



RESOLUTION NO. 2018-05

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE MONTEREY PENINSULA WATER MANAGEMENT DISTRICT INTERPRETING CONDITION 2 OF SWRCB ORDER WR 2009-0060 AND DIRECTING JURISDICTIONS WITHIN THE DISTRICT AND CALIFORNIA AMERICAN WATER TO APPLY THIS INTERPRETATION

FINDINGS

1. The Monterey Peninsula Water Management District ("District" or "MPWMD") was authorized in 1977 by the California Legislature (Chapter 527 of the Statutes of 1977, as amended, found at West's Water Law Appendix Section 118-1, et seq.). Voters of the Monterey Peninsula ratified its creation in June 1978. The District holds comprehensive authority to integrate management of the ground and surface water resources in the Monterey Peninsula area. MPMWD governs the Allocation of limited water supplies distributed by California American Water ("Cal-Am"). The District has enacted, by ordinance, a set of Rules and Regulations to implement its statutory authority, including issuance of Water Permits and the regulation of Water Distribution Systems.
2. In 1995, the State Water Resources Control Board (SWRCB) issued Order WR 95-10 to affirm Cal-Am held rights to divert only 3,376 Acre-Feet annually ("AFA") from the Carmel River. This order required Cal-Am to reduce former river diversions of 14,106 AFA in 1995 to 11,285 AFA in 1997.
3. District Resolution No. 2004-11 noted that Order WR 95-10 directed Cal-Am to maximize water production from the Seaside Basin to serve existing Connections, honor existing Allocation commitments, and to reduce diversions from the Carmel River. Resolution No. 2004-11 also recognized the use of pre-Paralta credits and public credits.
4. In 2007, the Monterey County Superior Court in *California-American Water Company v. City of Seaside*, et al. (Case No. M66343) issued a comprehensive order to adjudicate the Seaside Groundwater Basin and impose a declining pumping schedule from the Seaside Groundwater Basin for Cal-Am and others.
5. In 2009, SWRCB Order WR 2009-0060 issued a Cease and Desist Order (CDO) on Cal-Am that required Cal-Am to (a) reduce Carmel River diversions from 11,285 AFA to 10,429 AFA until 2017, (b) set 3,376 AFA as Cal-Am's Carmel River diversion limit beginning in 2017, and (c) required Cal-Am to impose a moratorium on new Connections.

6. In 2011, the California Public Utilities Commission (CPUC) issued Decision (D.) 11-03-048, entitled “Decision Directing Tariff Modifications to Recognize Moratorium Mandated by State Water Resources Control Board.” D.11-03-048 prohibits new Cal-Am Connections and certain increased uses of water served by Cal-Am diversions from the Carmel River to the extent such service would violate the terms of Condition 2 of SWRCB Order WR 2009-0060.
7. At a hearing on July 19, 2016 SWRCB adopted Order WR 2016-0016 which superseded requirements of Orders WR 95-10, WR 2009-0060 and other SWRCB orders, and extended to December 31, 2021, the date by which Cal-Am must terminate its unlawful diversions from the Carmel River. Order WR 2016-0016 also set an Effective Diversion Limit from the Carmel River of 8,310 AFA starting Water Year 2015-2016.
8. At the July 19, 2016 SWRCB hearing twenty (20) speakers commented that Condition 2 of Order WR 2009-0060 was not accurately interpreted by Cal-Am and SWRCB; they argued that new guidance was needed to recognize historical property rights and past practice under MPWMD Rules and Regulations. The speakers, as well as SWRCB board members, expressed concern that the SWRCB staff interpretive letter of April 9, 2012 was not in the public record and had not been subject to any public review or hearing process. As such, SWRCB Chief Counsel suggested Section 5.3.1.5 of the July 15, 2016 draft Order be deleted from the narrative. The motion to adopt the proposed Order was amended to direct deletion of Section 5.3.1.5. The motion also directed SWRCB staff to meet and confer with the parties represented by speakers at the hearing and to report back to the board within 60 to 90 days from the date of adoption; SWRCB staff has failed to complete this assignment.
9. Representatives of MPWMD, together with members of the Monterey Peninsula community, met with SWRCB staff on December 13, 2016. Following that meeting, a specific proposal for interpretation of Condition 2, as well as supporting data, was provided by the District to SWRCB staff in January 2017. Seventeen letters or emails in support of the proposal, and five opposing it, were received by SWRCB. Additional correspondence ensued during 2017. A conference call between Monterey Peninsula representatives and SWRCB staff was held on July 6, 2017, and further supporting material was thereafter provided by the District to SWRCB staff. Since that time, SWRCB staff have failed to provide formal guidance on Condition 2 or make any report to SWRCB board members as explicitly required by the SWRCB Order adopted on July 19, 2016.
10. Pursuant to Section 325 of the District Law, and except as otherwise limited by the District Law, the District has the power to do any and every lawful act necessary in order that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants within the District, including, but not limited to, irrigation, domestic, fire protection, municipal, commercial, industrial, recreational, and all other beneficial uses and purposes.
11. The District’s longstanding system of regulating and permitting water use relies on industry accepted water demand factors and fixture counts. This regulatory system has demonstrated its ability to ensure capacity to use water at a site remains neutral (water

neutrality) following each new project, renovation, or any change in use at a site. The national Alliance for Water Efficiency has lauded the District's ordinances, rules, and regulations as one of the earliest in the nation to ensure water neutrality in land use permitting – a goal that is consistent with and supportive of Condition 2.

12. SWRCB staff had indicated the intent of Condition 2 is to limit an increase in water consumption from the Carmel River that may be caused by regional or local zoning and land use changes to the conditions that existed at the time of the Order. However, a variety of conservation programs initiated since the 2009 CDO took effect have reduced pumping from the Carmel River by 3,000 AFA. The District believes it can document its efforts to implement and enforce the CDO through the multiple programs and regulations it has put into effect. The District does not find it appropriate to look only at a single program without recognizing all others.
13. The District finds that a reliance on actual billed water use for any period is flawed; this is a protocol that wrongfully rewards those who manipulate the system, and penalizes sites that make concerted conservation efforts as well as those that experience declining water use due to external factors such as vacancies, failing tenant businesses, economic conditions, renovations, or calamities such as fire. Further, California Public Utilities Commission privacy regulations interfere with access to and reliance upon historical water use records by anyone other than the specific account holder. This frustrates use of actual water use as a regulatory mechanism as it excludes prospective businesses, buyers, owners where the tenant is the account holder, or would-be developers.
14. The District finds actual water use to not be a usable metric to assess and assure future compliance with a “no increase” standard. First, enforcement based on water use records imposes an administrative burden to regularly – and perpetually – compare records of actual present water use against authorized baseline use. Due process requires the owner of each offending business be afforded an opportunity to receive notice of the infraction, and a hearing opportunity as to any consequence. Penalties must be structured to prevent recurring excess water use; monetary sanctions alone are not prudent or just. Each consumer is at risk for unintended consumption spikes. Enforcement would be hampered by requests for adjustment or variance based on reasonable explanation such as provable leaks, unanticipated guests or a myriad of unique business factors.
15. The District finds a regulatory scheme dependent on actual measured water use is an impossible standard to use at the time an application for any new or modified use is under review. At that moment, future water use is a mere projection or assumption. One can only approximate future water use based on factors reflected in the application, such as the type and scale of a business or the number of water fixtures in a residence. Future water use can only be estimated based on a review of plans submitted together with the application for water use. The District rules require future water use be estimated based on predetermined factors; its water use factors have been periodically grounded through a rigorous statistical examination of sample sites. Those factors have periodically been adjusted to ensure each faithfully relates to the water use capacity assigned by the District.

16. This resolution is adopted to enhance the District's ability to prevent diminution of waters within the District, to protect environmental values, and is consistent with the District's authority to reasonably regulate all water resources within District boundaries. The Board of Directors' General Counsel finds it necessary to adopt this resolution to protect the public health, welfare and safety of the District by ensuring the continuing water supply is physically adequate to meet demand, but to also ensure individual property rights of owners are protected. This measure is necessary to clarify and support moratorium requirements set by the CPUC in D. 11-03-048, and clarify and support requirements set by the SWRCB in its Orders WR 2009-0060 and WR 2016-0016.

NOW, THEREFORE, BE IT RESOLVED AND ORDERED by the Monterey Peninsula Water Management District Board of Directors:

Section One. The Findings set forth above are incorporated into this Resolution as if set forth in full.

Section Two. For purposes of Cal-Am or any Jurisdiction interpreting Condition 2, the phrase "any increased use of water at existing service addresses" shall mean increased capacity for use at an existing residential or non-residential site in excess of the pre-project capacity for use, adjusted for credit from water saved on a site, and/or a debit to a jurisdiction's allocation of water, and/or use of a water entitlement as permitted and authorized by the Monterey Peninsula Water Management District under its Rules and Regulations and determined either by using MPWMD fixture unit methodology to determine residential water use, or MPWMD water use factors for determining non-residential water use.

Section Three. The General Manager is directed and authorized to execute all documents and to perform all necessary acts to implement the effect of this Resolution.

Section Four. This Resolution shall take immediate effect.

Section Five. If any subdivision, paragraph, sentence, clause or phrase of this Resolution is, for any reason, held to be invalid or unenforceable by a court of competent jurisdiction, such invalidity shall not affect the validity or enforcement of the remaining portions of this Resolution. It is the District's express intent that each remaining portion would have been adopted irrespective of the fact that one or more subdivisions, paragraphs, sentences, clauses, or phrases be declared invalid or unenforceable.

On a motion by Director Byrne and second by Director Lewis the foregoing resolution is duly adopted this 19th day of March 2018 by the following votes.

Ayes: Directors Byrne, Lewis, Adams, Brower, Clarke, Evans and Rubio
Nays: None
Absent: None

I, David J. Stoldt, Secretary to the Board of Directors of the Monterey Peninsula Water Management District, hereby certify that the foregoing is a resolution duly adopted on the 19th day of March 2018. Witness my hand and seal of the Board of Directors this ~~19th~~ ^{21st} day of March 2018.


David J. Stoldt,
Secretary to the Board of Directors