

Water Demand Committee for Thursday, March 4, 2021

Item No. 3

Distributed to the Board of Directors for the MPWMD, District Counsel and GM

From: [Dave Stoldt](#)
To: [Amy Anderson](#); [Alvin Edwards](#); [Clyde Roberson](#); [George Riley](#)
Cc: [Joel Pablo](#); [Dave Laredo](#)
Subject: Tomorrow's Water Demand Committee Meeting
Date: Wednesday, March 3, 2021 12:33:37 PM
Attachments: [Application for Relief from CDO Condition 2.pdf](#)

Please see the attached draft document in connection with the Water Demand Committee meeting tomorrow.

Thanks.

Dave

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Unauthorized Diversion
and Use of Water by the California American
Water Company; Cease and Desist Order WR
2016-0016

APPLICATION FOR ORDER MODIFYING
STATE WATER BOARD ORDER WR
2016-0016 and WR 2009-0060 (CEASE AND
DESIST ORDER)

I. Introduction

The Monterey Peninsula aspires to make progress on its Regional Housing Needs Allocation (RHNA) and housing requirements set by the California Department of Housing and Community Development (HCD or Department) as mandated by the Housing Element Law, but is restricted by the State Water Resources Control Board (SWRCB) Cease and Desist Order (CDO) limiting setting of new meters or increasing water use at existing sites. Such restrictions are likely to remain in place up to several more years, until a new permanent replacement water supply is available. These two co-equal State priorities appear in conflict, hence the District seeks relief from certain provisions of the CDO as discussed further below.

The Housing Crisis Act of 2019 (SB 330) set forth the following:

- California is experiencing a housing supply and affordability crisis of historic proportion;
- Long commutes increase risk to life and health problems;
- Lack of affordable housing is a public health & safety issue;
- It is the policy of the State that a local government not reject or make infeasible housing development projects; and
- Local governments are restrained from imposing a moratorium or similar restriction or limitation on housing development.

On behalf of the Monterey Peninsula communities, the Monterey Peninsula Water Management District (District) hereby submits this application to the SWRCB seeking relief from the CDO specifically on health and safety reasons¹ related to the need for housing.

¹ Applicant reserves all rights and remedies to protect the water supply necessary to maintain health and safety of the Monterey Peninsula, and does not intend with this Application to waive any rights or remedies necessary to protect

II. Relief Requested

Pursuant to Water Code section 1832, the District, which is one of the “Applicants” as defined in Order WR 2016-0016², (Applicant) hereby applies to the SWRCB for an order modifying certain of the ordering provisions enforced upon California American Water (Cal-Am) in Order WR 2016-0016 (referred to herein as “Order” or “CDO”) and which amended WR 2009-0060.³ In Order WR 2016-0016, the SWRCB required Cal-Am to comply with Condition 2 of SWRCB Order WR 2009-0060 limiting new service connections and increases of use at existing connections.

Specifically, WR 2016-0016 states “This Order shall supersede the requirements in State Water Board Orders WR 2009-0060, 95-10 and any other State Water Board orders affecting Cal-Am’s diversions from the Carmel River, to the extent stated herein, or to the extent that there is an irreconcilable conflict between the requirements here and those orders. All other requirements in State Water Board orders affecting Cal-Am’s diversions from the Carmel River remain in effect until terminated by operation of law or action of the State Water Board.”⁴ Because WRO 2016-0016 did not directly alter or address Condition 2 of WR 2009-0060, said prior Condition 2 provision remains in effect.

Condition 2 of WR 2009-0060 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

an adequate water supply for the public welfare of the Monterey Peninsula.

² See footnote 16 of Order WR 2016-0016, page 20.

³ Applicant understands that, as of its effective date, the requested Order would supersede the ordering provisions of State Water Board WRO 2016-0016 and WRO 2009-0060. All other provisions of State Water Board orders concerning CAW’s diversions from the Carmel River would remain in effect until terminated by law or action of the State Water Board.

⁴ WRO 2016-0016 Ordering paragraph 1.

from a change in zoning or use after October 20, 2009, provided that 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."

Condition 2 has the practical effect of constraining additional housing construction due to both the restriction on an increase in use at an existing service address, as well as due to the prohibition on new service connections. We ask that the SWRCB consider approval, via staff interpretive letter or Board action, the following modifications to this provision:

- Allow a modest increment⁵ of increased use at existing or new service addresses for projects that enable moderate-, low-, or very-low income housing. 100% market rate projects would be excluded;
- Allow projects that may result from a change in zoning or a change in use;
- Use the District's water factors and fixture unit count methodology to determine pre-project and post-project capacity for water use, to apply against the suggested 75 AF;
- Allow new meters to be set for projects that have a moderate-, low-, or very-low income housing element;
- The suggested 75 AF would be an aggregate quantity available for use over time until a permanent water supply is built⁶; and
- Maintain that the Effective Diversion Limit (EDL) under the CDO will not

⁵ The District requests 75 acre-feet, an amount that was determined through several months of discussion with Monterey Peninsula jurisdictions. On July 2, 2020 the allocation of near-term housing needs for each jurisdiction was presented at the District's Water Demand Committee. It was presented and discussed with each jurisdiction at the August 4, 2020 Policy Advisory Committee meeting. In a presentation to the District Board on August 17, 2020 this amount of water was discussed as a reasonable estimate of potential use for housing in the next several years while continuing to progress on a permanent replacement water supply.

⁶ Even if a new permanent supply is not delivered on the expected timeline, the 75 AF is the total request for relief, regardless of the number of service connections required.

change and would remain Cal-Am's legal limit beginning January 1, 2022, and each water year thereafter.

The Monterey Peninsula communities have reduced consumption of water by over 3,000 AF since issuance of WR 2009-0060 in October 2009. This success has been due to aggressive conservation practices through District ordinances and incentives, and the steeply-tiered Cal-Am local rate structure. In addition, the Pure Water Monterey project has been brought online, which promises to offset unlawful diversions by 3,500 AF per year. Allowing 75 AF "back into the system" for near-term housing needs would not constitute an increase from 'conditions that existed at the time of the Order,'⁷ rather instead appears to be an urgently needed "fix" to help meet two co-equal high priority Statewide goals.

Fortunately, two permanent water supply replacement project alternatives are in hand, the Monterey Peninsula Water Supply Project (desalination) and Pure Water Monterey expansion, ensuring that a project will get built, but final approvals and completion will likely take several years. Accordingly, Applicant hereby requests that the SWRCB issue a new interpretive letter or a new order modifying and restating certain of the ordering provisions as they may relate to the housing mandate.

The Applicant would also like to acknowledge the significant efforts by staff of the SWRCB in following this issue, including correspondence and attendance of some the District's committee and Board meetings. SWRCB staff have professionally and cooperatively worked with the District to provide feedback, cite SWRCB precedents, and manage expectations. We hope the Board recognizes the efforts and professionalism of its staff members in communication regarding this Application.

⁷ April 9, 2012 Letter from Barbara Evoy, Deputy Director, Division of Water Rights, SWRCB to Tim Miller Cal-Am, top of page 3: "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."

III. The SWRCB has Authority to Modify the CDO for Health and Safety Reasons

The SWRCB has broad discretion to modify a CDO and to revise a schedule of compliance contained in a CDO. *See* Order WR 2010-0002. The District makes this Application pursuant to Water Code section 1832, which states, in relevant part: “The board may, after notice and opportunity for hearing, upon its own motion or upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part any cease and desist order issued pursuant to this chapter.”

Further, under the heading titled "8.1 Considerations Mitigating Against the Use of Punitive Enforcement Options," Order 95-10 found that "[t]he people and businesses on the Monterey Peninsula must continue to be served water from the Carmel River to protect public health and safety." The order did not constrain future SWRCB discretion as to the quantity of water necessary for public health and safety in Cal-Am's service area. Accordingly, the SWRCB can and should exercise that discretion now.

A 2012 SWRCB letter to Cal-Am⁸ identified that California Public Utilities Commission Decision 11-03-048 imposed obligations on Cal-Am with respect to implementing a moratorium on the setting of new meters. In the letter and in response to the Decision, Cal-Am proposed to the SWRCB that upon the MPWMD finding that an institutional project presents a demonstrated and compelling public health and safety need that warrants an exception to Condition No. 2, Cal-Am will cooperate with the interested institution and MPWMD staff to meet with State Water Board staff and request that the State Water Board issue an exception from Condition 2. SWRCB's response was “the State Water Board generally agrees with the proposed procedure of requesting an exception from Condition 2 for public health and safety needs, provided: (1) the procedure allows adequate time for State Water Board staff to review the proposed exception; and (2) expanded water

⁸ April 9, 2012 Letter from Barbara Evoy, Deputy Director, Division of Water Rights, SWRCB to Tim Miller Cal-Am

service is not provided prior to the State Water Board granting such an exception. Prior to approving any exception to Condition 2, Cal-Am must be able to demonstrate that the Carmel River is the only available and viable water supply to meet the public health and safety need.”⁹

Finally, Order condition 3.c. of WR 2016-0016 says, among other things, “Either Cal-Am or the District may petition the Deputy Director for Water Rights for relief from reductions imposed under this Order.” including “a showing is made that public health and safety will be threatened if relief is not granted. Any relief granted shall remain in effect only as long as a prohibition on new service connections remains in effect, and compliance with applicable conservation standards and requirements remains in effect. This section supersedes ordering paragraph 3.b. of State Water Board Order WR 2009-0060.” This condition supports Applicant’s contention that (a) the Deputy Director may grant certain relief, and (b) health and safety is a priority. This construction is consistent with Barbara Evoy’s 2012 letter that clarifies “expanded water service is not provided *prior to the State Water Board granting such an exception.*”¹⁰ Further, we believe the reference to “reductions” goes to all aspects of the CDO that create constraints on use, including the moratorium on new service connections. As stated, the 2012 SWRCB letter bolsters this interpretation and affirms the authority of the Deputy Director to provide relief.

IV. It is Reasonable and in the Public Interest to Modify the CDO as Requested

A. The Public Interest is at Issue.

Health and safety concerns place the housing crisis squarely in the public interest to modify the CDO. Senate Bill 330 findings and the HDC requirements stated in the AMBAG RHNA plan, provide by example, that “The Department determined AMBAG's

⁹ April 9, 2012 Letter from Barbara Evoy, Deputy Director, Division of Water Rights, SWRCB to Tim Miller Cal-Am

¹⁰ Condition 3.c further addresses the circumstances that relief from this limit may be provided and clarifies that such relief “shall remain in effect only as long as a [general] prohibition on new service connections remains in effect...” This provision allows the relief to apply prospectively. That is, the moratorium needs to have been maintained until relief is requested, but the relief can include a limited, prospective abatement of the moratorium.

regional housing need to be 10,430 for the 10-year projection period, from January 1, 2014 to December 31, 2023. In assessing AMBAG's regional housing need, the Department considered the critical role housing plays in developing sustainable communities and supporting employment growth.” If unmet, local public health and safety will be impaired.

B. Applicant has Diligently and Aggressively Implemented Measures to Comply with the CDO.

1. Efficiency and Conservation Measures

Prior to and since the issuance of the CDO, Applicant and Cal-Am have dedicated tremendous resources to implement efficiency and conservation measures to control and reduce customer demand and system losses within Cal-Am’s Monterey district, such that the community is currently outperforming the Carmel River diversion reduction targets set forth in the CDO. Over 3,000 acre-feet of annual consumption has been demonstrated.

2. Applicant and Cal-Am are Diligently Pursuing Development of an Alternative Water Supply

As directed by Order 95-10 and the Order, Cal-Am has diligently pursued the Monterey Peninsula Water Supply Project desalination component, and the District and its partner Monterey One Water have shown the Pure Water Monterey expansion to be a lower cost, less environmentally intrusive alternative, either of which will produce the replacement water supply necessary to eliminate unauthorized diversions from the Carmel River.

V. Conclusion

For the reasons stated herein, the District respectfully requests modification of Order WR 2016-0016 as set forth above.

By: _____

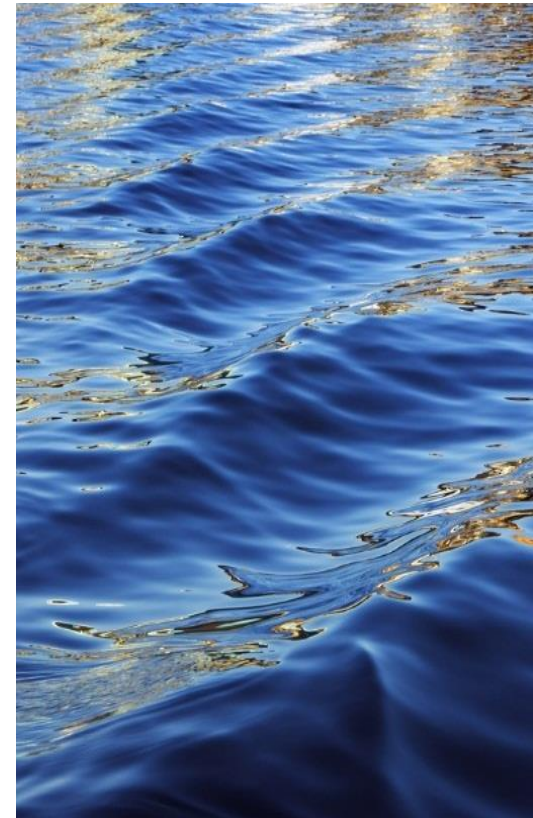
MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT

Discussion of Water Demand Through Water Year 2019-20

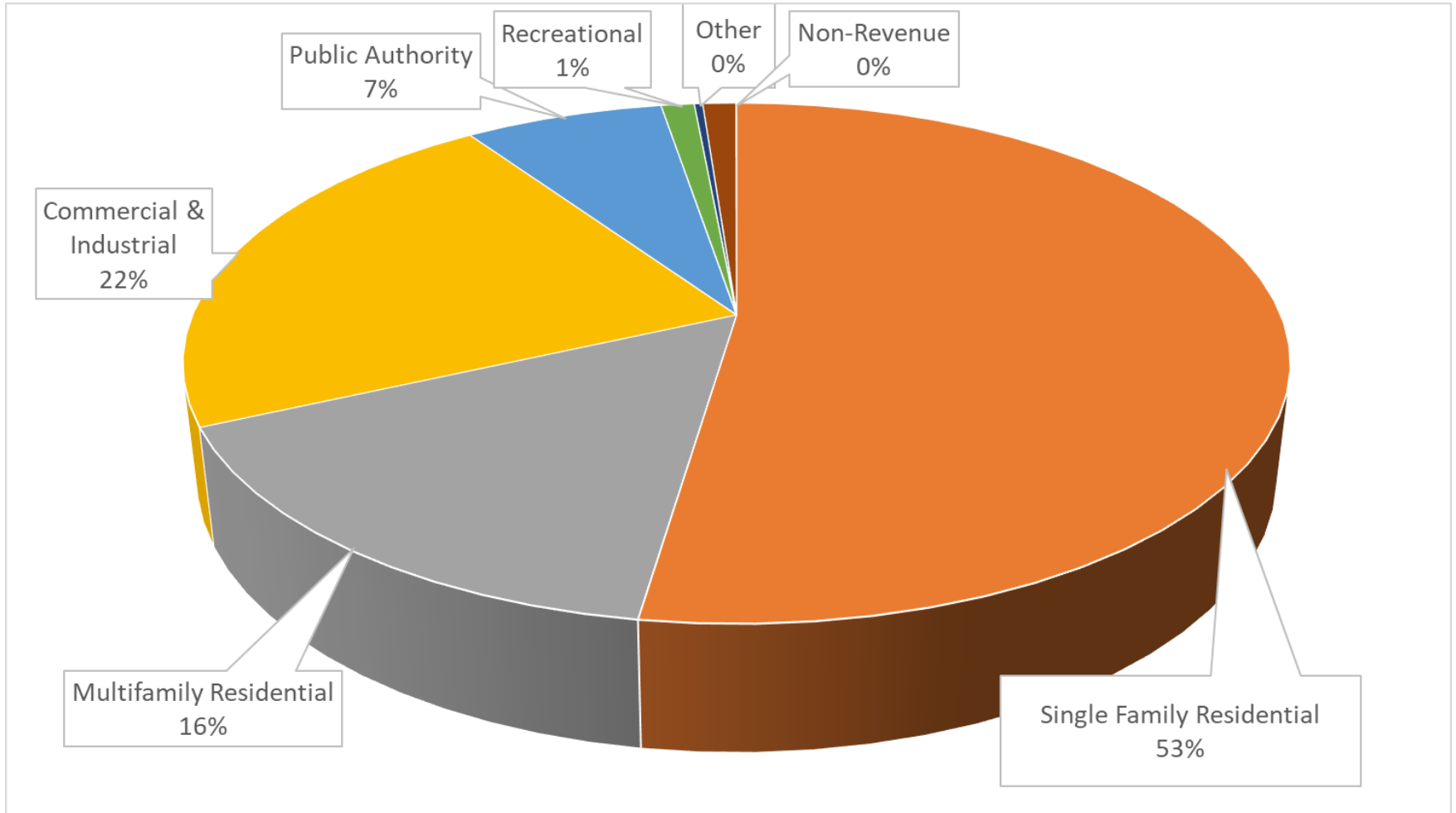
Water Demand Committee

David Stoldt
General Manager

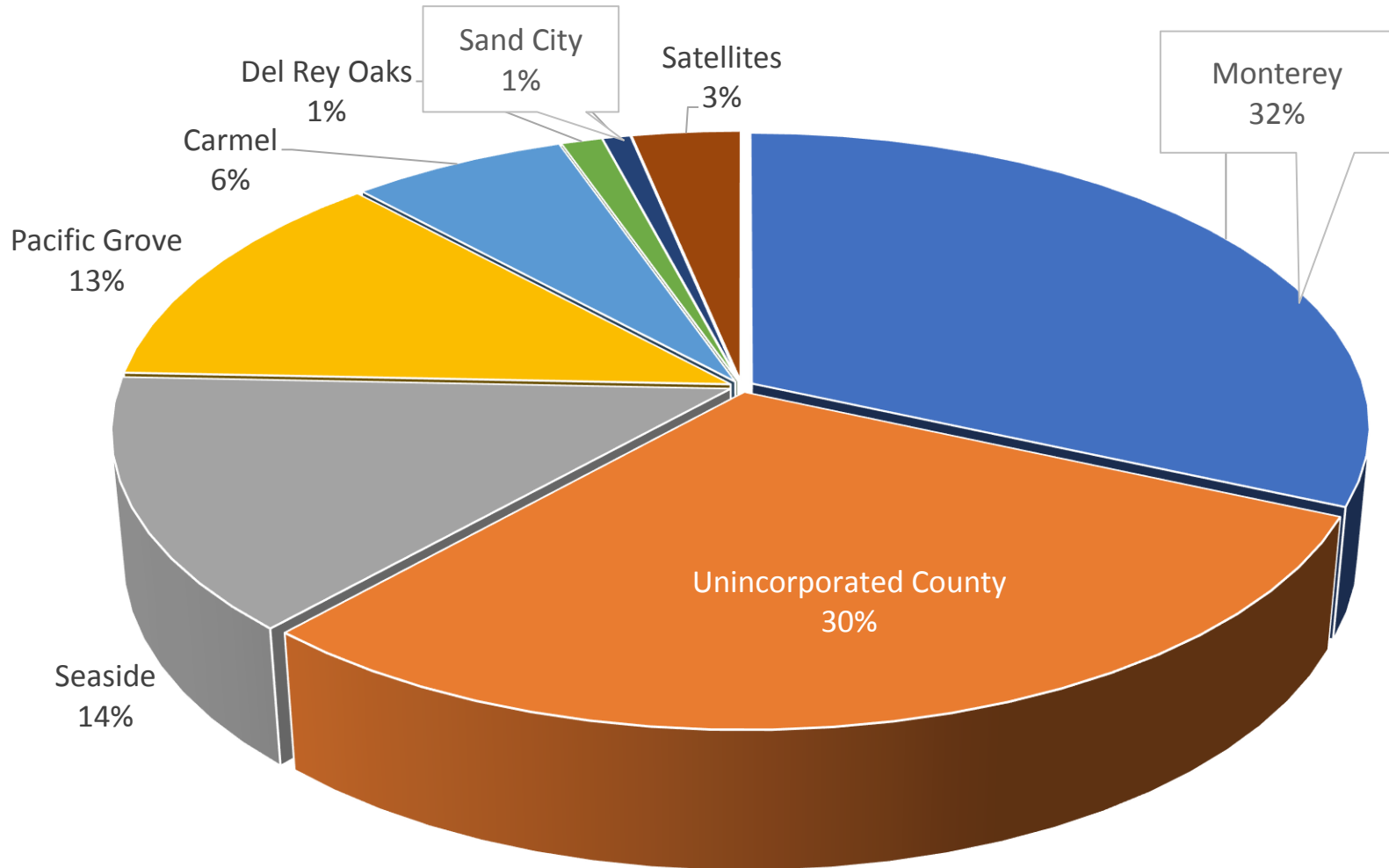
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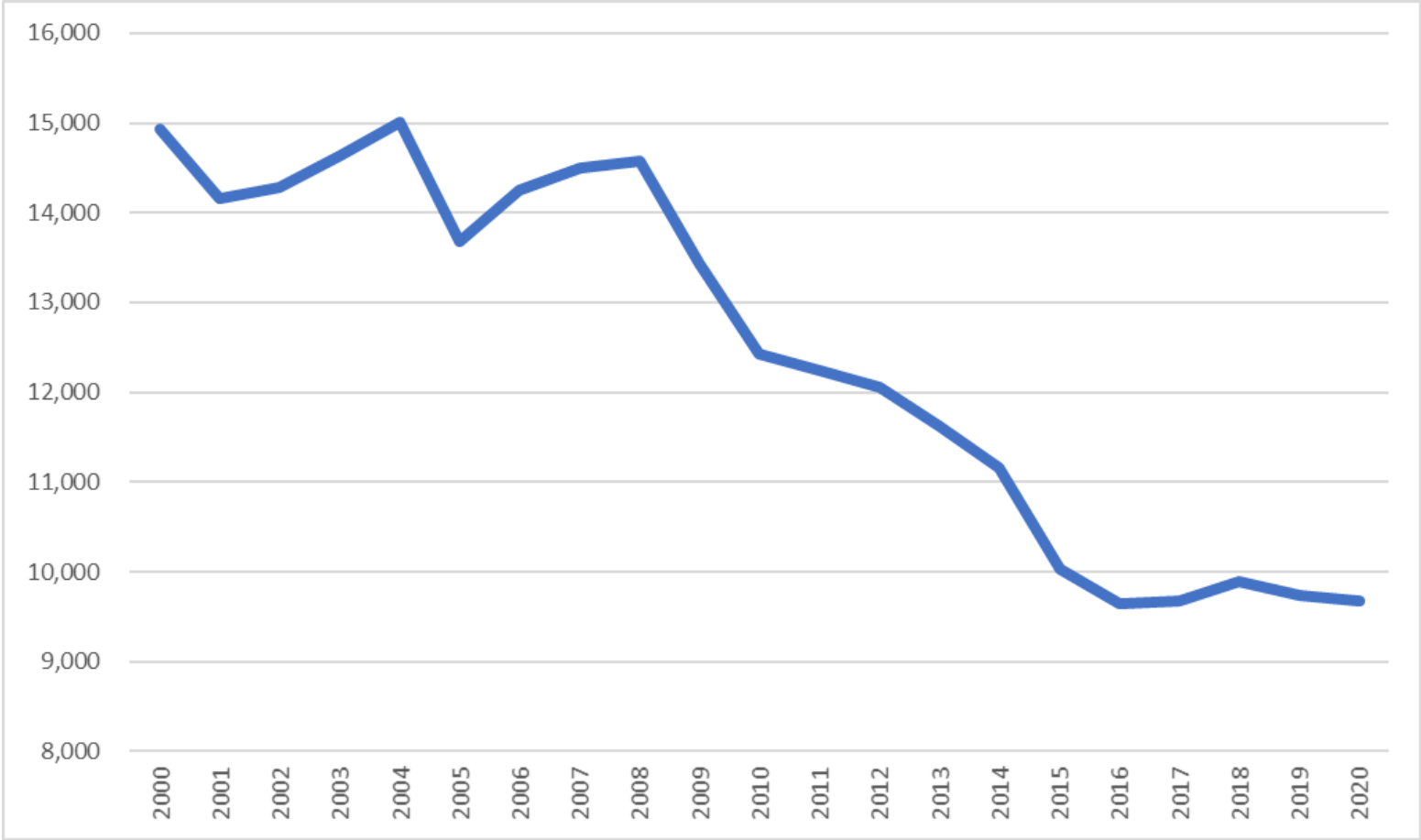
Water Demand by Use – WY2019-20



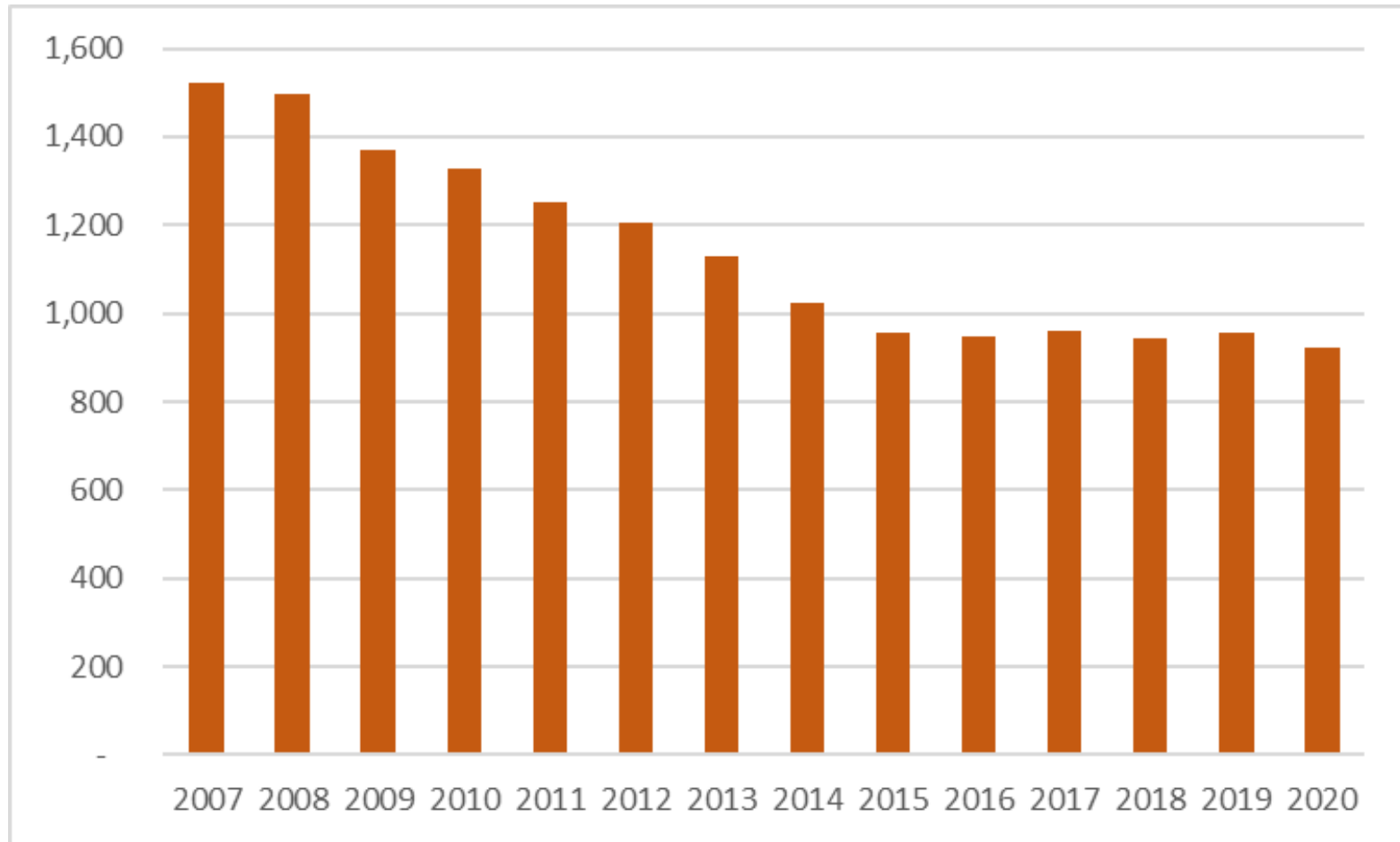
Water Demand by Jurisdiction – WY2019-20



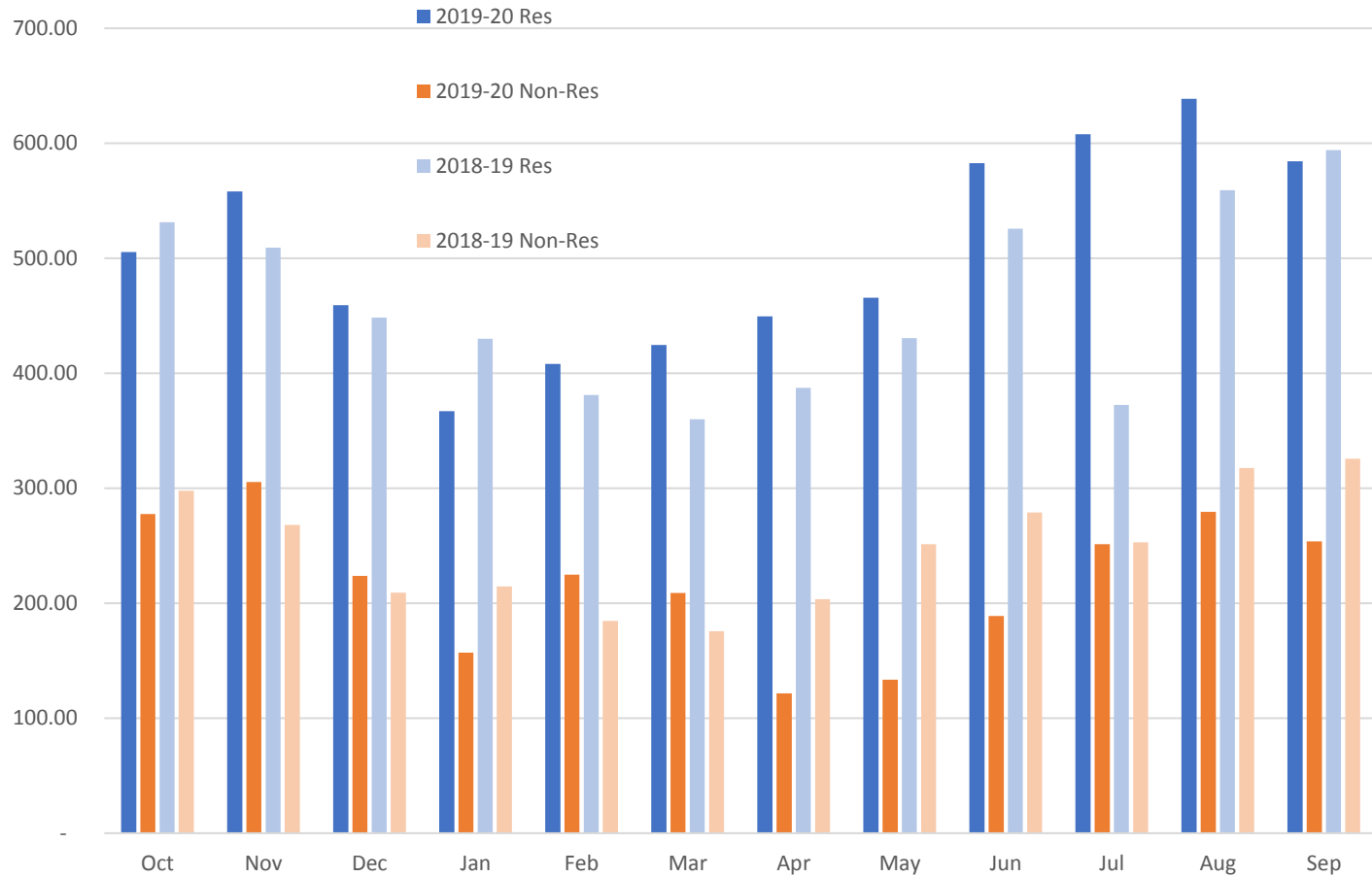
Total Water Demand – Last 2 Decades



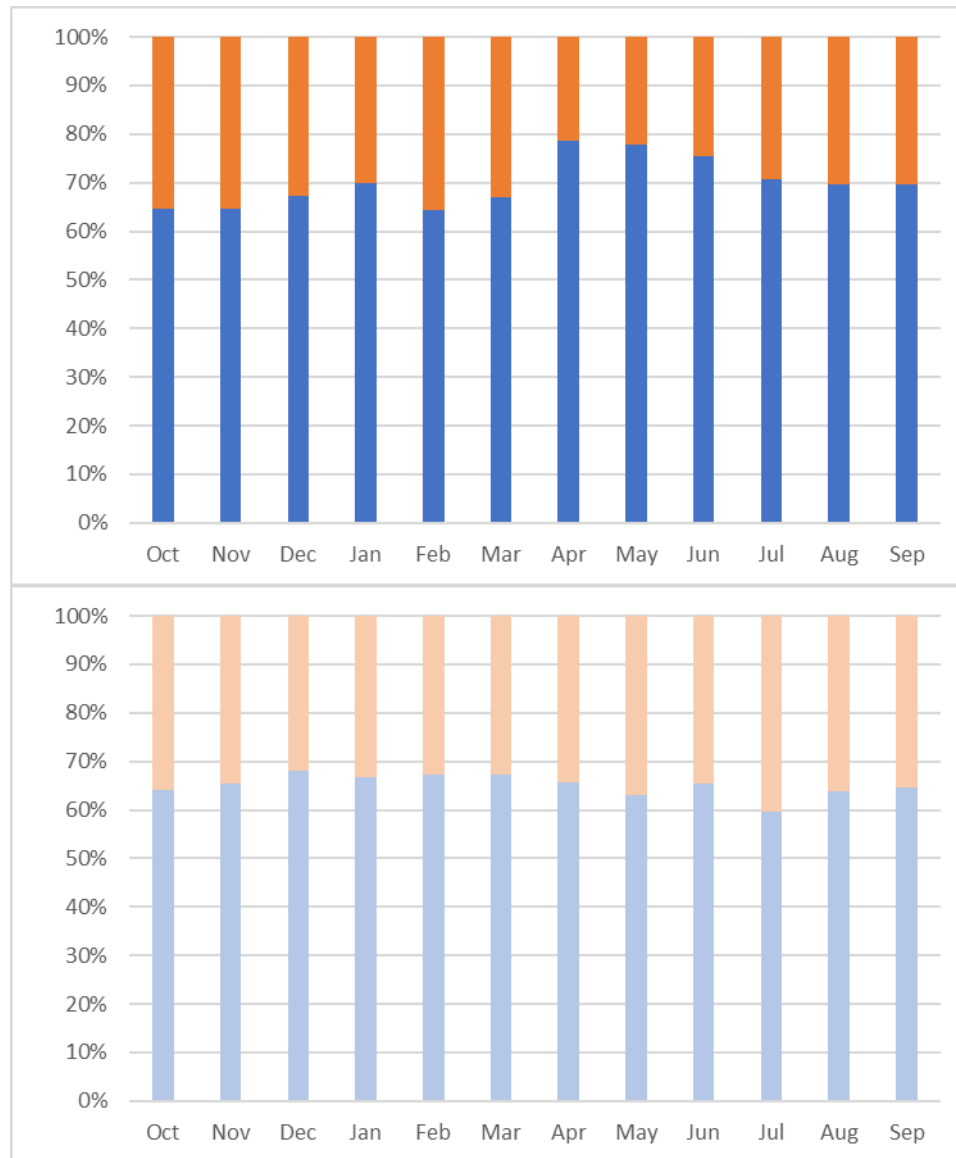
Maximum Month Demand Since 2007 – AF



Residential and Non-Residential Use – Last 2 Years



Residential and Non-Residential Use as %



WY 2020

WY 2019