

Notice of Comment Deadline &
Rationale Document for Preliminary Staff Recommendation

California-American Water Request to Modify
Cease and Desist Order WR 2009-0060

NOTICE:

The public is invited to comment on California-American Water's (Cal-Am) request to modify State Water Board Order WR 2009-0060, on the preliminary recommendation, or other related documents prior to the July 19, 2016 State Water Board meeting, at which the Board is anticipated to consider action on the application. Staff may further amend its recommendations before that time. **Written Comments are due no later than 5:00 PM on July 13, 2016..**

RATIONALE DOCUMENT FOR PRELIMINARY STAFF RECOMMENDATION:

The following document describes the rationale behind the preliminary staff recommendation for action by the State Water Resources Control Board on the application of Cal-Am to modify Order WR 2009-0060 (Order). This rationale document summarizes and describes the rationale for key points in the attached Preliminary Staff Recommendation for the Order: It also summarizes staff's reasons for proposing that the State Water Board adopt the general framework proposed in the application, and for the proposed modifications to Cal-Am's application.

Background:

On July 6, 1995, the State Water Resources Control Board (State Water Board) adopted State Water Board Order 95-10, in response to four complaints filed regarding Carmel River diversions by the Cal-Am. Order 95-10 found that Cal-Am was unlawfully diverting water approximately 10,730 acre-feet per annum (AFA) from the Carmel River. Order 95-10 required Cal-Am to diligently pursue alternative water supplies, among other actions. On October 20, 2009, the State Water Board adopted Order WR 2009-0060, a cease and desist order regarding Cal-Am's unlawful diversions from the Carmel River. At that time, Cal-Am was diverting an average of 10,978 acre-feet per annum from the Carmel River, with an average of 7,602 acre-feet being without a valid basis of right. Order WR 2009-0060 requires Cal-Am to take various actions, and to terminate all unlawful diversions from the Carmel River by December 31, 2016. Since adoption of Order 95-10, several large-scale proposals to address unlawful diversions from the Carmel River by providing an alternative to supply the Monterey Peninsula communities have been proposed, vetted, and ultimately failed, including the proposed Los Padres Dam, the proposed Carmel River Dam and Reservoir, the Coastal Water Project, and the Regional Desalination Project. At the time the Order was issued, Cal-Am, other parties to the hearing, and the State Water Board anticipated that the Coastal Water Supply Project, a proposed large-scale desalination project, would be developed and used as the primary water supply for the Monterey Peninsula communities. It was also anticipated that the Coastal Project would be completed by December 31, 2016 to halt unlawful diversions. The Coastal Water Supply Project was never developed. Cal-Am's unlawful diversions from the Carmel River have decreased significantly since 2009, but remain substantial.

For approximately two years prior to November 20, 2015, State Water Board staff members met with representatives of Cal-Am and other interested parties with the goal of seeing whether it was possible for Cal-Am to develop proposed modifications to State Water Board Order 2009-0060 that staff and other stakeholders could recommend to the State Water Board. These

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discussions were productive, and a broad framework emerged. Cal-Am would propose extending the CDO's compliance schedule until the end of December 31, 2020. The compliance schedule would require that Carmel River pumping be held at levels reflecting recent conservation and water supply measures, but without additional reductions so long as annual milestones reflecting progress in creating alternative, lawful supplies were met. Failure to meet a milestone would result in a 1,000 acre-foot-per-annum reduction in the compliance schedule's diversion limits, such that diversions ultimately would be limited to lawful supplies regardless of whether the envisioned water supply projects were ever built. The specifics of the proposal remained in flux, but this broad framework forms the basis of the applications and of the staff recommendation to the State Water Board.

On November 20, 2015, Cal-Am, along with the Monterey Peninsula Regional Water Authority (MPRWA), Monterey Peninsula Water Management District (MPWMD), the Pebble Beach Company, and the City of Pacific Grove, filed an application under Water Code section 1832 to modify Order WR 2009-0060. The applicants request that the State Water Board issue a new, amended order that extends the deadline for Cal-Am to terminate all unlawful diversions from the Carmel River from December 31, 2016, to December 31, 2020, to allow additional time to develop replacement water supplies. Since that time, staff has communicated with outside parties regarding the application only in writings posted on our website, or in regards to non-controversial procedural matters. On April 28, 2016, the same applicants filed an amended application requesting an extension of the compliance timeline until December 31, 2021, and other changes to the initial application.

A copy of Cal-Am's current application, as well as the previous filing, is available at: http://www.waterboards.ca.gov/waterrights/water_issues/projects/california_american_water_company/index.shtml.

The application requests an extension of the deadline for Cal-Am to eliminate unauthorized diversions from the Carmel River from December 31, 2016 until December 31, 2021, with certain milestones to demonstrate progress and mandatory reductions of diversions if milestones are missed. It anticipates that, by then, two new water supply projects, the Monterey Peninsula Water Supply Project (MPWSP) and the Pure Water Monterey Project (Pure Water), will provide water to Monterey Peninsula communities. MPWSP is a proposed desalination project using slant well technology with a designed capacity of up to 9.6 million gallons per day. Pure Water will deliver purified recycled water for groundwater replenishment, domestic delivery to Monterey Peninsula urban water customers and treated water for Salinas Valley irrigation. MPRWA and MPWMD are jointly developing Pure Water. Additionally, applicants anticipate a second pipeline for an existing groundwater storage project, the Aquifer Storage and Recovery (ASR) Project, will allow for additional lawful diversions from the Carmel River in wet years.

Under the requested changes to Cal-Am's compliance schedule, Cal-Am would not be penalized for continued Carmel River diversions at a level up to 8,310 acre feet per annum, so long as permitting and construction milestones for the water supply and diversion projects are met. Failure to meet the milestones would result in significant annual reductions in the amount Cal-Am could divert from the Carmel River. The application proposes a "credit" system if Cal-Am surpasses the diversion limits in one year, if Cal-Am has pumped less than the diversion limit in previous years. Additionally, the application requests changes to the manner in which

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ASR pumping and agreements to reduce pumping of lawful diversions affect the diversion limits in the compliance schedule. Applicants also request other minor changes to Order 2009-0060.

Staff Preliminary Recommendation:

1. Extension of the Order to December 31, 2021

Staff proposes to allow for extending the compliance schedule until December 31, 2021, under the structure proposed. This extension can support development of alternative water supplies for the Monterey Peninsula without causing great disruption to the community reliant on water services. Cal-Am's significant reductions in unlawful diversions since 2009 as well as the company's funding of extensive fisheries protection, conservation and habitat improvement measures, as well NOAA's support of the extension, and the conservation measures required in this order and in agreements with NOAA and California Department of Fish and Wildlife are all integral to staff's recommendation.

2. Effective Diversion Limit (EDL)

Commencing in Water Year 2015-2016, the application proposes an Effective Diversion Limit cap of 8,310 AFA. This number represents the five-year average diversions from water year (WY) 2009-10 through WY 2013-14 under the existing method of calculating diversions toward the compliance schedule in Order WR 2009-0060. However, this limit does not take into account either the most recent diversion data for WY 2014-15, or the proposed changes in accounting for ASR pumping. Staff proposes an effective diversion limit of 7,990 AFA. This amount represents Cal-Am's six-year average pumping during the entire CDO period, with an adjustment to account for how excess pumping to the Seaside Groundwater Basin under three ASR permits will be accounted for, as described below. This number is significantly below the existing CDO's requirements of 9,310 AFA for WY 2015-2016. It is approximately 760 AFA more than Cal-Am's total diversions from the Carmel River in WY 2014-15.

3. Milestone Adjustment to EDL

The application proposes milestones related to approvals and construction of alternative water supply facilities. All milestone dates, except for the last date in 2021, are assessed at the end of each WY. Failure to meet a milestone will result in a reduction in the EDL of 1,000 AFA (see following discussion of potential credits). Staff proposes accepting the concept of milestones, as they provide incentive for development of alternative water supplies, and also provide a stepping-down of diversions from the Carmel River in the event that the water supply projects do not continue on a path towards completion in a reasonable time. In either event, the process allows for complete end to unlawful diversions by the end of 2021.

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If a milestone date is missed, but Cal-Am successfully achieves the milestone that WY, the application proposes to allow any reduction to be eliminated in the following water year. Staff does not concur with this concept, and recommends that some long-term reduction should be incurred for failure to meet a milestone. Staff recommends for Milestones achieved within the first month following the deadline, the continuing reduction shall be 250 AFA. For Milestones achieved between one and six months after the deadline, the continuing reduction shall be 500 AFA. For Milestones achieved between six and nine months after the deadline, the continuing reduction shall be 750 AFA. The 1000 AFA reduction to the EDL shall remain for milestones achieved 9 months after the deadline or later.

Staff also added two milestones, because it is necessary to track progress towards completion of the recycled water project, even in the face of delays for the review of the MPWSP. Staff proposes adding a milestone for requested CPUC approvals of Cal-Am's use of water from the Pure Water Monterrey project based on Administrative Law Judge Sandoval's ruling of April 25, 2016. This decision accelerated the CPUC's decision-making schedule for the Pure Water Monterrey project. Additionally, staff added a milestone for the start of construction of the Pure Water Monterrey project facilities, based on the timeline originally proposed for the start of work in Cal-Am's November 2015 application. Staff intends to find meaningful milestones for tracking whether the water supply projects are proceeding as envisioned, rather than to impose difficult-to-achieve timelines on a project that requires permitting approvals from multiple agencies. If the proposed milestones are inappropriate, staff looks forward to proposed amended milestones in the comment period.

4. Carryover Credits

Petitioners' proposal allows for credits to be earned when diversions from the Carmel River are less than the specified EDL for any year. The credits can be applied to exceedances of the EDL in future years. The petitioners propose a maximum potential earned credit in any one year to be 750 AFA. The application was somewhat ambiguous as to whether the credits could be applied for diversion exceedances above the initial EDL. Staff understands that the credits can be a useful tool in promoting conservation and small water projects, and believes that with the 750 AFA cap the credits will not undermine the milestone reduction system, in light of the proposed addition of early milestones. Without the addition of milestones for the beginning years of the proposed CDO, staff would not support such a broad credit proposal. Additionally, staff has clarified the proposed language to make clearer that 7,990 AFA is a hard cap.

5. New Water Meter Connections

Petitioners did not request relief of the CDO's restrictions on new service connections. Staff concurs and also recommends adding definition of terms and how an increase in

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water use is calculated, based on clarifications provided since adoption of Order WR 2009-0060.

6. Small Projects & Instream Flow Protections

The request includes language requiring Cal-Am to expend reasonable efforts on acquisition of water rights or instream flow dedications from willing users, and proposes an increase in diversion limits for these. Staff supports Cal-Am's continuing effort to add small water project sources that can reduce unauthorized diversions, increase legal diversions, or enhance instream flows, and agrees that clarification is necessary to provide that increasing instream flows is an important goal relevant to the enforcement order. However, applicant's proposal that the acquisition of flow or diversion rights should raise the EDL is contrary to the basic premise in the enforcement action that new water supplies must offset current unlawful diversions, and amends the proposal in this manner. (see State Water Board Order 2009-0060, narrative section 19.2) Additionally, much of the proposed language is more appropriate as a narrative description or resolution, rather than the implementation provisions of an enforcement order. Staff therefore does not recommend including it in this portion of the order, but does recommend adding assurances for water right holders and some additional explanatory language regarding instream flows and forbearance agreements to either the resolution or the narrative portion of the order. .

7. Aquifer Storage & Recovery (ASR) Accounting

All water pumped to Seaside Groundwater Basin under ASR permits is currently counted towards determining compliance with Order WR 2009-0060's pumping limits. Applicants propose that any ASR water pumped in excess of 600 AFA in any water year not be considered for compliance with the EDL. Staff accepts this proposal because the water is legally diverted and because it encourages ASR pumping in winter and reduces pumping in summer months, when the fishery impacts are greater. This recommendation is conditional upon the proposed adjustment of the EDL to one that reflects this accounting methodology, as discussed in 2, above.

8. Extension of Allowing use MPWMD allotment credits for Pebble Beach

Staff recommends allowing the extension of time until the end of 2021. Staff recommends that any diversions from the river by Cal-Am to satisfy PBC remaining entitlements from MPWMD should not be considered in calculating compliance with the Effective Diversion Limit.

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9. Milestone Exceptions

Applicants' proposal includes annual reports to the Board, including a report on the status of the fishery and on progress towards meeting the milestones. Applicants propose that they be given an opportunity to present circumstances that conditions beyond their control may prevent meeting a milestone. At a Board Meeting, the State Water Board can decide whether or not to relieve Cal-Am of a required mandatory reduction required by the CDO. Staff is amenable to this provision, as it will give the Board the opportunity to monitor the status of the fishery affected by the unlawful diversion, including potential adaptive management provisions, and it allows the Board to monitor progress towards creating alternative water supplies. Staff recommends edits to specific time lines for Board action and to the proposed mandatory nature of the finding regarding whether a circumstances is beyond the applicant's control.

10. Funding for Steelhead Fishery Report

Applicants propose to provide funding of \$175,000 per year for a Status of Steelhead Fishery Report by National Marine Fishery Service. Staff concurs with this requirement and adds that if NMFS cannot complete the report in any year, the agency should have a concurrence requirement for any other preparer.

11. Conservation Measure Funding, Old Carmel River Dam & Sleepy Hollow Ford

The application includes statements that Cal-Am will endeavor to remove Old Carmel River Dam and Sleepy Hollow Ford by fall of 2017, and fund certain additional conservation measures, up to \$2.5 million. These commitments form part of the basis for staff's recommendation to extend the compliance deadline. Staff understands that NMFS and CDFW support and are taking the lead on these conservation measures, and recommend adding reopener provisions for the event that they do not occur.

12. Malpasos and Pacific Grove Water Supplies

Cal-Am recommends specific language to address the accounting for water supplied by the Malpasos Water Company and from the Pacific Grove Recycled Water Project. The State Water Board addressed the accounting from these supplies in the decisions approving them, and staff does not recommend making a change to those decisions.