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**BEFORE THE STATE WATER
RESOURCES CONTROL BOARD**

In the Matter of the State Water Resources)
Control Board (State Water Board))
Hearing to Determine whether to Adopt a)
Draft Cease & Desist Order against)
California American Water Regarding its)
Diversion of Water from the Carmel River)
in Monterey County under Order WR 95-10)

Hearing Date: July 23 - 25, 2008

Carmel River in Monterey County


EXHIBIT MPWMD-HS15
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

MEMORANDUM

Date: August 18, 2006 (revised October 17, 2006)

To: MPWMD Staff and Interested Parties

From: David A. Berger, General Manager 

RE: WATER DISTRIBUTION SYSTEM MEMORANDUM #3 – PROTOCOL FOR APPLICATIONS AND REQUESTS INVOLVING WELLS IN CARMEL VALLEY ALLUVIAL AQUIFER

The revised Implementation Guidelines for the Monterey Peninsula Water Management District (MPWMD) Rules and Regulations governing Water Distribution Systems (WDS) are currently being prepared. Due to questions about the protocol to address wells in the Carmel Valley Alluvial Aquifer (CVAA), this memorandum serves as written guidance on this subject to be incorporated into revised Implementation Guidelines when they are completed. This memorandum was reviewed and approved by the MPWMD Board of Directors at its regular meeting of October 16, 2006, and included consideration of comments by the public.

Questions about the CVAA protocol stem from letters to MPWMD from the California Department of Fish & Game (CDFG) and the National Marine Fisheries Service (NMFS or NOAA Fisheries) asserting that additional extractions from the CVAA should not be allowed and that a full California Environmental Quality Act (CEQA) review is required before any decision to approve wells in the CVAA. This memorandum is based on discussions with General Counsel in August 2006, and the August 15, 2006 memorandum from Counsel shown as Attachment 1.

The following paragraphs provide specific guidance to MPWMD staff in processing various types of WDS applications and requests that involve wells in the CVAA.

General Guidance (Applicable to All Situations)

A well is first determined to be in the CVAA based on the plan view maps available at the District office pursuant to Rule 11. Current Implementation Guidelines allow staff to determine that a well is not in the CVAA based on the well log, hydrogeologic data, and/or field inspection of the well site. This determination may be made by the District's Hydrogeologist/Water Resources Division (WRD) Manager in the Pre-Application phase, and would be included in the Pre-Application Review letter to the applicant. The District's Hydrogeologist/WRD Manager also has the authority to amend the boundaries of the CVAA on District maps based on scientific evidence and a signed, dated, written rationale.

If the District staff believes the well is an alluvial well, or if there is a question about the alluvial characteristics of the well in the Pre-Application review, the District presumption is that the well is an alluvial well, absent substantial evidence to the contrary as demonstrated by a qualified consultant retained by the applicant. The District's Hydrogeologist/WRD Manager may concur or disagree with the applicant consultant's recommendation with a signed, dated, written determination, including a rationale if the District disagrees with the applicant consultant's recommendation. The District's hydrogeology consultant may assist District staff in this review.

The terms "**actual historical use**" or "**historical baseline**" is hereby defined as the arithmetic mean (often called the "average") of the past 10 years of metered water well production data and/or metered California American Water (Cal-Am) water records, depending on the situation. If 10 years are not available, the average of the available years of data shall be used. The use of a water year (defined as October 1 through September 30 of the following year) is preferred if data are available in this format. Use of a 10-year average is based on MPWMD Rule 40-A-4 as well as consistency with the State Water Resources Control Board (SWRCB) protocol used in Order 95-10. Given that well production reports may be prone to errors due to water meter reporting inaccuracies, District staff may conduct a field inspection of the well, meter and surroundings, and potentially correct readings if there is reasonable cause for such action. District staff may discuss the water production or use history with the property owner as part of the assessment.

The District will serve as the CEQA Responsible Agency for any development project for which discretionary approval is needed by a member jurisdiction (City or County); that jurisdiction will serve as the CEQA Lead Agency. Thus, the District will rely on, and provide input to, the environmental documentation prepared by the Lead Agency. A specific case may warrant an exception to this protocol if the District determines the Lead Agency's environmental documentation does not adequately address water resources and related topics within the District's authority.

For any WDS application for which the District is the CEQA Lead Agency, there will be no CEQA exemptions for any new or amended WDS application for well(s) in the CVAA pursuant to CEQA section 15300.2. Thus, an Initial Study will be performed for all WDS applications in the CVAA. The Initial Study will be circulated for 30 days and noticed through the State Clearinghouse as well as local entities.

As described in Attachment 2, a key concern of resource agencies is the cumulative impacts of the combined effects of CVAA extractions by Cal-Am and non-Cal-Am wells. Thus, for all WDS applications and requests for wells in the CVAA described below, the water use history of Cal-Am and non-Cal-Am water use will be considered, as applicable.

The following direction recognizes that there may be exceptions or unusual circumstances which result in a different protocol for permit processing or responding to a WDS request. Any deviation must be approved by the General Manager in consultation with District General Counsel.

As part of the WDS application process, determinations about permit processing protocol are put in writing for each application as a determination by the General Manager. Such staff determinations are subject to appeal to the MPWMD Board pursuant to Rule 70.

Application for New Alluvial Well/WDS

Based on an Initial Study, an Environmental Impact Report (EIR) will be prepared for any application to create a new WDS based on a new alluvial well that results in water extractions from the CVAA greater than the historical baseline within the proposed WDS service area. A Mitigated Negative Declaration may be considered for a situation where a new well would result in total water use no greater than the historical baseline, considering combined Cal-Am and non-Cal-Am use before the proposed project and estimated water use after the project is operational.

Application for Amended WDS Based on Existing Alluvial Well

Based on an Initial Study, an EIR will be prepared for any application to amend an existing WDS based on an existing alluvial well that results in water extractions from the CVAA greater than the historical baseline within the proposed WDS service area. A Mitigated Negative Declaration may be considered for a situation where amendments to the use of an existing well would result in total water use no greater than the historical baseline, considering combined Cal-Am and non-Cal-Am use before the proposed project and estimated water use after the project is operational.

Set System Limit Baseline for Previous Systems

Rule 20 requires that the system limits for previous WDS be established pursuant to Rule 40-A. Rule 40-A-4 provides types of information that can be considered when setting the limit for an existing WDS for which system limits were not previously established, such as a "pre-existing multiple connection WDS" described in Rule 20-C-10. For such a situation, a system capacity (production limit) baseline may be set without CEQA review if the baseline does not exceed the actual historical use. Setting a baseline above actual historical use is possible, pursuant to Rule 40-A-4, but setting such a baseline would require CEQA review as a discretionary action that would allow more water as the baseline than was historically produced. As noted above, there would be no CEQA Exemption for such action.

Attachments

1. August 15, 2006 Memorandum from General Counsel
2. June 7, 2006 and June 9, 2006 letters from CDFG and NMFS

De LAY & LAREDO

Attorneys at Law
606 Forest Avenue
Pacific Grove, California 93950

Paul R. De Lay
David C. Laredo
Heidi A. Quinn
Frances M. Farina, of Counsel

Telephone (831) 646-1502
Facsimile (831) 646-0377

August 15, 2006

TO: Henrietta Stern
FROM: David C. Laredo
RE: Historical Water Use Baseline for Alluvial Wells

You have asked for our informal review of issues relating to baseline water use for alluvial wells in the context of recent letters forwarded by National Marine Fisheries Service (NOAA) and California Department of Fish & Game (CDFG) in relation to an application to create the St. Dunstan's Water Distribution System (WDS).

NOAA and CDFG each submitted letters in response to the District's circulation of an Initial Study and Proposed Negative Declaration under the California Environmental Quality Act (CEQA) for proposed creation of the St. Dunstan's WDS under District Rule 22. These letters assert water is not currently available for expanded use due to State Water Resources Control Board (SWRCB) Order WR 95-10, and due to concerns regarding the Endangered Species Act (ESA) listed steelhead and the California Red Legged Frog. In essence, the contention is made that any increase in water use from the Carmel Valley Alluvial Aquifer cumulatively affects Carmel River flow, in reliance upon CEQA Guideline section 15130 that impacts consist of "an impact which is created as a result of the combination of the project evaluated... together with other projects causing related impacts."

Concerns raised in the context of the proposed expansion of the Cal-Am WDS apply equally to the creation or expansion of any non-Cal-Am WDS that derives its water supply from the Carmel Valley Alluvial Aquifer. It is my conclusion that the baseline water use for any existing alluvial well, including pre-existing Water Distribution Systems (WDS), cannot exceed historical use without further review under the CEQA. Staff may use a rule of reason to quantify the increments of water that fall under the definition of "historical use." By way of example, staff could use the average of the previous 10 years, assuming that data are available, to determine this increment of use. Alternate methodologies may also satisfy this rule of reason, so long as an objective standard is used to quantify actual historical water use.

Staff also holds authority to grant a permit for a quantity of use that exceeds demonstrated historical use pursuant to District Rule 40. Such a discretionary determination can only be made in reliance upon a proper CEQA analysis. This analysis cannot be made pursuant to a CEQA exemption. CEQA exemptions are not available to permit applications that propose a new WDS or increased water use above the historical baseline due to the cumulative impacts issues, including those raised by NOAA and CDFG. CEQA Guideline section 15300.2 (b) states, "All

exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.”

It appears that applications that propose water use at or below historical use, however, are allowable under a CEQA mitigated negative declaration (at least in reference to water use impacts) as those projects will not contribute the cumulative impacts of increased water use. Conditions to limit water use so that it does not exceed historical use would justify a finding that “the project will not have a significant effect on the environment” pursuant to section 15075 of the CEQA Guidelines.

An alternate approach that justifies reliance upon a mitigated negative declaration in reference to water use impacts would be based upon the provisions of CEQA Guideline section 15130 that provides, “... a project’s contribution to a significant cumulative impact will be rendered less than cumulatively considerable if the project is required to implement or fund a share of a mitigation measure or measures designed to alleviate the cumulative impact.” This approach must result in full mitigation of the adverse effect of proposed water use – meaning that the mitigation effort shall fully offset existing water use in an identical or larger quantity as compared to the proposed new water use. The approach to mitigate water use impacts shall not be satisfied, however, if it merely results in some form of payment into a “fund” which does not in fact result in a quantifiable and actual mitigation effort separate and distinct from efforts underway to mitigate Cal-Am’s unlawful diversions (e.g., contributing to the existing or planned Cal-Am ASR project cannot provide a mitigation effort for a non-Cal-Am well). Actual mitigations could include, by example, some sort of mitigation bank, restoration project, or reclamation project.

I trust that the summary nature of this memo is helpful to you. If you would like to discuss this matter in further detail, please do not hesitate to contact me.

Sincerely,

De LAY & LAREDO

David C. Laredo

FAXED 6/7/06



State of California - The Resources Agency

ARNOLD SCHWARZENEGGER, Governor

DEPARTMENT OF FISH AND GAME

<http://www.dfg.ca.gov>

POST OFFICE BOX 47
YOUNTVILLE, CALIFORNIA 94599
(707) 944-5500

ATTACHMENT 2



June 7, 2006

RECEIVED

JUN 12 2006

MPWMD

Ms. Henrietta Stern, Project Manager
Monterey Peninsula Water Management District
Post Office Box 85
Monterey, California 93942-0085
Fax: (831) 644-9560
Email: henri@mpwmd.dst.ca.us

Dear Ms. Stern:

Monterey Peninsula Water Management District (MPWMD)
Initial Study and Notice of Intent to
Adopt a Negative Declaration for Application to
Create St. Dunstan's Water Distribution System,
Application #20031208DUN for APN 416-024-014 and 416-522-005,
at 28003 Robinson Canyon Road, Carmel Valley, Monterey County

Department of Fish and Game (DFG) personnel have reviewed the Initial Study and Proposed Negative Declaration (IS/ND) for this project. This project proposes to eliminate CalAm commercial water service to the existing parcels and replace that service with a new Water Distribution System (New Well) operated by St. Dunstan's Church (Applicant). This change is proposed to accommodate the additional water needs of the Applicant due to: 1) expansion of the building from 6,500 square feet to 10,000 square feet; and 2) increase water needed to meet irrigation demands of additional landscaping. Currently the facility uses 1.6 acre-feet (af) of CalAm water, and it has been calculated that the project expansion will require an additional 6 af of water for a total diversion of 7.6 af to be provided by the New Well. Staff discussed this project with MPWMD on May 24, 2006 to confirm that this project intends to divert additional or "new" water from the Carmel Basin on a year-round basis with the highest rate of diversion occurring during the dry season to meet increased landscape irrigation needs.

DFG has previously documented its concerns about the potential impacts to public trust resources resulting from existing and new diversions from the Carmel River and the Carmel Valley Alluvial Aquifer. The adverse impacts to public trust resources, including listed species, resulting from diversions within the Carmel Basin are well documented and are clearly more than just local concern¹.

¹ Considering the significance of the adverse impacts to sensitive resources from over-pumping within the Carmel River Basin, this project meets the requirements of CCR § 15206 (b) 5 for projects of statewide, regional or area wide significance. It, and other projects proposing additional diversions within the Carmel Basin, should not be considered only of "local interest." This would allow circulation through the State Clearinghouse without a reduced review period and ensure that adequate time is allowed for comments to be provided.



The cumulative impacts to resources resulting from pumping are so clearly recognized that restrictions and agreements are already in place to prevent increased pumping. State Water Resources Control Board (SWRCB) Water Right Order 95-10 and a Conservation Agreement with National Marine Fisheries Service (NOAA Fisheries) (intended to reduce adverse impacts to sensitive species by reducing diversions by CalAm from the Carmel Basin) do not allow CalAm to increase its diversion to serve the Applicant's expanded water needs. This has resulted in the project proposal to develop the New Well to satisfy the new demand. However, shifting the increased diversion activity away from the CalAm wells to the Applicant's New Well does nothing to reduce or eliminate the impacts of increasing local diversions especially in the critical dry season. Simply changing who is pumping, to avoid the limitations and restrictions already in place to protect the environment, does not reduce the impacts or support the finding that this new diversion has a less-than-significant impact.

There is substantial evidence in the record that pumping in the vicinity of the proposed project has a significant adverse impact on the environment and the sensitive species it supports. While the IS disclosed that the well would "cumulatively contribute" to extraction from the basin, the impact is dismissed because: 1) the "relatively low water use from the proposed well"; and 2) "the hydrologic regime in dry periods is controlled by much larger well production in the vicinity, including two major CalAm wells." Unfortunately, this sidesteps the issue of why a "new" diversion by the Applicant would not be considered "cumulative considerable" when resource protection agreements in place consider *any* new diversions by CalAm a significant effect on the environment when viewed in connection with the effects of all the other diversions.

In seeking a long-term solution to this problem, NOAA Fisheries, with review by DFG and MPWMD, released a policy paper entitled *Instream Flow needs for Steelhead in the Carmel River; Bypass flow recommendation for water supply projects using Carmel River waters, June 2002* (NOAA document). The NOAA document² established specific bypass flows for new projects to ensure that, as the problems of over-pumping in the Carmel Basin are being resolved with CalAm, no new diversions are developed that would be counter to the efforts to restore flows to protect the resources. In addition to prescribing bypass flows to ensure that restoration of flows will occur and be sustained, the document recommends a restriction for the dry season that "no new diversions be permitted, authorized, or otherwise sanctioned for the period June 1 to October 31." Approval of any diversions without inclusion of the mitigation recommendations in the NOAA' document for bypass flows/pumping restriction only serve to increase the over-pumping impacts that the agencies are attempting to reverse. Without the inclusion of appropriate mitigations, any new diversion project represents cumulative considerable effects on the environment.

There are no mitigations proposed to assure that the terms of this well permit would be consistent with achieving the long term goals of resource protection that precludes

² This document can be found at <http://swr.nmfs.noaa.gov/hcd/policies/Carmel%20Flows.pdf>

Ms. Henrietta Stern
June 7, 2006
Page 3

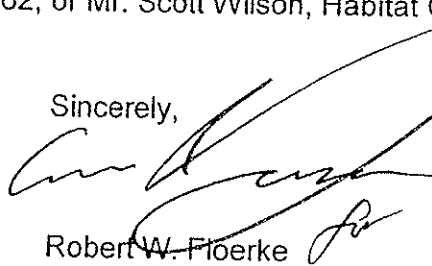
CalAm from serving the facility. The flow preservation/restoration to be provided under WRO 10-95 and the Conservation Agreement restricting the ability of CalAm to serve additional water requests are intended to support public trust resources, not provide water for additional diversions that will perpetuate adverse impacts to these resources while CalAm reduces their impacts. As stated in the IS/ND, the agreements between CalAm and NOAA and between CalAm, NOAA, DFG and MPWMD, focus on preserving year-round river flow as far downstream as possible. However, these efforts are to provide flow to protect the public trust and are not intended to make additional water available for diversions.

In summary, DFG believes that the ND is inappropriate because the proposed project will result in and contribute to the continuation of significant impacts to the environment. No mitigations or project changes are proposed to avoid or reduce the significant impacts of this new water diversion. Potentially feasible project revisions and mitigations could include: 1) delaying expansion until alternative water sources are available; 2) drastically reducing the amount of landscaping water required so that all additional diversions can be eliminated; or 3) permitting pumping at the New Well only when the diversions would follow recommendations in the NOAA document. DFG recommends that this IS/ND be withdrawn and revised to include appropriate analysis and mitigation. Additionally, DFG is concerned that any permitting of individual wells by MPWMD outside the terms of the NOAA recommendation are contrary to the long term solution developed for this basin. These projects should be circulated through the State Clearinghouse to ensure an appropriate review and comment period.

Please also be advised this project will result in changes to fish and wildlife resources as described in the California Code of Regulations, Title 14, Section 753.5(d)(1)(A)-(G). Therefore, a de minimis determination is not appropriate, and an environmental filing fee as required under Fish and Game Code Section 711.4(d) should be paid to the Monterey County Clerk.

If you have questions about these comments, please contact Ms. Linda Hanson, Staff Environmental Scientist, at (707) 944-5562; or Mr. Scott Wilson, Habitat Conservation Supervisor, at (707) 944-5584.

Sincerely,



Robert W. Floerke
Regional Manager
Central Coast Region

cc: See next page

Ms. Henrietta Stern
June 7, 2006
Page 4

cc: Dr. William Hearn
Ms. Joyce Ambrosius
National Marine Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Ms. Katherine Mrowka, Chief
Watershed Unit 3
Division of Water Rights
Post Office Box 2000
Sacramento, CA 95812-2000



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southwest Region
777 Sonoma Ave., Room 325
Santa Rosa, CA 95404-6528

June 9, 2006

In response refer to:
151416SWR2006SR00350:JEA

RECEIVED

JUN 14 2006

MPWMD

Henrietta Stern, Project Manager
Monterey Peninsula Water Management District
P.O. Box 85
Monterey, California 93942-0085

Dear Ms Stern:

Thank you for the opportunity to comment on the Initial Study (IS) and Proposed Negative Declaration for Approval of Application #20031208DUN to Create St. Dunstan's Water Distribution System. The proposed project entails approval of operation of a Water Distribution System, based on a new water well, to: 1) serve existing and expanded needs at St. Dunstan's Episcopal Church, including landscaping church grounds, and 2) replace the current source of supply by California-American Water (Cal-Am).

The maximum estimated water use is 7.5 acre-feet per year (AFY), 0.7 AFY for the enlarged sanctuary/parish hall and 6.8 AF for landscape irrigation. Actual water use in the past five years has not exceeded 1.66 AFY. Currently Cal-Am water is not available for church expansion due to State Water Resources Control Board (SWRCB) Order 95-10. The well would be located in the Carmel Valley Alluvial Aquifer at approximately River Mile 8.5. It is noted the proposed project intends to divert additional water from the Carmel River Basin on a year-round basis with the highest rate of diversion occurring during the low flow season to meet increased landscape irrigation needs.

South-Central California Coast Evolutionarily Significant Unit (ESU) steelhead are listed as threatened under the Endangered Species Act (ESA) of 1973 and are present in the Carmel River. Populations of steelhead within the South-Central California Coast ESU are at critically low levels. Any adverse impacts to them must be minimized to assure these species do not become extinct. Decreasing flows in the river can delay the migration of upstream adults and downstream juveniles within the system. Decreased flows can contribute to increased water temperatures and a decrease in water quality, both detrimental to salmonids.

The IS discloses the well would "cumulatively contribute to extractions from the Carmel Valley Alluvial Aquifer that cumulatively affect Carmel River flow," but then goes on to dismiss the impact because of the "relatively low water use from the proposed well" and the 'hydrologic regime



in dry periods is controlled by much larger well production in the vicinity of the proposed well, including two major Cal-Am production wells.” We disagree with this IS finding.

Adverse impacts to listed species in the Carmel River Basin are well documented. SWRCB Order 95-10 and Order 2002-0002 do not allow Cal-Am to increase its diversions for expanded water needs or new water users and orders Cal-Am to pump from the lowermost wells to protect listed species. For MPWMD to approve a new Water Distribution System because Cal-Am cannot provide for expansion does not negate the on-going adverse impacts to listed species from water withdrawals. In fact, any increase in diversions on the Carmel River will be cumulative and only exacerbate the impacts. By changing who does the pumping, whether it be Cal-Am or a new diverter, does nothing to reduce or eliminate the impacts of increased diversions, especially in the low flow season. The flow prescriptions provided under Order 95-10 and 2002-0002, restricting the ability of Cal-Am to serve additional water requests and preserve year-round flow as far downstream as possible, are intended to support public trust resources, and are not intended to provide water for additional diversions that will perpetuate adverse impacts to these resources.

NOAA’s National Marine Fisheries Service’s (NMFS) June 2002 report, “*Instream Flow Needs for Steelhead in the Carmel River, bypass flow recommendations for water supply projects using Carmel River waters*” establishes bypass flows for new projects to ensure that no new diversions are developed that would be counter to the efforts to restore flows to protect listed species while a long-term solution to a sustainable water supply is found. This document recommends “no new diversions should be permitted, authorized, or otherwise sanctioned for the period June 1 to October 31.” As noted in the IS, most of the increased diversion for the proposed project is for landscape irrigation which usually is needed during this low flow period. Approval of any diversions, especially during this critical flow period only serves to increase the over-pumping impacts the agencies are attempting to reverse.

NMFS believes the finding of a Negative Declaration is inappropriate because the proposed project will result in and cumulatively contribute to the continuation of significant impacts to the environment. NMFS recommends MPWMD provide full disclosure of significant impacts through an Environmental Impact Report. NMFS also recommends revising the proposed project to minimize impacts to listed species, including, but not limited to: 1) delaying the expansion until alternative water sources are available; 2) reducing or eliminating the amount of landscape irrigation water required during the low flow season; and 3) permitting pumping at the new well only when no impacts to resources would occur, *i.e.*, during the high flow season.

NMFS also recommends MPWMD establish a mitigation fee for non-Cal-Am diverters to provide for mitigation of impacts to the Carmel River Basin resources in the same manner as Cal-Am customers are levied a fee for mitigation. We believe all diverters, whether riparian or otherwise, have a responsibility to mitigate impacts and protect the resources of the Basin.

If you have any questions concerning the above comments, please contact Ms. Joyce Ambrosius at (707) 575-6064 or joyce.ambrosius@noaa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Dick Butler", with a long horizontal flourish extending to the right.

Dick Butler
Santa Rosa Area Office Supervisor
Protected Resources Division

cc: R. Strach, NMFS, Sacramento
L. Hanson, CDFG, Yountville