

July 8, 2016

Felicia Marcus, Board Chair
Tom Howard, Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Matthew Quint
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

**Re: Comments of the Monterey Peninsula Water Management District (“District”)
Regarding SWRCB Staff’s Preliminary Recommendation re California-American
Water Request to Modify Cease and Desist Order WR 2009-0060**

Dear Ms. Marcus, Mr. Howard and Mr. Quint:

On June 29, 2016, representatives of the Monterey Peninsula Community, including our District, sent a joint comment letter to you regarding the State Water Resources Control Board (“SWRCB”) staff’s Preliminary Staff Recommendation (“Preliminary Recommendation”) to Modify Cease and Desist Order WR 2009-0060 (“CDO”). The District strongly endorses that joint letter. This letter provides additional comments by the District on three key points:

- 1) The proposed effective diversion limit (“EDL”) is too low and sets the Community up to fail;
- 2) Proposed paragraph 3, as it relates to existing service connections, creates confusion, is inequitable among businesses, and is rife with unintended consequences; and
- 3) The proposal has removed incentives to seek interim solutions that would provide additional water during the time period it takes to bring a desalination plant on-line.

Each of these is addressed below.

The Proposed Effective Diversion Limit (“EDL”) is Too Low

As discussed in the Community’s joint letter, the staff proposal of 7,990 acre-feet for an EDL would result in the Community’s failure to comply in water year 2017-18 if consumer demand stays at last year’s (2014-15) level. We would be out of compliance immediately if demand returned to levels of just two years ago (2013-14). The EDL should be set at 8,310 AF as in the original application for the following reasons:

- 8,310 AF was suggested by SWRCB staff in what we were led to believe was a mutual negotiation.
- 8,310 AF was agreed to by the Sierra Club and Planning and Conservation League in recognition of the importance of the forbearance agreement with Trust for Public Land and the following of

two golf courses.

- Recent data on actual pumping from the Carmel River is understated because wells were off-line for maintenance.
- Recent data on actual pumping from the Carmel River is understated because the District was heavily advertising drought awareness, and Statewide calls to action were made.
- Recent data on actual pumping from the Carmel River is understated because the Seaside Basin was pumped in excess of its adjudicated limits, a practice that cannot be sustained.
- The proposed EDL does not recognize the adjudicated mandatory reduction in Seaside groundwater availability in 2018.
- The additional 320 AF in the EDL will do more to protect the local Community and its economy than it will to incrementally enhance habitat or environmental values.
- It has been variously articulated by State officials during the drought that conservation and rationing should not come at the expense of a vital California economy.

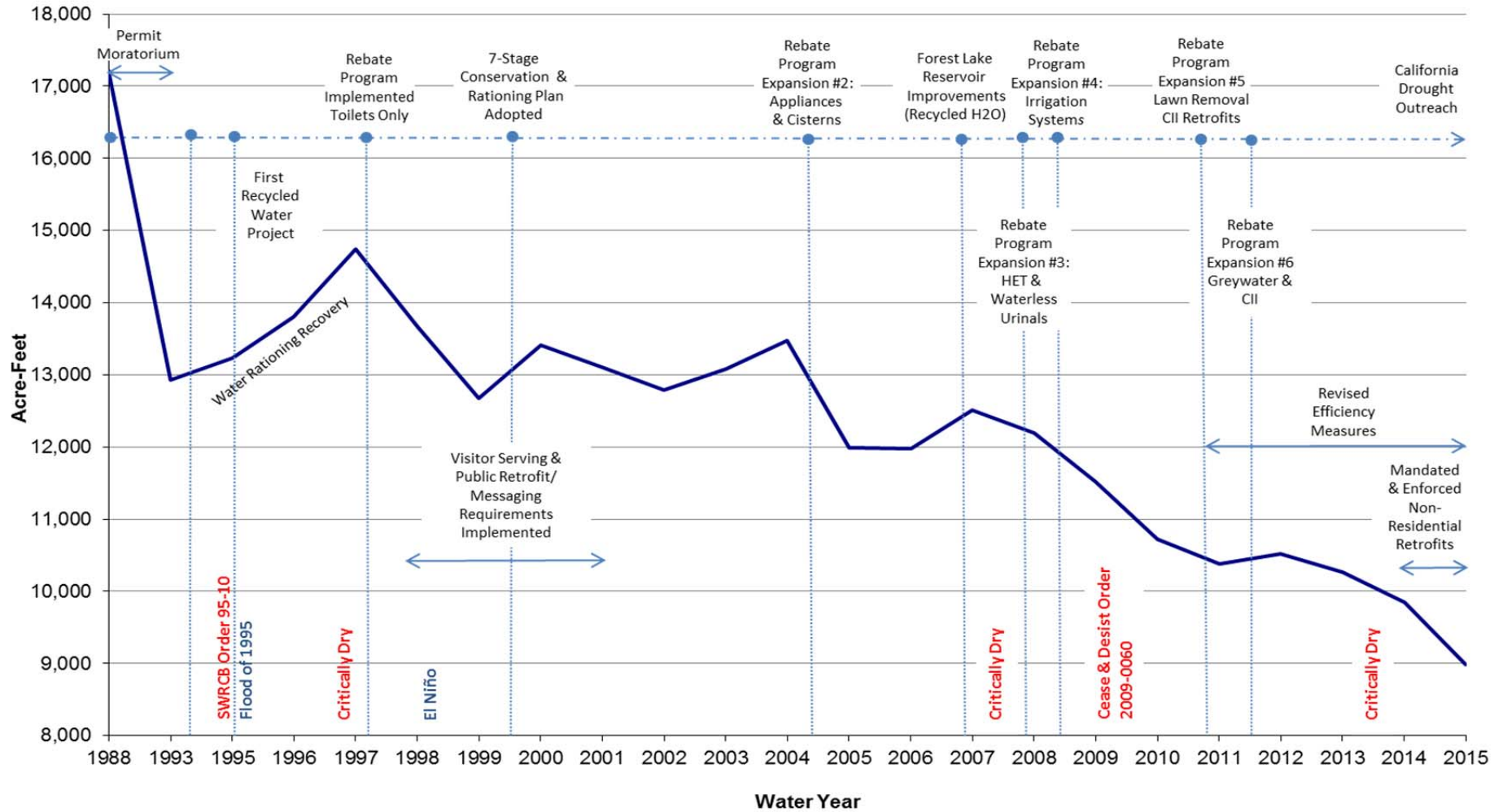
The California Water Action Plan states “*To be sustainable, solutions must strike a balance between the need to provide for public health and safety, protect the environment, and support a stable California economy.*” A modified CDO with the proposed EDL that will likely undermine the local economy does not strike the balance desired.

In your SWRCB Resolutions No. 2015-0032 and No. 2016-0007 you commended regions “*that have already surpassed their 20x2020 conservation targets*” – we have – and you recognized “*that some commercial and industrial customers have already taken steps to significantly reduce their water consumption and cannot further reduce without substantial impacts.*” – our non-residential conservation programs have done just that.

The Monterey Peninsula has implemented strong conservation practices since the 1980s. MPWMD has regulations that require the most efficient water using devices/appliances and hot water systems, as well as landscaping and irrigation, in new construction and remodels and requires conservation retrofits in homes and businesses upon title transfer. Visitor-serving businesses were required to install water efficient fixtures/toilets by 2001. All businesses were mandated to install water efficient plumbing fixtures, ice machines, and clothes washers, and must display notification to conserve water in every bathroom. In 2015, the District began physical verification audits of businesses. MPWMD and Cal-Am offer a variety of aggressive rebates for an extensive array of equipment, provide water saving devices free to customers, offer on-site audits with water saving recommendations, and sponsor a variety of classes and workshops focused primarily on outdoor water efficiency. MPWMD has representatives in the field on a daily basis to enforce its regulations and to educate the public. The rate designs provide conservation incentives through tiered pricing and rewards for Best Management Practices. Commercial customers can only achieve the lowest water rates by complying with MPWMD requirements and strict outdoor irrigation efficiencies. As a result, the Monterey Peninsula has saved almost 4,000 acre feet of water annually – a medium sized water supply project – and per capita water consumption is among the lowest in the state. Diversions from the Carmel River are 46% lower than they were before Order 95-10. The effect of these aggressive conservation practices is shown in the chart on the next page. ***The Community should be rewarded for the sacrifice and financial investment it has made, not be put on a knife’s edge facing economic hardship of non-compliance with an EDL that is too low.***

The concept introduced by staff to set the EDL as a “hard cap” with no carryover or “banking” of water from periods where the Community outperforms the EDL is also too onerous, removes flexibility, and could create undue economic hardship in reaction to an aberrant one-time spike in customer demand. ***The concept of a carryover that will allow a limited exceedance of the EDL, as originally agreed to by SWRCB staff, should be reinstated.***

Monterey Peninsula Conservation Program Cal-Am Main System Consumption WY 1988 - WY 2015



Data Source: CAW Customers and Consumption by Political Jurisdiction

Prepared by MPWMD

Proposed Paragraph 3, For Existing Service Connections, is Rife With Unintended Consequences

The SWRCB staff recommends elaborating on the original ordering paragraph 2 by adding language related to how to establish a baseline in water use for a property. This actually further confuses language that was not very good to begin with, in the original CDO, as it relates to existing service connections. That is, the original CDO states, in Condition 2, "*Cal-Am shall not divert water from the Carmel River for new service connections or for any increase use of water at existing service addresses resulting from a change in zoning or use.*" New service connections are prohibited by the California Public Utilities Commission ("CPUC") moratorium on the setting of new meters. However, existing customers' business practices and local land use decisions are not under the legal authority of Cal-Am. Cal-Am has an existing legal obligation to serve an existing service connection and account holder. This Condition 2 seems to be saying Cal-Am cannot serve an increase in use at a property due to a change in zoning or use, but that an increase in use of water due to revised business practices, i.e. a new chef, a better menu, longer hours, better product offerings, etc is OK. Cal-Am has no authority over land use decisions or tenant changes. What constitutes a change in use? How does Cal-Am receive notice of a change in use and how does it distinguish between increased water use due to a successful business practice versus a change in use? There is no foolproof method to clearly identify 100% of subject properties, determine increases in use due to business practices versus zoning, or authority for Cal-Am to affect a permit for land use.

It appears in its Decision establishing the moratorium, that the CPUC has acknowledged Cal-Am's authority to choose not to serve an increase in use due to a change in zoning or use, but the CPUC did not provide guidance on how to do so. If Cal-Am were to remove a meter from an existing customer it would likely be litigated by the customer – and the customer has the right to use water for its pre-existing business practice as long as the bill is paid. How might Cal-Am distinguish between increases in use due to different, but successful business practices and NOT due to a change in zoning or use? Will Cal-Am utilize flow restrictors to ratchet water delivered back to that of the 5-year average even though some of the increased use is not due to a change in zoning or use? The method of enforcement is very undefined.

A further (and larger) problem is the proposed 5-year period. This is not a continuation of past practice, but represents a change. The April 9, 2012 letter from the SWRCB to Cal-Am states the "*Board will determine the baseline for past water use based on the lesser of the actual average metered annual water use for a water year from the past five years of records, or the amount calculated from the fixture unit count.*" This allows choosing one water year among the past five years. The new proposal is an average of all five specific years from 2009 to 2013. The new proposal is more restrictive for three reasons (i) a building that was vacant or underutilized for a few years in that period drastically reduces the average, (ii) the five year period chosen occurs immediately following the stock market crash and collapse of the economy known as "The Great Recession" when many businesses struggled or closed and may have had unintended reduced water use, and (iii) there may have been reduced or zero water use during that time due to tenant changeover, planning and design, or other purpose.

Yet another problem is that of records. That is, the CPUC has ensured customer privacy and limits access to billing records. How can a prospective purchaser of a business or property access this information to make an informed decision about the value of a building, or potential future uses, especially if the building has gone through several ownership changes? There is the further problem of potential need to publish the data to demonstrate a water source for CEQA and permitting. This customer privacy issue is a very messy area for which no guidance is provided.

Finally, existing businesses that originally received a business use permit or building permit since 1985 also received a Water Permit limiting the amount of water that could be used at a site. That capacity for

use was paid for by the business. The use of MPWMD's water use capacity (referred to as "fixture unit count" is consistent with the local water allocation process, whereas past actual water use is not. The Condition 2 language attempts to further limit an already permitted use for which the business should be able to modify its business and continue the quiet enjoyment of its water, irrespective of if the increase in use is due to more successful business practices, a change in zoning, or a change in use.

- This whole section begs the question: Why does the SWRCB want to get into local land use decision making?
- Doesn't it make more sense to focus on the macro-level – setting an EDL – rather than the micro-level which gets involved in land use decisions and what an existing service connection can or cannot do with its business?
- Attempting to enforce this condition on existing service connections is akin to rationing some properties, but not others, resulting in inequitable treatment of the same class of customers. Some business owners view it as a "taking."

Since the CDO went into place in 2009 pumping from the Carmel River has been reduced by 3,272 AF. ***Let existing businesses and property owners practice their craft unimpeded and under the regulation of local land use jurisdictions and the District, while at the same time focus on complying with an overall EDL system wide.***

The Proposal has Removed Incentives to Provide Additional Water

SWRCB staff's "Rationale Document" states that "*applicant's proposal that the acquisition of flow or diversion rights should raise the EDL is contrary to the basic premise in the enforcement action that new water supplies must offset current unlawful diversions.*" The SWRCB staff recommendation says that supplemental water rights and acquisitions "*may increase the proportion of Cal-Am's diversions that are made under lawful right*" and that Malpaso Water "*to the extent such water is used by Cal-Am as a general source of delivery to its customers, this water will be counted towards the calculation of the Effective Diversion Limit, and shall serve to increase the portion of such diversion that are made under lawful rights.*" These statements run counter to several other facts:

- In a meeting with former Carmel Mayor Jason Burnett and District GM Dave Stoldt on June 7, 2013, SWRCB Chair Marcus acknowledged that there would be no incentives for local agencies to invest in local projects or water rights unless some benefit was received.
- The proposal in the Community's joint application that "*fifty percent of water available under any Carmel River water right that is acquired by Cal-Am after the effective date of this Order shall be dedicated to instream use, and the remaining fifty percent shall be used to increase the Effective Diversion Limit in effect at the time a transaction is completed*" was actually suggested by SWRCB staff during our negotiations.
- The proposal in the Community's joint application that "*water provided on an interim basis by the Malpaso Water Company LLC to Cal-Am under SWRCB License No. 13868A shall be added to the Effective Diversion Limit for the Water Year in which the water is provided to Cal-Am*" is consistent with the Malpaso water right (Permit 20905B). That permit specifically addressed the CDO and Order 95-10 by assigning 50 AF to reduce Cal-Am's unauthorized diversions in 2016 and 25 AF in 2017. No other assignment was made. License 13868A is a completely separate water right from Cal-Am's. That water right holder could have used the water separate from Cal-

Am. What would happen if a third party bought all the Malpaso water and gave it to existing Cal-Am customers to offset existing use instead of for new uses? As a private transaction with Malpaso LLC that would not reduce Cal-Am's EDL yet it would reduce use. Lending it to Cal-Am on an interim basis could be viewed the same way. Should that right holder make the water available for general use it should be additive to the EDL.

A final water project by 2021 is a long way off. Small steps can be made to secure local supplies or to offset other diversions. The investment to do so may or may not be Cal-Am. ***In order to facilitate these kinds of projects, the investment must be incentivized.***

Thank you for the opportunity to address you and the Board through the comment process. Our District is hopeful you will see how measured and balanced the Community's joint proposal was, and urge you to recognize the need for changes from the Preliminary Staff Recommendation as reflected in the many comment letters.

Sincerely yours,



David J. Stoldt
General Manager