

BRC/MJA
WR 2009-0060

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May 31, 2016

VIA FAX (916-341-5400), email (Matthew.Quint@waterboards.ca.gov), and U.S. Mail

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

STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS
MAY 31 PM 3:32
SACRAMENTO

Subject: In the Matter of the Unauthorized Diversion and Use of Water by the California American Water Company – Cease and Desist Order WR 2009-0060; Marina Coast Water District comments on the Amended Application for Order Modifying Order

Dear Mr. Quint:

Thank you for the opportunity to comment on the Amended Application filed by California-American Water Company (Cal Am). We are Legal Counsel to the Marina Coast Water District (MCWD).

MCWD was formed in 1960. Today MCWD is a 100% groundwater dependent water agency serving municipal and industrial water uses within the City of Marina and the former Fort Ord. MCWD's production wells are located near the northern boundary of the DWR Bulletin 118 Seaside Area Subbasin. During 2015, MCWD delivered approximately 3,200 acre-feet of groundwater to its customers. The CEMEX property from which Cal Am proposes to pump up to 27,000 acre-feet per year of source water for its proposed desalination plant is located south of the Salinas River within the southwest portion of the 180/400 Foot Aquifer Subbasin. The 180/400 Foot Aquifer Subbasin is designated by the State of California as a Critically Overdrafted subbasin; one of only twenty-one in the whole State. See http://www.water.ca.gov/groundwater/sgm/pdfs/COD_BasinsTable.pdf. The CEMEX property is only 1.6 miles from one of MCWD's production wells.

MCWD is generally supportive of Cal Am's proposed Order, Attachment 1 to the Amended Application, for the following reasons:

1. Some extension of the CDO deadline will be required, at least until the Pure Water Monterey/Groundwater Replenishment (GWR) Project is operational. MCWD is a strong supporter of the GWR Project. MCWD joined in the Joint Motion for a Separate Phase 2 Decision to the California Public Utilities Commission (CPUC), Attachment 4 to the Amended

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Application. MCWD participated in an evidentiary hearing before the CPUC on May 26, 2016, to address the multi-party request that the CPUC promptly grant approval for Cal Am to enter into a Water Purchase Agreement which, along with approvals to construct the proposed non-GWR Monterey Pipeline and related Monterey Pump Station, would allow Cal Am to purchase and deliver to the Monterey Peninsula 3,500 acre-feet per year of GWR Project water. The schedule for the CPUC A.12-04-019 proceeding anticipates a CPUC decision on those approvals by August 2016, and testimony adduced at the hearing by the GWR proponents indicated that if approved, the GWR Project could begin injection operations by late 2017 and withdrawals for delivery to Cal Am customers by February 2018. MCWD believes that when the GWR Project is fully operational, Cal Am will have almost all the water supply it needs to cease its illegal Carmel River diversions, even without the construction of the MPWSP.

2. MCWD does not believe that Cal Am's ratepayers and customers, or MCWD customers who are employed on the Monterey Peninsula, should suffer because of Cal Am's corporate misjudgments and mismanagement regarding the Regional Desalination Project and now the Monterey Peninsula Water Supply Project (MPWSP).

3. The degree of environmental harm caused by Cal Am's illegal diversions from the Carmel River, and the schedule under which those diversions should cease, is a question for the State Board.

While MCWD is generally supportive of the proposed Order, we would point out the following:

- On page 19 of the Amended Application, Cal Am states, "The requested modifications are necessary because factors beyond CAW's and Petitioners' control – namely the failure of the Regional Desalination Project and delays in the CPUC approval schedule for the MPWSP – made it infeasible to complete the MPWSP and entirely eliminate unauthorized Carmel River diversions within the current CDO schedule (i.e., by December 31, 2016)." Yet Cal Am itself determined by September 2011 that it would not carry out the public-private Regional Desalination Project, a decision that it publicly disclosed in January 2012. It was pointed out to both Cal Am and the CPUC that this switch could substantially delay meeting the December 31, 2016 deadline. Since that time Cal Am has pursued CPUC approval of the MPWSP instead, an entirely Cal Am-owned desalination project. Cal Am was well aware when it embarked on this course of action that federal approvals would be required because its proposed source wells are now located within the Monterey Bay National Marine Sanctuary (MBNMS) and, therefore, NEPA as well as CEQA compliance would be necessary. It is not clear why Cal-Am delayed seeking the required federal approvals and the required NEPA compliance. Regardless of the reason, the CPUC's issuance of a schedule for a joint EIR/EIS that delayed the release of the DEIR/DEIS and commencement of the public comment period to December 21, 2016, was foreseeable.
- Cal Am admits that its source wells on the CEMEX property will pump groundwater that may be used for beneficial uses, which includes for drinking and for non-potable uses. See State Board Resolution No. 88-63 as to water quality standard for sources of drinking water and Water Code Section 10783(g)(2). Cal Am does not have any overlying, appropriative, or prescriptive groundwater rights in the Critically Overdrafted 180/400 Foot Aquifer Subbasin

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and cannot acquire any such water rights for its source wells. MCWD must protect its own groundwater sources from within both the Seaside Area Subbasin and the adjoining 180/400 Foot Aquifer Subbasin south of the Salinas River. Based upon MCWD's own hydrogeological analysis, MCWD believes it is beyond dispute that Cal Am's proposal to pump up to 27,000 acre-feet per year of source water from the CEMEX property will result in significant harm to the groundwater aquifers within the 180/400 Foot Aquifer Subbasin and significant harm to MCWD's groundwater rights and water quality and quantity. In addition, the 1996 Marina Lands Annexation Agreement to Monterey County Water Resources Agency's (MCWRA) Zones 2 and 2A limits groundwater pumping of non-potable water on the CEMEX property to a total amount of not more than 500 acre-feet per year; all of which groundwater can only to be used on the CEMEX property. The then CEMEX property owner agreed to limit its then existing overlying groundwater rights in exchange for other consideration in the agreement and that limitation took effect upon signing of the Annexation Agreement. The Annexation Agreement was entered into by the property owner, MCWRA, MCWD, and others for the express purposes of groundwater protection and reduction of seawater intrusion. Cal Am's attacks before the CPUC and in the courts on MCWD's hydrogeological analysis of projected harms to the aquifers and to MCWD, Cal Am's refusal to consider desalination "return water" options south of the Salinas River, and Cal Am's refusal to consider alternative technologies or locations (i.e., locating its source wells north of the Salinas River) for the MPWSP's source wells are further examples of Cal Am's misjudgment and short-sightedness. A legal determination of Cal Am's lack of the right to pump source water from the CEMEX property could become necessary, which would further delay Cal Am eliminating all of its unauthorized diversions of Carmel River water.

- The Amended Application seeks an extension of the CDO for a five-year period, permitting Cal Am to draw up to 8,310 acre-feet per year from the Carmel River. Thus, subtracting the 3,376 acre-feet to which Cal Am is lawfully entitled, the proposed modification would permit Cal Am to continue drawing only an additional 4,934 acre-feet per year in excess of its lawful limit for the extension period. However, the GWR project is expected to provide 3,500 acre-feet per year, and the planned expansion of Aquifer Storage and Recovery (ASR) is projected to provide 1,500 acre-feet per year on average according to Cal Am's recent CPUC filings. In addition, both MCWD and Cal Am customers achieved significant water conservation during 2015 compared with 2013. Therefore, the GWR Project, an expanded ASR, and water conservation together have the potential to provide the 4,934 acre-feet per year of excess Carmel River diversions within the next two to three years. In that case, Cal Am will be very close to full compliance with the Board's Order WR 2009-0060 and Order WR 95-10, possibly as early as late 2017, notwithstanding any delay in the development of, or failure to obtain approval of, the MPWSP. If the grant of an extension for the full five years could result in Cal Am recovering from its customers' rates for all costs of delay, the Board should consider granting the Amended Application for a shorter period than the requested five years.

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Very truly yours,

Roger K. Masuda

Roger K. Masuda
Legal Counsel
Marina Coast Water District



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