

California American Water Company Cease and Desist Order Hearing

Closing Brief Of the Planning and Conservation League Prepared by Jonas Minton jminton@pcl.org October 6, 2008

Summary:

Until recently there has perhaps been some rationale for why the State Water Resources Control Board has not enforced Order 95-10. Without feasible water supply alternatives it would be politically difficult for the SWRCB to require California American Water Company to reduce supplies to its customers by over half. Although there is still the potential for increased conservation, the level of water use reduction resulting from the Cease and Desist Order would be quite significant.

That excuse no longer exists. The Regional Plenary Oversight Group (REPOG)¹ convened by the California Public Utilities Division of Ratepayer Advocates effort has collaboratively involved local water, waste water and other interest groups in the area. Evidence presented without objection at the SWRCB's hearing on the draft Cease and Desist Order has demonstrated that there are now feasible alternatives that would allow water supplies to be fully maintained at the same time that California American's water diversions were limited to their legal rights. In addition testimony was presented that the new water sources could be implemented in time to meet the schedule in the draft Cease and Desist Order recommended by the prosecution team.

However adoption of the Cease and Desist Order by the SWRCB is still required to actually force the local interests to work together to get those alternative water supply projects implemented. Those projects cannot be carried out solely by California American Water Company. They require cooperative actions by other water and wastewater agencies in the area.

Testimony in the record demonstrates that to date such cooperation has not existed. Individual agencies have pushed for competing projects with the result that few projects have proceeded. Furthermore there is testimony from local interests that adoption of the Cease and Desist Order will provide a powerful incentive for such cooperation.

The only way for California Water Company to eliminate its illegal diversions and for locals to have adequate water supplies is for the State Water Resources Control Board to issue the Cease and Desist Order as recommended by the prosecution team. Facing a future with real

¹ Now referred to as the Water for Monterey County Coalition, [online]
<http://www.waterformontereycounty.org/index.php>

reductions in Carmel River diversions will force the local interests to cooperate and make the alternatives water supply projects a reality.

The history of water management on the Monterey Peninsula shows what the result will be if the SWRCB does not adopt the Cease and Desist Order as recommended by the prosecution team. Local interests will continue their bickering and non-cooperation. Competing proposals will be proposed by individual agencies only to fail for a lack of required cooperation.

Existence of Feasible Alternative Water Supplies

Exhibit PCL 2, the testimony of Steven Kasower, University of California Santa Cruz Center for Integrated Water Research, describes the work being done by that organization pursuant to a contract with the California Public Utilities Commission, Division of Ratepayer Advocates.

As that Exhibit describes, in January, 2007 a regional water supply planning process known as the Regional Plenary Oversight Group (REPOG) began a series of meetings to identify a regional water supply solution. The meetings frequently had 40 to 60 agency managers, senior staff, regulatory staff, local and State elected officials and staff, elected and appointed board members from various municipalities and agencies, non-government organizations and citizens.

Exhibit PCL 3, the "Sustainable Water Program for Monterey County" dated March, 2008 identifies specific projects that could provide up to 29,000 acre feet of water annually. These include 9,000 acre feet of desalinated water, 10,000 acre feet of Salinas groundwater, up to 7,800 from the Salinas river diversion, up to 3,000 acre feet of recycled water - urban, 2,500 acre feet Seaside augmentation, up to 10,000 acre feet recycled water - agriculture, Seaside Aquifer Storage and Recovery 1,400 acre feet, stormwater 500 acre feet, and conservation 300 acre feet. Partial implementation of just some of these projects would more than allow California American Water Company to cease its diversions in excess of its legal rights.

As described in Exhibit PCL 2 the REPOG process has turned its focus to drafting a strategic implementation plan including a "fast track" solution to the Monterey Peninsula's regulatory issues. This Strategic Implementation Plan will include: project engineering and economic analysis, project implementation responsibilities, project scheduling and sequencing, project permitting strategies, institutional relationships and agreement, funding and financing strategy, and outreach strategy.

Timely Availability of Alternative Water Supplies

In Exhibit PCL 2 Mr. Kasower testified that analysis of the regional project and its components was completed and submitted to the California Public Utilities Commission in time for them to be included in the CPUC Coastal Water Project Environmental Impact Report.

The next question is whether alternative supplies can be made available to coincide with the reductions that would be ordered in the draft Cease and Desist Order recommended by the prosecution team.

Mr. Kasower addressed this directly under questioning by Michael Jackson, starting at line 18 on page 250 of the hearing transcript,

18 MR. JACKSON: If I told you that their time line
19 (*under the draft Cease and Desist Order recommended by the*
20 *prosecution team*) would basically supply 5- to 6,000 acre feet of
21 less diversion within 2015, could elements of your
22 project deal with that in that time line?

22 DR. KASOWER: If the agencies involved in this
23 regional suite cooperated, I believe that we could
24 completely supplant the diversion from the Carmel River
25 within that time line.

Why is a Cease and Desist Order Required?

The Planning and Conservation League leaves to the prosecution team and other parties to cite the extensive evidence that California American Water Company has been and is continuing to illegally divert water in excess of its legal rights.

This closing brief will explain why adoption of the draft Cease and Desist Order as recommended by the prosecution team is necessary to achieve the actual reduction in diversion by California American Water Company down to their legal rights.

As can be seen by the list of alternative water supply projects described in Exhibit PCL 3, most would require cooperative effort among California American Water Company and other water and waste water agencies in the region. Simply put, California American Water Company cannot itself implement alternative projects to replace all the water it diverts in excess of its legal rights.

Mr. Kasower's testimony in response to questions by Mr. Minton starting at line 13 on page 242 of the hearing transcript and continuing on page 243 explains why cooperation by other parties is critical to making these alternative water supplies available,

13 MR. MINTON: Thank you. Two remaining
14 questions

15 In your experience, would implementation of
16 the projects in the suite be facilitated by cooperation
17 among the various water and wastewater agencies in the
18 region?

19 DR. KASOWER: The project in this suite will
20 not happen unless there is cooperation between those
21 agencies. So when those agencies are cooperating,
22 we're able to move ahead; and when they -- when they
23 wake up one morning and find they remember what it used
24 to be, and they dislike each other, then I've got to
25 put it all back together again.

1 MR. MINTON: To date, has there been
2 sufficient cooperation among the water and wastewater
3 agencies in the region to actually implement projects
4 that would allow Cal Am to comply with Water Board
5 Order 95-10.

6 DR. KASOWER: Yes and no.
7 Yes, we were able to get the information
8 together to do the environmental impact work. That
9 took an amazing amount of collaboration and cooperation
10 amongst those agencies.

11 When that was finished, they all went back in
12 their corners and starting hissing at each other again.

This lack of cooperation is not just a result of interpersonal conflicts. There is at least a general understanding that any alternative water supplies will cost customers more than the water currently diverted by California American Water Company in excess of its water rights.

That water rates will have to increase to implement these alternative water supplies is confirmed by Mr. Kasower's testimony in response to Mr. Minton's questions starting at line 1 of page 241 of the hearing transcript,

1 MR. MINTON: Okay. Would implementation of
2 these projects increase rates to water users in the
3 region?

4 DR. KASOWER: There's good news and bad news
5 about rate impacts. And again, I have a client. My
6 client is the Division of Ratepayer Advocates of the
7 California Public Utilities Commission. And the
8 impacts to those ratepayers are a very major concern to
9 myself, my colleagues at the university, and to the
10 Regional Plenary Oversight Group.

11 But the facts are that no matter what project
12 gets implemented to resolve this issue, it is going to
13 cost money and it's going to impact those ratepayers.

By not cooperating on the implementation of alternative water supply projects, water agencies are able to avoid increasing rates to their customers to pay for those projects. In short, there is a large financial disincentive for the level of cooperation required to implement alternative water supply projects.

So the question is what will be required to get the local agencies to cooperate despite the fact that it will inevitably result in some rate increases? The draft Cease and Desist Order as recommended by the prosecution team is the only mechanism to create sufficient incentive.

Unless alternative water supplies and additional conservation were implemented, the Cease and Deist Order would result in significant water supply reductions to the California American Water Company's customers. If several witnesses in the hearing were correct, that would have economic reverberations throughout the Monterey Region.

The prospect of such reductions in Carmel River diversions without alternative water supplies will be a powerful motivation for residents and businesses in the region to demand that their water and wastewater agencies stop the bickering and cooperate to implement alternative water supply projects.

This point was confirmed by the testimony of several witnesses. Mr. Darby Fuerst, General Manger of the Monterey Peninsula Water Management District, testified beginning at line 23 of page 952 of the hearing transcript and continuing to page 953,

23 MR. MINTON: Let me follow up more
24 specifically. Would the Board's adoption of the cease
25 and desist order as recommended by the Prosecution Team
1 provide additional pressure?
2 MR. FUERST: I don't know. I'm not certain.
3 In terms of on first -- first blush, yes, it would.
4 But in terms of if it's unrealistic, if it's not
5 achievable, there could be unintended consequences that
6 haven't been unexplored.

In conclusion the Planning and Conservation League strongly urges the State Water Resources Control Board to adopt the draft Cease and Desist Order as recommended by the prosecution team.

Procedural Issue

At the end of the hearing it was pointed out by Co-Hearing Officer Wolff that Mr. Buck Taylor, State Water Resources Control Board Staff Counsel to the hearing was a retired annuitant who served without compensation due to a recent gubernatorial order discharging all employees known as "retired annuitants." See hearing transcript starting at line 3 on page 1457,

3 CO-HEARING OFFICER WOLFF: I wanted to say a
4 thank you. To thank Mr. Taylor, for his voluntary
5 service --
6 CO-HEARING OFFICER BAGGETT: Voluntary
7 service.
8 CO-HEARING OFFICER WOLFF: -- due to the
9 Governor. He is a retired annuitant who is not being
10 paid for these days due to the recent gubernatorial
11 order.

We respectfully request that the State Water Resources Control Board expeditiously determine whether an exemption to reemploy Mr. Taylor as a retired annuitant will be granted by the California Department of Finance. If no such determination is forthcoming by November 10, 2008, the date for receipt of reply briefs, and if Mr. Taylor does not continue his voluntary service in this matter, we request that the State Water Resources Control Board assign an existing attorney to complete the work being performed by Mr. Taylor for this matter.

Literally thousands of hours have been invested by the State Water Resources Control, the California American Water Service Company and other parties in this hearing process. On November 10th the hearing record will be complete and current. Preparing the matter for consideration by the entire State Water Resources Control Board will require the work of a staff counsel.

Any hiatus in the necessary work of the staff counsel would put a decision by the entire Board further away in time from the hearing. It is important to remember that it has already been 13 years since adoption of Order 95-10. It is time to move this along.