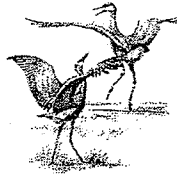


CALIFORNIA ENVIRONMENTAL LAW PROJECT  
A Non-Profit Legal Corporation



MAR 25 2009

Of Counsel

Laurens H. Silver, Esq.  
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MPWMD

March 25, 2009

By Email  
[markeyka@co.monterey.ca.us](mailto:markeyka@co.monterey.ca.us)

Kristi Markey, Chair, and  
Board of Directors  
Monterey Peninsula Water Management District  
P.O. Box 85  
Monterey CA 93942

Subject: Application of Cal-Am and SNG to Produce and Use Water in Seaside  
Groundwater Basin

Dear Members of the Board:

Sierra Club has been forwarded a copy of a letter dated March 23, 2009 to the MPWMD Board of Directors concerning the Application by California American Water Company and SNG to Produce and Use Water in the Seaside Groundwater Basin. The letter asks that the Board "reconsider" its decision to deny the joint application of Cal-Am and SNG for a water distribution permit.

This letter completely ignores the District's authority to manage conjunctively the groundwater and surface water within its jurisdiction through its authority to approve water distribution permits. See Sierra Club's letter of February 24, 2009 to Chairperson Markey (p.10, "MPWMD Has Authority to Require a Subsequent EIR")<sup>1</sup> The letter misstates the nature of the physical solution embodied within the Judgment, insofar as it reserves certain powers in the District delegated to it by the Legislature. Additionally, the letter states that the judgment recognizes the "rights" of Alternative Production Allocation producers to pump water from an off-site location (using Cal-Am as a purveyor) so long as the use of the water is on the overlying parcel identified in the Judgment. This conclusion is erroneous, as Sierra Club stated in its letters to the Watermaster dated February 5 and February 11, 2009.

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<sup>1</sup> The District has been delegated explicit authority to coordinate and integrate groundwater supplies and surface water supplies. Water App. 118-341. In creating the District, the Legislature found there was a need for regional management of limited and fragile resources of

Board of Directors  
Monterey Peninsula Water Management District  
Page 2 of 2

Sierra Club requests that if the Board entertains the Watermaster's request as a Motion for Reconsideration timely made, that the Sierra Club be given an opportunity to make a response to the Watermaster's letter, and that any "hearing" on any such request not be held at its meeting on March 26, 2009.

Attached are (electronic) copies of Sierra Club's letters to the Watermaster dated February 5th and February 11th, 2009.

Sierra Club vigorously objects to any on the merits consideration of the Watermaster's request for reconsideration at its March 26<sup>th</sup> meeting.

Sincerely,

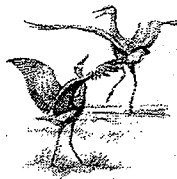
Laurens Silver  
California Environmental Law Project

cc: Watermaster, Ralph Rubio  
Rita Dalessio  
John Williams  
David Laredo  
Henriette Stern (MPWMD)

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the Carmel River Basin and the Seaside Aquifer. SWRCB Order 95-10 states "The District is responsible for managing available surface and ground water sources to supply water within the District and to protect the environmental quality of the area's water resources, including the protection of fish and wildlife resources." In Order 95-10 the SWRCB requires Cal-Am to reduce pumping in the Seaside aquifer during periods of heavier river flow. The District is required to allow no person or operator to establish, extend, or expand or create a water distribution system within its boundaries unless approved by the MPWMD Board. Water-App 118-363.

CALIFORNIA ENVIRONMENTAL LAW PROJECT  
A Non-Profit Legal Corporation



Of Counsel

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February 5, 2009

Ralph Rubio, Chairman  
Seaside Groundwater Basin Watermaster  
2600 Garden Road, Suite 228  
Monterey, CA 93940-0810

Re: Water Connection Permit – Security National Guarantee (Watermaster Letter of  
September 19, 2008)

Dear Mr. Rubio:

By letter dated September 19, 2008, you advised Mr. Ed Ghandoor, Security National Guaranty, Inc. that under the Basin Adjudication Decision, “SNG’s Alternative Production Allocation gives it the right to produce up to 149 acre-feet of water on an annual basis from the Seaside Groundwater Basin for beneficial use on the SNG property.” You further advised that with respect to water used off-site, SNG “has the right to convert some or all of its Alternative Production Allocation to a “Standard Production Allocation...”

The SNG application referred to in your letter proposed that Cal-Am would pump groundwater from its Peralta wells and convey it through the Cal-Am distribution system for use on SNG’s property. SNG proposed that this pumped water be treated as production from its Alternative Production Allocation, as set forth in the Adjudication Decision (California American v. City of Seaside, No. M66343.

For the reasons stated below, Sierra Club believes that to the extent your letter endorsed such an arrangement (“SNG’s approach as described above is consistent with the terms of the Basin Adjudication Decision”), that endorsement is legally incorrect. Sierra Club requests that you reconsider this Opinion, or in the alternative, refer it to Judge Randall for interpretation.

The Adjudication Decision creates two classes of rights in the Basin – the Standard Production Allocation and the Alternative Production Allocation. The Standard Production Allocation generally includes producers with appropriative rights. The Alternative Production Allocation encompasses producers with overlying rights (“Accordingly, the Court find that the parties collectively possess a variety of rights based in prescription and other original rights (including overlying and appropriative rights).”) (Decision at 9, emphasis added) In III B1, the Court, referencing “groundwater rights” states:

Ralph Rubio, Chairman  
Seaside Groundwater Basin Watermaster  
February 5, 2009  
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“Parties have accrued mutual prescriptive rights and/or have preserved their overlying appropriative, and prescriptive rights... These individual and competitive rights, whether mutually prescriptive, appropriative, or overlying rights can be most efficiently exercised and satisfied by the implementation of this physical solution.”

In III B3, p.19, the Court characterizes SNG’s right as an “overlying Groundwater right” and recites that SNG “has chosen to participate in an Alternative Production Allocation.” In III B3(a), id., the Court ruled that “the Alternative Production Allocation may not be transferred for use on any other property, but shall be limited to use on the respective properties...”

If the Watermaster intended in his September 19, 2008 letter to approve SNG’s plan to contract with Cal-Am to pump Peralta well water to be conveyed through the Cal-Am distribution system for use on the SNG site, the Watermaster in effect authorized an unlawful use of SNG’s overlying right that is not contemplated under the Decision and that is inconsistent with California law pertaining to overlying water rights. The overlying right constitutes an appurtenant right to take water from the ground and use it on the overlying property. It is unlawful to sever the appurtenant pumping right from the right of use. The overlying land-owner cannot lawfully “convey” its groundwater pumping right to a third party, who is to pump water not appurtenant to the overlying land.

In City of Barstow v Mohave Water Agency, 23 Cal.4<sup>th</sup>, 1224 (2000), the Supreme Court characterized an overlying right as “the owner’s right to take water from the ground underneath for use on his land within the basin or watershed; it is based on ownership of the land and is appurtenant.” 23 Cal 4th at 1231. (emphasis added) The Court cited California Water Service Co. v. Edw. Sidebotham and Sons, 224 Cal.App. 2d, 715-725. (1964) in support of its statement. The Court described the overlying rights of appellants as “the right to pump water from the ground underneath their respective lands for use on their lands.”

In Hutchins, Water Rights Laws In Nineteen Western States, it is stated:

“The right to use percolated water, as well as the corpus of the water itself, is real property.” In Pasadena v. Alhambra, 33 Cal.2d 908, 925 (1949) the California Supreme Court stated that the overlying “right,” or right of the owner of the land, “to take water from the ground underneath for use of his underlying land is based on ownership of the land and is appurtenant thereto.” (Hutchins, Vol.II, 67). (emphasis added)

In Burr v. Maclay Rancho Water Co., 154 Cal.428, 439 (1908) the Supreme Court adjudicated the right of the plaintiff as the owner of certain lands to take waters from the underlying supply for use on such lands and declared “that such right is parcel of said lands.” In Pasadena v. Alhambra, 33 Cal.2<sup>nd</sup> 908, 925 (1949) the Court stated that the overlying right to take water from the ground underneath for use on overlying land “is based on ownership of the land and is appurtenant thereto.” See Hutchins, The California Law of Water Rights, at 428.

An appurtenant water right is one that is incidental to the use of land when it is by right used with the land for its benefit. Civil Code §662 recites: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit..." Civil Code §658 defines real property. "Real or immovable property consists of (1) land; (2) that which is affixed to land, (3) that which is incidental or appurtenant to land." *Id.* Black's Law Dictionary defines appurtenant as "belonging to; accessory or incident o; adjunct, appended or annexed to." Black's Law Dictionary, Third Edition.

Nothing in the Court's Decision contemplates such severance of an appurtenant pumping right, as SNG has proposed. In effect it has assigned its pumping right to Cal-Am, contemplating increased Cal-Am production from the Peralta Well that will be conveyed through the Cal-Am distribution system to SNG. If the Watermaster allows this precedent to occur, other owners of Alternative Production Allocations under the Seaside Decree could similarly sever the appurtenant pumping right from their property and enjoy and use water conveyed from other parts of the Basin for use on the overlying property.<sup>1</sup>

Nothing in the Court's Decision relating to the Alternative Production Allocation indicates that the Court intended to expand the rights of overlying water rights owners by authorizing them to contract with off-site users to pump groundwater for use on their overlying property. Rather, the Court's Decision suggests it had no intention to expand the right, since it ruled that the "Alternative Production Allocation may not be transferred for use on any other property, but shall be limited to use on the respective properties." III B3(a), p. 19. In effect, the Watermaster has endorsed a "use" of the overlying right on other property by apparently endorsing augmented pumping at the Peralta Well and transporting the water produced off-site for ultimate use on SNG's land.

Civil Code §22.2 provides that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this state." Since the Court's decision recognizes overlying rights as the foundation for the Alternative Production Allocation, the Court had an obligation to make clear how, if at all, it was altering or abrogating the common-law rules in the context of a physical solution. It did not do so, and it may not have had the power to do so. See City of Barstow, supra.

Rather, as the Watermaster noted in his letter, if the overlying landowner wished to use water off-site and transfer its production allocation for use by others, it was authorized to do so under the Decision by electing to change all or a portion of its Alternative Production Allocation to the Standard Production Allocation. Decision III B3(e) p. 21. If SNG wishes to contract with Cal-Am to pump water off-site for use on its property it may do so only by electing to produce under the Standard Production Allocation. Under III M2 (p.42), the parties may assign and transfer any portion of their respective Production Allocation for use within the Basin. This would be the exclusive procedure for SNG to follow, as allowed under the Decision, if it wishes to have water purveyed to it from off-site wells.

---

<sup>1</sup> We note that (including SNG), there are approximately 1400 acre-feet in Alternative Production Allocations under the Seaside Decree.

Ralph Rubio, Chairman  
Seaside Groundwater Basin Watermaster  
February 5, 2009  
Page 4

In sanctioning SNG's proposal, the Watermaster has created special benefits to SNG that are clearly not intended under the Decision. First it has improperly "enhanced" SNG's overlying right by allowing it to sever the appurtenant pumping right from its land. Secondly, it has improperly granted SNG immunity from the 10% reduction requirement in production from the Basin that the Court has mandated for Standard Production Allocation pumpers. Had SNG done what the Decision contemplates in connection with the transfer or assignment of rights and elected to become a Standard Production Allocation producer, SNG's 149 acre foot production allocation would be subject to the 10% reduction requirement.

Sierra Club asks for reconsideration of the Watermaster's decision, and/or for submission of this matter to Judge Randall for resolution. The Decision states "full jurisdiction power and authority are retained and reserved by the Court upon application...by the Watermaster for such further or supplemental orders or directions as maybe necessary or appropriate for interpretation, enforcement, or implementation of this Decision."

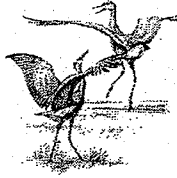
Sierra Club asks for your prompt reconsideration of your opinion and that you notify the MPWMD of any such reconsideration. The MPWMD is currently considering Cal-Am's application for a water distribution permit.

Sincerely  
CALIFORNIA ENVIRONMENTAL LAW PROJECT

Laurens H. Silver  
On behalf of Ventana Chapter, Sierra Club

cc: Darby Fuerst, MPWMD  
Victoria Whitney  
Sheri Damon, Esq.

CALIFORNIA ENVIRONMENTAL LAW PROJECT  
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Of Counsel

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February 11, 2009

Ralph Rubio, Chairman  
Seaside Groundwater Basin Watermaster  
2600 Garden Road, Suite 228  
Monterey, CA 93940-0810

Re: Water Connection Permit – Security National Guarantee (Watermaster Letter of  
September 19, 2008)

Dear Mr. Rubio:

This letter is intended to supplement my letter of February 5, 2009, and to comment on a letter dated February 5, 2009 written to me by James W. Kassel of the SWRCB, concerning the Application of California-American Water Company for a Water Distribution Permit To Serve Monterey Bay Shores Ecoresort. I am forwarding a copy of this letter to you, as you are not copied on this letter. In his letter Mr. Kassel states:

“The Water supply for this project will be up to 90 AFY from the Seaside Groundwater Basin. The Seaside Groundwater Basin Adjudication Judgment of March 27, 2006 allocated 149 AF to Security National Guaranty, Inc. (SNG) for use on the property of this project. The judgment does not restrict the production of water to the subject parcel through SNG’s onsite wells. Water may also be produced from another offsite well owned by another entity and delivered to the SNG parcel, so long as the well is within the Seaside Groundwater Basin.”

In connection with Mr. Kassel’s interpretation of the meaning of the Adjudication Decision, with respect to the SNG application, Sierra Club would like to iterate its position taken in its February 5, 2009 letter to you. In that letter, Sierra Club stated:

Rather, as the Water Master noted in his letter, if the overlying landowner wished to use water off-site and transfer its production allocation for use by others, it was authorized to do so under the Decision by electing to change all or a portion of its Alternative Production Allocation to the Standard Production Allocation. Decision III B3(e) p.21. If SNG wishes to contract with Cal-Am to pump water off-site for use on its property it

may do so only by electing to produce under the Standard Production Allocation. Under III M2 (p.42), the parties may assign and transfer any portion of their respective Production Allocation for use within the Basin. This would be the exclusive procedure for SNG to follow as allowed under the Decision, if it wishes to have water purveyed to it from off-site wells.

In sanctioning SNG's proposal, the Watermaster has created special benefits to SNG that are clearly not intended under the Decision. First it has improperly "enhanced" SNG's overlying right by allowing it to sever the appurtenant pumping right from its land. Secondly, it has improperly granted SNG immunity from the 10 % reduction requirement in production from the Basin that the Court had mandated for Standard Production Allocation pumpers. Had SNG done what the Decision contemplates in connection with the transfer or assignment of rights and elected to become a Standard Production Allocation producer, SNG's 149 acre foot production allocation would be subject to the 10% reduction requirement.

Sierra Club's position, then, is that since the Adjudication Decision specifically prohibits holders of the Alternative Production Allocation from transferring their water rights (allocation) for use on any other property, but shall be limited to use on the respective properties (Decision, IIIB3(a)), if SNG wishes to engage Cal-Am to pump from an off-site well, it must elect to proceed under a Standard Production Allowance (and be subject to the mandatory reduction requirements under the Adjudication Decision). Sierra Club believes that SNG has only one option under the Adjudication Decision if it wishes to proceed with its off-site pumping scheme – it must proceed to elect a Standard Production Allocation (at least with regard to the amount needed for the project).

In this respect, as qualified above, Sierra Club does not quarrel with Mr. Kassell's characterization of the Adjudication Decision.

I would also like to note that while under the common law, a riparian right may under certain circumstances be "severed" when land is subdivided and cut off from contact with a stream, see Hudson v. Daily, 156 Cal 617, 624-625 (1909), there is no case law authority, that a pumping right can be severed from the overlying right so long as the water is conveyed to the overlying land for use there. In any event, the Adjudication Decision itself supplants the common law relating to overlying rights. It contemplates severance of the overlying pumping right, by permitting a holder of an Alternative Production Allocation to elect to proceed under a Standard Production Allocation. This "severance" however, which promotes transferability of pumping rights within the aquifer effectively "transmutes" the common-law overlying right into a transferable interest in water, which, under the Decision, can be effectuated only through an election to proceed under a Standard Production Allocation.



Ralph Rubio, Chairman  
Seaside Groundwater Basin Watermaster  
February 11, 2009  
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In the last paragraph of its February 5, 2009 letter, Sierra Club asked for your "prompt reconsideration of your opinion". Since the City of Seaside maintains a Municipal Water System, which includes 3 water wells, and is an Alternative Allocation Producer under the Decision, Sierra Club believes that it would be appropriate for you acting as Watermaster, to apply to Judge Randall, for an opinion, as set forth in the Adjudication Decision, rather than to render a decision or reconsideration. Please set this matter on the agenda for the March 4, 2009 Water Master Board meeting.

Sincerely  
CALIFORNIA ENVIRONMENTAL LAW PROJECT

Laurens H. Silver  
On behalf of Ventana Chapter, Sierra Club

cc: Darby Fuerst, MPWMD  
Victoria Whitney  
Sheri Damon, Esq.



# State Water Resources Control Board



## Division of Water Rights

1001 I Street, 14<sup>th</sup> Floor ♦ Sacramento, California 95814 ♦ 916.341.5300  
P.O. Box 2000 ♦ Sacramento, California 95812-2000  
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Linda S. Adams  
Secretary for  
Environmental Protection

Arnold Schwarzenegger  
Governor

FEB 05 2009

FEB - 9 2009

Laurens H. Silver, Esq.  
P.O. Box 667  
Mill Valley, CA 94942

MPWLD

Dear Mr. Silver:

### APPLICATION OF CALIFORNIA AMERICAN WATER COMPANY FOR WATER DISTRIBUTION PERMIT TO SERVE MONTEREY BAY SHORES ECORESORT

This letter is in response to your letter dated January 15, 2009 to Victoria Whitney, State Water Resources Control Board (State Water Board) Deputy Director for Water Rights, asking for a determination whether the one-for-one reduction of Condition 2 of State Water Board Order 95-10 applies to the 90 acre-feet per year (AFY) that will be pumped by the California American Water Company (Cal-Am) for the benefit of the Monterey Bay Shores Ecoresort in Sand City. We are also in receipt of your letter to Ms. Whitney dated January 26, 2009 providing your position on this matter in greater detail. Because the State Water Board is currently considering evidence presented at a recent water right hearing with regard to compliance with Order 95-10 and Ms. Whitney is advising the Board on that matter, she has asked me to respond to your request in my capacity as the Chief Enforcement Officer for the Division of Water Rights.

Conditions 2 and 4 of Order 95-10 state:

2. Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful diversions from the Carmel River: (1) obtain appropriate permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside aquifer shall be governed by condition 4 of this Order not this condition, and/or (3) contract with another agency having appropriate rights to divert and use water from the Carmel River.
4. Cal-Am shall maximize production from the Seaside aquifer for the purpose of serving existing connections, honoring existing commitments (allocations), and to reduce diversions from the Carmel River to the greatest extent. The long-term yield of the basin shall be maintained by using the practical rate of withdrawal method.

I have reviewed the description of this project on the website of the Monterey Peninsula Water Management District (District) and have discussed the project with District staff. The water supply for this project will be up to 90 AFY from the Seaside Groundwater Basin. The Seaside Groundwater Basin Adjudication Judgment of March 27, 2006 allocated 149 AFY to Security National Guaranty, Inc. (SNG) for use on the property of this project. The judgment does not restrict the production of water to the subject parcel through SNG's onsite wells. Water may also be produced from another offsite well owned by another entity and delivered to the SNG parcel so long as the well is within the Seaside Groundwater Basin. For this project, Cal-Am

*California Environmental Protection Agency*

FEB 05 2009

will be using its water distribution system to deliver water to this project from Seaside Groundwater Basin wells offsite of this project parcel. Because of the inter-related nature of Cal-Am's water delivery system, it is my understanding that there is a possibility that Cal-Am could supply this project with Carmel River water.

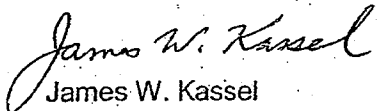
Because the supply of water being supplied from the Seaside Groundwater Basin has been allocated to SNG by the Seaside Groundwater Adjudication, it is my opinion that Order 95-10 does not require Cal-Am to make a one-for-one reduction in its unlawful diversion from the Carmel River. However, Cal-Am should not in any case supply this project with Carmel River water. This would only exacerbate Cal-Am's illegal diversion of water from the Carmel River.

If the District decides to approve this application, I recommend that the District require Cal-Am to implement strict water accounting methods to ensure that any use of Carmel River water does not serve this project. Furthermore, it would be in Cal-Am's interest to include such accounting in its quarterly reports to the State Water Board in order to demonstrate that service to this project does not violate Order 95-10.

I also note that SNG will only be using up to 90 AFY for this project and will have 59 AFY of its groundwater allocation remaining. Cal-Am should consider obtaining the rights to any unused portions of the water allocations from the Seaside Basin groundwater adjudication from SNG and other entities in order to minimize its use of water from the Carmel River. It is my opinion that Cal-Am should undergo these efforts at least in an interim time frame to reduce its unauthorized diversion from the Carmel River until it secures an alternate long term water supply.

Please call me at (916) 341-5446 if you have any questions regarding this matter.

Sincerely,



James W. Kassel  
Assistant Deputy Director for Water Rights

cc: Darby Fuerst, General Manager  
Monterey Peninsula Water Management District  
5 Harris Court Building  
PO Box 85  
Monterey, CA 93942

B. Kent Turner, President  
California American Water Company  
P.O. Box 951  
Monterey, CA 93940

Victoria Whitney, State Water Board Deputy Director for Water Rights

John O'Hagan, Manager, Division of Water Rights Enforcement Section

Reed Sato, Director, State Water Board Office of Enforcement