

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED
08-30-13
04:59 PM

In the Matter of the Application of California-American Water Company (U 210 W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.

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

**MARINA COAST WATER DISTRICT'S
CONSOLIDATED COMMENTS ON THE SETTLING PARTIES'
1) MOTION TO APPROVE SETTLEMENT AGREEMENT AND
2) MOTION TO APPROVE SETTLEMENT AGREEMENT ON PLANT
SIZE AND OPERATION**

MARK FOGELMAN
RUTH STONER MUZZIN
FRIEDMAN & SPRINGWATER LLP
33 New Montgomery Street, Suite 290
San Francisco, CA 94105
Telephone: (415) 834-3800
Facsimile: (415) 834-1044
Email: mfogelman@friedmanspring.com
Email: rmuzzin@friedmanspring.com

Attorneys for Marina Coast Water District

Date: August 30, 2013

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. LEGAL DEFICIENCIES OF THE PROPOSED SETTLEMENTS	3
A. The MPWSP, if Approved and Implemented as Proposed, Would Violate the Pumping Restriction on the CEMEX Property and MCWD’s Exclusive Right to Serve the Property Under the 1996 Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands.	3
B. The MPWSP, if Approved and Implemented as Proposed, Would Appear to Violate the Agency Act’s Prohibition on Export of Groundwater from the Salinas Valley Groundwater Basin.	7
C. The Commission May Not Approve the Settlements, Approve the MPWSP, or Grant a Certificate of Public Convenience and Necessity Without a Record That Includes the Evaluation of Potential Environmental Impacts.	10
III. CONCLUSION	15

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Atlantic Refining Co. v. Public Service Com.</i> (1959) 360 U.S. 378	12
<i>Laurel Heights Improvement Assn. v. Regents of University of Calif.</i> (1988) 47 Cal. 3d 376.....	14
<i>Northern California Power Agency v. Public Utilities Com.</i> (1971) 5 Cal.3d 370.....	11, 12
<i>Rio Vista Farm Bureau Center v. County of Solano</i> (1992) 5 Cal.App.4th 351.....	14
<i>Save Tara v. City of West Hollywood</i> (2008) 45 Cal.4th 116	13
Statutes	
Pub. Resources Code § 21065	2, 13
Pub. Resources Code § 21082.1, subd. (c)(3)	13
Pub. Resources Code § 21100	2, 11, 13
Pub. Resources Code § 21151	13
Pub. Resources Code § 21068	11
Pub. Util. Code § 1002, subd. (a)	2, 11, 12, 13
Water Code §§ 30000-33901.....	5
Water Code, Appendix, ch. 52, §§ 52-01 through 52-91	5
Water Code, Appendix, ch. 52, § 52-09	5
Water Code, Appendix, ch. 52, § 52-21	7
Constitutional Provisions	
U.S. Const., art. I, § 10	6
Cal. Const., art. I, § 9.....	6
Cal. Const., art. XII.....	5
Codes	
MCWD Code §§ 1.01-7.08 & Appendices	5
Regulations	
14 Cal. Code Regs., § 15378(a).....	2, 14
Commission Decisions	
D.94-04-088.....	7
D.94-07-064.....	7
D.96-01-011.....	7
D.09-12-017.....	13
D.10-12-016.....	5, 7
Commission Rules of Practice & Procedure	
Rule 12.1(d).....	1, 10, 15
Rule 12.2.....	1

I. INTRODUCTION

In accordance with Rule 12.2 of the Commission's Rules of Practice and Procedure, Marina Coast Water District ("MCWD") respectfully submits its Consolidated Comments on the Settling Parties' 1) Motion to Approve Settlement Agreement and 2) Motion to Approve Settlement Agreement on Plant Size and Operation, both of which were filed in this proceeding on July 31, 2013 (collectively, the "Settlement Motions"). MCWD participated in good faith in the discussion that led to the settlements, and supports the goal of achieving the settlement of contested applications. However, MCWD must at this time oppose approval of the two settlement agreements that were reached in this proceeding concerning the Monterey Peninsula Water Supply Project ("MPWSP"), on the legal basis that the settlements do not meet the criteria of Rule 12.1(d). MCWD's Comments opposing the Settlement Motions rest on what MCWD believes are fundamental legal deficiencies in the settlements. MCWD does not believe that there are contested material facts that are relevant to its grounds for opposing the Settlement Motions.

Three primary reasons prevent the Commission from finding at this time and on the record before it that the settlements are "reasonable in light of the whole record, consistent with law, and in the public interest." (Rule 12.1(d).) First, the proposal of the Applicant, the California-American Water Company ("Cal-Am"), to locate the MPWSP source wells on the CEMEX property north of the City of Marina would violate MCWD's rights under the 1996 Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands (Ex. MCD-6, executed March, 1996 by MCWD, the City of Marina, the Monterey County Water Resources Agency ("MCWRA"), the Armstrong Family and RMC Lonestar, the predecessor-in-interest to CEMEX, hereinafter the "1996 Annexation Agreement"), thereby

violating the constitutionally-guaranteed sanctity of the contract and unlawfully intruding into MCWD's service territory and regulatory authority, as well as violating related county pumping restrictions. Second, the MPWSP, as described in the agreements presented by the Settlement Motions and in the Application, does not appear to avoid exportation of groundwater from the Salinas Valley Groundwater Basin, which would violate section 21 of the Monterey County Water Resources Agency Act (Water Code, Appendix, ch. 52 (the "Agency Act")). Third, because the Commission's Subsequent Environmental Impact Report ("EIR") for the MPWSP has not yet been completed and because the Commission has not considered proffered evidence on environmental factors at a hearing, the Commission's granting of the Settlement Motions and the requested Certificate of Public Convenience and Necessity ("CPCN") at this time would constitute an impermissible and premature project approval, under the requirement of the Public Utilities Code that the Commission consider all relevant factors (Pub. Util. Code § 1002, subd. (a)), as well as the requirements of the California Environmental Quality Act ("CEQA") (Pub. Resources Code §§ 21065, 21100 (project approval requires the lead agency's certification of an environmental impact report); CEQA Guidelines, 14 Cal. Code Regs., § 15378(a) (a project evaluated under section 21065 of the Public Resources Code must include the "whole of an action" that will have an impact on the environment)). Neither the Commission nor any other public agency can approve a project that may have a significant impact on the environment without first engaging in such environmental review as is required by CEQA.

In short, three clear legal obstacles prevent the Commission's approval of the settlements, and thus the project: the 1996 Annexation Agreement; the Agency Act; and the lack of a certified final EIR for the MPWSP that permits examination of the "whole of [the]

action” and due consideration of evidence of environmental impacts. As MCWD will explain in greater detail below, while it is theoretically possible that time and a comprehensive final EIR that is favorable to the project and the settlements might resolve the third obstacle, the first two legal obstacles cannot be resolved under the current configuration of the MPWSP. Moreover, even the completion of a comprehensive, final, and certified EIR in the coming months – and before the Commission considers whether it will approve the settlements – may not cure the failure of a public agency to consider such an EIR before committing itself to a project approval. Absent revision of the proposed project configuration to address the first two issues, as well as a legally correct resolution of the third issue that would satisfy the requirements of the Public Utilities Code and CEQA, MCWD must respectfully request that the Commission deny both of the Settling Parties’ motions.

II. LEGAL DEFICIENCIES OF THE PROPOSED SETTLEMENTS

A. The MPWSP, if Approved and Implemented as Proposed, Would Violate the Pumping Restriction on the CEMEX Property and MCWD’s Exclusive Right to Serve the Property Under the 1996 Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands.

Cal-Am’s preferred configuration for the MPWSP places the source wells within an active sand-mining area on property of CEMEX, located north of the City of Marina. (Settlement Agreement, §§ 6.5, 10.2.) Secondary intake contingency options for the MPWSP permit Cal-Am’s consideration of different intake well locations, if the CEMEX location proves legally or technically infeasible. (*Id.*, § 10.2.) Pursuant to the 1996 Annexation Agreement among MCWRA, MCWD, CEMEX’s predecessor-in-interest, and others (Ex. MCD-6), pumping on the CEMEX property is limited to 500 acre-feet per year (“AFY”), for use only to provide water to the CEMEX property. (Ex. MCD-6, 1996

Annexation Agreement, §§ 5.1.1.3, 7.2.) The Settlement Agreement on Plant Size and Operation (“Sizing Agreement”) places desalination production requirements for the MPWSP in a range up to 9,752 AFY. (Sizing Agreement, p. 4.) Calculating sourcewater intake requirements conservatively at roughly twice the volume of production yields a potential intake requirement of more than 19,500 AFY for the MPWSP project wells, some thirty-nine times the amount of water that may legally be drawn on the CEMEX property, for use only on the property.

The record in this proceeding includes intervenor testimony from MCWD which addresses the pumping restriction and MCWD’s exclusive right to serve the property, following annexation into the MCWRA zones of benefit and for purposes of protecting the Salinas Valley Groundwater Basin (“SVGB”). (Ex. MCD-1A, Revised Direct Testimony of Lloyd W. Lowrey, Jr., pp. 14-15; Ex. MCD-6, §§ 4.1, 4.4, 5.1.1.3, 7.) At the time for cross-examination of Mr. Lowrey during hearings on the Application, no party challenged MCWD’s understanding of either its rights under the 1996 Annexation Agreement or the existence of the pumping limitation, as set forth in Mr. Lowrey’s Revised Direct Testimony and the referenced exhibits and as modified by him on the witness stand on April 30, 2013.

Prior to the hearings, in response to Mr. Lowrey’s direct testimony concerning the pumping restriction on the CEMEX property, Cal-Am provided testimony stating that the MPWSP intake wells would instead be located on State Lands Commission property in the Monterey Bay National Marine Sanctuary (“MBNMS”), below the mean high tide line and seaward of the CEMEX property. (March 8, 2013 Rebuttal Testimony of Richard C. Svindland, pp. 2-3.) However, in response to input from federal and state agencies, Cal-Am has now moved the proposed well location out of the MBNMS, again proposing to locate the

MPWSP test well and possibly all source wells on the CEMEX property. (Settlement Agreement, § 6.5.) As far as MCWD is aware, none of Cal-Am, CEMEX or MCWRA has sought to modify or terminate any of the provisions of the 1996 Annexation Agreement that affect the CEMEX (fka Lonestar) property and MCWD's related rights.

The Constitution empowers the Commission to regulate public utilities. (Cal. Const., art. XII.) However, the Commission's regulatory powers do not extend to water rights. (D.10-12-016, p. 17 (considering and declining to interfere with state and local water agencies' jurisdiction, in granting a CPCN).) In Monterey County the Legislature has vested local regulatory power over surface and groundwater, including production and conservation, in MCWRA pursuant to the Agency Act. (Water Code, Appendix, ch. 52, § 52-09; *see also id.*, §§ 52-01 through 52-91.) Pursuant to Division 12 of the Water Code, MCWD is empowered to manage its own, smaller service area within Monterey County. (*See* Water Code §§ 30000-33901; MCWD Code §§ 1.01-7.08 and Appendices.) As noted above, the 1996 Annexation Agreement brought the CEMEX property within MCWD's regulatory territory, as part of MCWRA's performance of its statutory duty to preserve and protect the SVGB, including ongoing efforts to reverse seawater intrusion in the basin and particularly in the intruded area.

Because the MPWSP, as currently proposed, would require nearly forty times the amount of source water that may legally be drawn on the CEMEX property, operation of the project would violate the 500 AFY pumping restriction that the landowner agreed upon with MCWRA and MCWD, the bodies with regulatory authority over water use on the property, as well as interfering with MCWD's regulatory authority within its service territory. (Ex. MCD-6, 1996 Annexation Agreement, §§ 5.1.1.3, 7.2.) The project, as proposed, would

violate MCWD's exclusive right to provide water to the CEMEX property pursuant to the 1996 Annexation Agreement. (*Ibid.*) Therefore, the settlements that propose Cal-Am's implementation of the MPWSP as currently configured are not consistent with law.

In addition, the Settling Parties' proposal to have the Commission validate a state-approved intrusion into the 1996 Annexation Agreement would be in violation of both the state and federal constitutions, as it would plainly violate the prohibition against the State of California adopting a law that impairs the obligation of contract. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) The 1996 Annexation Agreement has been in effect some 17 years, and, like MCWRA, the Commission is constitutionally prohibited from modifying it now without the concurrence of all of the parties to the agreement.

Nor is it reasonable in light of the whole record to approve the settlements, where the record specifically indicates the Applicant's acknowledgement of the legal impediment to the current preferred configuration that is presented by the 1996 Annexation Agreement. (Ex. CA-21, Svindland Rebuttal Testimony, pp. 2-3, *citing* Lowrey Direct Testimony, p. 14; Ex. MCD-1A, Lowrey Revised Direct Testimony, pp. 14-15.) Moreover, in light of the whole record, MCWD maintains that it is not reasonable to prematurely agree upon a location for project source wells and grant a CPCN on that basis, when the Settling Parties simultaneously are agreeing to implement a plan for comprehensive hydrogeologic testing that could conclusively refute the technical feasibility of the preferred well location, even assuming *arguendo* that the use of that preferred well location were lawful. (Settlement Agreement, §§ 3.1(b); 5.)

In evaluating whether or not settlements are in the public interest, one of the factors the Commission has historically considered is whether or not the settlement is "consistent

with law.” (*In re Application of Southern California Edison* (Cal. P.U.C. 1996) 1996 Cal. PUC LEXIS 23 (“D.96-01-011”) at *33-34, *citing* D.94-04-088, slip op. at p. 8 (“we consider individual elements of the settlement in order to . . . assure that each element is consistent with our policy objectives and the law.”).) For example, in a decision issued prior to resolving proceeding R.88-08-018, *Order Instituting Rulemaking into Natural Gas Procurement and System Reliability Issues*, the Commission rejected a settlement as not in the public interest where not all settlement provisions were consistent with law, while recommending modifications that would render the settlement consistent with law. (D.94-04-088, slip. op.) Upon the parties’ subsequent modification of the proposed settlement, the Commission granted approval of the settlement in D.94-07-064. (*Order Instituting Rulemaking into Natural Gas Procurement and System Reliability Issues* (Cal. P.U.C. 1994) 1994 Cal. PUC LEXIS 976 (“D.94-07-064”) at *5-7.) Accordingly, unless the legal impediment to locating the MPWSP source wells on the CEMEX property can be resolved, it would be neither “in the public interest” nor “consistent with law” to approve the settlements in this case, or to grant the requested CPCN.

B. The MPWSP, if Approved and Implemented as Proposed, Would Appear to Violate the Agency Act’s Prohibition on Export of Groundwater from the Salinas Valley Groundwater Basin.

Section 21 of the Agency Act prohibits export of groundwater from the SVGB. (Water Code, Appendix, ch. 52, § 52-21.) The Commission’s decision approving settlement of Cal-Am’s prior application for the Regional Desalination Project acknowledged the need to comply with this legal requirement. (D.10-12-016 at Finding of Fact 79 (“Because the source water cannot be exported from the Salinas Valley, this factor becomes a critical component . . .”) and Conclusion of Law 11 (“Pursuant to the Agency Act, no groundwater

from the Salinas Basin may be exported for use outside the basin . . . and MCWRA may obtain an injunctive relief from the court prohibiting the exportation of such groundwater.”.)

The Application and Cal-Am’s supporting testimony are vague as to whether and how the MPWSP will return any groundwater that the project extracts to the basin. (Ex. CA-6, Svindland Direct Testimony, p. 26 (final selection of method of compliance to be based on outcome of EIR and engineering recommendations); 36 (Cal-Am will comply with the groundwater export prohibition “to the extent it applies”).) To date, Cal-Am’s only specific action toward compliance with the Agency Act prohibition on groundwater export has been to support MCWRA’s conduct of a groundwater monitoring program. (See Ex. CA-12, Svindland Supplemental Testimony, p. 7.) During hearings on the Application, Cal-Am’s witnesses indicated that the preferred approach might be to return groundwater to the SVGB by sending desalinated water to the Castroville Seawater Intrusion Project (“C-SIP”), although they admitted there could be feasibility issues related to seasonal availability of capacity and demand for that option. (See Ex. CA-12, Supplemental Testimony of Richard Svindland, Attachment 11, p. 8 (describing only the methods to be utilized during “irrigation season”).) Thus, it is not at all clear that C-SIP return could provide a year-round workable solution to ensure Agency Act compliance.

Neither of the Settlement Motions, nor the settlement agreements themselves, refer to this legal requirement, let alone set forth any concrete plan for compliance with it. The *only* mention of the groundwater export prohibition is a passing reference in one of the attachments to the Settlement Motions – in the “Definitions” section of the agreement among Cal-Am, the Monterey Peninsula Regional Water Authority, and the Monterey Peninsula Water Management District to form the MPWSP Governance Committee – to “facilities that

may be required to prevent export” of SVGB water. (Settlement Agreement, Appendix 1, § 2.H.)

As noted above in section II.A., the Sizing Agreement calls for production of desalinated water in a volume of up to 9,752 AFY. (Sizing Agreement, p. 4, *citing* Ex. CA-12, Svindland Supplemental Testimony, Attachment 1, p. 5.) However, as Mr. Svindland confirmed during cross-examination and as reflected in the same source document, the 9,752 AFY figure does not include the additional estimated 875 AFY of desalinated water that will likely be required to be returned to the SVGB in order for Cal-Am to maintain the project’s compliance with the Agency Act prohibition on groundwater exportation. (Ex. CA-12, Svindland Supplemental Testimony, Attachment 1, p. 5.) The MPWSP, in the preferred configuration proposed in the Settlement Motions and for the desalination plant sizing options contemplated in the Sizing Agreement, appears to have abandoned any practical attempt to plan for compliance with the groundwater export prohibition, either by providing for a sufficient volume of production or a feasible mechanism for conveyance of product water to the basin. Notably, several of the Settling Parties have conditioned their support for the MPWSP upon the outcome of hydrogeologic testing which could bear upon the project’s ability to avoid exporting groundwater. (Settlement Agreement, § 3.1(b).) These parties have reserved “all rights to challenge production of water” from the SVGB. (*Ibid.*) Indeed, MCWD fails to see how the Commission can declare the MPWSP to be feasible, let alone required by the present or future public convenience and necessity, or declare the proposed settlements to be consistent with the requirements of Rule 12.1(d), until after the hydrogeologic testing is completed with favorable results.

Because there is no provision for compliance with the prohibition on export of groundwater from the SVGB, the Settlement Motions appear to advocate Commission approval of and grant of a CPCN for a project that would not be consistent with law. The likely violation of the Agency Act's prohibition on export of groundwater would also work against the public interest, to the detriment of MCWD and all of the SVGB users of groundwater that have worked so diligently for so many years and at great expense to protect the basin. (Ex. MCD-1A, Revised Direct Testimony of Lloyd W. Lowrey, Jr., pp. 3, 7-10, 13-15, and exhibits there referenced.) In addition, because the voluminous record in this Application fails to demonstrate the Applicant's commitment to a concrete, feasible mechanism for the proposed project to achieve Agency Act compliance, MCWD maintains that the Commission cannot find the settlements reasonable at this time.

Therefore, until Cal-Am articulates a specific feasible mechanism for bringing the MPWSP into compliance with section 21 of the Agency Act, or at least a range of specific technically and legally feasible options for achieving compliance, the Commission cannot approve the Settlement Motions. (Rule 12.1(d) (settlements must be reasonable in light of the whole record, consistent with law and in the public interest).)

C. The Commission May Not Approve the Settlements, Approve the MPWSP, or Grant a Certificate of Public Convenience and Necessity Without a Record That Includes the Evaluation of Potential Environmental Impacts.

The Settlement Motions seek approval of two settlement agreements and the grant of a CPCN. (Motion to Approve Settlement Agreement, p. 2; Motion to Approve Settlement Agreement on Plant Size and Operation, p. 2.) The settlements require Cal-Am to undertake, in cooperation with the Salinas Valley Water Coalition, substantial hydrogeologic testing activities. (Settlement Agreement, § 5.) Presumably, information developed during the

agreed-upon hydrogeologic testing will also inform the Commission's environmental review of the MPWSP, to the extent that data is developed concerning the proposed project's potential significant effects on the environment. (Pub. Resources Code §§ 21068, 21100.)

Meanwhile, the MPWSP application is proceeding on two separate tracks, a CEQA compliance track and a CPCN track. According to the schedule set forth in the ALJ's May 30, 2013 Ruling After Evidentiary Hearings, the draft of the Commission's Subsequent EIR is due to be circulated for comment in February of 2014 and to be finalized in June of 2014. (May 30, 2013 Ruling, pp. 6-7.) Thus, the evidentiary hearings that were conducted in April and May of 2013 necessarily did not include much of the relevant environmental and technical information that may be elicited upon completion of environmental review. Indeed, much of the parties' cross-examination of Cal-Am's technical witnesses during the hearings was met by a representation that the answers would be revealed in the Commission's EIR.

Still, the Commission is required by law to consider and weigh the potential environmental impacts of the project in making its determination of whether or not its grant of a CPCN for the project is necessary and in the public interest. (Pub. Util. Code § 1002, subd. (a).) A CPCN determination must be made on the basis of all relevant factors. (*See Northern California Power Agency v. Public Utilities Com.* (1971) 5 Cal.3d 370, 378.) Impact, or influence, on the environment is a relevant factor to be considered at the CPCN hearing in determining whether the public convenience and necessity requires the construction of the project. (Pub. Util. Code § 1002, subd. (a).) As the Supreme Court stated the Commission's view in the *Northern California Power Agency* case:

Indeed, the answer of the Commission in this case . . . states: “When a hearing is requested under Section 1005 [of the Public Utilities Code], as in this case, the Commission will notice and hold a hearing, and may do so on its own motion, so that it may be apprised of any relevant factors bearing on the issue of public convenience and necessity. [Par.] Such factors include the effect on the environment”

(*Northern California Power Agency, supra*, 5 Cal.3d at p. 378; *see also Atlantic Refining Co. v. Public Service Com.* (1959) 360 U.S. 378, 391 (in determining “public convenience and necessity,” the decision-making agency is required to “evaluate all factors bearing on the public interest.”).) Thus, the Commission may not approve the settlements, the MPWSP and grant a CPCN unless it has conducted and considered all relevant environmental factors, including consideration of the parties’ positions in light of that review.

In this connection, under *Northern California Power Agency* and the Public Utilities Code, it appears clear that the parties have a right to have an evidentiary hearing on environmental issues before the Commission makes any CPCN or public interest determination.¹ It is hard to understand how the Commission can properly weigh all factors bearing on the public interest when it has allowed some factors to be the subject of testimony, evidence and cross-examination while immunizing environmental factors from the same level of evidentiary scrutiny. Parties will have been limited to commenting on the un-cross-examined and untested conclusions of Commission staff and consultants in the CEQA compliance track of this proceeding. In this case in which the Commission has made the now-final determination that a hearing is required, the record before the Commission

¹ MCWD’s request for modification of the schedule to permit hearings on environmental issues following completion of the Commission’s Subsequent EIR and its request for subpoenas to examine the Commission staff and consultants preparing the Subsequent EIR during hearings were both denied. (May 30, 2013 ALJ’s Ruling After Evidentiary Hearings, pp. 3-5 (modifying schedule to permit briefing after issuance of Draft EIR, but denying hearing on environmental issues); March 18, 2013 email ruling of ALJ Weatherford, memorialized in May 30, 2013 ALJ’s Ruling After Evidentiary Hearings, Attachment A at pp. 2-3 (denying request to examine).)

concerning one of the specific factors it *must* consider in granting a CPCN will be no more than a shallow paper record. Even if the dual-track approach separating CEQA review from public interest review satisfies CEQA, it cannot satisfy the Commission's duty to consider and weigh all relevant factors in the CPCN hearing under *Northern California Power Agency* and Public Utilities Code section 1002, subdivision (a).

Moreover, as above noted, CEQA does not permit the Commission, or any public agency, to approve a project in advance of certification of an EIR. (Pub. Resources Code §§ 21100, 21151 (project approval requires the lead agency's certification of an environmental impact report); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128-132. *See also, e.g.*, D.09-12-017, p. 20, *citing* Pub. Resources Code § 21082.1, subd. (c)(3) (lead agency must certify EIR for a project, reflecting its independent judgment).) In this case, EIR completion and certification is not expected until the summer of 2014, at the earliest. Accordingly, even without considering the Commission's duty to hold a CPCN hearing on the environmental impacts of the project, under CEQA the Commission cannot approve the settlements or grant the requested CPCN until such time as it has completed and certified its EIR.

In addition, the Settling Parties are requesting that the Commission treat the potential Groundwater Replenishment ("GWR") component of the proposed water supply that is being explored by other local agencies on the Monterey Peninsula as an entirely separate project. (Sizing Agreement, §§ 2, 3; Settlement Agreement, § 4. *See* Settling Parties' Motion to Bifurcate Proceeding, filed herein August 21, 2013.) MCWD is concerned that this approach could be contrary to the requirements of CEQA that an agency's environmental review encompass the entirety of a proposed project's potential impact on the environment. (*See*

CEQA Guidelines, Cal. Code Regs., tit. 14, § 15378(a) (a project evaluated under section 21065 of the Public Resources Code must include the “whole of an action” that will have an impact on the environment).) To the extent that the Settling Parties’ approach to GWR is a “piecemealing” of environmental review, if the Commission were to grant its approval, that would also constitute a violation of CEQA. (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370 citing *Laurel Heights Improvement Assn. v. Regents of University of Calif.* (1988) 47 Cal. 3d 376, 394 (“reasonably anticipated future projects” must be considered in conducting environmental review).) At a minimum, the GWR project’s own environmental review must be considered in the Commission EIR’s discussion of cumulative impacts for the MPWSP. (*Ibid.*)

Finally, the crucial question of what water rights, if any, would be required for Cal-Am to legally extract sourcewater for the MPWSP remains unanswered, because the project’s likely impacts on the SVGB are not yet known. As the recent opinion of the State Water Resources Control Board (“SWRCB”) solicited by and provided to the Commission concluded, “additional information is needed to accurately determine MPWSP impacts on current and future Basin conditions.” (July 31, 2013 SWRCB “Final Review of California American Water Company’s Monterey Peninsula Water Supply Project,” p. 50, available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_mpws/docs/cal_am_final_report.pdf.) The information that is needed may be forthcoming with conduct of the hydrogeologic testing and investigation that Cal-Am has agreed to complete in cooperation with the Salinas Valley Water Coalition. (Settlement Agreement, § 5.) Until it is determined whether or not extraction of MPWSP sourcewater is likely to cause injury to existing users of the SVGB, the question of Cal-Am’s ability lawfully to extract the project’s

sourcewater will remain unanswered and the “consisten[cy] with law” of the settlements cannot be determined.

Environmental review for the MPWSP, as well as the potential GWR component of the water supply project, is not yet completed and the potential effects of the project on the SVGB are not yet known. Therefore, the Commission may not, at this time and on the existing record, find the settlements to be reasonable, consistent with law or in the public interest and the Settlement Motions must be denied. (Rule 12.1(d).)

III. CONCLUSION

Because the MPWSP, as proposed by the Settling Parties, would 1) violate MCWD’s rights under the 1996 Annexation Agreement, 2) violate the Agency Act, and 3) proceed on an insufficient record without the completion of the environmental review required by CEQA and the evidentiary hearing exploring environmental factors required by the Public Utilities Code, the Settlement Motions seek approval of agreements that are not reasonable in light of the whole record, are not consistent with law, and are not in the public interest. The project configuration must be modified to avoid injury to MCWD and to comply with the Agency Act. The project’s potential environmental impacts must be thoroughly examined through the Commission’s completion, evaluation and certification of its Subsequent EIR, and its exploration of the environmental impacts of the project at a hearing, and the deficiencies noted above must be corrected. Only after CEQA review is completed can the public agency Settling Parties have a sound basis for joining the settlements and approving the project, and only after environmental review is completed and the Commission conducts its evidentiary hearing on environmental factors can the record be sufficient to support the proposed settlements, project approval and the grant of a CPCN under the Public Utilities Code. Even

assuming the environmental concerns noted above could be resolved, the Commission could only approve these or revised settlements *if* the MPWSP as described in the proposed settlements could be modified both so as to avoid injury to MCWD by using the CEMEX property for its source wells *and* to avoid illegally exporting groundwater from the Salinas Valley Groundwater Basin, *and* the Commission then determined that the modified settlements were reasonable, consistent with law and in the public interest.

Absent revisions to the MPWSP and the settlements that resolve the legal problems posed by the project's non-compliance with section 21 of the Agency Act and its placement of source wells on the CEMEX property, and absent the Commission's lawful resolution of the environmental review issues raised above, MCWD respectfully requests that the Commission deny both of the Settlement Motions.

DATED: August 30, 2013

Respectfully submitted,

FRIEDMAN & SPRINGWATER LLP

By: /s/ Mark Fogelman
Mark Fogelman
Ruth Stoner Muzzin
Attorneys for
MARINA COAST WATER DISTRICT