

**PETITION TO THE CALIFORNIA STATE
WATER RESOURCES CONTROL BOARD
TO RECONSIDER THE ORDER
TO AMEND ORDER WR 2009-0060**

In accordance with California Code of Regulations, Title 23, Waters, Sections 768-770, this Petition for Reconsideration is submitted by the Water Ratepayers Association of the Monterey Peninsula (WRAMP, aka Water Plus), as an interested and aggrieved party. WRAMP advocates for residential ratepayers in Cal-Am's Monterey service area.

Information required by Section 769, Petition for Reconsideration

(1) Name and address of petitioner

Water Ratepayers Association of the Monterey Peninsula
Dr. Ron Weitzman, President
P. O. Box 146
Carmel, CA 93921

(2) Specific Board action of which petitioner requests reconsideration

Approval of the Order to Amend Order WR 2009-0060.

(3) The date on which the order was approved by the Board, pending reconsideration

July 19, 2016

(4) The reason the action was inappropriate or improper

The primary reasons fall under Section 768:

Subsection (a). Irregularity in the proceedings prevented a fair hearing;

Subsection (b). The order is not supported by substantial evidence; and

Subsection (d). Error in law.

Irregularity in the Proceedings

As shown in the schedule below, the State Water Resources Control Board (SWRCB) scheduled insufficient time and opportunity for WRAMP to respond to the Preliminary Staff Recommendation or the Draft Order.

The schedule was as follows, all dates in 2016:

June 1	Original deadline for Public Comments
June 16	Preliminary Staff Recommendation
July 13	Revised Deadline for Public Comments
July 15 (Friday)	Draft Order of 29 pages with unmarked changes from June 16 document
July 19 (Tuesday)	Board Meeting, with WRAMP/PWN presentation limited to 20 minutes

During this period, ex-parte conversations were taking place between SWRCB staff and representatives of Cal-Am, with no involvement of WRAMP as a long-time and much-involved advocate for the residential ratepayers who would bear the consequences of the amended order.

This exclusion of WRAMP from the dialogue between the SWRCB and Cal-Am is not confined to this period. It has extended for years. During this time, WRAMP sent numerous emails to the SWRCB and its staff with no idea of how the emails were being received until the Preliminary Staff Recommendation was issued. It was only then that we learned that the SWRCB and its staff had ignored all of the information and recommendations in our emails. Our exclusion from dialogue and the lack of a meaningful opportunity to comment have required the submittal of this petition.

Order to Amend WR 2009-0060 Not Supported by Substantial Evidence

WR 2009-0060 Requirements

The State Board has not enforced Order WR 2009-0060. That Order required the SWRCB Deputy Director for Water Rights closely to monitor Cal-Am's compliance with Order WR 95-10 and Order WR 2009-0060. Appropriate action to insure compliance with the Orders included issuance of additional cease and desist orders under Water Code Section 1831, the imposition of administrative civil liability under Water Code Section 1055, and referral to the State Attorney General for injunctive relief and imposition of civil liability under Water Code Section 1845. None of these actions has been taken.

Substantial Evidence Supports Denial of the Request for Extension of Order WR 2009-0060

SWRCB's Failure to Comply with the Terms of WR 2009-0060

The Deputy Director failed to take the required action to ensure that Cal-Am would have implemented a new water source by December 31, 2016, to substitute for the illegal diversions it had taken from the Carmel River. Instead, the SWRCB did nothing to prevent or reverse Cal-Am's intentional termination of the Regional Desalination Project, which would have produced replacement water by December 31, 2016. Nothing in the record documents the SWRCB's intervention before the Regional Desalination Project was terminated, so Cal-Am could become the sole owner of a substitute project. Neither has the Deputy Director of Water Rights taken action to ensure that Cal-Am's substitute projects were feasible and legally defensible and included essential water rights and would be implemented by December 31, 2016.

In addition, the Deputy Director failed to determine what volume of water would be required to protect the health and safety of the people served by Cal-Am on the Monterey Peninsula. Simply the reference in Order WR 2009-0060 to "protecting public health and safety" does not provide the substantial evidence required to determine the amount of water needed from the Seaside Aquifer Storage and Recovery Project or the Carmel River to ensure public health and safety. Neither did the Deputy Director require Cal-Am to produce a Water Allocation Plan that might be implemented to ensure health and safety. Most importantly, there is nothing in the record to suggest that enforcement of WR 2009-0060 would affect the health and safety of Cal-Am's customers on the Monterey Peninsula.

The SWRCB's amendment of Order WR 2009-0060 on July 19 would also allow Cal-Am to continue to violate the State Water Code. In so doing, the SWRCB has also failed to exercise its Public Trust duty to protect the Carmel River and its Public Trust Resources, which belong to the residents of California.

There is no substantial evidence in the record of the hearing held by the SWRCB that produced the amendment to Order WR 2009-0060 that the Deputy Director closely monitored Cal-Am's compliance with Orders WR 95-10 or WR 2009-0060 to ensure that Cal-Am would meet the terms of WR 2009-0060. Moreover, there is no evidence in the record to document *diligent implementation* of projects by Cal-Am to replace the water being illegally withdrawn from the Carmel River or any legally defensible excuses for its failure to comply. To wit, the Deputy Director for Water Rights has failed to ensure compliance with Order WR 2009-0060, has failed to issue additional cease and desist orders, impose administrative civil liability, or request referral to the State Attorney General for injunctive relief. This is not the vigorous enforcement required by Water Code Section 1825.

Cal-Am's Failure Diligently to Implement Feasible Projects

Cal-Am's pattern and practice began in 2011 when, of its own accord, it abandoned the Regional Desalination Project for its currently-proposed Monterey Peninsula Water

Supply Project, a project which is much more lucrative to the company and correspondingly costly to the company's ratepayers, particularly the residential ones.

The stakeholders who supported the five-year extension had been put on notice by WR 2009-0060 that Cal-Am's illegal water diversion from the Carmel River would cease on December 31, 2016. Specific stakeholders were reminded of this deadline by Order WR 2010-0001. There is nothing in the record to document any efforts on their parts to ensure Cal-Am's successful compliance with Order WR 2009-0060. Neither is there anything in the record to document their concern with Cal-Am's withdrawal from the Regional Desalination Project.

The SWRCB made no findings between adoption of Order WR 2009-0060 and July 19, 2016 to justify a five-year extension – findings that were required to document that Cal-Am had diligently implemented projects in the past and that its proposed projects would be implemented prior to December 31, 2021. In addition, the SWRCB must take cognizance of its own findings and conclusions about Cal-Am's failure to implement projects diligently, as well as the SWRCB's failure to provide substantial evidence that Cal-Am would produce a legally-defensible substitute water supply by the end of 2021. To the contrary, the extension simply sanctions a pattern and practice of twenty-six (26) years of illegal diversion of water from the Carmel River, with continued adverse impacts to Public Trust Resources, and no feasible substitute projects.

There is no evidence in the July 19, 2016, record to contradict the substantial evidence in Order WR 95-10 and Order WR 2009-0060 that Cal-Am's illegal diversions from the Carmel River have had significant adverse impacts on the viability and sustainability of Public Trust Resources of the Carmel River, including species listed as threatened under the Endangered Species Act. There is nothing in the record to suggest that the five-year extension of WR 2009-0060 would not have a continued adverse impact on Public Trust Resources.

There is no evidence in the record that enforcement of Order WR 2009-0060 would have an adverse impact on public health and safety. In fact, Order WR 2009-0060 documents the opposite, that the public health and safety of Cal-Am's customers would not be affected by enforcement of its terms. Moreover, neither Cal Am nor the SWRCB produced a Water Allocation Plan in 2009 or in 2016 to allow the public to determine which customers would be served by the water to which Cal-Am had a legal entitlement.

Error in Law

The Staff Report and record are devoid of evidence of compliance with the legal requirements and considerations that should have been included in the SWRCB's July 19, 2016, decision to amend WR 2009-0060, which should have addressed the following issues:

California Public Trust Doctrine

“The public trust doctrine and the appropriative rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.” National Audubon Society v. Superior Court of Alpine County (1983) 33 Cal.3d 419; 658 P.2d 709; 189 Cal. Rptr.346.

In this landmark opinion, the California Supreme Court recognized tributary streams as essential public trust resources because of the relationship to the navigable waters they feed. The court also reaffirmed that:

“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” National Audubon, Supra at 447.

“Amendments to the Water Code enacted in 1955 and subsequent years codify in part the duty of the Water Board to consider public trust uses of stream water. The requirements of the California Environmental Quality Act (Pub. Resources Code, §21000 et seq.) impose a similar obligation. Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” National Audubon, Supra.

As described under “Order to Amend WR 2009-0060 Not Supported by Substantial Evidence”, the SWRCB Deputy Director for Water Rights failed to perform the duties specified in WR 2009-0060: the duty to ensure the end of illegal diversions from the Carmel River by Cal-Am by December 31, 2016, the duty to ensure that a replacement water source would be diligently implemented before December 31, 2016, and the duty to verify the water required to protect public health and safety. In addition, there is nothing in the record to document the proper allocation of water resources to Cal-Am, which has appropriative rights for only 3,376 afa while the SWRCB’s Order to Amend WR 2009-0060 provides for diversion of 8,310 afa. The SWRCB granted Cal-Am a right to continue to divert water in an amount almost 250% of its appropriative rights, which the SWRCB’s prior Orders documented had adverse impacts on Public Trust Resources.

Despite severe drought in the last three to four years that is expected to continue, as well as wildfires that have raged within several miles of Cal-Am’s service area in the same time period, which require water to suppress, the SWRCB failed to produce any environmental review of the foreseeable impacts to the Public Trust Resources of the Carmel River by continuing to allow Cal-Am illegally to divert almost 5,000 afa. These “changes on the ground” would exacerbate the already significant impacts on Public Trust Resources.

California Constitution, Article X, Water Section, Section 2

“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented...”

As described previously in this letter, the SWRCB and its Deputy Director provided nothing in the record to document what volume of water would be required to protect the Public Trust Resources of the Carmel River or the public health and safety of Cal-Am’s current customers. As the Board reminded several parties in its Order WR 2010-0001:

The Water Code does not require the Board to consider the relative benefit of the use being made of illegally diverted water versus the need of public trust resources prior to adopting an enforcement order or taking authorized actions such as the imposition of civil penalties, adopting a cease and desist order or seeking injunctive relief. (Water Code §§ 1055, 1831, and 1845.) Order WR 2010-0001, p. 8.

Moreover, Order WR 2010-0001 also stated:

And the evidence in the record clearly supports the conclusion that illegal diversions from the Carmel River are harming public trust resources and will continue to do so[,] so long as those illegal diversions continue. Order 95-10 found that Cal-Am’s diversions were having an adverse effect on the riparian corridor along the Carmel River below river mile 18.5, the wildlife depending on riparian habitat and steelhead and other fish inhabiting the river (pp. 25-29). These findings are res judicata to Cal-Am and to the Monterey Peninsula Water Management District.” (Order WR 2009-0001 at p.7)

Given (a) the *res judicata* finding in Order WR 2010-0001 that Cal-Am’s illegal diversions from the Carmel River were harming public trust resources and would continue to do so and (b) the reminder in the same Order that the Water Code does not require the Board to consider the relative benefit of the use being made of illegally diverted water versus the need of public trust resources, on what basis could the SWRCB continue to aid and abet the destruction of public trust resources of the Carmel River by granting Cal-Am a five-year extension?

California Water Code, Section 1825, Policy

It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses...to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water.

Orders WR 95-10 and WR 2009-0060 articulated the applicable legal requirements and state policy, as well as the substantial evidence of the adverse effects to Public Trust Resources of the Carmel River of Cal-Am’s continued illegal diversion of river water. The

Orders were sound statements of public policy and provided Cal-Am with twenty-one (21) years to end illegal diversions and implement a substitute water supply.

There is nothing in the record to suggest that *force majeure* or economic conditions made it impossible for Cal-Am to meet the December 31, 2016, deadline. To the contrary, the SWRCB is aware and the record should have reflected that Cal-Am elected to withdraw from a partnership in the Regional Desalination Project and instead develop a private project that would generate greater profits for its shareholders at a much later date. The record should also reflect the facts that Cal-Am has proceeded to plan and implement a substitute water-source project, the Monterey Peninsula Water Supply Project, that has been delayed by conflict-of-interest and lacks essential water rights. Gordon Gekko told us that "Greed is good." However, that does not explain or excuse the SWRCB's failure to enforce the terms of Order WR 2009-0060 and Cal-Am's appropriative rights and to protect the Public Trust Resources of the Carmel River.

California Water Code, Section 1243 (a)

"The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, when it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources."

Orders WR 95-10 and WR 2009-0060 documented in great detail and explained how Cal-Am's illegal diversion of water from the Carmel River was adversely affecting public trust resources, which included wildlife and fish. Order 2009-0060 also emphasized that after the adoption of Order WR 95-10, the Central Coast Steelhead had been listed as threatened under the Endangered Species Act and the Carmel River had been designated as critical habitat for the steelhead. What was required to protect the Public Trust Resources of the Carmel River was vigorous enforcement of Order WR 2009-0060. What is missing from the Staff Report and the record associated with amendment of WR 2009-0060 is any documentation of the amount of Carmel River water determined necessary to enhance its fish and wildlife and whether the Board considered this information before authorizing another five years of illegal diversion from the river.

Specific Action Petitioner Requests

Petitioner requests that the State Board reconsider its Order amending Order WR 2009-0060 and that it enforce WR 2009-0060 with the following amendments:

- 1) That prior to October 31, 2016, the SWRCB determine the volume of water required on an annual basis by Cal-Am's current customers for public health and safety;
- 2) That prior to October 31, 2016, the SWRCB determine the volume of water available on an annual basis from the Seaside Aquifer Storage and Recovery Project for Cal-Am's current customers for public health and safety;

- 3) That prior to October 31, 2016, the SWRCB determine the volume of water needed on an annual basis from the Carmel River for Cal-Am's current customers for public health and safety (total water needed less water available from the Seaside Aquifer Storage and Recovery Project);
- 4) That prior to October 31, 2016, the SWRCB (a) determine the amount of water needed from the Carmel River to provide water to current Cal-Am customers for public health and safety that is in excess of its legal entitlement (3,376 afa) and (b) impose an administrative civil penalty for each acre foot that is illegally diverted;
- 5) That prior to December 31, 2016, the SWRCB withdraw all appropriative water rights currently held by Cal-Am in excess of what is required for public health and safety for Cal-Am's current customers in its Monterey service area (as computed under Numbers 1-4, above);
- 6) That Cal-Am be required to document the legal defensibility of its water supply projects that are to replace its illegal diversions from the Carmel River and, if it cannot demonstrate project legal defensibility by December 31, 2016 and if the SWRCB has not imposed an administrative civil penalty specified in Number 4 of Specific Action Requested, herein, Cal-Am (and not its ratepayers) be held liable for any and all damages resulting from its failure to provide a water supply required to protect public health and safety; and,
- 7) That if any current Cal-Am customer or any successor-in-interest successfully claims damages against Cal-Am for failure to deliver water required to protect public health and safety, only Cal-Am shall be liable for those damages. If Cal-Am succeeds in obtaining California Public Utility Commission (CPUC) approval to include any such damages in its costs charged to ratepayers, the SWRCB shall impose an administrative civil penalty in an amount equal to the amount so approved by the CPUC.

Most respectfully,

Ron Weitzman, President
Water Ratepayers Association of the Monterey Peninsula

16 August 2016