

CALIFORNIA ENVIRONMENTAL LAW PROJECT

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July 11, 2016

Felicia Marcus, Chair

Matthew Quint

SWRCB

Division of Water Rights

PO Box 2000, Sacramento, CA. 95812-2000

Matthew.Quint@waterboards.ca.gov

Re: Sierra Club Comments on Draft Revisions to WRO 2009----0060

Dear Mr. Quint:

On or about October 31, 2009, currently applicants to the Board for Modification of Board Order 2009-0060, MPWMD and California American, simultaneously filed Petitions for Writ of Mandate in the Superior Court of Monterey County, seeking, inter alia, an immediate stay of Board Order 2009-0060 and/or preliminary injunctive relief preventing the SWRCB from enforcing Board Order 2009-0060. In their respective 2009 complaints MPWMD and California American sought to have Board Order 2009-0060 invalidated on a variety of grounds. Both sought invalidation of the moratorium provisions of the Order, and sought relief against the reductions ordered by the Board. The District alleged as well that the reductions in diversions ordered by the Board would endanger the health and safety of the community to the extent they would violate provisions of California law relating to household water supply requirements, and therefore should not be enforced. Both petitioners requested that Order 2009-0060 be set aside in its entirety, and that California American be allowed to continue its unlawful diversions to the detriment of the public trust resources of the River.

The Petition of the MPWMD alleges, inter alia:

l. The SWRCB failed to recognize the special status of the District as a legislatively created authority to integrate management of the ground and surface resources within the Monterey Peninsula, effectuating a deprivation of due process, and resulting in an unfair hearing. (Paragraph 47).

2.. The cumulative annual reductions mandated by SWRCB Order WR 2009—0060 interfere with the land use planning assumptions of the cities of the Monterey Peninsula, and the management authority of the Water Management District. (Para. 49).

3. Order 2009-0060 unlawfully modifies the District's vested rights in Permit 20808A, and limits how the District may use its water right. (Para. 51).

4. SWRCB Order WR2009-0060 limits the water available for individual Cal Am residential customers to levels less than the standard required by Title 23 of the California Code of Regulations. The Order is invalid because the Board made no findings as to water supply needs, or how those needs can be met, in light of the diversion restrictions it imposed. (Para. 54).

5. By adopting Order WR 2009-0060, the SWRCB ignored uncontroverted evidence that forced water use reduction will harm residents and businesses, contrary to the public health standard set forth in Title 23, section 697(b) of the CCR. The SWRCB, in adopting Order 2009—0060 ignored the health and safety impacts to the community. (Para. 65).

The verified petition for Writ of Mandate filed by California American alleges, inter alia:

1. The SWRCB violated CEQA and SWRCB regulations when it determined that the adoption of the 2009 CDO was exempt from CEQA.. In so doing, it failed to analyze impacts associated with the 2009 CDO, failed to formulate mitigation measures, and failed to consider alternatives in violation of CEQA. (Paragraphs 90-92).

2. The SWRCB, in its procedures and hearing leading to the adoption of the Order, violated CAW's due process rights. (Para. 88-89).

3. The SWRCB's findings were arbitrary, capricious and contrary to law. In particular the Board's finding that CAW violated Condition 2 of Order 95-10 is not supported by the evidence and is based on an interpretation of Condition 2 that is contrary to the evidence and the law. The Board's finding that CAW had been committing a trespass pursuant to Water Code 1052 because CAW had been diverting more than 3376 afy is contrary to evidence and the law. (Para. 66).

4. The SWRCB's adoption of the 2009 CDO is contrary to law because it violates the doctrines of res judicata, collateral estoppel, and equitable estoppel. (Para. 70-77).

On the same date that the MPWMD petition was filed, MPWMD filed an ex parte motion for a stay of enforcement of the Order. This stay was granted ex parte, with no adequate notice to the Attorney General, resulting in no opportunity for the Board's representatives to argue against a grant of the stay request. Despite subsequent Motions to Vacate the Stay filed by the State, and, as well, papers in support of the SWRCB's Motion to Dissolve the Stay and its Opposition to California American's Motion for Preliminary Injunction filed by the respondent intervenors, Sierra Club and Carmel River Steelhead Association, the Monterey County Superior Court declined to vacate the stay.¹ Shortly thereafter in mid-December 2009, the State moved for a change of venue, and the Superior Court ordered that the case be transferred to Santa Clara County. California American and MPWMD then sought mandamus relief in the Sixth District Court of Appeal, seeking to keep the case in Monterey County. After briefing by the parties (including respondent intervenors), the Sixth District Court of Appeal denied a writ, and the cases were transferred to Santa Clara Superior Court. After extensive briefing by the State and intervenors in support of the validity of Order 2009-0060, and in opposition to California American's Motion for Preliminary Injunction, and the District's Motion to continue the stay, the Santa Clara County Superior Court, after a hearing in March 2010, vacated the Monterey Superior Court's stay and denied California American's Motion for Preliminary Injunction. The Santa Clara Superior Court's Order dissolving the Stay and denying California American's Motion for Preliminary Injunctive relief was entered in April 2010. Order 2009-0060 has been in effect since the Superior Court Order, and shortly thereafter, upon approval by the CPUC, the moratorium ordered under the Board's CDO was implemented by the applicants.

In 2011-2012, after a mediation before Judge Richard Silver, the parties, negotiated a Stipulation for Dismissal Without Prejudice, Agreement to Toll Statute of Limitations, filed August 13, 2012. (hereafter "Agreement"). The Agreement provided, inter alia, that Petitioners California American and MPWMD could after August 2013 resurrect their claims contained in their respective Petitions for Writ of Mandate, as well as any additional new claims relating to the validity of Board Order 2009-0060. Such an action, however, under the terms of the Agreement, would have to be brought in Santa Clara County

¹ Sierra Club and Carmel River Steelhead Association intervened in the action early in December 2009 in support of respondent Board.

Superior Court, and the original actions were to be dismissed with prejudice.² Agreement, Paragraphs 3(d), 4, 13.

Staff of the Board has recently released a proposed Order Modifying Board Order 2009-0060. Proposed Paragraphs One, Fifteen, and Fourteen provide that the conditions and requirements of Board Order 2009—0060 remain in effect until “terminated by operation of law” to the extent they remain consistent with the provisions of the modified proposed Order. Paragraph 15 provides, inter alia, that the provisions of State Water Board Order 2009-0060 shall remain in effect until “California American has obtained a permanent supply of water that has been substituted for the water illegally diverted from the Carmel River.”

Sierra Club is concerned that under the terms of the Agreement applicants MPWMD and California American could file in the Santa Clara Superior Court a new action or Amended Petition challenging those aspects of Order 2009-0060 that remain in force and effect. As a party to the Agreement, Sierra Club does not wish, in light of the Proposed Revised Order reaffirming the provisions of WRO 2009-0060 to find itself once again involved in contentious, prolonged, and expensive litigation regarding 2009-0060. No matter how speculative or unlikely such an event would be, Sierra Club strongly recommends that the Board condition the proposed Revised Order in such a manner as to require that the applicants waive any rights reserved under the Agreement to commence a new action, or maintain any action challenging the validity of Order 2009-0060. Sierra Club believes that it is not in the public interest for the Board to leave this opening for the initiation of new litigation by the applicants relating to Order 2009-0060.

Sierra Club is not seeking to amend the Agreement but only to condition approval of the Revised Order on applicants’ waiver of rights reserved in the Agreement. At this point, although this matter has been raised throughout the negotiations by Sierra Club, the applicants, California American and the District, have declined to give assurance to Sierra Club, or to the Staff, that they will not exercise their rights pursuant to the Agreement to challenge aspects of WRO 2009-0060 that are not inconsistent with any revised order, in the event either or both are not satisfied with the Board’s action in July. Sierra Club has been involved with this matter since 1992 when it participated in hearings based on complaints filed by CRSA, Sierra Club and others alleging that California American was unlawfully diverting water from the Carmel River to the

² The Superior Court records, when last examined in 2015, do not reflect that either MPWMD or California American has dismissed their respective actions. Intervenors have not been served with any dismissal documents.

detriment of the River's fishery resources. These complaints and the subsequent hearing persuaded this Board to issue WRO 95-10. Sierra Club entered into the Agreement, as the Agreement states, in order to give the signatories time to work out a plan for a Monterey Peninsula water supply solution,³ and as recounted in the joint PCL- Sierra Club letter dated to the Board dated April 28 and the letter dated July 11, 2016, it has worked closely and cooperatively with the applicants to obtain alternative water resources and obtain relief from the CDO's curtailment of diversions to be effective in June 2016. Sierra Club does not believe it appropriate to leave an avenue for potential litigation open that could cast a cloud over Order 2009-0060. Applicants have full rights to seek judicial review of any new Board Order concerning extension of the CDO, and should be limited to that statutory remedy.

Sierra Club requests that a copy of this letter be forwarded to SWRCB legal counsel and to Chair Marcus.

Sincerely,
Laurens H. Silver
Attorney for Sierra Club

³ The Agreement recites that the parties desire "collectively [to] focus their attention on development of alternative water supplies for the Monterey region to the benefit of Cal Am's customers and and the South Central California Coast Steelhead Distinct Population Segment and to comply with the Order [2009-0060] and Order 95-10."