



August 15, 2016

Ms. Barbara Evoy  
Deputy Director, Division of Water Rights  
State Water Resources Control Board  
PO Box 2000  
Sacramento, CA 95812-2000

Subject: Orders WR 2016-0016 and WR 2009-0060

Dear Ms. Evoy:

Under separate cover, representatives of the Monterey Peninsula community have proposed a solution to the interpretation of Condition 2 of Order WR 2009-0060 that focuses on defining what constitutes an increase in use of water. The proposal relies on utilizing existing Water Management District (District) ordinances, rules, and regulations that already restrict water use on the Peninsula. The purpose of this companion letter is to provide background information regarding the District's Water Permit system, and illuminate District policies that are consistent with the goals of the Board's Cease and Desist Order.

In 1977, the California Legislature created the District for the primary purposes of augmenting and managing the supply of water on the Monterey Peninsula. The District's Water Permit system is a fundamental tool used to achieve the District's purposes. The Water Permit system already closely regulates water uses on a property-by-property basis and, as it relates to Condition 2, has a set of rules in place to address situations where there is a change in use of a property. As set forth in more detail below, these rules focus on the historically documented water use capacity of a property, and ensure that changes in use of a property do not result in an increase in the capacity to use water. These rules are relatively straightforward to apply, and are understood by the community. As such, the District joins other community supporters and respectfully requests that the Board interpret Condition 2 to comport with the District's existing Water Permit system.

Experience since 2009 has indicated that the District's rules for allocating water within the Monterey Peninsula, including our "change in use" rules, fit well with the Board's intent of ensuring that additional demands are not placed on the Carmel River as a result of land use changes. What is necessary now is clarification of Condition 2 that furthers that intent while enabling the Monterey Peninsula community's land uses to evolve organically.

The District has accepted and supports the ban on new service connections (no setting of new meters) required by Condition 2. In fact, following the recent amendment of the Order, the District renewed its commitment to not issue water permits for construction that requires a new meter by enactment of Ordinance 173 on August 15th (see Exhibit A.).

The concern of our community lies in the phrase "*any increased use of water at existing service addresses resulting from a change in zoning or use.*" This condition presents three fundamental problems for property owners seeking to renovate, redesign, or reconfigure to make highest and best use of their property:

- What constitutes a "change in zoning or use"?

- What is the best way to identify an “increase in use”?
- How can Cal-Am enforce this directive when it lacks any land use permitting authority and has an obligation to serve existing service connections?

Each of these questions is addressed below.

### **Change in Zoning or Use**

Since the late 1980’s the Monterey Peninsula, through the District, determined that a finite amount of water is available and no new water can be permitted for use until new supplies are developed. Since then, the District has developed multiple layers of regulation to ensure new water would not be allocated to users beyond that finite amount. The Board, in its April 2012 letter, referred to “*a change in zoning or use approved by either MPWMD or a local land use authority.*” This potentially creates confusion because one of the District’s rules, Rule 11, states: “*Change of Use means a Non-Residential change from one Group to another, as uses are categorized in Table No. 2 of Rule 24, or a change from Table 1 to Table 2 or vice versa. Change of Use as defined by the District may differ from a change in zoning or use as defined by a Jurisdiction.*” This Rule means renovation of an existing property from residential use to commercial use or vice versa, or from a use such as a nail salon to a deli, or a deli to a laundromat, is defined as a change in use under the District’s rules. Tables 1 and 2 are included as Exhibit B hereto. Therefore, we need clarification as to what was meant in Condition 2 relative to the District or local land use authority rules.

One approach might be to simply look at the account type before and after a renovation – if it was commercial and remains commercial, for example, then say there is no change in use. However, most if not all local general plans strongly encourage mixed-use projects to bring residents into the urban core. Many properties seek to combine commercial and residential use. Cal-Am commercial and residential rate structures are very different and the District’s method to calculate capacity for water use is different for each. The District issues separate permits for residential and commercial purposes, even when in the same building. Hence, even if the master meter account remains the same type, the use may have changed, and the confusion persists.

With respect to zoning, there are two considerations: How long after a zoning change is a project related to that change? and, With the passage of time, who is going to evaluate whether a project was allowed under prior zoning versus changed zoning?

Focusing instead on defining an increase in use removes the subjectivity and grey areas of dealing with trying to clarify what constitutes a change in zoning or use. The District’s Water Permit process does just that.

### **Increase in Use**

Long before Order 95-10, the District declared limits on the quantity of water available for use by property owners. (See Exhibit C for a history of District rules related to allocation of water.)

Until new supplies were developed water could only come from three sources: (i) historical water use capacity on a property as documented by the District, (ii) water saved from retrofits or permanent abandonment of Cal-Am, including governmental projects (a Public Water Credit), or (iii) from an allocation of water already available in a jurisdiction from the Paralta Well in the Seaside Basin

(established in 1993) or from Water Permits issued prior to the District’s Water Allocation Program Environmental Impact Report (in 1990). The limited quantity of jurisdictional water that remains available is shown below:

<b>Source of Allocation</b>	<b>Still Available</b>
Paralta Well - 1993	26 AF
Allocation EIR - 1990	36 AF
Public Water Credits	30 AF
Total	92 AF

The amount still available overstates what can be implemented because most jurisdictions have dedicated it to future projects that cannot proceed due to the moratorium on new service connections. That increment of water will not be used until the CDO is lifted. (Detail on jurisdictional allocations can be found in Exhibit D.)

Because available water is finite, the District developed strict rules to count the water use capacity of a property (Tables 1 and 2, cited earlier) and developed the water permit process to ensure that capacity is not exceeded. Properties must demonstrate either no increase in use, or that capacity elsewhere is reduced. This global and holistic approach ensures no increase in water use capacity can occur within the entire service area until the CDO is lifted. Furthermore, we should recognize the capacity to use water does not equate to actual use of water. Some businesses are successful, some are not; accordingly the factors in Table 2 reflect average water use. Many homes on the Peninsula are second homes, others may have large families, hence fixture unit values in Table 1 are averages, but individual usage will vary. While the factor and fixture unit methodologies are supported by industry standards (see Exhibit E), it is important to note that a 2011 statistical study by A&N Technical Services showed actual non-residential water use in the District was less than the Table 2 factors. The difference occurred in 79% of the cases, meaning the District’s methodology generally results in lower actual use than the calculated capacity, which is a benefit to the Carmel River.

As an alternative to water use capacity calculations, it may be tempting to rely on actual billing records to measure use, but as highlighted in the companion letter, this has at least five drawbacks: (i) businesses are somewhat organic – they live, thrive, die, and renew. The decision to buy or renovate a building often involves a long lead time where leases are terminated, tenants removed or temporarily replaced, or where a property lies vacant while new plans are developed. For every new renovation that accommodates new business uses, there often is another struggling property in the area going out of business, becoming vacant, or planning for its own re-use. This continual property “churn” is why it makes sense to examine water use on a macro-level, rather than on a property-by-property micro-level; (ii) choosing an appropriate period to use billing records is challenging as we enter another five-year extension of the CDO – the Board in its April 2012 letter stated “*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.*” Yet a variety of programs initiated since the 2009 CDO took effect have reduced pumping from the Carmel River by 3,272 AF meaning records from around 2009 may not be appropriate. The broad, macro-level conservation programs are achieving the Board’s goals while relying on the District’s building-by-building permit process; (iii) The CPUC ensures customer privacy; it limits access to billing records. A prospective purchaser of a business or property cannot access prior water use information to make an informed decision as to the value of a building, or what potential uses can be supported, especially if the building has gone through several ownership changes. Similarly, water use data is not available to planning agencies. This scenario compounds the inability to promulgate water source data needed for CEQA compliance and permitting; (iv) general economic conditions and climate-related conditions affect water use; historical data is not fully

comparable to current conditions; and (v) local water conservation rules, technologies, and rate structures continue to promote water use reductions across the service area (see Exhibit F for a description of conservation activities on the Monterey Peninsula.) Because of these weaknesses, the District's Water Permit process is a more objective method.

### **Enforcement**

Cal-Am does not approve projects. Neither Cal-Am nor any other body receives notification of changes in tenancy or business practices at an existing service address. Cal-Am and others cannot be aware of any specific activities that change use or increase use. Cal-Am has no role in permitting processes. However, the District is aware, because many (but not all) projects rely on a District Water Permit. This is the reason the District can better ensure collective increases do not occur in the capacity to use water.

Although the CPUC, in its decision, acknowledged Cal-Am can choose to not serve an increase in use due to a change in zoning or use, the CPUC did not provide guidance on how Cal-Am can do so. If Cal-Am removed a meter from an existing customer it would likely result in litigation –the customer has the right to use water from its connection. As an example, consider an existing building with a single master meter for two rental spaces, one of which undergoes a change in use. Cal-Am is unable to distinguish between increased water use due to successful business practices in one space versus a change in use in the other space. Cal-Am cannot fairly install flow restrictors to reduce water to some historical billing period. Neither this nor any other method of enforcement is well defined.

No foolproof method exists to identify all subject properties, to differentiate increases in use due to business practices versus zoning or change in use, or to authorize Cal-Am to engage in land use approval.

### **Proposed Solution**

We offer an alternative approach that effectively restricts community-wide water use to remain under the Effective Diversion Limit (EDL) (see Exhibit G for a description of local laws designed to ensure compliance with the CDO and EDL). Additionally, continued efforts will be made on the community-wide conservation programs that served so well to reduced diversions from the Carmel River by 46% since Order 95-10.

For almost 30 years the community has faced local regulations designed to ensure no increase in the capacity to use water. These restrictions are well understood and have been effective. To interpret Condition 2 of WR 2009-0060, a simple but effective solution is to clarify that "increased use of water at existing service addresses" be defined to mean "an increase in the capacity to use water at an existing site in excess of the historical capacity to use water as documented by the Monterey Peninsula Water Management District. 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."

Thank you for the opportunity to provide background on the District's programs.

Sincerely yours,



David J. Stoldt  
General Manager