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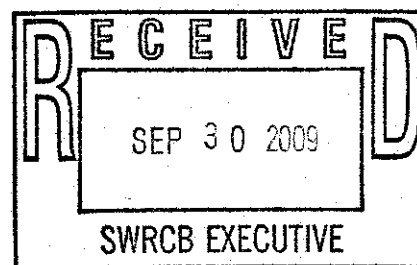
IN REPLY REFER TO:

1-531.154

September 29, 2009

**VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL**

Ms. Jeanine Townsend, Clerk to the Board  
Executive Office  
State Water Resources Control Board  
Cal/EPA Headquarters  
1001 "I" Street  
24<sup>th</sup> Floor  
Sacramento, California 95814-2828



Re: Comment Letter - 10/20/09 Board Meeting: CAL-AM CDO

Ladies and Gentlemen:

By your letter dated September 16, 2009, the State of California State Water Resources Control Board (the "State Water Board") has invited limited public comment on the draft cease and desist order, as revised effective as of September 16, 2009 (the "Revised CDO"). Without expressing any opinion as to the validity or enforceability (or invalidity or lack of enforceability) of the Revised CDO, and for the reasons set forth below, we urge that if the State Water Board decides to issue a cease and desist order, in substantially the form of the Revised CDO, then the State Water Board should insert in Paragraph 2 of such order the actual date of issuance of the order, and not September 2, 2009:

There is ample applicable Federal authority and California law holding that a cease and desist order (i) cannot be applied retroactively, and (ii) can only be applied to actions being taken *in futuro*. The State Water Board recognizes this doctrine, in the penultimate paragraph at P. 32 of the Revised CDO, by stating "a CDO looks forward -- establishing appropriate terms to obtain compliance and to avoid or reduce impacts of threatened or continuing violations, as opposed to imposing penalties for past violations . . .". Wat. Code, §1832, provides that "[C]ease and desist orders of the board shall be effective upon the issuance thereof". No provision of the California Water Code, including §1832 thereof, authorizes or

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permits the State Water Board to exercise its authority on a retroactive basis. Any cease and desist order issued by the State Water Board can only restrain activities occurring from and after the date of issuance of such order; a cease and desist order cannot restrain or punish activities which occurred prior to the issuance of the cease and desist order.

We note that the second sentence of Paragraph 2 of the Revised CDO provides that "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 *September 2, 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*" (emphasis added). Since the Revised CDO will become effective only upon the issuance thereof, and because the State Water Board does not anticipate taking action on the Revised CDO prior to its meeting in mid-October, which is approximately 45 days after the September 2<sup>nd</sup> date, the Revised CDO, as drafted, would be retroactive as it seeks to impose penalties against Cal-Am (and indirectly punishes customers of Cal-Am) for actions taken in the past by Cal-Am prior to the date of issuance of any final cease and desist order. Such retroactive application is contrary to applicable Federal authority and California law.

We further note that the language contained in the second sentence of Paragraph 2 of the Revised CDO is materially different from the language in Paragraph 2(b) of the draft Cease and Desist Order dated July 27, 2009. The State Water Board has previously stated that it reserves the right to modify or change any of the terms or conditions in any "draft" cease and desist order. There can be no reasonable reliance upon the terms and conditions contained in any "draft" cease and desist order. Reasonable reliance can only occur once a final cease and desist order has been issued by the State Water Board. A party affected, either directly or indirectly, by a cease and desist order cannot be expected to have complied with the retroactive "draft" terms and conditions contained in a proposed cease and desist order; it can only be expected to comply, on a going-forward basis, with the terms and conditions of any final cease and desist order which may be issued by the State Water Board.

Given the foregoing facts and circumstances, and in light of existing law, and in order to avoid litigating the issue of the retroactive application of the final cease and desist order, we urge that if the State Water Board decides to issue a cease and desist order, in substantially the form of the Revised CDO, then the State Water Board should insert in Paragraph 2 of such order the actual date of issuance of the order, and not September 2, 2009.

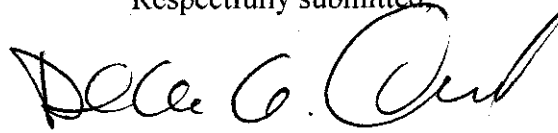
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Thank you for your consideration of this letter of comment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dean M. Ward". The signature is fluid and cursive, with the first name "Dean" and last name "Ward" clearly distinguishable.

Dean M. Ward  
of WARD & WARD, A LAW CORPORATION

DMW:jj