

Sierra Club and CRSA Letter Opposing Proposed Interpretation of Condition 2 of the 2009 CDO, As Advanced by MPWMD et al.

September 2, 2016

Ms. Barbara Evoy
Deputy Director, Division of Water Rights
SWRCB
PO Box 2000
Sacramento, CA 95812-2000

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

Dear Ms. Evoy:

Sierra Club and Carmel River Steelhead Association wish to respond, and to oppose, the proposals relating to a Board interpretation of Condition 2 of the 2009 CDO Order, made by California American and the Monterey Peninsula Water Management District (joined by the Monterey Peninsula Regional Water Authority and the Coalition of Peninsula Businesses) in their letter dated August 15, 2016. The signatories request that the Board confirm by letter to California American and the District that “increased use of water at existing service addresses” under Condition 2 shall mean:

“An increase in capacity to use water at an existing site in excess of the historical capacity to use water documented by the MPWMD. Documented historical capacity to use water may include capacity to use water from another site or jurisdictional allocation of water so long as the documented capacity from such other source if reduced by a like amount.”

Sierra Club and CRSA oppose such an interpretation because, if implemented during the moratorium period, it could result in increased diversions from the Carmel River to the detriment of public trust resources. In *Save Our Carmel River v. MPWMD*, 201 Cal App 4th 758 (2006), the Sixth District Court of Appeal invalidated a water transfer approved by the District on the basis of inadequate environmental review. In so doing, the Court discussed District Rule 28-B, which allowed transfer of documented water credits (for commercial property) from an existing commercial use to an expanding commercial use in the same jurisdiction. The Court noted that District Rule 28-B1 was amended in 2003 to read:

“Due to the District’s ongoing concern about the viability of the available water supply and the possibility that water transfers may result in additional water usage, water transfers shall be approved by the Board.....if the transfer will not have an adverse effect on the water supply. In exercising this discretion, the Board shall consider the impacts of the application under consideration, as well as the cumulative impacts of other transfers on the water supply.”

The Court of Appeal further noted that:

“ A staff report in July of 2004 reflected ongoing concerns about the Water Credit Transfer Program. Staff noted that since the program had been initiated in 1993, circumstances had changed regarding water issues on the Monterey Peninsula. First and foremost, the State Water Board’s Order 95-10 had severely limited the water supply within the District and had mandated a comprehensive water conservation plan in the region. In letters from the State Water Board to the Water District clarifying Order 95-10, the State Board had indicated that the water credit transfer program might violate both the letter and spirit of Order 95-10. Although the amount of water usage that had been transferred thus far pursuant to the water credit transfer program was relatively small.....in relation to Cal Am’s total water production supply, District staff wrote that ‘there is potential for increased utilization of the program, particularly as water supplies are less available in the local jurisdictions and transfers provide one of the ways to obtain a permit for expanded uses.’”

Sierra Club and CRSA oppose the proposal put forth in the letters of August 15, 2016 for the same reasons expressed by Board staff that were quoted in the Court’s opinion. To the extent that documented historical use includes a “jurisdictional allocation of water” in connection with a particular site, it is clear that an application for an increase in capacity to use water at an existing site could result in more diversions for the Carmel River to the extent a transfer of a jurisdictional allocation of water (not presently being used) from another site would allow increased usage at the existing site. The interpretation put forth in the letter is designed to allow growth through augmented water use at existing commercial sites at the expense of the River upon application for a new or expanded use. The Board has adopted an effective diversion level somewhat higher than the last five year average to accommodate increased use of water that might occur if the existing drought situation improves (“bounce back” water). In agreeing to this somewhat higher effective diversion limit, Sierra Club and CRSA did not intend that there be new or expanded uses that could result in increased withdrawals from the River, and that could exacerbate an already bad situation in the event future years before 2021 are drought years, or if California American misses deadlines contained in the Order that would result in curtailments of diversions. For these reasons CRSA and Sierra Club urge you to reject the proposed interpretation made by the signatories to the August 15 letter.

Laurens H. Silver
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