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June 7, 2018

Eileen Sobeck, Executive Director  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: **California American Water Company’s Response to “Petition to Modify SWRCB Resolution 2016-0040 (May 9, 2018)”**

Dear Ms. Sobeck:

On behalf of the California-American Water Company (“Cal-Am”), we submit the following response to the “Petition to Modify SWRCB Resolution 2016-0040” (“Petition”), which we understand was submitted by the Planning and Conservation League and other entities (collectively, “Petitioners”) on or about May 9, 2018.<sup>1</sup> Cal-Am was not served with the Petition and, as of the date of this response, the State Water Resources Control Board (“SWRCB”) has not posted the Petition on its Carmel River/WRO Order 2009-0060 website. While the Petition requests amendments to the milestone schedules in SWRCB WRO Order 2016-0016 (the “Amended CDO”), the unmistakable intent of the Petition is to influence the California Public Utilities Commission’s (“CPUC”) consideration of a separate motion to add another phase to the CPUC’s Certificate of Public Convenience and Necessity (“CPCN”) proceeding in order to consider expansion of the Pure Water Monterey project (“Expanded PWM”). Expanded PWM is a project proposed by Monterey One Water and the Monterey Peninsula Water Management District to increase by 2,250 acre-feet per year (“afy”) the volume of treated water made available from the Pure Water Monterey project for groundwater replenishment in the Seaside Basin.<sup>2</sup>

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<sup>1</sup> The other “Moving Parties” noted in the Petition include Monterey One Water (formerly the Monterey Regional Water Pollution Control Agency), the Monterey Peninsula Water Management District, the Monterey Regional Water Authority, the Marina Coast Water District, Land Watch Monterey, the Sierra Club, Citizens for Just Water, the Public Trust Alliance, and Public Water Now.

<sup>2</sup> As a component of the Monterey Peninsula Water Supply Project, Cal-Am has entered into a water purchase agreement with Monterey One Water and the Monterey Peninsula Water Management District, approved by the CPUC, to purchase 3,500 afy from groundwater replenishment in the Seaside Basin (“PWM”). Expanded PWM would increase that amount to 5,750 afy.

Cal-Am's singular focus at this time is obtaining the necessary approvals and permits for the Monterey Peninsula Water Supply Project ("MPWSP") to meet the near- and long-term water supply demands in Cal-Am's Monterey District so that Cal-Am can comply with the requirements in the Amended CDO, including ceasing all unauthorized diversions from the Carmel River by December 31, 2021. With that said, Cal-Am does not oppose the concept of adding parallel milestones to the Amended CDO tied to alternative water supply projects that, like the MPWSP, are designed to reliably meet the near- and long-term water demands on the Monterey Peninsula. Unfortunately, the Petition does not contemplate such a project.

The premise of the Petition is that there will be future delays to the desalination component of the MPWSP as the result of litigation, permitting, or other reasons, and that those delays will cause Cal-Am to miss future milestones in the Amended CDO. The Petition posits that missed milestones can be avoided if Expanded PWM milestones are added to the Amended CDO. However, the Petition is premised on the erroneous conclusion that Expanded PWM is a water supply alternative to the desalination component of the MPWSP (i.e., that it would meet Cal-Am's water supply demands).

Even if Expanded PWM could be brought on-line as proposed in the Petition, which is far from certain at this time, the water supply from Expanded PWM is insufficient to meet the long-term and maximum month water demands on the Monterey Peninsula without the desalination project. As such, the alternative milestone schedule proposed in the Petition is not an alternative path to establish a secure water supply to replace unauthorized diversions from the Carmel River; it is simply a proposal to incrementally reduce the water supply deficit on the Monterey Peninsula. The only viable, identified approach for Cal-Am to meet the long-term and maximum month water demands on the Monterey Peninsula must include the desalination component of the MPWSP. The information below and attached hereto explains why the parallel milestone schedule proposed in the Petition will not address the problem assumed by the Petition.

In addition to the concerns discussed above, the timing of the Petition is suspect and could present significant obstacles to Cal-Am's ability to efficiently and effectively communicate with SWRCB members and staff regarding implementation of and compliance with ongoing obligations under the Amended CDO. Cal-Am therefore requests that the SWRCB deny the Petition without prejudice to refile at a more appropriate time when more information is known about the need for an alternative water supply project or milestone schedule. Alternatively, Cal-Am requests that the SWRCB explain in writing that there are no restrictions under the SWRCB's *ex parte* communication rules on Cal-Am's ability to communicate freely with the SWRCB concerning any subject in the Amended CDO.<sup>3</sup>

### **1. The Amended CDO and the Petition**

The Amended CDO was approved by the SWRCB on July 19, 2016, and conditionally allows Cal-Am to continue unauthorized diversions from the Carmel River during the period that the MPWSP is being approved, permitted and constructed. The Amended CDO requires Cal-Am to cease all

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<sup>3</sup> Cal-Am hereby expressly reserves the right to augment this response if and to the extent the SWRCB accepts the Petition or notices receipt thereof.

unauthorized diversions from the Carmel River by December 31, 2021, and establishes a set of annual milestones to demonstrate progress towards meeting that objective. Achievement of the milestones set forth in the Amended CDO, and ongoing compliance with the myriad other conditions in the Amended CDO, authorize Cal-Am to continue diversions from the Carmel River at an amount up to 8,310 afy (the “Effective Diversion Limit”).<sup>4</sup> Cal-Am’s failure to achieve a milestone can result in a reduction of the Effective Diversion Limit by as much as 1,000 afy, with further reductions if subsequent milestones are missed. Although the Amended CDO allows Effective Diversion Limit reductions to be partially offset by accumulated credits from a prior year, assuming such credits are available, the diversion reductions cannot be reversed during the term of the Amended CDO. Thus, if a milestone is missed for reasons within Cal-Am’s control<sup>5</sup> resulting in a reduction to the Effective Diversion Limit, that water will not be available to the Monterey Peninsula during the remaining term of the Amended CDO. As such, Cal-Am, the other Amended CDO Applicants and water users on the Monterey Peninsula have every incentive to comply with the Amended CDO and to achieve the milestones specified therein.

The Petition requests that the Amended CDO be further amended to include an additional “parallel” set of milestones related to Expanded PWM, beginning with the September 2019 milestone. Specifically, the Petition requests that the SWRCB modify the Amended CDO to include the following “parallel” milestones:

- CPUC approval of a water purchase agreement for Expanded PWM (September, 2019);
- Civil site work and other construction progress on Expanded PWM (September, 2020);
- Completion of construction of Expanded PWM (September, 2021); and
- Completion of Expanded PWM and elimination of unauthorized diversions.

The Petition also includes a “Preliminary Progress Report on Pure Water Monterey Expansion,” prepared by Monterey One Water and the Monterey Peninsula Water Management District, which purports to support the finding that there will be sufficient source water for Expanded PWM to supply a minimum of 2,250 afy for groundwater replenishment and use by Cal-Am.<sup>6</sup>

**2. The Petition Erroneously Suggests and Assumes that Expanded PWM is an Adequate Alternative to the Desalination Component of the MPWSP**

As described in the Final Environmental Impact Report and Statement (“FEIR/S”) for the MPWSP, any alternative water supply solution for the Monterey Peninsula must be able to meet a demand of

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<sup>4</sup> Cal-Am has valid appropriative water rights that authorize diversion of up to 3,376 afy from the Carmel River.

<sup>5</sup> Several requirements of the Amended CDO are directed at the Amended CDO “Applicants,” which includes the Monterey Peninsula Water Management District, the Monterey Peninsula Regional Water Authority, the City of Pacific Grove, and the Pebble Beach Company. In effect, however, Cal-Am is ultimately responsible for meeting the requirements of the Amended CDO, as its operations are affected by the Amended CDO.

<sup>6</sup> The Preliminary Progress Report on Pure Water Monterey Expansion was made available to Cal-Am when Petitioners filed with the CPUC a Motion for a Phase 3 proceeding on May 9, 2018. Cal-Am is still evaluating the Report and will provide comments on the Report to the CPUC as part of the CPUC proceedings. Cal-Am will concurrently provide comments on the Report to SWRCB.

14,275 afy.<sup>7</sup> If Expanded PWM were substituted for the proposed 6.4 million gallons per day desalination plant, there would be a water supply shortfall of 2,981 afy on the Monterey Peninsula.<sup>8</sup> If Aquifer Storage and Recovery yield (i.e., 1,300 afy) is excluded from the source water calculation, as would be reasonable given the uncertainty of that source of supply, the supply shortfall increases to 4,281 afy.<sup>9</sup> In addition, as described and illustrated in the attached table and figure (**Attachment A**), “Maximum Month System Sizing” for Cal-Am’s Monterey District service areas, without the desalination component of the MPWSP, Cal-Am cannot come close to meeting maximum monthly demands for undeveloped lots of record, tourism bounce-back, or Pebble Beach entitlements. As a consequence of these source water shortfalls, Cal-Am would not be able to meet the Amended CDO requirement to diligently implement actions to terminate its unauthorized diversions from the Carmel River by December 31, 2021, and the CPUC and the SWRCB’s Division of Drinking Water would not dissolve the moratorium for Cal-Am’s Monterey District.

### **3. The Petition is Unsubstantiated and Procedurally Flawed, and Should be Denied**

In addition to being premature based on the lack of information regarding the need for an alternative water supply project and/or milestone schedule, there are numerous procedural defects with the Petition that would justify denial of the Petition. For example, the Petition does not identify any legal authority or basis upon which the SWRCB should modify the Amended CDO. Even if the SWRCB were to consider the Petition as an application to modify the Amended CDO under Water Code section 1832,<sup>10</sup> the Petition does not establish or even assert how the Petitioners are “aggrieved” or why the SWRCB should even consider the Petition. Indeed, there is no explanation whatsoever as to why the SWRCB should consider amending milestones in the Amended CDO that will not arise for at least 16 months, particularly since the SWRCB and parties to the CPCN proceeding will have significantly more information from the CPUC in the next few months about the need and basis for possible alternative water supply projects and/or milestones. Moreover, it should not be lost on the SWRCB that Petitioners have been meeting for months with SWRCB staff and board members - individually and as a group, and generally without invitation to Cal-Am - and have only now decided to file the Petition in connection with a motion before the CPUC that, if approved, will likely delay the CPCN proceedings for the MPWSP. The SWRCB should be very suspicious about Petitioners’ motives for filing the Petition at this juncture, and should be particularly cautious about taking any action that might interfere with Cal-Am’s ability and need to freely and efficiently communicate with SWRCB staff and members regarding the Amended CDO and compliance therewith.

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<sup>7</sup> See FEIR/S, Volume 2, § 2.3, [https://nmsmontereybay.blob.core.windows.net/montereybay-prod/media/resourcepro/resmanissues/desal\\_projects/pdf/180323calam-mpwsp\\_feireis\\_execsumm-ch7.pdf](https://nmsmontereybay.blob.core.windows.net/montereybay-prod/media/resourcepro/resmanissues/desal_projects/pdf/180323calam-mpwsp_feireis_execsumm-ch7.pdf).

<sup>8</sup> This shortfall is calculated as follows: 3,376 afy (Carmel River authorized diversions) + 774 afy (authorized production from the Seaside Basin) + 1,300 afy (Aquifer Storage and Recovery, or “ASR”) + 94 afy (Sand City Desalination Plant) + 5,750 afy (PWM and Expanded PWM) = 11,294 afy (total source water supply) – 14,275 afy (total demand) = -2,981 afy. (See FEIR/S, Vo. 2, § 2.3, p. 2-18, Table 2-4.)

<sup>9</sup> Although Cal-Am diverted 811 af to ASR storage in 2016 and 2,233 af to ASR storage in 2017, Cal-Am was unable to divert to ASR storage in 2013, 2014, and 2015 due to hydrologic conditions in the Carmel River.

<sup>10</sup> The Petition itself does not request amendment to WRO 2016-0016, but rather requests the SWRCB to modify the ordering paragraphs of SWRCB Resolution No. 2016-0040.

**4. The Petition Should Not Create Any Restrictions on Communications Between Cal-Am and SWRCB Staff and Board Members Regarding Matters Related to the Amended CDO**

Even if the SWRCB is not inclined to deny the Petition as presented, the SWRCB should make clear in its noticing or acknowledgement of the Petition that the Petition will in no way restrict communications between Cal-Am and SWRCB staff and Board members pertaining to the subject matter of the Amended CDO. To allow the Petition to become an *ex parte* barrier to Cal-Am concerning matters covered by the Amended CDO would be extremely prejudicial to Cal-Am; as the party against whom the Amended CDO is imposed, Cal-Am must be able to meet and communicate freely with the SWRCB about ongoing compliance with the Amended CDO.<sup>11</sup> For example, pursuant to ordering Condition 3.b.viii of the Amended CDO, Cal-Am must communicate with the SWRCB regarding progress towards the Amended CDO milestones, and Condition 3 provides for an interactive process through which Cal-Am and the other applicants can seek relief from the SWRCB for diversion reductions if delays in achieving a milestone are due to factors beyond Cal-Am's control. This process cannot be circumscribed as a result of the Petition. Therefore, Cal-Am respectfully requests that the SWRCB take appropriate action to ensure that Cal-Am's ability to communicate with the SWRCB about the Amended CDO is not restricted in any way by the Petition. The SWRCB could do this, for example, by clarifying that it does not at this time deem the Petition to be a "pending action" under the California Administrative Procedures Act.

For the reasons noted herein, Expanded PWM is not a viable alternative to the desalination component of the MPWSP, and therefore the premise of the Petition is fatally flawed. Moreover, the Petition is untimely and procedurally defective, and could prejudice Cal-Am's ability to communicate efficiently with the SWRCB regarding compliance with the Amended CDO. For these reasons the Petition should be denied without prejudice to refile at a more appropriate time in the future. If the SWRCB does not deny the Petition, the SWRCB should clarify in writing that the Petition will not bar or limit Cal-Am's ability and rights to communicate with the SWRCB regarding the subject matter of the Amended CDO. Cal-Am reserves the right to augment this response in the future, as appropriate.

Best Regards,



Robert E. Donlan  
Ellison Schneider Harris & Donlan  
Attorneys for California-American Water Co.

cc: Felicia Marcus, SWRCB Chair  
Tam Doduc, SWRCB  
Steven Moore, SWRCB

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<sup>11</sup> As a matter of SWRCB policy and administrative practice, moreover, it would be patently unfair to allow unsubstantiated and untimely "petitions" by third parties to create *ex parte* barriers adversely impacting the entity against whom a cease-and-desist order is directly issued.

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# **ATTACHMENT A**

**Maximum Month System Sizing for  
Monterey Main, Hidden Hills, Ryan Ranch & Bishop  
No Desal Alternative**

Source	Volume	Unit	Comment
Carmel River	281	AF	3376 AF / 12 months
Desal	-	AF	no desal per PCL, MCWD
ASR	-	AF	Assumes dry year
PWM	292	AF	3500 / 12 months
PWM Expansion	188	AF	2250 / 12 months
Seaside GWB	65	AF	774 / 12
Sand City BWRO	8	AF	94 / 12 months
<b>Total Sources</b>	<b>552</b>	<b>AF</b>	
Max Month <u>2017</u>	962	AF	
Deficit	411	AF	
Min. Additional Flow Needed for CDO	4.4	MGD	Does not include LOR, TB & PB
Min. Additional Flow Needed for DDW	5.7	MGD	Needed to lift Moratorium on New Services
Max Month <u>2016</u>	946	AF	
Deficit	394	AF	
Min. Additional Flow Needed for CDO	4.2	MGD	Does not include LOR, TB & PB
Min. Additional Flow Needed for DDW	5.5	MGD	Needed to lift Moratorium on New Services
Max Month <u>2015</u>	956	AF	
Deficit	404	AF	
Min. Additional Flow Needed for CDO	4.3	MGD	Does not include LOR, TB & PB
Min. Additional Flow Needed for DDW	5.6	MGD	Needed to lift Moratorium on New Services
Max Month <u>2014</u>	1,023	AF	
Deficit	472	AF	
Min. Additional Flow Needed for CDO	5.1	MGD	Does not include LOR, TB & PB
Min. Additional Flow Needed for DDW	6.4	MGD	Needed to lift Moratorium on New Services
Max Month <u>2013</u>	1,131	AF	
Deficit	580	AF	
Min. Additional Flow Needed for CDO	6.2	MGD	Does not include LOR, TB & PB
Min. Additional Flow Needed for DDW	7.6	MGD	Needed to lift Moratorium on New Services

**Notes:**

LOR = Lots of Record  $590/1120 \times 1.25$  PF = Max Month Demand of 0.65 MGD

TB = Tourism Bounceback =  $250/1120 \times 1.25$  PF = Max Month Demand of 0.28 MGD

PB = Pebble Beach entitlements =  $325/1120 \times 1.3$  PF = Max Month Demand of 0.36 MGD

Total Max Month Demand for LOR, TB, & PB = 1.3 MGD

## Demands vs. Supply (AFY)

### MULTI-YEAR DROUGHT SCENARIO WITHOUT DESAL, NO ASR and PWM 5,750

