Decision **DRAFT DECISION OF ALJ MCVICAR (Mailed 3/1/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water Company (U210W) Pursuant to D.04-07-035 Deferring Request for an Immediate Moratorium in its Monterey District.	Application 04-09-037 (Filed September 29, 2004)

OPINION REJECTING MORATORIUM

Summary

This decision finds that it is not at this time in the public interest to order California American Water Company (CalAm) to impose a moratorium on new water connections in its Monterey District. Instead, CalAm should evaluate whether its existing Tariff Rule 14.1 is adequate to ensure that future water ,production does not violate State Water Resources Board (SWRCB) Order WR 95-10. This proceeding is closed.

Background

CalAm's Monterey District serves approximately 39,000 customers on the Monterey Peninsula and vicinity, providing about 85% of the Monterey Peninsula's water. It develops its supply from Carmel River surface water and wells in the Carmel Valley, Seaside basin, and along the Highway 68 corridor. It has been apparent for some time that during periods of drought there is not sufficient water to satisfy fully both environmental requirements and

unrestrained municipal water demands, but various factors have prevented any permanent solution to date.

In 1995, SWRCB added a major new legal constraint to the Monterey Peninsula's physical water supply limitations. SWRCB, following hearings begun in 1992, acted on complaints alleging that CalAm's Carmel River water use was without valid rights and adversely impacted environmental and public trust values. In Order WR 95-10, it directed CalAm to cut its Carmel River diversions to 14,106 acre-feet annually and implement conservation measures to bring that figure down by 20% more beginning with the 1997 water year. CalAm met the SWRCB-mandated cutback during the first water year ending September 30, 1996 following Order WR 95-10. It exceeded the limit in the second year, however, and the SWRCB levied a $168,000 fine on CalAm for the violation.[1] CalAm continues to this day to operate Monterey District under the terms of SWRCB Order WR-95-10 as modified by Order WR 98-04. With the aid of Commission-authorized rate structures designed to provide very strong conservation incentives, it has been able to meet SWRCB's limits in every water year after 1997.

CalAm ran into difficulty again in mid-2004. CalAm works with Monterey Peninsula Water Management District (MPWMD) to create quarterly water production budgets and sets monthly targets that, if met, should at the end of the water year bring production within the SWRCB annual limit. Although it had

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[1] CalAm has been authorized memorandum account treatment in three earlier Monterey District decisions (D.98-08-036, D.00-03-053, and D.03-02-030) for any SWRCB fines due to failure to meet the requirements of Order WR 95-10. Recovery in rates may be allowed provided the Commission determines that CalAm's management and operations related to those fines have been reasonable and recovery is justified.

managed to stay within its cumulative water production target through April 2004 for the October 2003 through September 2004 water year, CalAm recognized that May deliveries were consistently exceeding the daily targets due to early, dry and hot weather conditions with no relief in sight. That pattern continued into June, making it highly likely that Carmel River production would exceed the SWRCB limit for the 2004 water year if extraordinary steps were not taken.

In June 2004, CalAm filed Application (A.) 04-06-020 seeking authorization to impose a special rate design to reduce consumption during the remainder of the water year. Several respondents to that application recommended the Commission approve CalAm's request, but only with modifications and conditions. One of the Office of Ratepayer Advocates' (ORA) conditions was that CalAm file an application for authority to implement a moratorium on new hookups and expansions. CalAm accepted the respondents' conditions, and in July 2004 we issued Decision (D.) 04-07-035 granting CalAm authority to implement its proposed rate design. In that *ex parte* order, we withheld judgment as to whether a moratorium would be justified but did order CalAm to file a subsequent application to allow us to consider the matter without delaying CalAm's urgently needed conservation efforts. CalAm filed today's application pursuant to that order.

Discussion

There is little disagreement that CalAm faces significant challenges in meeting the Monterey Peninsula's water needs. We have been called on to address those challenges many times in the past, including in some proceedings

still pending before us.[2] To date there has been no long-term solution. In the proceeding leading to D.04-07-035, ORA sought to have CalAm file an application that would place before us the question of whether a moratorium on new hookups and water use expansion is needed. CalAm agreed to do so, and we so ordered. CalAm has met that D.04-07-035 obligation by filing today's application. In that decision, we described at length the overusage and overproduction problems CalAm faced during the summer of 2004. Those problems are summarized above; we need not repeat the details here.

Two parties protested CalAm's application: MPWMD and ORA. We first review below CalAm's position, and then each of the protests along with CalAm's reply.

CalAm's Position

CalAm's application argues that no moratorium is presently required. Rather, CalAm would have us allow it to work first with MPWMD to amend CalAm's and MPWMD's existing rules to include a moratorium provision that would ensure future Carmel River water production does not violate SWRCB Order WR 95-10. CalAm would then come back with a new application to update its current water conservation tariff to incorporate those rules. CalAm cites four primary reasons for taking this position: community reaction;

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[2] *See, e.g.*, A.04-09-019, in which CalAm has proposed to build a desalination plant to supply Monterey District. That proceeding is effectively suspended until CalAm files a Proponent's Environmental Assessment for the project. CalAm's pending general rate case for Monterey District, A.05-02-012, also presents a number of issues related directly to its water supply development efforts.

successful compliance with SWRCB Order WR 95-10 in 2004; effective measures taken to reduce usage; and discussions with MPWMD.

In preparation for filing this application, CalAm held two public hearings in the local area to receive public comments as required under Water Code Section 350 *et seq.* The transcripts from those hearings show that local reaction, from local government representatives, business owners, and individual citizens, was almost uniformly negative. Most opposed a moratorium, some spoke of the need for allowing exceptions, others of developing new sources and reducing waste. One speaker supported the moratorium. In addition, CalAm includes in the application a letter opposing a moratorium from the Monterey County Mayors' Association on behalf of the mayors of all six Monterey Peninsula area cities served by CalAm,[3] and individual letters from two of those cities, the Monterey Peninsula Chamber of Commerce, and the Independent Reclaimed Water Users Group. Those letters express views that a moratorium would be unfair to the community, devastating to the local economy, in violation of MPWMD's existing regulations, blind to CalAm's allegedly excessive system water losses, and unnecessary. The Commission has received similar letters from local government, groups and individuals since issuing D.04-07-035.

CalAm believes that its experience in addressing the threat when overproduction loomed in mid-2004 also demonstrates that no moratorium is necessary. In addition to the successful conservation rate design the Commission approved on short notice, CalAm undertook an ambitious campaign of customer outreach, focus groups, and conservation incentives. While others may not

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[3] Monterey, Seaside, Sand City, Carmel-by-the-Sea, Pacific Grove, and Del Rey Oaks.

agree, CalAm argues that its system water losses are lower than the industry standard and will benefit further from an ongoing series of main replacement projects and other system monitoring and improvement measures.

Lastly, CalAm argues that its Tariff Rule 14.1 conservation and standby rationing plan, and MPWMD's Ordinance 92 after which it is modeled, only address production shortfalls (physical supply shortages, primarily from drought or other emergency), not overconsumption that could lead to violations of SWRCB's Order WR 95-10. Given the opportunity, CalAm would like to work with MPWMD to update the ordinance to include a moratorium provision designed to control consumption when production threatens to exceed SWRCB-mandated levels. Once it completes that process, it would file a new application to amend its Tariff Rule 14.1 to incorporate the new moratorium provision.

MPWMD's Protest

MPWMD agrees with CalAm that no hookup moratorium is presently required. It also agrees that Ordinance 92 is not designed to address a consumption crisis where excessive consumption threatens to increase production over SWRCB's mandated limit.

Rather than attacking overconsumption by adding additional moratorium provisions to Ordinance 92 (and by implication, to Tariff Rule 14.1), however, MPWMD plans to proceed with a public process to modify its regulations to address potential overconsumption-driven violations of SWRCB Order WR 95-10 in other ways. MPWMD already has the statutory authority to impose a moratorium or other restrictions on water use, should that become necessary, and already controls water demand by setting a maximum number of connections and supply quantity for each water system. No new CalAm water meter is set without a permit from MPWMD and authorization from the local

jurisdiction to debit its water allocation for the resulting use. MPWMD supports emergency conservation rates of the type the Commission approved during 2004 in D.04-07-035, and would like to see the resulting WRAM excesses used to fund community conservations programs. Finally, it argues once again that CalAm's system water losses are excessive and renews its call for CalAm to reduce them.[4]

MPWMD also agrees with CalAm's recommendation and the Commission's preliminary determination that no evidentiary hearing is required.

ORA's Protest

ORA takes no position at this time on whether a moratorium is the best solution to the problem. Instead, it would have the Commission schedule a prehearing conference and public participation hearings while it pursues discovery. It plans to consider public input and evaluate other possible alternatives including other automatic conservation rate design trigger mechanisms that could help reduce consumption. While it refers to "possible evidentiary hearings," its protest does not state that an evidentiary hearing *will* be needed. Nor, if it is requesting such a hearing, does it include a statement of "the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application."[5]

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[4] Disposition of CalAm's WRAM overcollections was addressed in D.05-03-012 (March 17, 2005). CalAm's recently filed Monterey District general rate case, A.05-02-012, includes a proposal for ongoing authority to impose increased conservation-promoting rates on short notice; and system water losses are typically evaluated in water utilities' general rate cases.

[5] Rules of Practice and Procedure, Rule 44.2, Contents of Protests.

In its reply to ORA's protest, CalAm does not agree that an evidentiary hearing should be required in this application. But, to the extent the Commission may desire to evaluate a possible moratorium and other alternatives, CalAm suggests that addressing the issue in its pending general rate case (or in this application consolidated with the general rate case) would conserve resources while giving ORA and other interested parties an opportunity to fully analyze the options.

Conclusion

We are not persuaded to order a moratorium at this time. We reach that conclusion for several reasons. From the pubic and party input we have received, there is widespread local government and community opposition to a moratorium, no formal support, and almost no informal support. MPWMD already limits new and expanded water uses, and our imposing a moratorium would add little value but considerable complexity. A moratorium is likely to be disruptive and potentially damaging to the local economy. Experience has demonstrated that overconsumption leading to violation of SWRCB-mandated production limits, the problem a moratorium was intended to address, has not recurred since CalAm and local stakeholders successfully came to grips with it beginning in 1998. Lastly, the conservation rate design we imposed in July 2004, combined with other conservation incentives and an intensive community outreach campaign, was shown to be effective for addressing potential overconsumption during the 2004 water year.

In lieu of ordering a moratorium at this time, we will require CalAm to evaluate its current Monterey District Tariff Rule 14.1 to determine whether, in its judgment, revisions are needed to ensure future water production does not violate State Water Resources Board Order WR 95-10. In doing so, CalAm

should consult with MPWMD, ORA, and the Commission's Water Division. If CalAm determines that revisions to Tariff Rule 14.1 are needed, it should propose those changes in an application for Commission approval.[6]

Under Rule 44.4, "The filing of a protest does not insure that an evidentiary hearing will be held. The decision whether or not to hold an evidentiary hearing will be based on the content of the protest." The content of the protests in this proceeding does not persuade us that an evidentiary hearing is needed. To the extent ORA may want an evidentiary hearing to examine alternative or additional measures, it should advocate including the issue in the scope of the Monterey District general rate case, A.05-02-012, now getting underway.

Procedural Considerations

The Commission in Resolution ALJ 176-3140 (October 7, 2004), preliminarily categorized this as a ratesetting proceeding not expected to require hearings. No party has requested an evidentiary hearing, there are no material facts in dispute, and the application and protests provide sufficient information to decide the matter. We conclude that it is not necessary to disturb our preliminary category and need for hearing determinations.

[6] While Tariff Rule 14.1 is currently modeled on MPWMD's Ordinance 92, the Commission may order such changes to the Rule as it finds to be in the public interest.

Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. ORA filed comments and CalAm filed a reply.

While ORA continues to support a more detailed review of whether a moratorium is needed, it limited its comments to requesting that the Commission establish a deadline by which CalAm must complete the evaluation of Tariff Rule 14.1 required by Ordering Paragraph 1. ORA suggests a time limit of 60 days from the effective date of the decision. CalAm opposes setting a deadline. Both note that Tariff Rule 14.1 is currently modeled on MPWMD's Ordinance 92, the Expanded Water Conservation and Standby Rationing Plan, and that MPWMD has now proposed to replace Ordinance 92 with recently enacted Ordinance 119.[7] CalAm intends to modify Tariff Rule 14.1 to conform as closely as possible to Ordinance 119 once that ordinance becomes final and effective. Because Ordinance 119 is not yet effective and CalAm cannot control MPWMD's process and timetable for reviewing challenges and appeals and finalizing it, CalAm believes imposing a deadline to revise Rule 14.1 would not be appropriate. Moreover, CalAm claims that it has included in its recently filed Monterey District general rate case a request to modify Rule 14.1. Thus, the Commission may already have before it a proceeding in which to evaluate both

[7] According to CalAm, MPWMD Ordinance 119, Expanded Water Conservation and Standby Rationing Plan Amendments for Water Consumption Emergency, was enacted March 21, 2005 and would become effective on the thirtieth day thereafter absent challenge or appeal.

Ordinance 119's effects on Rule 14.1 and any other related changes CalAm, ORA, and possibly others, may propose. Assuming that is the case (ORA has not had an opportunity to respond), CalAm may already have complied with the filing requirement in Ordering Paragraph 1 and would need only to follow through by consulting with MPWMD, ORA and Water Division and ensuring any necessary revisions relating to a moratorium are presented in the general rate case proceeding. In any case, we agree with CalAm that setting a compliance deadline, whether 60 days or otherwise, would not be appropriate given the uncertainty in Ordinance 119's effective date, and no such revision has been made to the draft decision.

Separately, we have updated footnote #4 to reflect the recent issuance of D.05-03-012, closing A.04-10-037.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and James C. McVicar is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. SWRCB Order WR 95-10 limits the amount of water CalAm may produce from the Carmel River system. Violation of SWRCB Order WR 95-10 could expose CalAm to significant fines that CalAm would likely seek to pass through to its Monterey District water customers.

2. CalAm's continued compliance with SWRCB-imposed water production limits established in Order WR 95-10 is in the public interest.

3. There is strong local government and community opposition to ordering a moratorium in Monterey District, and no formal support for it in this proceeding.

4. A moratorium is likely to be disruptive and potentially damaging to the local economy.

5. MPWMD has taken steps to limit new and expanded water uses, and our imposing a moratorium at this time would add little value but considerable complexity.

6. Overconsumption leading to violation of SWRCB-mandated production limits, the problem a moratorium was intended to address, has not recurred in Monterey District after 1997.

7. The conservation rate design we imposed in July 2004, combined with other conservation incentives and an intensive community outreach campaign, was shown to be effective in reducing consumption and keeping water production within the limits mandated by SWRCB Order WR 95-10 for the 2004 water year.

8. Two protests to CalAm's application were received. Neither protest requested an evidentiary hearing or demonstrated that an evidentiary hearing is needed.

9. No hearing is required.

Conclusions of Law

1. It is not at this time in the public interest to order a moratorium in Monterey District on new water connections and increased uses through existing connections.

2. CalAm should be required to evaluate its current Monterey District Tariff Rule 14.1 to determine whether revisions are needed to ensure future water production does not violate SWRCB Order WR 95-10.

3. For administrative efficiency, and to properly focus the parties' future efforts, this decision should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. California-American Water Company (CalAm) shall evaluate its current Monterey District Tariff Rule 14.1 to determine whether, in its judgment, revisions are needed to ensure future water production does not violate State Water Resources Board Order WR 95-10. In doing so, it shall consult with Monterey Peninsula Water Management District, the Commission's Office of Ratepayer Advocates, and the Commission's Water Division. If CalAm determines that revisions to Tariff Rule 14.1 are needed, it shall propose those changes in an application for Commission approval.
2. Application 04-09-037 is closed.

This order is effective today.

Dated _____, at San Francisco, California.