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April 15, 2011

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Chair Robert S. Brower Sr.  
Board of Directors  
Monterey Peninsula Water Management District  
5 Harris Court, Bldg G  
Monterey, CA 93940

Re: CPUC Directed Consultation re: Interpretation of SWRCB Cease and Desist Order

Dear Chair and Members of the Board:

I am writing on behalf of a number of our clients who hold water credits issued by MPWMD. When the California Public Utilities Commission ("CPUC") recently approved Cal-Am's application for a moratorium, it directed Cal-Am to consult with MPWMD and SWRCB regarding interpretation and scope of the SWRCB's October 20, 2009 Cease and Desist Order (Order WR 2009-0060, hereinafter, "CDO"). Our clients and many other landowners are extremely concerned that this consultation process will exclude the public and could lead Cal-Am to refuse to serve existing connections even where the CDO expressly allows service because there is either no increase in water use or no change in zoning or use. Expanding the scope of the CDO through the consultation process would raise serious due process issues, would result in substantial interference with reasonable investment-backed expectations of property owners, and therefore must be carefully avoided.

It appears that many of those most closely involved, including SWRCB, CPUC, and Cal-Am, do not appear to understand that the plain language of the CDO allows use of water credits and certain increases in water use at existing service addresses. Some incorrectly cite SWRCB's January 5, 2010 Order Denying Motions for Reconsideration (Order WR 2010-0001) as evidence that the SWRCB intended the CDO to prohibit use of water credits. However, Order WR 2010-001 does not support that conclusion. To the contrary, in that very order, SWRCB candidly admitted its lack of understanding of water credits. In footnote 3 on page 3 of that order, SWRCB stated, "The Board does not know if the operative effect of water credits received from MPWMD differs from water entitlements received from MPWMD." SWRCB cannot prohibit something it does not understand.

It has also been recently reported that Cal-Am will not honor water credits issued by MPWMD. If true, Cal-Am's refusal to serve existing addresses based on water credits would improperly expand the scope of CDO, which by its own terms allows the use of water credits at existing service connections, as explained below.

Unless the express CDO exception applies based on timing of permits,<sup>1</sup> Condition 2 of the CDO prohibits Cal-Am from diverting "water from the Carmel River for . . . for any increased use of water at existing service addresses resulting from a change in zoning or use." This is a two part test. To be prohibited by the CDO, service to an existing service address must both involve an "increase in use" and "result from change in zoning or use." Unless both criteria are satisfied, the CDO does not prevent Cal-Am from diverting Carmel River Water for the service.

An "increase in use" only occurs if a later use is greater than an earlier use. This raises the question of when and how the earlier use should be measured. The most fair and reliable measure is through MPWMD's process for confirmation of use and issuance of a water credit. Furthermore, by definition under MPWMD Rules 11 and 25.5, use of a water credit or water use credit at an existing service address does not involve any increase in use. MPWMD water credits and water use credits are a measure of past use for purposes of allowing a future use after a temporary suspension of water use. (Note this is true even where there has been a "Permanent Abandonment of Use" as defined under MPWMD rules, as the latter term is defined to apply to abandonment of a type of use, not a quantity of use. No property owner seeking a water credit ever intends to permanently abandon the quantity of use.) Because use of a water credit at an existing service does not involve any "increase in use," such use is permissible under the CDO.

Nor does it matter when the water credit is or was issued. Some might argue that MPWMD water credits issued before SWRCB approved the CDO should be prohibited by the CDO because it involves an increase in use over what existed at the time the CDO was adopted. Under that argument, the CDO would only prevent pre-CDO water credits, but not future Post-CDO water credits. However, there is no rational basis for prohibiting a property owner from using a water credit that was issued before the CDO was adopted while allowing use of water credits issued after the CDO was adopted. Such discrimination between property owners based on whether they were past or future water credit applicants (i.e., the accident of timing) would raise significant constitutional due process and equal protection concerns.

The second step in determining whether the CDO prohibits use of Carmel River water to serve an existing service address is determining whether there has been a "change in zoning or use." This obviously refers to a change in zoning or use of property, as only property undergoes a change in zoning. It is beyond dispute that the phrase "change in zoning" refers to a legislative enactment in the form of an ordinance resulting in a change in the land use

<sup>1</sup> It is very important to note that the exception in Condition 2 based on timing of permits only comes into play when there is both an increase in water use and a change in zoning or use.

Chair Robert S. Brower Sr.  
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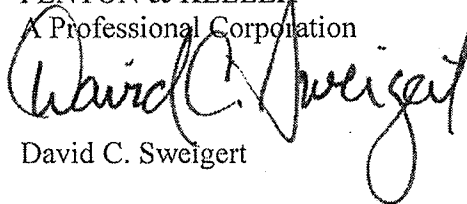
designation for property under the applicable zoning code. In interpreting the CDO, it is reasonable and appropriate to construe the phrase "change in use" to mean a similarly substantial change in the nature of the underlying use of property from one category or type of use to another. It would be unreasonable to interpret "change in use" to include minor changes in residential or commercial uses, such as occupancy of a previously vacant structure, a large family moving into a home previously occupied by a small family, a successful restaurant taking over space of a failed one, or the addition of a room to a home or office, as none of these would come within the normal or common meaning of a change in use of property.

In summary, the use of a water credit at an existing service address does not involve an increase in use of water. Nor does use of a water credit, even for a remodeled or rebuilt structure at an existing commercial or residential service address, ordinarily involve a "change in zoning or use" of the property. Therefore the CDO does not prohibit the use of Carmel River water to serve such properties under these circumstances.

For these reasons, we respectfully request the Board to direct MPWMD staff and encourage Cal-Am to take the following positions in the consultation process: 1) that the CDO allows the use of MPWMD water credits and water use credits at existing service addresses; and 2) that "change in zoning or use" applies to only substantial changes in the fundamental nature of the use and not to minor changes such as the examples given above. Finally, we would urge the Board to direct staff and Cal-Am to use all due caution and care to avoid inadvertent expansion of the scope of the CDO through the consultation process to the detriment of property owners holding MPWMD water credits.

Very truly yours,

FENTON & KELLER  
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