PLANNING AND CONSERVATION LEAGUE

SIERRA CLUB
FOUNDED 1892

February 1, 2017

Mr. John O'Hagan
SWRCB
PO Box 2000
Sacramento, CA 95812-2000
Subject: Orders WR 2016-0016 and WR 2009-0060

Dear Mr. O'Hagan:

Sierra Club and the Planning and Conservation League wish to respond, and to oppose, the January 24, 2017 proposal relating to interpretation of Condition 2 of the 2009 Order, made by the Monterey Peninsula Water Management District.

The District's most recent proposed interpretation provides: "Increased use of water at existing service addresses shall mean an increase in the capacity to use water at an existing residential or non-residential site in excess of the pre project capacity to use water, credit from water saved on a site, and/or a debit to a jurisdiction's allocation of water, each as permitted and authorized by the Monterey Peninsula Water Management District under its Rules and Regulations."

In its initial request the District asked that the Board confirm by letter to California American and the District that "increased use of water at existing service addresses" under Condition 2 shall mean: "An increase in capacity to use water at an existing site in excess of the historical capacity to use water documented by the MPWMD. Documented historical capacity to use water may include capacity to use water from another site or jurisdictional allocation of water so long as the documented capacity from such other source is reduced by a like amount."

It is the District's intention that with regard to commercial uses, water use credits (as defined in the District's "Water Credits and Condition 2 of Order 2009-060" memo) from other sites may be used to calculate baseline water use at a particular site. Likewise, On Site Water Credits for commercial uses may be transferred from one site to another. Finally, credits from any jurisdiction within the California American service area arising from unused water allocations under the 1991 EIR may be transferred for the purpose of calculating baseline use.

In its "Water Credits" memo the District states it has identified approximately 128 AF from 5046 individual documented water use credits." It states: "Almost 70.5 AF of these Water Use Credits were documented for Non Residential reductions in use." The District states as well in its memo that although Non Residential Water Use Credits can be transferred to another Non Residential Site under District rules, this "seldom happens" because of CEQA requirements. See Save Our Carmel River v MPWMD, 201 Cal App. 4th 758 (2006), discussed below. The undersigned are not convinced, however, that a developer will not seek to avail itself of such a transfer because of CEQA requirements.

A FONSI might be approved under such circumstances and would not constitute a significant impedance to such a transfer. That there has been no such transfer since 2004 does not mean that none would be used during the next five years to be included in baseline determinations.

With respect to On Site Water Credits, the District reports 26 AF of Water Credits on these commercial sites that were not reflected in last year's customer demand figures. The District admits that "with respect to On Site Water Credits it is challenging to determine the potential for projects that will seek to "reinstate a water use capacity in the next five years."

Whatever the case, the Onsite Water Credits set forth in the memo and perhaps others not listed, are available to be transferred to another commercial site and treated as "baseline" water amounts for the purpose of determining whether there has been in increase of use within the meaning of Condition 2.

Additionally, there are the unused Jurisdictional allocations that are available to be "credited" to a commercial user's baseline. Although the total of unused jurisdictional allocations is relatively small (36 AF), when On Site Water Credits and Water Credits are taken into account, the total is not negligible.

Sierra Club and PCL oppose the District's January 24 2017 proposal because, if such transfers take place during the moratorium period, there could occur increased diversions from the Carmel River to the detriment of public trust resources.

In Save Our Carmel River v. MPWMD, 201 Cal App 4th 758 (2006), the Sixth District Court of Appeal invalidated a water transfer approved by the District on the basis of inadequate environmental review. In so doing, the Court discussed District Rule 28-B, which allowed transfer of documented water credits (for commercial property) from an existing commercial use to an expanding commercial use in the same jurisdiction.

The Court noted that District Rule 28 was amended in 2003 to read: "Due to the District's ongoing concern about the viability of the available water supply and the possibility that water transfers may result in additional water usage, water transfers shall by approved by the Board…….if the transfer will not have an adverse effect on the water supply. In exercising this discretion, the Board shall consider the impacts of the

application under consideration, as well as the cumulative impacts of other transfers on the water supply."

The Court of Appeal further noted that: "A staff report in July of 2004 reflected ongoing concerns about the Water Credit Transfer Program. Staff noted that since the program had been initiated in 1993 circumstances had changed regarding water issues on the Monterey Peninsula. First and foremost, the State Water Board's Order 95-10 had severely limited the water supply within the District and had mandated a comprehensive water conservation plan in the region.

In letters from the State Water Board to the Water District clarifying Order 95-10, the State Board had indicated that the water credit transfer program might violate both the letter and spirit of Order 95-10. Although the amount of water usage that had been transferred thus far pursuant to the water credit transfer program was relatively small…..in relation to Cal Am's total water production supply, District staff wrote that 'there is potential for increased utilization of the program, particularly as water supplies are less available in the local jurisdictions and transfers provide one of the ways to obtain a permit for expanded uses."

Sierra Club and PCL oppose the MPWMD proposal for the same reasons expressed by Board staff that were quoted in the Court's opinion. To the extent that documented historical use (baseline) includes a "jurisdictional allocation of water" or transfer of water credits from another site, it is clear that an application for an increase in capacity to use water at an existing site could result in more diversions from the Carmel River .

The interpretation put forth in the letter is designed to allow growth through augmented water use at existing commercial sites upon application for a new or expanded use. The Board has adopted an effective diversion level somewhat higher than the last five year average to accommodate increased use of water that might occur if the existing drought situation improves ("bounce back" water).

In agreeing to this somewhat higher effective diversion limit, Sierra Club and PCL did not intend that there be new or expanded uses that could result in increased withdrawals from the River, and that could exacerbate an already bad situation in the event future years before 2021 are drought years, or if California American misses deadlines contained in the Order that would result in curtailments of diversions.

Both Sierra Club and PCL believe that authorization of such increased uses for commercial purposes, based on transfers of water credits or jurisdictional allocations sets a very poor precedent to other users and may discourage efforts at conservation by these users during the next five years. Sierra Club and PCL request staff not to approve the interpretation of Condition 2 advanced by the District since if the transfers contemplated under that proposal are effectuated, and new commercial projects go forward, other users may lose their motivation to continue the excellent conservation efforts made during the last seven years as a result of the CDO.

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