

**BEFORE THE STATE WATER
RESOURCES CONTROL BOARD**

In the Matter of the State Water Resources)
Control Board (State Water Board))
Hearing to Determine whether to Adopt a)
Draft Cease & Desist Order against)
California American Water Regarding its)
Diversion of Water from the Carmel River)
in Monterey County under Order WR 95-10)

Hearing Date: TBD

Carmel River in Monterey County

**BRIEF OF
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
ADDRESSING THE SCOPE OF PROCEEDINGS**

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INTRODUCTION

On July 6, 1995, the State Water Resources Control Board (SWRCB) adopted Order No. WR 95-10¹ regarding four complaints concerning California-American Water Company's (Cal-Am's or CAW's) legal basis for its right to divert water from the Carmel River.

By letter dated January 15, 2008, James W. Kassel, SWRCB Assistant Deputy Director for Water Rights, issued a draft Cease and Desist Order (CDO) by which the SWRCB initiated further compliance proceedings against CAW relating to its Carmel River water use. The draft CDO alleges that since 2000, CAW has illegally diverted at least 7,164 acre-feet annually (afa) from the Carmel River and that CAW's unauthorized diversions continue to have adverse effects on the public trust resources of the Carmel River. The CDO proposes a schedule to ramp-down CAW diversions from the Carmel

¹ The SWRCB adopted Order No. WR 95-10 on July 6, 1995 (hereafter Order, or Order 95-10). The Order required, *inter alia*, CAW to terminate unlawful diversions from the Carmel River and to comply with specified conditions. The SWRCB found CAW's rights to divert 3,376 afa from the Carmel River consisted of 1,137 afa under pre-1914 appropriative rights, 60 afa under riparian rights, and 2,179 afa under License 11866 (Application 11674A). Order 95-10 contained findings that CAW diversions were having an adverse effect on: (a) the riparian corridor of the river; (b) wildlife dependent upon instream flows and riparian habitat; and (c) steelhead which spawn in the river.

Petitions for Writ of Mandate were filed challenging Order 95-10. As part of the litigation settlement, the SWRCB adopted Order WR 98-04 on February 19, 1998 amending Order 95-10. Further modification occurred on March 21, 2002, with the issuance of Order WRO 2002-0002. An earlier modification from April 18, 2001 was rescinded with the 2002 order.

River to begin in Water Year (WY) 2009; this would take effect beginning October 1, 2008.

On March 5, 2008 the SWRCB issued a formal Notice of Public Hearing, Meeting to Receive Policy Statements and Pre-Hearing Conference on the draft CDO. The Notice identified the following key issue for this proceeding:

Should the State Water Board adopt the draft CDO? If the draft CDO should be adopted, should any modifications be made to the measures in the draft order? What is the basis for each modification?

During the Pre-hearing Conference convened by Board Members Arthur G. Baggett, Jr., and Gary Wolff on March 19, 2008, questions arose regarding the scope and procedure for this proceeding. The hearing officers allowed the parties the opportunity to submit briefs on this matter. The Monterey Peninsula Water Management District (Water Management District or MPWMD) herewith submits this brief to address its concerns regarding the scope of this proceeding.

**THE WATER MANAGEMENT DISTRICT IS RESPONSIBLE FOR
INTEGRATED WATER RESOURCE MANAGEMENT
IN THE MONTEREY PENINSULA AREA**

The California Legislature created the Water Management District in 1977², forming a public agency which was the first of its kind in California. MPWMD boundaries encompass the cities of Carmel-by-the-Sea, Del Rey Oaks, Monterey, Pacific Grove, Sand City, Seaside, the Monterey Peninsula Airport District, and portions of unincorporated Monterey County, primarily in Carmel Valley, the Del Monte Forest and Carmel Highlands. With minor exceptions, the entire CAW Monterey District distribution system lies within the jurisdictional boundary of MPWMD.

² Statutes of 1977, Chapter 118, as amended, found at West's Water Code Appendix, Sec. 118-1, *et. seq.*

The Water Management District is unique. Its duties are not those undertaken by traditional public utilities or water systems; it does not deliver water to customers. Instead, the District exercises regulatory authority over delivery and use of water, both by municipal and private systems. The Water Management District statute provides the sole legislative authority for integrated management of water resources within the Monterey Peninsula area, encompassing the surface and subsurface waters of the Carmel River, the Seaside Groundwater Basin, and all other water-bearing geologic formations within the MPWMD boundaries.

Meeting this statutory responsibility, the Water Management District has had more than thirty years experience analyzing Peninsula water resources, managing the inter-relationship between Carmel Valley and Seaside waters, dealing with the complex yet limited CAW system network, and undertaking means to balance water demand and supply among those who compete for this limited resource.

Based upon the Water Management District's extensive database and comprehensive operations model it uses to manage and predict water system impacts, the District asks the SWRCB to modify the scope of these proceedings as stated in detail below.

SCOPE OF PROCEEDINGS

THE DRAFT CDO MUST CONSIDER CHANGED CIRCUMSTANCES THAT LIMIT WATER SUPPLIES AVAILABLE TO THE MONTEREY PENINSULA

The SWRCB must consider consequences of the court-mandated production ramp-down caused by the Seaside Basin adjudication decision (*California American Water vs. City of Seaside*, Monterey County Superior Court Case No. M66343). **This court mandate may require CAW to reduce its Seaside Basin pumping by ten percent (10%) on January 1, 2009 and includes subsequent potential reductions every three (3)**

years (triennially) thereafter, beginning October 1, 2012. The initial CAW reduction from the Seaside Basin in WY 2009 would be 387 afa; the total reduction for CAW from the Seaside Basin in WY 2021 will be 2,355 afa.

The draft CDO must consider all requirements of law that restrict water supplies available to CAW, and cannot consider the Carmel River issues in a vacuum.

A key issue to address this consideration can be stated as follows:

What current constraints affect water supplies for the CAW water system? How does the production ramp-down in the Seaside Basin, mandated by the court in *California American Water vs. City of Seaside*, affect CAW and what effect, if any, should these constraints have upon measures required by the draft CDO?

**AS DRAFTED, THE PROPOSED CDO MAY NOT SIGNIFICANTLY IMPROVE
THE ENVIRONMENT FOR STREAM DEPENDENT
FISH, WILDLIFE OR VEGETATION**

Overwhelming evidence defines the fundamental problem addressing water resource issues in the Monterey Peninsula area:

- not enough water for people;
- not enough water for fish and wildlife;
- not enough water for stream dependent vegetation.

This water shortage has evoked heroic efforts by volunteers, the Water Management District and the community at large³.

³ The draft CDO fails to recognize the considerable efforts that have been made to pursue alternative supply projects to reduce the community's reliance upon Carmel River water. These include the following efforts:

- In November 2007, the SWRCB issued Water Right Permit 20802A jointly to the Water Management District and CAW to enable Phase 1 of the Seaside Basin Aquifer Storage Recovery (ASR) project, with a projected long term, average, yield of 920 afa. In November 2007, the District approved, and the City of Sand City thereafter began to implement the City of Sand City Brackish Water Desalination Project, with a projected long term yield of 300 afa.

- In March 2008, the District directed its staff to assign its highest priority to the MPWMD Seawater Desalination Project in the Sand City area and renamed this project the "95-
[footnote continues on next page]

There has been no evaluation as to whether or not the water supply ramp-down proposed in the CDO will provide significant benefit to fish, wildlife or stream dependent vegetation. The amounts of increased streamflow in the Carmel River and groundwater in the underlying Carmel Valley Alluvial Aquifer that the proposed water restrictions will provide have not been quantified. The CDO will jeopardize the health and safety of the citizens of the Monterey Peninsula, but may not confer a corresponding benefit upon fish, wildlife or vegetation.

A key issue to address this consideration can be stated as follows:

Will the production ramp-down proposed in the draft CDO significantly improve the environment for stream dependent fish, wildlife or vegetation? If so, how?

As proposed, the draft CDO does nothing to address problems resulting from the water shortage. The draft CDO cannot end the chronic water shortage on the Monterey Peninsula. The draft CDO does not provide enough water for people... and at the same time it fails to provide enough water to satisfy environmental needs.

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10 Project in recognition of its proposed long term annual yield, which is estimated to range from approximately 3,900 to 8,400 afa and would be dedicated to eliminating CAW's illegal diversions from the Carmel River.

- CAW continues to support analysis of its Coastal Water Project (CWP) application pending before the California Public Utilities Commission (CPUC), in accord with the Plan B Project Report required by AB 1182 (Ch. 797 of the Statutes of 1998), comprised of a proposed Moss Landing Seawater Desalination Plant having a long term yield of 10,430 afa, and an ASR project having a long term yield of 1,300 afa.

- The CPUC's Division of Rate Payers' Advocates (DRA) has initiated a concept for a Regional Project for the Monterey Peninsula and North Monterey County areas, with a proposed long term yield of approximately 29,900 afa.

- Other project concepts have also been proposed and are under active investigation, including the Pajaro/Sunny Mesa Community Services District's Monterey Bay Regional Seawater Desalination Project and the Water Standard Company's Seawater Desalination Vessel Project.

**THE DRAFT CDO SHOULD CONSIDER
WHETHER MEASURES TO REDUCE
WATER USE ARE REALISTICALLY ACHIEVABLE
WITHOUT ADVERSLY AFFECTING
HEALTH AND SAFETY ON THE MONTEREY PENINSULA**

The draft CDO is inconsistent with the terms of SWRCB Order 95-10. These proceedings must enable CAW to meet the water needs of the community in accord with its existing commitments and obligations as a regulated water utility. The CDO should clarify its effects upon vested rights such as those recognized by the water entitlements held by the Pebble Beach Company and the City of Sand City.

The draft CDO proposes to phase in additional limits upon community water use. These limits, in combination with the limits specified in the Seaside Basin adjudication decision, would ultimately require rationing of municipal water use at the sixty percent (60%) level, based on diversion amounts in 1995. This is unfair and unrealistic. It is difficult enough to motivate water users to reduce consumption during a physical water shortage; the ability to sustain this level of reduction in response to a regulatory restriction is unprecedented and untested. Rationing at this level and for this reason may not be achievable.

A key difficulty endemic to any order that CAW reduce water production is evident in the draft CDO. The order incorporates a production ramp-down schedule. This schedule is prima facie evidence that the entire proposed reduction cannot be immediately achieved. Implicit in the ramp-down is a tacit acknowledgement that time is needed to implement the conservation goal; it cannot be achieved overnight. Measures will need to be devised and implemented over time to cause the reduction. What is lacking, however, is any factual basis to support either the eventual ramp-down goal (i.e.,

50% reduction in CAW's currently allowed diversions from the Carmel River) or its timeline.

The CDO hearing should not focus only on the quantity of water to be diverted by CAW, but also on the means CAW must impose upon the community to cause this necessary reduction in water demand. Key issues to this effect can be stated as follows:

Should the State Water Board require CAW to impose specific water conservation requirements upon the community under the draft CDO? If so, what are those measures and what is the basis for each measure?

Is the mandatory production ramp-down schedule in the draft CDO realistically achievable by the community, in the absence of drought or other water supply shortage? If so, how?

Will the production ramp-down adversely affect the health, safety or welfare of the citizens of the Monterey Peninsula?

Shall the CDO incorporate Condition 4 of Order 95-10, allowing CAW to honor existing commitments, including water entitlements such as those held by the Pebble Beach Company and the City of Sand City. If so, how?

**THE DRAFT CDO SHOULD ADDRESS
MEASURES THAT CAW MUST TAKE TO
DEVELOP REPLACEMENT WATER
FOR THE MONTEREY PENINSULA**

The draft CDO should address the manner and timing in which CAW shall develop a replacement source of water. The draft CDO should require CAW to develop a schedule for compliance with Order 95-10. This schedule should be consistent with a realistic timetable for an expected determination by the CPUC on the water supply project alternatives. The CDO timeline should be specifically tied to CPUC and CEQA processes. Key issues to this effect can be stated as follows:

Should the State Water Board require CAW to complete specific tasks in compliance with a clear schedule to comply with Order 95-10, in lieu of the phased production ramp-down proposed in the draft CDO? If so, what

should those tasks be, and what schedule is appropriate to comply with CPUC and CEQA processes?

What consequences should be imposed upon CAW if it fails to complete these tasks in accord with the required schedule?

THE CDO PROCEEDINGS SHOULD BE BIFURCATED

The pending SWRCB proceedings will address a variety of issues relating to CAW's water use practices. A decision to bifurcate the hearing would clarify the interests of the parties and provide focus for the key issues. Threshold matters needing resolution include the following:

- Is CAW in compliance with all terms and conditions of Order 95-10, as amended?
- What additional constraints now affect CAW water supplies?

Subsequent matters are for the most part derivative of the manner in which threshold issues are resolved. Some subsequent matters may become moot, no longer requiring resolution. Others, while still in need of resolution, may have their scope greatly constrained by the manner in which the threshold issue has been resolved. These include:

- Should CAW be required to complete specific tasks to comply with Order 95-10?
- Should specific conservation requirements, instead of production limits, be imposed on CAW?
- Should CAW be required to comply with a clear schedule, appropriate under CPUC and CEQA processes, to achieve its required tasks?
- What consequences should be imposed upon CAW if it fails to complete these tasks in accord with the required schedule?
- Are mandatory production limits realistically achievable? How will it affect the health, safety or welfare of the citizens of the Monterey Peninsula?

- To what extent will broad production limits upon CAW positively affect the environment for stream-dependent fish, wildlife and vegetation?
- How shall existing commitments and water entitlements such as those held by the Pebble Beach Company and the City of Sand City to be recognized?

The parties will benefit from a decision to bifurcate this hearing and address additional issues only at a second stage in these proceedings. Select parties may have interests that only relate to those raised in a portion of the proceedings. Any reduction in the number of parties or the extent of their participation will ease the administrative burden for the SWRCB and the parties, and result in a more efficient hearing.

CONCLUSION

The Water Management District asks the SWRCB to expand the scope of these proceedings (a) to consider the limited water supplies now available to the Monterey Peninsula due to the Seaside Basin Adjudication, (b) to consider whether measures to reduce water use are realistically achievable without adversely affecting health and safety on the Monterey Peninsula, (c) to consider whether and to what extent, if any, river diversion will positively affect the environment for stream-dependent fish, wildlife and vegetation, and (d) to address the manner and timing in which CAW shall be required to develop replacement sources of water.

The SWRCB should bifurcate the CDO proceedings to enable early resolution of threshold issues, and allow a full hearing on all derivative issues. Bifurcation may make the trailing matters moot. If not, many subsequent matters will have their scope

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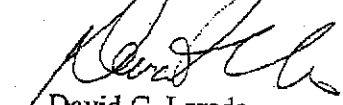
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constrained by the manner in which the threshold issues are resolved. Bifurcation will result in administrative efficiency, and remove undue burdens from staff and parties alike.

Respectfully submitted,

Dated: April 8, 2008

De LAY & LAREDO



David C. Laredo
General Counsel
Monterey Peninsula Water
Management District

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PROOF OF SERVICE

I, Wanda Gooch, declare as follows:

I am employed in the City of Pacific Grove and County of Monterey, California. I am over the age of eighteen years, and not a party to the within cause; my business address is DE LAY & LAREDO, 606 Forest Avenue, Pacific Grove, California 93950. On April 8, 2008, I served the within:

- **BRIEF OF MONTEREY PENINSULA WATER MANAGEMENT DISTRICT ADDRESSING THE SCOPE OF PROCEEDINGS**

on the interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Please see attached list

(BY MAIL) By placing such envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at De Lay & Laredo, Pacific Grove, California following ordinary business practice. I am readily familiar with the practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 8, 2008, at Pacific Grove, California.



Wanda Gooch

**CALIFORNIA AMERICAN WATER CEASE AND DESIST ORDER
JUNE 19, 2008 HEARING**

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