

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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In the Matter of the Application of California
American Water Company (U210W) for
Approval of the Monterey Peninsula Water
Supply Project and Authorization to Recover
All Present and Future Costs in Rates

Application A.12-04-019
(Filed April 23, 2012)

**SURFRIDER FOUNDATION'S RESPONSE TO MARINA COAST WATER
DISTRICT'S MOTION TO MODIFY PROCEDURAL SCHEDULE**

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INTRODUCTION

Surfrider Foundation agrees with the reasoning and conclusion of the Marina Coast Water District (“MCWD”) in its Motion to Modify Procedural Schedule: the nature of this proceeding requires that the parties’ briefs have the benefit of the information that will be contained in the environmental impact report (“EIR”) for the proposed project.¹ Surfrider writes to provide its perspective and an alternative proposal, under which the briefing schedule set out in the August 29, 2012 Directives to Applicant and Rulings Regarding Scoping, Schedule and Official Notice (“Scheduling Order”) would simply be adjusted to account for the importance of the EIR.²

¹ Surfrider Foundation takes no position on MCWD’s argument regarding reopening the evidentiary hearing following the EIR, but reserves its right to request such reopening if circumstances require further evidence.

² This Order recognized the need for the proposed decision to follow the Final EIR’s release. Any schedule revisions must retain this sequencing to avoid the CEQA compliance concerns that Surfrider raised in its July 20, 2012 Motion to Amend Assigned Commissioner’s Scoping Memo and Ruling.

ARGUMENT

The Commission's decision whether to grant a Certificate of Public Convenience and Necessity ("CPCN") for the proposed project in this proceeding will depend on facts developed in the EIR. The Commission must weigh the project's "[i]nfluence on the environment" in its consideration of the CPCN. Pub. Util. Code § 1002(a)(d). The EIR will be the predominant source of evidence regarding the project's influence on the environment.

Moreover, important questions regarding other aspects of the project, such as the appropriate design of slant wells for optimal protection against erosion, the appropriate design of the facility's outfall, and the capacity of the plant, all turn on facts that will be contained in the EIR. The Applicant's testimony has on many occasions acknowledged the gaps in the present record that the EIR will fill. *See, e.g.*, Transcript 6:952,³ (Testimony of R. Svindland, noting that the CEQA process will address potential injury to groundwater users); 7:1219-20 (Svindland, noting that the EIR will consider the deleterious effect of discharging undiluted brine); 8:1280-81 (Svindland, noting that design of slant wells depends on the erosion rate, which the EIR will analyze); 8:1272; 9:1645 (Svindland, noting that the EIR will inform design of the outfall for brine discharge).

³ Citations to the Reporter's Transcript of the evidentiary hearing in this case are provided as follows: "Transcript [Volume Number]:[Page Number]."

The parties must brief all of these issues, and cannot do so without the facts contained in the EIR.⁴ Therefore briefs must be scheduled for submission after the completion of the EIR. The appropriate time for this briefing is, as MCWD points out in its Motion, following the publication of the Final EIR. It is true that the Draft EIR will contain substantial information, likely even most of the missing facts. But a “[Draft] EIR is, of course, a *draft* document subject to public comment and further analysis.” *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1459 (emphasis in original); *see also* CEQA Guidelines § 15132 (“The final EIR shall consist of . . . [t]he Draft EIR or a revision of the draft . . . [and a]ny other information added by the lead agency”). The only way to ensure that the parties base their arguments on a complete and accurate factual record is to schedule briefing after the Final EIR is available.

In light of the importance of moving the Project forward, however, briefing based on the Draft EIR may be sufficient to inform the ALJ’s proposed decision. The Scheduling Order set opening briefs for 45 days after the close of evidentiary hearings. Scheduling Order at 9. Surfrider proposes shifting that schedule to account for the EIR’s crucial contributions to the record:

Common Outline Opening Briefs	45 Days after publication of Draft EIR
Reply Briefs	15 Days after Opening Briefs

⁴ Accordingly, the parties will rely on and cite to the EIR in their briefs. Before seeing the EIR itself, Surfrider can take no position on the correctness or evidentiary weight of its methods, analysis, or conclusions.

If the Draft EIR is released on or relatively close to July 1, as stated in the Scheduling Ruling, Surfrider's proposed alternative schedule would not interfere with the scheduled November/December timing of the circulation for comment of the ALJ's proposed decision. Regardless of the EIR's release date, Surfrider's proposal allows for briefing during the period in which Commission staff is receiving and responding to comments on the Draft EIR. *See* Pub. Res. Code § 21091(a) (requiring a 45-day comment period for EIR's submitted to the State Clearinghouse).

As noted above, the Final EIR may change the factual conclusions of the Draft EIR and thus necessitate further briefing. As a practical matter, this is unlikely. But if the Final EIR contains new facts that are important to the CPCN determination, the ALJ could allow limited briefing to address the new information.

On the last hearing day, counsel for the Applicant proposed that opening briefs be due on July 19, with reply briefs due on August 2. Transcript 12:2045 *et seq.* This proposed schedule is inadequate for two reasons. First, it provides a date certain for the submission of opening briefs, apparently on the assumption that the Draft EIR would be released on July 1. That date, however, is not binding, and there is no guarantee the EIR will be published on July 1. To account for this uncertainty, it is essential that briefing be scheduled not for a date certain, but with reference to the EIR's release.

Moreover, even if the draft EIR is released on July 1, the Applicant's proposal provides only 18 days for briefing from the day that the record is sufficiently complete. The Scheduling Order, by allowing 45 days after the close of evidence, appropriately recognized the parties' need to thoroughly review the record as part of the briefing

process. In light of the EIR's demonstrated importance to the record, the revised briefing schedule should do the same. Surfrider's proposed alternative schedule moves the proceeding forward expeditiously while providing for effective briefing on a sufficiently complete record.

CONCLUSION

For the reasons stated above, Surfrider Foundation respectfully requests that the ALJ adopt the briefing schedule proposed by Marina Coast Water District or, alternatively, the schedule proposed herein.

DATED: May 17, 2013

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