

July 17, 2017

Mr. Michael A.M. Lauffer
Acting Executive Director - Chief Counsel
State Water Resources Control Board
PO Box 2000
Sacramento, CA 95812-2000

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

Dear Mr. Lauffer:

As promised during the July 6, 2017 conference call with your staff, this letter furthers the dialogue related to the present, problematic interpretation of Condition 2 of Order WR 2009-0060 regarding increases of water use at a site. Recall that at the July 19, 2016 hearing, Board member Moore's motion directed staff to report back within 90 days on a proposal that you suggested would hopefully "come back as an Executive Director report" to the Board. Here we are a year later, yet still without agreement on how to measure a baseline for determining an increase in use at an existing service address, without unduly penalizing a business or property owner.

We continue to support a common-sense resolution, that the best means to interpret and enforce this provision is the District's longstanding system of permitting that relies on industry accepted factors and fixture counts to ensure that capacity to use water at a site remains neutral (water neutrality) following a new project, a renovation, or a change in use at a site. The national Alliance for Water Efficiency has lauded the District's ordinances, rules, and regulations as one of the earliest in the nation to ensure water neutrality in land use permitting – a goal that is consistent with and supportive of Condition 2.

Representatives of the Monterey Peninsula community met with your staff on December 13, 2016 to propose a solution to interpret Condition 2 of Order WR 2009-0060. Additional data was later provided to your staff and other interested parties in January to clarify this concept. An exchange of correspondence thereafter also addressed this matter. It is clear that not all stakeholders may ever agree on a single methodology, but this body of evidence supports use of the District's existing regulatory system that has proved instrumental in reducing water consumption throughout the Cal-Am system.

We do not believe modification of Order WR 2009-0060 is needed or appropriate, but your staff instead should promulgate an interpretive letter to better clarify the protocol by which Condition 2 may be implemented. Our suggested guidance for that letter includes the following:

Condition 2 now states: "Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date."

We propose a new interpretive letter that states: “For purposes of interpreting Condition 2, the phrase “any increased use of water at existing service addresses” shall mean increased use at an existing residential or non-residential site in excess of the pre-project use, adjusted for credit from water saved on a site, and/or a debit to a jurisdiction’s allocation of water as permitted and authorized by the Monterey Peninsula Water Management District under its Rules and Regulations and determined either by using MPWMD fixture unit methodology to determine residential water use, or MPWMD water use factors for determining non-residential water use.”

Several elements of the existing interpretation afforded Condition 2 are problematic. First, reliance on actual billed water use for any period is flawed; it is a protocol that rewards those who manipulated the system, and penalizes sites that experienced declining water use due to external factors such as vacancies, failing tenant businesses or calamities such as fire. Further, declining water use is often a by-product of careful long range planning. Owners might encourage their structure to become vacant to facilitate significant renovation of the site. To further complicate any protocol that relies on the history of billed water use, California Public Utilities Commission privacy regulations interfere with access to historical water use records for specific account holders by prospective businesses, buyers, or developers. The District instead relies on its statutorily adopted Rules and Regulations to calculate baseline water use attributable to installed fixtures for residential use, or discrete water use factors that correlate to business type for non-residential water use capacity.

Just as prior water history provides a flawed baseline, actual water use is not a usable metric to assess future compliance with a “no increase” standard. First, enforcement based on water use records imposes an administrative burden to regularly – and perpetually – compare records of actual present water use against authorized baseline use. Due process would need to afford the owner of each offending business an opportunity to receive notice of the infraction, and a hearing opportunity as to any consequence. Penalties must be structured to prevent recurring excess water use; monetary sanctions alone are not prudent or just. Each consumer is at risk for unintended consumption spikes. Enforcement would be hampered by requests for adjustment or variance based on reasonable explanation such as provable leaks, unanticipated guests or a myriad of unique business factors. (Notably, the present, problematic interpretation of Condition 2 does not allow for any adjustment.)

The District chose to eschew a regulatory scheme dependent on actual measured water use. While such a metric can ascertain prior water use (flawed by above referenced reasons), it is an impossible standard to use at the time an application for any new or modified use is under review. At that moment, future water use is a mere projection or assumption. One can only approximate future water use based on factors reflected in the application, such as the type and scale of a business or the number of water fixtures in a residence. Future water use can only be estimated based on a review of plans submitted together with the application for water use. The District rules require future water use be estimated based on predetermined factors; its water use factors have been periodically grounded through a rigorous statistical examination of sample sites. Those factors have periodically been adjusted to ensure each faithfully relates to the water use capacity assigned by the District. (Of note, under separate cover the District intends to provide staff an example of comparative data from actual use and the calculated factors if Cal-Am can overcome the privacy issues.)

When used in tandem, the District’s capacity calculation fairly compares prior water capacity to future water capacity. This is a true apples-to-apples comparison, instead of the disparate comparison of apparent billed water history to future water projection, as encouraged by your staff’s interpretation of Condition 2. The District’s approach precludes manipulation, enables sound business planning, and resolves problematic enforcement dilemmas. These rules have been in effect for a significant period and are well understood both by local land-use regulators and the local building and business communities.

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Data validates the District's approach to manage water use. Since 2009-060 took effect, Cal-Am's pumping from the Carmel River has been reduced by 3,000 acre-feet. The District's existing regulatory process is designed to reduce system-wide consumption and ensure compliance with the overall Effective Diversion Limit (EDL.) During the July 2016 hearings, Board member D'Adamo said, "The whole point behind the EDL is that should be incentive enough."

We reinforce that we do not believe that the CDO needs to be re-opened and can be addressed through a restated interpretive letter. The Condition does not specifically speak to metered water use, nor to a specific time period. The latitude shown by a 4-page interpretive letter on the same subject in April 2012 seems to show that State Water Board staff should have similar latitude here to interpret Condition 2 as proposed.

We suggest the restated interpretation of Condition 2 of Order WR 2009-0060 provides a workable solution for everyone. We are available to answer any question and look forward to rapidly bringing this matter to conclusion.

Sincerely yours,

A handwritten signature in blue ink that reads "David J. Stoldt". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Stoldt".

David J. Stoldt
General Manager

cc: Les Grober
John O'Hagan
Marianna Aue
Bill Kampe
Jim Cullem
David Laredo
Stephanie Locke
Rich Svindland
Eric Sabolsice