

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2016-0024

In the Matter of the Petitions for Reconsideration of
**WATER RATEPAYERS ASSOCIATION OF THE MONTEREY PENINSULA
AND
PUBLIC TRUST ALLIANCE**

Regarding State Water Board Order WR 2016-0016,
Amending in part requirements of State Water Board Order WR 2009-0060

ORDER DENYING RECONSIDERATION

BY THE BOARD

1.0 INTRODUCTION

Water Ratepayers Association of the Monterey Peninsula (Water Plus) and Public Trust Alliance filed petitions for reconsideration of State Water Board [Order WR 2016-0016](#), which amended the compliance schedule set forth in State Water Board [Order WR 2009-0060](#), a cease and desist order (CDO) requiring cessation of unlawful Carmel River diversions by California American Water Company (Cal-Am). For the reasons described below, this order finds that the order was appropriate and proper, and denies both petitions for reconsideration.

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(Cal. Code Regs., tit. 23, § 768.)¹

¹ All subsequent California Code of Regulations citations are to title 23, unless otherwise specified.

Among other requirements, a petition must specify the specific board action for which the petitioner requests reconsideration, “the reason the action was inappropriate or improper,” “the specific action which petitioner requests,” and contain “a statement that copies of the petition and accompanying materials have been sent to all interested parties.” (§ 769, subd. (a)(2), (4)-(6).) Additionally, “a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.” (§ 769, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)² The State Water Board may elect to hold a hearing on the petition for reconsideration. Here, neither petition included a request for a hearing, and the issues raised do not require an evidentiary hearing for resolution.

3.0 BACKGROUND

On October 20, 2009, the State Water Board adopted State Water Board Order WR 2009-0060, a Cease and Desist Order (CDO) against the California American Water Company (Cal-Am) for unlawful diversions from the Carmel River.³ WR 2009-0060 required Cal-Am to undertake certain actions to reduce its unlawful diversions and to improve habitat conditions on the Carmel River, and included a compliance schedule for ending unlawful diversions from the river by December 31, 2016. In 2014, after the failure of joint efforts with a range of regional entities to build a desalination plant in Moss Landing, and Cal-Am’s decision to propose a different desalination facility, Cal-Am initiated discussions with State Water Board staff on whether and under what conditions it would be possible for staff to support an amendment of the compliance schedule in the CDO. On November 20, 2015, Cal-Am, joined by Monterey Peninsula Regional Water Authority, Monterey Peninsula Regional Water Management District, City of Pacific Grove and Pebble Beach Company, submitted an application under Water Code section 1832 to amend the CDO, triggering an ex parte communications bar. Staff created a web page for posting all substantive communications regarding the application and proposed changes in the CDO.

² The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass’n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

³ This order refers to State Water Board Order WR 2009-0060 as “WR 2009-0060” or as the CDO.

The State Water Board received 11 comments on this application, including two from Water Plus. On April 28, 2016, Cal-Am submitted a revised application. On May 6, 2016, the State Water Board noticed Cal-Am's application, and set forth the anticipated schedule for bringing the decision at the July 19, 2016 meeting of the State Water Board. The Board received five additional comments prior to the June 1, 2016 deadline for consideration in the preliminary staff recommendation. Staff circulated a preliminary staff recommendation for comment on June 17, 2016. Staff received an additional 77 comments prior to the written comment deadline of July 13, 2016. Staff then released a Draft Order for State Water Board consideration on July 15, 2016. After deliberation at its July 19, 2016 meeting, the State Water Board adopted State Water Board Order WR 2016-0016,⁴ amending, in part, the requirements of WR 2009-0060.

4.0 PETITONS FOR RECONSIDERATION

The State Water Board received two petitions for reconsideration for WR 2016-0016, one from Water Plus received on August 16, 2016, and the other from Public Trust Alliance, received August 15, 2016. This section summarizes the petitions, and then discusses additional filings made subsequent to the petitions.

To the extent that the petitions purport to raise additional arguments, those arguments are either not fully enough articulated to be able to formulate a response, or otherwise do not raise substantial issues related to the grounds for reconsideration, and are denied.

4.1 Water Plus Petition

4.1.1 Errors Alleged in Water Plus Petition

Water Plus alleges that there were irregularities in the proceedings for WR 2016-0016, that the order is not supported by substantial evidence, and that the order is legally erroneous for failure to address certain issues. The concerns it raises under these three headings are essentially (1) that Water Plus was improperly denied access to the proceedings; (2) that the State Water Board did not pursue additional enforcement actions against Cal-Am after the company withdrew from the Regional Development Project, which action constituted a violation of WR 2009-0060; (3) that the State Water Board did not define a health and safety amount of water and use this as the basis of any recrafting of the CDO; (4) that the State Water Board did not sufficiently vet the feasibility (legal and technical) of proposed water supply projects that would replace Carmel River diversions; and (5) that the State Water Board failed to exercise its public trust responsibilities, including the quantification of water needs for public trust uses.

⁴ State Water Board Order WR 2016-0016 is referred to as WR 2016-0016 or "the order."

The petition intertwines its arguments, and raises issues two through five under both the substantial evidence and the legal error sections. This summary sets forth the issues as presented: the analysis section addresses issues as combined, where doing so provides greater clarity.

Regarding perceived irregularities in the proceedings, the petition asserts that there were ex parte conversations between Cal-Am and State Water Board staff between June 1 and July 19, 2016, and that Water Plus was excluded from dialogue between Cal-Am and State Water Board staff for years. It asserts that Water Plus did not know how its numerous e-mails would be considered until release of the preliminary staff recommendation, and further asserts that there was insufficient time for response on the preliminary staff recommendation and the draft order.

Under the heading of lack of substantial evidence, the petition asserts that there was insufficient evidence that the State Water Board itself had complied with WR 2009-0060. The petition asserts that the Deputy Director for Water Rights failed to take specific enforcement actions to “ensure that Cal-Am would have implemented a new water source by December 31, 2016,” as petitioners assert was necessary both under WR 2009-0060’s requirement that the Deputy Director for Water Rights monitor Cal-Am’s compliance and under Water Code section 1825’s requirement for vigorous enforcement. (*Id.* at pp. 2-3.) Specifically, petitioners allege non-compliance with WR 2009-0060 for (1) failure to prevent or reverse Cal-Am’s termination of the Regional Desalination Project, which was scheduled to provide water prior to December 31, 2016; and (2) failure to take action to ensure that “substitute projects were feasible and legally defensible and included essential water rights and would be implemented by December 31, 2016.” (*Id.* at p. 3.) It further asserts that there is “no substantial evidence in the record of the hearing held by the SWRCB ... that the Deputy Director closely monitored Cal-Am’s compliance with State Water Board Orders [WR 95-10](#) or WR 2009-0060” or that Cal-Am diligently implemented new water projects, namely the Regional Desalination Project. (*Id.* at pp. 2-3.)

Petitioners further state that there was no determination of, or substantial evidence to support, the specific amount of water required for health and safety in the Cal-Am service area, or to require Cal-Am to produce a Water Allocation Plan that might be implemented to ensure health and safety. (*Id.* at pp. 2-3.) The petition asserts that there is no support in the record for the contention that enforcement of WR 2009-0060 would affect the health and safety of Cal-Am’s customers. (*Id.*)

The petition then asserts that the State Water Board did not make findings sufficient to justify a five-year extension, in light of the lack of evidence that the projects proposed in the application were legally-defensible and would be constructed by the end of 2021, and in light of Cal-Am’s asserted failure to implement projects diligently.

The petition further asserts that there is no evidence in the record to contradict State Water Board Order 95-10 and WR 2009-0060's findings regarding the public trust impacts on the river, or to reach any conclusion except that that an extension of the CDO compliance period would continue adverse public trust impacts.

Regarding the alleged errors in law, the Water Plus petition alleges that the staff report and record do not show compliance with the public trust doctrine as expressed in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; with Article X, section 2 of the California Constitution; with sections 1825 and 1243, subdivision (a), of the Water Code. The petition further asserts that the order failed to review the environmental impacts to public trust resources, and grants Cal-Am a right to continue diversions that impact public trust resources. It also re-asserts the allegations regarding the perceived failure of the State Water Board to comply with an alleged duty to ensure an end of illegal diversions by December 31, 2016, an alleged duty to ensure replacement water by that date, and an alleged duty to determine the water required to protect public health.

4.1.2 Requested Actions in Water Plus Petition

The petition requests that the State Water Board enforce the unamended WR 2009-0060, subject to seven amendments. In the first four proposed amendments, the petition requests that, prior to October 31, 2016, the State Water Board determine the amount of any unlawfully diverted Carmel River water necessary for Cal-Am customers' health and safety, by determining the net amount of water needed for health and safety, and subtracting out the annual water available from Aquifer Storage and Recovery and the lawful diversion amount identified in 2009-0060 (3,376 acre feet per annum). It then requests that the State Water Board issue Cal-Am administrative penalties for each acre-foot diverted in excess of this amount.

Its fifth proposed amendment is that, by December 31, 2016, the State Water Board withdraw all appropriative water rights currently held by Cal-Am in excess of what is required for public health and safety for current customers. Its sixth is that Cal-Am be required to document the legal defensibility of replacement water supplies by December 31, 2016, and that Cal-Am (rather than ratepayers) be liable for any damages for failure to provide health and safety water, if the State Water Board has not issued the administrative penalties requested above. Finally, the petition's seventh proposed change is that if any damages levied against Cal-Am for failure to supply health and safety water are charged to the ratepayers, that the State Water Board impose administrative civil penalties equal to the amount that the California Public Utilities Commission (CPUC) approves as recoverable.

4.2 Public Trust Alliance Petition

The Public Trust Alliance petition asserts that the order is vague, and that the vagueness could lead to public trust impacts and to unreasonable water supply decisions. It asserts that the alleged ambiguity can and should be cured by the addition of the sentence: “This order establishes a set of performance standards and does not constitute any sort of waiver for any requirement of existing California Law.” While it does not so specify, it can be understood to contend that the alleged vagueness constitutes an error in law.

4.3 Additional Filings Related to the Petitions for Reconsideration

On September 2, 2016, the joint applicants for modification of WR 2009-0060 – Cal-Am, Monterey Peninsula Regional Water Authority, Monterey Peninsula Regional Water Management District, City of Pacific Grove and Pebble Beach Company – filed a joint opposition to the petitions for reconsideration. The filing contests the issues both petitions raised on reconsideration, and also raises procedural objections to the petitions. On September 20, Water Plus purported to file a supplement to their petition for reconsideration. The purported supplementation primarily consists of information and arguments available prior to adoption of WR 2016-0016 and the reconsideration deadline, but also responds in part to the joint applicants’ response to the petition for reconsideration. On September 27, 2016, the joint applicants for modification of the CDO filed a joint opposition to supplementation of the petition for reconsideration, arguing that supplementation should not be permitted and addressing points raised in the purported supplement. On September 30, 2016, Water Plus submitted a purported second supplementation to the petition for reconsideration, addressing concerns with the joint applicants’ opposition to supplementation.

5.0 ANALYSIS

5.1 Due Process Allegations

The Water Plus petition makes the unsubstantiated allegation that State Water Board staff and Cal-Am representatives violated an ex parte communication bar between June 1 and July 19, 2016. As described in the May 5, 2016 notice of application, as well as in the May 11, 2016 letter from the State Water Board to Water Plus, all communications regarding amendment of the Cal-Am CDO except for non-controversial procedural matters that have occurred since the filing of the first application to amend WR 2009-0060 on November 20, 2015, have been posted on a dedicated website and have been publicly available to all interested parties.

(http://www.waterboards.ca.gov/waterrights/water_issues/projects/california_american_water_company/index.shtml.) Water Plus’ allegation that ex parte communications occurred is incorrect.

Water Plus also asserts that it was “excluded” from conversations regarding the CDO for years. (Petition, p. 2.) As described in WR 2016-0016, State Water Board staff met with a range of stakeholders who requested such meetings prior to Cal-Am’s submission of an application. (*Id.* at p. 4.) Water Plus cites no instance in which it requested to meet with anyone at the State Water Board prior to the onset of the *ex parte* communications bar, but was rebuffed, denied access, or otherwise excluded. Water Plus’s petition provides no authority for its assertion that these meetings “excluded” anyone or were otherwise improper. The State Water Board has broad authorization and discretion to meet with the public. (E.g. Water Code §§ 179, 179.6, 186, 187, 1051.) This authority is separate from, and in addition to the procedures for engaging the interested public and stakeholders regarding pending decisions: such procedures involve notice requirements, and offer the interested public the opportunity to provide input on the proposed matters. (E.g. Bagley-Keene Open Meeting Act, Gov. Code § 11120 et seq.; Wat. Code, division 2, parts 3-5, § 1310 et seq. [detailing notice, protest and hearing requirements for water right applications].) The State Water Board staff acted appropriately in meeting with stakeholders at their request up to filing of an application, at which point it made all substantive communications available to the public.

The State Water Board held an open public process on the application before it. That process included significant participation by Water Plus. The organization sent numerous communications to State Water Board members regarding a range of issues related to Cal-Am’s operations. After the November 20, 2015 application, its communications regarding amendment of the CDO were included on the webpage for Cal-Am’s application to amend the CDO. Water Plus sent comment letters on November 23, 2015; and April 15, May 1, June 18, July 12, and July 13, 2016: the State Water Board considered these comments. Water Plus asserts, on page 2, that the organization had “no idea” how emails were received until it learned staff had “ignored all of the information and recommendations” upon release of the preliminary staff recommendation on June 16, 2016. To the contrary, staff publicly responded to Water Plus in a letter on May 11, 2016 responding to background questions, giving assurance the letters were being considered, and welcoming Water Plus’ involvement. The preliminary staff recommendation and WR 2016-0016 mention Water Plus’ (and other ratepayers’) comments and include changes to the proposed application on the basis of the letters submitted. (E.g. Preliminary Staff Recommendation, p. 3, fn 3; WR 2016-0016, pp. 9, fn 6; 15-16, 20, fn 17.) Water Plus made a PowerPoint presentation at the State Water Board meeting that was comparable in length to those made by staff and by Cal-Am, and was significantly longer than the three-minute comment period allocated for parties that did not request additional time for presentation prior to the meeting. The State Water Board rejects the assertion that the process provided somehow stifled Water Plus’ involvement in the proceedings, or that the eight months over which Water Plus submitted letters was insufficient opportunity to present evidence, arguments, recommendations, or other input on behalf of ratepayers.

The State Water Board issued public notice of the application to amend Order 2009-0060 under Water Code section 1832 on May 6, 2016, more than two months prior to the date of adoption of WR 2016-0016. The State Water Board released an agenda for the July 19, 2016 State Water Board meeting, including information on the application to amend Order 2009-0060, on July 8, 2016, in compliance with the Bagley-Keene Open Meeting Act. (Gov. Code, § 11125.) The State Water Board also:

- Created a web site to post communications related to Cal-Am's application on December 7, 2015;
- Released a second notice and preliminary staff recommendation on June 16, more than one month prior to the date of adoption of WR 2016-0016;
- Released a proposed draft order on July 15, two days after the close of the comment period and four days prior to the adoption meeting, to allow interested parties another opportunity to respond to changes in the proposal at the State Water Board meeting;
- Held a public meeting that included presentations by staff, Cal-Am and Water Plus, in addition to the requirements for comment under the Bagley-Keene Public Meetings Act.

The State Water Board undertook these activities to further public engagement and input. Allowing this additional opportunity for engagement did not exclude Water Plus, hamper its ability to engage in the proceeding, or violate any of its due process rights.

The petition for reconsideration on this ground is denied.

5.2 Substantial Evidence Allegations

Water Plus misstates the standard for alleging lack of substantial evidence to support WR 2016-0016. California Code of Regulations, section 768, subdivision (b), permits a petition for reconsideration when "the decision or order is not supported by substantial evidence." The petition alleges that "Substantial Evidence Supports Denial of the Request for Extension of Order WR 2009-0060." (*Id.*, at p. 3 [underlining in original].) This reverses the inquiry, asking not what evidence supports the order adopted, but whether evidence could have supported a decision the State Water Board did not make. Parts of the petition correctly speak to the amount of evidence that supports the findings in the order, rather than speaking to the incorrect standard of whether there would have been sufficient evidence to support a different decision. The rest of section 5.2 speaks to the evidentiary concerns so raised. To the extent that other parts of the Water Plus petition rely on the incorrect statement of the standard, they fail to raise an issue related to the causes for reconsideration, and are denied.

5.2.1 Presumed Limitations of Information

Water Plus makes multiple allegations regarding a lack of evidence in the record to support the State Water Board's decision. Water Plus does not indicate the body of information it understands to constitute

“the record.” It appears that Water Plus may be under the misimpression that the State Water Board was limited to only the application and comments submitted on the application, or perhaps to information presented at the public meeting.

The State Water Board maintains the records of Cal-Am proceedings, as well as Cal-Am’s reports, and other communications relevant to the CDO. Water Plus appears to believe that reports to, and other communications with, the State Water Board are unavailable to inform the agency’s decision-making process. This is not the case.

The public meeting of July 19, 2016 was not an evidentiary hearing for determination of facts subject to the requirements of the Administrative Procedure Act, commencing with section 11400 of the Government Code. (Compare Cal. Code of Regs., § 647 et seq. [public meeting procedures] with § 648 et seq. [procedures for adjudicative proceedings].) Water Code section 1832, which establishes the State Water Board’s authority to modify its cease and desist orders, provides for modification after notice and opportunity for hearing. Here, the party that is subject to the CDO, Cal-Am, did not request a hearing, so the decision to modify the CDO was not made subject to a formal evidentiary proceeding. The State Water Board is therefore not subject to that Administrative Procedure Act’s requirement that the decisions from formal evidentiary proceedings rely solely on evidence formally submitted or officially noticed. (See Government Code, section 11425.50, subd. (c).) State Water Board members are chosen, in part, because of specific expertise in areas relevant to the exercise of its authorities, and the agency has staff in order to give it technical advice. (Wat. Code, §§ 175, 186, subds. (a), (b).) Additionally, the State Water Board is charged with gathering and maintaining certain information on the diversion and use of water and its impacts, and with coordinating with other agencies in sharing this information. (See, e.g., Wat. Code, §§ 1053, 187, 1840, 5101.) In the absence of a formal rule prohibiting reliance on the records it maintains in executing its responsibilities, public information, and State Water Board members’ and staff’s expertise, there is no reason to limit access to the agency’s full expertise and information in making decisions: indeed, such limitation would be contrary to the “orderly and efficient administration of the water resources of the state” in a control board that combines authorities “to provide for coordinated consideration of water rights, water quality, and safe and reliable drinking water. (Wat. Code, § 174.)

This clarification alone should be sufficient to address petitioner’s evidentiary concerns but this order further addresses the specifically-alleged concerns, below.

5.2.2 Allegations regarding evidence to show the State Board’s compliance with WR 2009-0060

Water Plus asserts that the Deputy Director failed to undertake required actions to ensure that Cal-Am implemented new water supplies by December 31, 2016. It is not entirely clear, but it appears that Water Plus is asserting that WR 2016-0016 required substantial evidence that the State Water Board itself complied with WR 2009-0060. Water Plus appears to argue WR 2009-0060, Condition 10’s direction to

the Deputy Director to monitor Cal-Am's compliance with the CDO and State Water Board Order 95-10, and to take appropriate actions to ensure compliance with them, combined with the general policy statements of Water Code section 1825 that the Board "should take vigorous action to enforce ... state board orders and decisions, and to prevent the unlawful diversion of water" resulted in a duty to take additional enforcement actions.

The petition alleges that such enforcement action was a necessary prerequisite to amending the CDO's compliance schedule.⁵ This argument is unpersuasive for several reasons.

First of all, this argument fundamentally misunderstands the nature of a CDO and its compliance schedule. Cal-Am, not the State Water Board itself, is the diverter and user of water, and is the recipient of the cease and desist order. (See Water Code, § 1831, subds. (a), (d) [detailing to whom a CDO may issue].) No order is issued against the Deputy Director or the State Water Board. While the Board can, and does, provide staff with direction, doing so does not make staff the object of an enforcement CDO under Water Code, section 1831. Thus, it is not clear how action or inaction vis-à-vis the CDO can result in non-compliance.

Secondly, Water Plus fails to provide a basis for its erroneous statement that compliance with the CDO by anyone is a prerequisite to amending the compliance schedule. No such prerequisite exists. Water Code section 1832 allows the State Water Board to "modify, revoke, or stay in whole or in part any cease and desist order issued pursuant to this chapter," without setting such a limitation on the State Water Board's authority and discretion in amending the enforcement orders.

Third, Water Plus interprets WR 2009-0060, Condition 10, and Water Code section 1825 as an affirmative obligation to initiate enforcement actions that would ensure that Cal-Am would meet the December 31, 2016 compliance deadline. These directives do no such thing. The State Water Board exercises discretion in the decision whether to initiate enforcement actions against any particular diverter, or in any particular situation. There is no reason to think that a directive to "closely monitor" a CDO's compliance schedule and to take "appropriate action" to insure compliance was intended to bind such discretion. (WR 2009-0060, p. 62.) "Appropriate action" is not a mandate for any particular action, but rather a direction to exercise discretion in choosing the correct course of action. The condition gives a non-exhaustive list of potential enforcement actions that may be appropriate. (*Ibid.*) WR 2009-0060 addresses challenges to the State Water Board's ability to take enforcement action in light of prior water right orders: this list is best interpreted as an affirmation that the CDO is not intended to limit the

⁵ Similarly, the petition alleges a failed duty under WR 2009-0060 for the Deputy Director for the Division of Water Rights to make a determination regarding the amounts of water required for health and safety purposes. This argument is addressed under section 5.2.4.

agency's ability to bring further enforcement action. (See *Id.*, pp. 23-37.) WR 2009-0060 Condition 10's direction to the Deputy Director to bring additional enforcement actions as necessary did not amount to a waiver of prosecutorial discretion. (*Id.*, p. 62.)

Water Plus' further errs in asserting that the Deputy Director should have taken action to "ensure that Cal-Am would have implemented a new water source by December 31, 2016," or to "ensure that Cal-Am's substitute projects were feasible and legally defensible and included essential water rights and would be implemented by December 31, 2016." (Water Plus petition, p. 3.) WR 2009-0060 requires Cal-Am to "diligently implement actions to terminate its unlawful diversions." (*Id.*, Condition 1, p. 57.)

The compliance schedule was set in anticipation of Cal-Am receiving water from the Coastal Desalination Project, but the CDO itself does not require developing that particular supply, or any other supply. WR 2009-0060 did not make any findings regarding the legal defensibility of the Coastal Desalination Project, or of its feasibility or regarding its water rights or water quality, and recognized that the CPUC might not approve the project at all. (*Id.* at pp. 35, 37.) A requirement to monitor compliance with the CDO and to take appropriate action does not amount to a requirement that the Deputy Director require implementation of the Regional Desalination Project or that substitutes the Deputy Director's judgement regarding water supply alternatives for that of the CPUC or the state courts in the ongoing litigation regarding allegations of fault for the failure of the Regional Desalination Project.

Here, staff's engagement with Cal-Am and other stakeholders since 2014 on alternative water supply developments, and the subsequent recommendation by staff to amend the CDO was one of the results of active monitoring of the CDO.⁶ The State Water Board's subsequent decision to amend the CDO rather than to leave the compliance schedule unaltered was well within the Board's authority. (See Wat. Code, § 1831, subd. (b) [CDO may require compliance "in accordance with a time schedule set by the board"]; State Water Board Order WR 2010-0002, pp. 14-15 [discussing authority and discretion in setting compliance schedules].) The basis for the decision to extend the CDO's compliance schedule was explained in WR 2016-0016, at pages 6-12.

The petition for reconsideration on this ground is denied.

5.2.3 Allegations regarding evidence to show Cal-Am's Compliance with WR 2009-0060

As discussed above, compliance with the WR 2009-0060 was not a prerequisite to changing the CDO's compliance schedule, as Water Plus assumes.

⁶ Staff's active monitoring also included other activities, including: reviewing Cal-Am's reports, engaging with Cal-Am and the Monterey Water Management District regarding implementation of Condition 2, and coordinating with other parties concerning the timing of ASR water use.

WR 2016-0016 discusses the fact that Cal-Am had more than met the minimum flow requirements in WR 2009-0060's compliance schedule. The evidence for such compliance with pumping limits is in the quarterly reports Cal-Am submitted since 2009, as well as in the application Cal-Am submitted to amend the CDO.

This discussion does not imply, however, that there is a legal requirement for compliance with a cease and desist order before it may be amended. Rather, these pumping reductions weighed in Cal-Am's favor in consideration of its application, both because they showed Cal-Am was capable of incremental reduction in reliance on unlawful diversions (as would occur if milestones are missed), and because the overall reductions in pumping, in conjunction with other actions, reduce the impact on the fishery from unlawful diversions.

WR 2016-0016 did not need, or purport, to determine whether or not Cal-Am had complied with WR 2009-0060, Condition 1's requirement to "diligently implement actions to terminate its unlawful diversions from the Carmel River." It is clear from Water Plus's filings and comments that the ratepayer organization does not believe Cal-Am was diligent in pursuing the Regional Desalination Project, and has proposed a different water supply to benefit its shareholders at the expense of its ratepayers. Various parties involved in the failed desalination project are engaged in litigation concerning the collapse of the project. (See, *California-American Water Co. v. Marina Coast Water District* __ Cal.App.4th __ (August 18, 2016, A145604) [www.courts.ca.gov/opinions-slip].) Their arguments, the evidence to support them, and a discussion of other potential water supply projects and water purchase options, do not require resolution before determining whether to approve Cal-Am's application to amend the CDO. The State Water Board adopted a compliance schedule that aims to end unlawful diversions from the Carmel River by the end of 2021, regardless of which parties bear what portion of the responsibility for the failure of the Regional Desalination Project.

Reconsideration on this ground is denied.

5.2.4 Evidence Regarding Health and Safety Impacts

Water Plus alleges that "there is nothing in the record to suggest that enforcement of WR 2009-0060 would affect the health and safety of Cal-Am's customers on the Monterey Peninsula." WR 2016-0016 does not make a finding that enforcing the December 31, 2016 deadline for cessation of unlawful diversions would impact the basic health and safety needs of the Monterey Peninsula Community. Thus, the State Water Board did not err by not developing a record to support setting such a standard. Nor does Water Plus point to a requirement to do so.

Additionally, Water Plus alleges that Order 2009-0060 imposed on the Deputy Director the “duty to verify the water required to protect public health and safety,” and that the Deputy Director failed to do so. (Petition, p. 5.) It is not clear whether such “verification” would entail the quantification petitioner later requests, or some other action. Similarly, the petition alleges that the Deputy Director was required to order Cal-Am to produce a “Water Allocation Plan” to protect health and safety uses of water. (*Id.*, at 3.) There is no pinpoint citation or other authority cited for these alleged duties. The Deputy Director has no such duties, and neither action is required for evidentiary or other purposes to support WR 2016-0016.

WR 2016-0016 acknowledges the recent rates of water usage by area residents are close to the benchmark level of 50 gallons/person/day the State Water Board has used for health and safety needs in drafting drought regulations, and also notes that there is no set standard for minimum health and safety requirements. (*Id.*, at p. 10.) As noted, numerous commenters – including petitioners, the CPUC, and an area hospital – expressed concern for public health and safety, were water supplies to drop precipitously. (E.g. Water Plus, letter of April 15, 2016; CPUC, letter of May 20, 2016; Community Hospital of the Monterey Peninsula, letter of July 1, 2016,) This constitutes substantial evidence to adopt a process to raise health and safety concerns to the Board, should compliance with the flow limit schedule threaten health and safety. (WR 2016-0016, Condition 3(c), p. 24.)

Reconsideration on this ground is denied.

5.3 Evidence Regarding Public Trust Impacts

Water Plus asserts that the State Water Board had no evidence “to contradict the substantial evidence in Order WR 95-10 and WR 2009-0060 that Cal-Am’s illegal diversions from the Carmel River have had significant adverse impacts” on public trust resources, or that “the five-year extension of WR 2009-0060 would not have a continued adverse impact on Public Trust Resources.” (Water Plus Petition, p. 4.) The petition does not point to, and there is, in fact, no, requirement to contradict prior evidence regarding public trust impacts. Similarly, there is no requirement to make a finding that there will be no adverse public trust impacts from amending the CDO compliance schedule.

As Water Plus notes, the State Water Board has “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” (Petition, p. 5, citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d. 419, 447.)

The Board did so here. As part of describing why an extension is warranted, the Order examines changes since the adoption of WR 2009-0060 that have increased instream flows and improved fishery habitat access and quality. (See pp. 7-8, 11.) These changes are described in the application, in Cal-Am’s progress reports, as well as in numerous comment letters on the proposed changes to the CDO (See, e.g., National Marine Fisheries Service letter of September 14, 2015; Cal-Am letter of

February 26, 2016; Trust for Public Lands letter of July 7, 2015.) Additionally, some of the changes have received State Water Board approval or funding. (E.g. State Water Board [Resolution No. 2015-0070](#) [City of Pacific Grove water recycling]; State Water Board, Division of Water Rights, Division Decision 2015-0001 [Eastwood/Odello Ranch habitat restoration and flow dedications].) Both the National Marine Fisheries Service, the federal agency charged with implementing the Endangered Species Act as applied to anadromous fish, and not-for-profit environmental organizations supported the limited extension of the compliance period in light of these changes and continued efforts in their comment letters. (WR 2016-0016 at p. 8; National Marine Fisheries Service letter of September 14, 2016; Planning and Conservation League & Sierra Club, joint letter of April 28, 2016; Carmel River Steelhead Association, letters of November 18, 2015 and July 12, 2016.) As stated in WR 2016-0016, “these factors all indicate that the impact of extending the compliance period will not be as great as the impacts found in 2009.” (WR 2016-0016 at p. 8.) Additionally, WR 2016-0016 requires an annual Status of the Steelhead Fishery report that includes adaptive management recommendations, and also contains reopener provisions in the event that conservation measures do not proceed as planned. (*Id.*, Conditions 4 – 6, at pp. 24-25.) This is in addition to the reduced pumping on the Carmel River that is scheduled to occur in the next two years, either through the imposition of reduced pumping limits or to the start of receipt of water from the Pure Water Monterey Project, scheduled to begin producing water in 2018. (WR 2016-0016, Condition 3, subd. (b), pp. 19-24; Amended Application for Order Modifying State Water Board Order 2009-0060 (April 28, 2016).)

The Water Plus petition alleges that WR 2016-0016 is not in conformity with State Water Board Order [WR 2010-0001's](#) finding that it is not necessary to balance unlawful water uses against public trust uses. WR 2016-0060 is in conformity with this finding: the order requires Cal-Am to stop its unlawful diversion completely, rather than balancing public trust uses against the unlawful municipal uses.

WR 2016-0016 does not grant a water right, as Water Plus states on p. 5 of its petition; WR 2016-0016 alters the compliance schedule for cessation of an unlawful diversion. The right to appropriate water in California may only be granted under the application provisions of division 2 the Water Code, sections 1000 et seq. (Wat. Code, § 1225.) These do not provide for development of a water right through issuance of a CDO. (See Wat. Code, § 1825 et seq. [enforcement of water rights].) Water Code section 1243, subdivision (a), which the petition cites on page 7, instructs the State Water Board to take the amount of water for public trust uses into account when the Board is “determining the amount of water available for appropriation for other beneficial uses.” As WR 2016-0016 does not involve an application for or approval of an appropriation of water, Water Code section 1243 is inapposite.

The direction in *National Audubon Society, supra*, 33 Cal.3d at 447, for the State Water Board to take public trust uses into account and protect them when feasible does not eliminate the State Water Board's discretion to take other factors relevant to the public interest into account in enforcement proceedings. (See Wat. Code, §§ 100, 105, 174, 179.)

In finding that the impact of continued diversion would be less than anticipated in 2009, based on increased flows, habitat improvements, and continued rescue efforts, the State Water Board appropriately discharged its public trust responsibilities. The State Water Board also considered public interests besides those protected by the public trust in adopting WR 2016-0016. This included, but was not limited to consideration of the water's use for health and safety by evaluating the per capita usage of the area compared to other areas in California and as compared to various health and safety standards. (*Id.*, at pp. 10-11.) Regarding potential economic and quality-of-life impacts, the State Water Board received approximately 35 letters that expressed concern regarding the potential impact of reduced water availability to area residents, support services and businesses: these comments stemmed from a wide range of stakeholders, including individual ratepayers, business owners, commerce advocacy groups, local non-profit organizations, local government and the CPUC. (see comment letters posted at: http://www.waterboards.ca.gov/waterrights/water_issues/projects/california_american_water_company/index.shtml.)

Numerous commenters in the July 19, 2016 public meeting also discussed the importance of water availability to the region's residents, to specific projects and to the local economy. As it did in 2009, the State Water Board determined that implementation of a compliance schedule, rather than enforcement of an immediate cessation of unlawful diversions, was the appropriate response.

For the reasons discussed above, reconsideration on these grounds is denied.

5.4 Error In Law Allegations

5.4.1 Alleged Non-Compliance with Public Trust Responsibilities, California Constitution, Article X, section 2, and Water Code, section 1243, subdivision (a)

The Water Plus petition cites the above section of the California Constitution, at pages 4-5, but fails to make any claims regarding compliance with the waste and unreasonable use doctrine. Instead, it discusses public trust claims. These claims, and those asserted under the public trust doctrine and Water Code, section 1243, subdivision (a) are addressed under *Evidence Regarding Public Trust Impacts*, above. Reconsideration on these grounds is denied.

5.4.2 Water Code, section 1825

Water Code section 1825 states:

It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water.

Water Plus asserts, without providing a legal standard, that, while enforcement orders State Water Board Order 95-10 and WR 2009-0060 (both of which included compliance schedules) were appropriate exercises of this policy, WR 2016-0016 is not. The petition suggests that extension of the CDO timeline should only have been permitted if the reason for failure to comply were a *force majeure* incident or economic impossibility. It provides no citation for such a standard, which would be contrary to the broad grant of authority to amend a CDO granted in Water Code section 1832, and the broad discretion in prosecutorial actions, as discussed in section 5.2.2, above. WR 2016-0016 describes, in detail, the reasoning behind extending the compliance schedule. (*Id.* at pp. 6-12.) The State Water Board affirms these reasons, and denies the petition for reconsideration on this ground.

5.5 Public Trust Alliance Petition

Public Trust Alliance alleges that WR 2016-0016 is not clear as to what actions the Order does and does not require. The petition suggests that the alleged vagueness could be corrected by clarifying that the order (1) sets performance standards, and (2) does not waive other provisions of California law.

The State Water Board disagrees that additional clarification is required in the order. WR 2016-0016 amends the compliance schedule in WR 2009-0060, including setting up the manner of calculating interim pumping limits from the Carmel River that will be used until the end of 2021. (*Id.*, Condition 3, pp. 19-24.) The pumping levels depend primarily on achievement of milestones based on Cal-Am's plans for additional water supplies. (*Id.*, Condition 3(b)v., pp. 20-21.) In the event that the plans for additional water supplies change, the order sets forth a method to change the milestones. (*Id.*, at p. 20, fn 17.) In the event that milestones are not reached, the order establishes a step-wise reduction in pumping limits. (*Id.*, Condition 3(b)vi-vii, pp. 21-23.) The order also allows for some variation in the pumping limits designed to incentivize investment in and implementation of additional instream flow, conservation or water supply actions. (Condition 3(b)l, iii, iv, ix, xxi, pp. 19-20, 23-24.) To the extent that the order relies on adaptive management provisions, any unspecified changes to pumping limits would require additional approval procedures. (E.g., *Id.*, Conditions 3(c), 5, 6, at pp. 24-25.) The order does not mandate implementation of any particular new water supply measures: compliance may be achieved through implementing Cal-Am's plans, through amending the plans and meeting the new goals, or by simply reducing pumping.

This means that there are many potential paths to compliance, but the State Water Board overarching interest is in ensuring compliance, not in the particular means by which it is achieved. Put another way, it

is generally better to set a performance standard than to specify the manner of compliance. The Order is clear as to which pumping levels constitute a violation of the CDO in any given circumstance. Issuing a CDO requiring a cessation of unlawful pumping under a compliance schedule does not operate to override the statutory prohibition against unauthorized diversions or any other requirement of California law. Nor does issuance of a CDO operate to immunize a diverter from any liability that may be imposed for unauthorized diversions. (Wat. Code, §§ 1052, subd. (f), 1836, 1848, subd. (a); see Order 2009-0060, condition 10 at pp. 62–63.)

While the State Water Board disagrees that it is necessary to amend the order as requested, the above clarification should address Public Trust Alliance’s concerns.

5.6 Requests for Action

For the reasons described above, the State Water Board declines to adopt the changes to WR 2016-0016 and WR 2009-0060 requested in the petitions.

5.7 Filings Subsequent to Deadline for Petitions for Reconsideration

5.7.1 Joint Opposition to Petition for Reconsideration

The joint applicants for amendment of WR 2009-0060 filed a twelve page joint opposition to the petitions for reconsideration on September 2, 2016. No statute or regulation provides for comment submittal or a response period based on requests for reconsideration, except for the discretion granted to the State Water Board to conduct a hearing on reconsideration. (See Wat. Code, §§ 1120 et seq., 1123; Cal. Code Regs., § 768 et seq.) The short time period for action on reconsideration does not allow for an extended rebuttal process between interested parties, absent a decision to hold a hearing. (Wat. Code, §§ 1122, 1123.) At the same time, California Code of Regulations, section 769, subdivision (a)(6), provides that a party filing a petition for reconsideration must provide copies of the petition and related materials to interested parties. This notice requirement suggests that an interested party may take some action based on receipt of the notice, albeit with no guarantee as to the degree of consideration the State Water Board will be able to grant it in the reconsideration timeframe. Here, the twelve page joint opposition to the petition for reconsideration was filed fifteen days after the close of the reconsideration period. The length of the filing in this period of time is not so extended as to interfere with the brisk timeline set forth for reconsideration. (See Wat. Code § 1122. cf Cal. Code Regs., § 3867.1 [20 days for interested parties to respond to petitions for reconsideration of water quality certification decisions].) This order denies the petitions for reconsideration for the reasons described above, which is the result sought by the opposition. It is therefore not necessary to address the individual points in the opposition.

5.7.2 Water Plus' Purported Supplement of September 30, 2016

On September 20, 2016, Water Plus filed an approximately 50 page document as a proposed supplement to its August 16 petition for reconsideration. Water Code section 1122 and California Code of Regulations, section 768 both state that an interested person may file a petition for reconsideration “no later than thirty (30) days after adoption by the board of a decision or order.” (*Id.*, underlining added.) No mechanism provides accommodation for supplementing or engaging on rebuttal regarding a petition for reconsideration once filed, unless the Board determines to hold a hearing on the issues or evidence raised, as provided under Water Code section 1123. (See Wat. Code, §§ 1120 et seq.; Cal. Code Regs., § 768 et seq.)

Here, the first purported supplement was submitted more than two months after the adoption of the initial order, more than twice as long as the 30-day statutory period for reconsideration. Additionally, the more than fifty pages submit additional information and arguments without explaining why they were not or could not have been provided prior to the adoption of the order or within the reconsideration period.⁷ Accepting the first supplement would undermine the finality that the limited statutory reconsideration period grants, and there is no indication of an overriding efficiency or interest of justice that could counterbalance this concern. For example, this is not a situation in which the supplementation is minor, raises evidence or issues that could not have been earlier addressed, corrects a simple oversight - such as a missing attachment or typographical error - or where there is prompt correction of an incomplete petition. Limiting the circumstances under which a petition for reconsideration may be supplemented is also consistent with the State Water Board's practice on water quality petitions, where additional filings after receipt of a response are permitted only upon permission of the Board, not as of right. (Cal. Code of Regs., § 2050.5, subd. (a).) The Board rejects the purported supplementation as untimely.⁸

5.7.3 Additional Filings

On September 27, 2016, the joint applicants for modification of the CDO filed a joint opposition to supplementation of the petition for reconsideration. On September 30, 2016, Water Plus submitted a purported second supplement to the petition for reconsideration. As the Board is not accepting the first supplement, the joint opposition to such supplementation is irrelevant to the proceeding, and the Board has no reason to examine the statements therein. The Board rejects the second purported supplementation for the timeliness reasons described in section 7.5.2 above, and because it responds to statements in the joint opposition to supplementation which the Board has declined to consider.

⁷ It is not clear whether this supplement is intended to supplement the asserted causes for reconsideration, or also to raise the cause for reconsideration that there is evidence that could not have been provided earlier. If the latter was intended, the arguments failed to supply the necessary affidavits regarding why the evidence could not have earlier been submitted, as required under California Code of Regulations, section 769, subdivision (b), and the supplement is also rejected on that grounds.

6.0 CONCLUSION

For the reasons stated above, the State Water Board finds that State Water Board Order WR 2016-0016 was appropriate and proper, and denies the petitions for reconsideration. To the extent that the petitions for reconsideration purported to raise issues not addressed in this order, the State Water Board finds that the issues do not raise substantial issues related to the causes for reconsideration enumerated in California Code of Regulations, title 23, section 768.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied.

CERTIFICATION


The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 1, 2016.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

⁸ It is worth noting that nothing in the petition raises an issue that would persuade the State Water Board to amend the WR 2016-0016. WR 2016-0016 adequately explained its reasons for extending the CDO compliance schedule, and nothing submitted in the purported supplement to the petition for reconsideration changes the Board's analysis.