diverted from the Carmel River without a water right in order to meet customer demand pending the development of supplemental water supplies.

2. In its Monterey District, Cal-Am must deal with several public entities as it copes with water scarcity. Each of those entities is variously constraining and

guiding the steps Cal-Am takes. Each exercises jurisdiction that bears on the application Cal-Am filed to start this proceeding.

3. The MPWMD was authorized by special legislation in 1977 to become the public entity to provide integrated management of ground and surface water supplies in the Monterey Peninsula region. In creating MPWMD, the legislature recognized the need, among other things, for “conserving and augmenting the supplies of water” in the region. The MPWMD governs the allocation of the limited unallocated water supplies, and the recognition of both water credits resulting from water conservation and water entitlements. In regulations that apply to Cal-Am, the MPWMD has defined the stages of shortage and the terms of water rationing.

4. The SWRCB is charged with overseeing water rights within the state. Its statutory mandate includes the statewide enforcement of water right permit terms and conditions and taking action against the unauthorized use of water. It is the principal state agency responsible for protecting and regulating the beneficial use of water as defined in the California Constitution.

5. In 1995, 69 percent of the diversions Cal-Am was making from the Carmel River were determined by the SWRCB to be not covered by valid water rights and therefore unlawful. The finding was made by the SWRCB in Order 95-10 which prohibited Cal-Am from appropriating more than a specific number of acre feet per year from the River and imposed a 20 percent conservation goal that would bring the appropriation down several thousand acre feet per year. Order 95-10 also required that Cal-Am replace the unlawful portion of its water supply with lawful appropriative permits, other sources to achieve a one-for-one reduction in unlawful diversions, and/or contractual arrangements with agencies having appropriative rights in the River.

6. On October 20, 2009, the SWRCB issued the 2009 CDO finding that Cal-Am “(a) failed to comply with the requirements of Order 95-10, and (b) is in violation of Water Code section 1052.” Cal-Am’s position that Order 95-10 had ordered it to pursue, not necessarily implement, supplemental water solutions, was rejected in the 2009 CDO.

7. The first two ordering paragraphs of the 2009 CDO require that Cal-Am “shall terminate all unlawful diversions from the [Carmel River] no later than December 31, 2016,” and “shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use.”

8. After the 2009 CDO was issued, legal actions were brought separately by Cal-Am and MPWMD, and later by three Carmel River resorts, seeking to invalidate that CDO. As requested by the MPWMD the Monterey County Superior Court granted a stay to the 2009 CDO on November 3, 2009, which remained in place until lifted by the Santa Clara County Superior Court on April 22, 2010, in response to a motion by the SWRCB.

9. No hearing is necessary.

Conclusions of Law

1. Cal-Am should be directed to comply with Condition 2 of the 2009 CDO.

2. In portions of the Monterey District served, in whole or part, by Carmel River diversions, Cal-Am should not deny requests for new service connections and should not prohibit any increased use of water at existing service addresses resulting from a change in zoning or use where all necessary approvals for project construction and connection to its system had been obtained prior to October 20, 2009.

3. In portions of the Monterey District served, in whole or part, by Carmel River diversions, Cal-Am should not deny the installation of additional meters at an existing service provided that the additional metering does not result in an increase in water use.

4. Cal-Am should not be authorized to deny service to:

- a. holders of Pebble Beach entitlements through December 31, 2016;
- b. Security National Guarantee, Inc. under its front-loading agreement;
- c. Laguna Seca Subarea; and
- d. a connection or increased use where an authorized official of the State Water Resources Control Board has given written approval.

5. Official notice should be taken as set out in Table 1 in Section 4 of the text of the decision.

6. Direction in today's decision for Cal-Am to comply with Condition 2 should expire at the filing by Cal-Am of an advice letter with the Commission transmitting the written concurrence of the Deputy Director of Water Rights of the SWRCB with Cal-Am's finding that a permanent supply of water is ready to serve as a replacement for the unlawful diversions of Carmel River water.

7. The Commission should direct Cal-Am within 30 days of the effective date of this decision to confer with MPWMD on the subject of how best to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District in light of Condition 2, and within 45 days of the effective date of this decision to request in writing of the SWRCB a process or mechanism that will permit Cal-Am to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District, notwithstanding Condition 2 of the 2009 CDO.

8. Cal-Am should return to the SWRCB for guidance with respect to any unresolved issues of interpretation or implementation concerning Condition 2.

9. In the event that the judicial outcome of the consolidated litigation in the Superior Court of Santa Clara (case nos. 1-10-CV-163328, 1-10-CV-183439, and 1-10-CV-183454) clarifies, limits, or nullifies WR 2009-0060 in whole or part in a manner that conflicts with the orders in this decision, Cal-Am should file a petition to modify this decision within 30 days of that judicial outcome.

10. For administrative efficiency, this order should be made effective today.

O R D E R

IT IS ORDERED that:

1. In portions of the Monterey District served, in whole or part, by Carmel River diversions, and subject to the following conditions and restrictions, California-American Water Company shall deny requests for new service connections and prohibit any increased use of water at existing service addresses resulting from a change in zoning or use:

- a. California-American Water Company shall not deny such requests or prohibit such increased use where all necessary written approvals for project construction and connection to California-American Water Company's system had been obtained prior to October 20, 2009; and
- b. California-American Water Company shall not deny the installation of additional meters at an existing service provided that the additional metering does not result in an increase in water use.
- c. This Ordering Paragraph does not authorize California-American Water Company to deny service to:
 - i. holders of Pebble Beach Company entitlements;

- ii. Security National Guarantee, Inc. under its front-loading agreement; and
 - iii. Laguna Seca Subarea.
- d. California-American Water Company shall not deny a request for new service or prohibit the increased use of water at an existing service address if an authorized official of the State Water Resources Control Board has given written approval for such service or increased use.

2. The relief and authority provided in the foregoing ordering paragraph shall expire at the filing by California-American Water Company of an advice letter with the Commission transmitting the written concurrence of the Deputy Director of Water Rights of the State Water Resources Control Board with California-American Water Company's finding that a permanent supply of water is ready to serve as a replacement for the unlawful diversions of Carmel River water.

3. Not later than 30 days after the effective date of this decision, California-American Water Company must file and make effective on five days' notice in accordance with General Order 96-B, a Tier 1 advice letter adding the following special condition in its tariff schedules for public utility water service in its Monterey District:

"Moratorium

In portions of the Monterey District served, in whole or part, by Carmel River diversions, and subject to the following conditions and restrictions, California-American Water Company shall deny requests for new service connections and prohibit any increased use of water at existing service addresses resulting from a change in zoning or use:

- a. California-American Water Company shall not deny such requests or prohibit such increased use where all necessary

written approvals for project construction and connection to California-American Water Company's system had been obtained prior to October 20, 2009; and

- b. California-American Water Company shall not deny the installation of additional meters at an existing service provided that the additional metering does not result in an increase in water use.
- c. This special condition does not authorize California-American Water Company to deny service to:
 - i. holders of Pebble Beach Company entitlements;
 - ii. Security National Guarantee, Inc. under its front-loading agreement; and
 - iii. Laguna Seca Subarea.
- d. California-American Water Company shall not deny a request for new service or prohibit the increased use of water at an existing service address if an authorized official of the State Water Resources Control Board has given written approval for such service or increased use.
- e. The relief and authority provided in this special condition shall expire at the filing by California-American Water Company of an advice letter with the Commission transmitting the written concurrence of the Deputy Director of Water Rights of the State Water Resources Control Board with California-American Water Company's finding that a permanent supply of water is ready to serve as a replacement for the unlawful diversions of Carmel River water."

4. Within 30 days of the effective date of this decision, California-American Water Company shall confer with Monterey Peninsula Water Management District on the subject of how best to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District in light of Condition 2. Within 45 days of the effective date of this decision, California-American Water Company shall request in writing of the State Water

Resources Control Board a process or mechanism that will permit California-American Water Company to serve demonstrated and compelling institutional public health and safety water needs within the Monterey District, notwithstanding Condition 2 of WR 2009-0060. Within 10 days after receipt of a substantive response from the State Water Resources Control Board, California-American Water Company shall file an informational-only advice letter as defined by Section 3.9 and pursuant to Section 6 of General Order 96-B reporting on the response to its request.

5. California-American Water Company shall ask the State Water Resources Control Board for written guidance with respect to any unresolved issues of interpretation or implementation concerning Condition 2 of WR 2009-0060, including any pertaining to requests by holders of water credits and entitlements from the Monterey Peninsula Water Management District.

6. In the event that the judicial outcome of the consolidated litigation in the Superior Court of Santa Clara (case nos. 1-10-CV-163328, 1-10-CV-183439, and 1-10-CV-183454) clarifies, limits, or nullifies WR 2009-0060 in whole or part in a manner that conflicts with the orders in this decision, California-American Water Company shall file a petition to modify this decision within 30 days of that judicial outcome.

7. Application 10-05-020 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

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