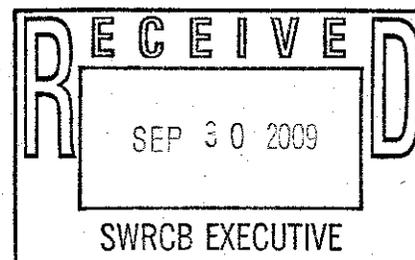


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Via Email, facsimile and First class mail

Jeanine Townsend  
Clerk of the Board  
State Water Resources Control Board  
PO Box 100  
Sacramento, CA 95812-0100



COMMENT LETTER-10/20/09 BOARD MEETING CAL-AM CDO

Dear Members of the Board:

I am a citizen of the United States, a life long resident of the Monterey Peninsula and familiar with both the history of the Carmel River, its habitat and the Peninsula water supply as well as being a residential and commercial customer of Cal Am. I was a real party in interest in the Seaside Basin Adjudication.

I have standing to raise the issues herein by virtue of the status described and the threat of immediate and irreparable harm to me and others similarly situated which will result if the Board imposes the proposed CDO. I make formal objection to the CDO on the grounds that it violates my (and by inclusion of the first person singular hereafter, I refer to all similarly situated persons and entities to me) rights under the Fifth and Fourteenth Amendments under the constitution of the United States and the provisions of California Trust Land law and California Pueblo Water law which may be applicable to the proposed order and water supply.

Let me begin by pointing out the obvious: I am not Cal Am. I am not an investor in Cal Am and have no ownership or financial interest in it. However, by virtue of my Monterey resident status, the special licenses, regulations, dispensations and permissions granted over the years to Cal Am, I am de facto your public trust beneficiary as well as Cal Am's customer. Your adjudication in the pending matter will benefit, harm or maintain some reasonable balance by you in the discharge of your constitutional and regulatory duties.

I contend that the proposed CDO, if issued, will result in immediate, irreparable harm to my personal physical needs for water to bathe, drink, cook and clean myself, will create the potential for increases in bacterial and other diseases by virtue of the forced reduction in water readily available for sanitation and cleaning. You need to ask a simple question: If the Monterey Peninsula already uses a FRACTION of the water the rest of the state does, why do you not, as an agency of statewide jurisdiction, impose the same restrictions on other utilities' usage of water in the face of the state's declaration of a statewide water emergency? It defies common sense to think that the peninsula residents have any more to give. Cal Am does not waste the water we residents conserve. To the extent it has leakage issues, ordering repairs is appropriate. Cal Am is a conduit for water that has been used by Peninsula residents for generations. Deciding in 1995 that water which comes from a source that has been used since our great-great grandparents lived was suddenly illegal, makes no practical sense. Under the convenient guise of somehow punishing Cal Am, you ignore and seem to dismiss our 14 years of moderation and conservation in usage of water and the multi-generational water history of the peninsula which some contend vitiates the propriety of 95-10. For a century and a half, WITHOUT OBJECTION, there has been of the use of Carmel Valley water for the whole of the Monterey Peninsula. This letter assumes, arguendo, that 95-10 is defensible.

Your proposed CDO and illustrates the facile dismissal of the heart of the problem here: The disaster to public health safety and welfare and irreparable damage that will flow from your actions with the CDO as proposed. You at once raise the specter of public harm and then retreat to the fallacious argument that Cal Am has been, essentially, an unruly child and deserves to be punished-NOTWITHSTANDING THE CONSEQUENCES

TO THE HEALTH AND SAFETY OF THE PUBLIC-and the singular constitutional property and due process harm to me as a citizen.

My right to receive water is a property right protected by the Fifth Amendment. The potential takings argument in the matter before the board goes further than the taking or drastic curtailment of the water use itself. The taking of water by way of the CDO is somewhat akin to a zoning action. If one is, by an action of government, denied practical beneficial use of one's real property, then the property has been taken. If the Board takes away rights to water, then it is also taking away beneficial use of real property within the affected water district – unless water is available for basic needs and in order to observe regulatory requirements (for instance health department requirements). If overbroad, the action of the board will result in one's property no longer having a beneficial use. The CDO as drafted is overbroad.

So the Board finds itself in a quandary. By seeking (arbitrarily or otherwise) to uphold one law (the Endangered Species Act and its presumptive and arguable conclusions about Carmel River water) it runs itself afoul of another law – the Fifth Amendment to the US Constitution. If the CDO has the effect, as it appears to in its present form, of taking away our practical beneficial use of our water, then you also take away the use of our property. Stores close, new stores cannot open, vacancies cannot be filled, empty lots cannot be built upon, state and city reforestation and native plant programs fail. The list goes on and on. The Board must act very carefully and very judiciously, and be financially prepared to underwrite takings losses of those affected. The courts have held that citizens possess a property right to receive water that is protected against uncompensated taking by the Fifth Amendment's just compensation clause. The courts have regularly rejected the government's argument that because plaintiffs' right to receive water was pursuant to contract or state regulatory authority that the right could be ignored without compensation. When the community has conserved to the level it has, for 14 years, all arguments of reasonableness in the Board's proposed CDO become groundless and a nullity. The CDO if enacted as written results in a compensable taking.

The CDO's effect on me and those similarly situated is a taking of water which amounts to physical taking of property and flies in the face of the

government's presumed argument that the taking should be analyzed as a regulatory taking: In the context of water rights, a mere restriction on use — the hallmark of a regulatory action — completely eviscerates the right itself since the plaintiffs' sole entitlement is to the use of the water and its effect on use of real property, businesses and homes.

The state is clearly estopped from doing what it wishes now in terms of the scope and depth of the proposed CDO. The estoppel argument raised by the supplier of our water is obviously a point of sensitivity for the board—why else spend so much time crafting arguments against it? The very forces which suggest there is a water solution on the horizon for the Peninsula members know well and fully what the actual effect of severe sanctions on Cal Am will have and that the difficulty of finding a new source of water will be impaired rather than enhanced. Those arguing most loudly for draconian action against Cal Am are not special interest groups interested or invested in a new water supply.

Unless and until the SWRCB is ready to level the playing field and deal with water on a statewide basis of shared pain, the effort here, to take the most conservation minded community in the state and drive a nail in its water coffin, becomes nothing short of retribution against a company we as consumers have no say over and which the state has consciously let conduct its business in the best way it could against insurmountable political odds for fourteen years.

It is my position that the CDO as drafted is improper because it creates immediate harm to me and others similarly situated, will result in the immediate loss of property belonging to me and others, including municipalities and the State.

I respectfully ask that you table the CDO as drafted, direct that the state utilize its considerable resources to intervene and help build a large water production project and expend your efforts seeking assistance from all other regions of the state to reduce their water usage to the level per capita of the Monterey Peninsula. Encouraging conservation efforts that are reasonable, requiring a vigorous repair of leak program and encouraging gray water and cistern based systems for outdoor watering are reasonable approaches. Legal exploration of the Pueblo Water Rights question should be undertaken immediately with the state as a plaintiff party in interest. Combine these

approaches with a proactive and cooperative effort to build new water sources and storage and you will be effectively discharging your constitutional duties.

Very truly yours,

  
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