

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 COMMENTS ON THE PROPOSED
SETTLEMENT AGREEMENT ON PLANT SIZE AND LEVEL OF OPERATION**

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INTRODUCTION

Several parties to this proceeding have entered a Settlement Agreement on Plant Size and Level of Operation (the “Sizing Agreement”) and submitted it to the Commission for approval.¹ The parties to the Sizing Agreement have agreed that the total capacity of the desalination facility at the heart of the Monterey Peninsula Water Supply Project (“MPWSP”) and the related groundwater recharge (“GWR”) project, should be 9.6 million gallons per day.²

Pursuant to Rule 12.2, Surfrider Foundation contests the Sizing Agreement and requests that the Commission decline to approve it. Surfrider supports the MPWSP and believes that California-American Water (“CAW”) has proposed an appropriate means of providing the Monterey Peninsula with sufficient water supply while preventing further degradation of the Carmel River. Surfrider has therefore joined the separate settlement agreement, here called the “Main Agreement,” by which sixteen of the twenty parties to this proceeding agree—with certain qualifications—to support the granting of a certificate of convenience and necessity for the MPWSP.³

The Main Agreement, while supporting the approval of the MPWSP, does not resolve the capacity of the desalination facility. There are thus multiple versions of the MPWSP that could emerge from the Main Agreement. The Sizing Agreement, which proposes to select the specific version that will be built, fails to command the same

¹ See Settling Parties’ Motion to Approve Settlement Agreement on Plant Size and Operation (“Sizing Motion”).

² Sizing Agreement § 3.1.

³ Main Agreement § 3.1.

consensus as the Main Agreement. Only nine parties, a minority of the total, have joined it. And with good reason: under the Sizing Agreement, the desalination plant would be needlessly large and cause unjustifiable environmental impacts.

Under Rule 12.1(d), a settlement must be reasonable in light of the whole record, consistent with law, and in the public interest. It is the settling parties' burden to show that the Sizing Agreement meets these requirements. To do so, they would need demonstrate that, in light of the whole record, the Sizing Agreement would provide an MPWSP that minimizes its desalination components in order to provide a diversity of water sources while reducing environmental impacts to the greatest extent possible. The record, however, shows that the Sizing Agreement would result in a plant that is too large.

The Sizing Agreement may have the superficial appeal of expedience. The Commission, however, should not be rushed into a decision regarding the MPWSP. Nor should the Commission allow the applicant or other parties to create an atmosphere of urgency because of the State Water Resources Control Board's cease and desist order, especially when the Water Board found that CAW "implemented astonishingly few actions to reduce its unlawful diversion from the [Carmel R]iver" during the decade and a half before the order.⁴ Significantly, the Main Agreement makes clear that crucial questions regarding the desalination plant's size will not be answered until at least July 2015. There is plenty of time to resolve every issue these comments raise without

⁴ State Water Resources Control Board, Order WR 2009-0060 at 36-37 (included as Attachment 1 to Surfrider Foundation's concurrent Request for Official Notice) ("CDO").

delaying the MPWSP.

ARGUMENT

I. The Sizing Agreement is Flawed Because The Law and the Public Interest Require a Desalination Plant that Minimizes Environmental Impacts.

The Sizing Agreement falls short of the Commission's standards because it would produce a desalination plant that is out of scale to the problem it must solve. There are two fundamental goals that must be balanced in determining whether the MPWSP and its desalination plant are appropriately sized: the project's specific purpose and the environmental goals that govern every project in California.

The settling parties themselves acknowledge the MPWSP's purpose: "The purpose of the MPWSP is to replace a significant portion of the existing water supply from the Carmel River, as directed by the State Water Resources Control Board."⁵ Similarly, the Administrative Law Judge, in setting the scope for this proceeding, has determined that an appropriate, approvable MPWSP must be "a reasonable and prudent means of securing an adequate, reliable and cost-effective water supply that meets Cal-Am's legal requirements for the Monterey District."⁶ These statements of purpose are clear: The Water Board has ordered CAW to cease its illegal use of Carmel River water. The MPWSP should therefore make the Peninsula whole following CAW's compliance, by effectively meeting existing demand and allowing CAW to meet its existing obligations. There is no justification in this proceeding for the MPWSP to provide water beyond those needs.

⁵ Sizing Motion at 2.

⁶ Administrative Law Judge's Ruling After Evidentiary Hearings at 1-2 (May 20, 2013).

At the same time, the Legislature has explained that “[i]t is the policy of the state to . . . take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.”⁷ To advance this policy, agencies like this Commission must “ensure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions.”⁸

Thus, an MPWSP that is in the public interest and reasonable will balance the production of sufficient water to replace the Carmel River water while causing the least possible environmental impacts. The settling parties were poorly positioned to determine whether the Sizing Agreement achieved that balance, as the environmental impact report for the MPWSP will not be released for many more months.⁹ Indeed, it is impossible for the Sizing Agreement to be supported by the record until the record is actually complete, which will not occur until the release of the EIR, at the earliest.¹⁰

But even the existing record makes clear that the project’s most important and damaging impacts will increase with the size of the desalination component. Thus, the public interest demands a MPWSP that includes the smallest possible desalination plant while still meeting the goal of replacing Carmel River water. The Sizing Agreement does not achieve this balance. Instead it would produce a project with flaws on both sides: it would cause excessive impacts while failing to ensure the achievement of its own goals.

⁷ Pub. Res. Code § 21001(a).

⁸ *Id.* § 21001(d).

⁹ Administrative Law Judge’s Ruling After Evidentiary Hearings at 2, 7.

¹⁰ *Id.* at 4-5.

II. The MPWSP's Serious Environmental Impacts Will Increase With Plant Size.

The desalination plant's use of carbon-intensive energy and its concentrated brine discharge threaten significant environmental harm.

Greenhouse gas emission are a "significant and under-recognized cost" of utility activities.¹¹ The Commission has recognized that "[c]limate change is the pre-eminent environmental challenge of our time," and will have "significant local impacts," especially on coastal populations.¹²

Throughout this proceeding, CAW and other parties have recognized that desalinated water is more energy-intensive than other potential replacement water sources for the Monterey Peninsula.¹³ The resulting energy consumption is more carbon intensive and will create substantially more greenhouse gas emissions than producing equivalent amounts of locally recycled water or groundwater supplies.¹⁴ CAW has represented that other permitting agencies will require it to develop a Greenhouse Gas Reduction and Energy Minimization Plan for the desalination plant.¹⁵ But even with this requirement, the parties have uniformly acknowledged that desalinated will result in greater

¹¹ Policy Statement on Greenhouse Gas Performance Standards, at 1 (Oct. 6, 2005) (included as Attachment 2 to Surfrider Foundation's concurrent Request for Official Notice).

¹² Order Instituting Rulemaking to Consider Establishing California Institute for Climate Solutions, R 07-09-008, 2007 WL 2872466, *1-2.

¹³ Direct Testimony of Richard C. Svindland ("Svindland Testimony") at 32:22-26; Direct Testimony of David J. Stoldt ("Stoldt Testimony") at 12:22-13:2; DRA's Report on California-American Water Company's Application for the Monterey Peninsula Water Supply Project, A.12-04-019 ("DRA Report") at 3-21:7-9; Direct Testimony of James M. Brezack ("Brezack Testimony") at 6:1-13; Direct Testimony of Thomas Frutchey ("Frutchey Testimony") at 15:1-5

¹⁴ Transcript Vol. 1 34:19-28 (League of Women Voters Testimony).

¹⁵ Direct Testimony of Kevin Thomas at 5:26-6:12.

greenhouse gas emissions than water from recycled water projects, such as the GWR project.¹⁶

The desalination plant's discharge of concentrated brine threatens to negatively impact marine life as well. CAW's proposes to send brine to the Pollution Control Agency's existing effluent outfall,¹⁷ which discharges directly into the Monterey Bay National Marine Sanctuary.¹⁸ At times of the year, CAW will discharge undiluted brine into the marine sanctuary.¹⁹ Without adequate dilution and diffusion, brine—which is denser than ambient sea water—will settle and can pool on the seafloor.²⁰ This dense brine layer can limit oxygen flow, creating lethal hypoxic or anoxic zones along the seafloor.²¹ Simultaneously, the brine contains toxically high levels of salt and other chemicals.²²

Both brine and greenhouse gas impacts are directly correlated with the size and production of a desalination plant. The larger the plant, the larger its energy demand and its brine discharge.²³ Consequently, CAW has recognized that reducing the desalination plant's size yields positive externalities by reducing its greenhouse gas emissions and

¹⁶ Transcript Vol. 8 1296:7-12 (Minton Cross Examination), Vol. 8 1352:14-19 (Stoldt Cross Examination), Vol. 10 1698:22-28 (Burnett Cross Examination); Brezack Testimony at 6:1-15; Svindland Testimony at 32:24-26.

¹⁷ A-12-04-019 Application Attachment B at 1.

¹⁸ Stoldt Testimony at 13:11-13.

¹⁹ Testimony of Craig Jones ("Jones Testimony") at 3:4-9; Transcript Vol. 7 1217:24-1218:15 (Svindland Cross Examination).

²⁰ Jones Testimony at 4:1-13.

²¹ *Id.* Exhibit 1 at 9, 22.

²² *Id.* Exhibit 1 at 9.

²³ Svindland Testimony at 32; Transcript Vol. 6:922:16-923:13 (Svindland Cross Examination).

brine discharge.²⁴ Thus, the desalination component of the MPWSP must be as small as possible to minimize these environmental impacts while also serving the project's goals. A plant with a larger capacity than needed will produce environmental impacts out of balance with its public benefits. As explained below, the Sizing Agreement's proposed desalination plant is too large.

III. The Record Demonstrates that the Sizing Agreement Proposes a Desalination Plant That Is Unjustifiably Large.

As ALJ Weatherford reminded the parties at the close of evidentiary hearings, "all the major elements of the settlement" must be "supported by the whole record."²⁵ Here, however, the opposite is true: the record in this proceeding, including most importantly the testimony of the applicant's own experts, shows that the Sizing Agreement would create a desalination plant that exceeds the minimum size required to meet the MPWSP's goals. It overstates future demand by relying on factual assumptions that are unsupported or wholly contradicted by the record. It further ignores potentially complementary water sources that could serve some of that demand without the desalination plant's impacts. Moreover, the Sizing Agreement's approach to an important element of demand, legal lots of record, leaves the MPWSP potentially unable to fulfill its legal obligations even as it causes unjustified environmental impacts.

A. The Agreement Inflates Water Demand.

The Sizing Agreement begins its determination of the size of the desalination plant

²⁴ Transcript Vol. 6 923:28-924:8 (Svindland Cross Examination).

²⁵ *Id.* Vol. 12 2043:8-12.

with an estimate of the demand that CAW will need to meet.²⁶ This estimate, however, is inaccurate and unsupported by the record. It substantially overstates the present need for water within CAW's Monterey District by including 1,180 acre feet per year of demand for "lots of record" that may or may not actually use that water. It also completely fails to account for ratepayers' reaction to a potentially huge increase in water prices.²⁷ Finally, it includes demand for "Tourism Bounce Back" that is unsupported by the record.

These flaws lead inevitably to a proposed size for the desalination plant that is larger than necessary. As explained above, this Commission should approve the smallest plant that will fulfill its purpose of replacing inaccessible Carmel River water. The facility described in the Sizing Agreement is not that plant.

1. The Desalination Plant Should Not Include Capacity for Speculative Development.

CAW's demand estimates include 1,180 acre feet per year for "Lots of Record."²⁸ This is equivalent to about one mgd, over 10 percent of the capacity proposed in the Sizing Agreement. The Lots of Record are currently undeveloped or under-developed lots whose owners have the legal right to develop. CAW is mandated to serve each such lot with water if and when it is developed.²⁹

Surfrider does not dispute the existence of these lots, their owners' rights, or CAW's obligation. The desalination facility, however, with its specific purpose of

²⁶ Sizing Agreement § 3.1(a).

²⁷ *See id.*

²⁸ *Id.*

²⁹ Svindland Testimony at 38:5-7.

replacing the Carmel River water, is an inappropriate means of meeting that obligation. These proceedings, encompassing several iterations of the desalination project and the Carmel River hearings before the Water Board, demonstrate that water is a real constraint on development on the Monterey Peninsula. This desalination plant is a reasonable means of maintaining current levels of development and economic activity, but it should not be used as a way to ignore the region's existing constraints. It is too expensive and too environmentally damaging to be the water supply of the future, especially because it will necessarily impose these costs on all residents and water users, regardless of whether their use began in a time of relative abundance or at a time when constraints were clear. CAW must find another way to serve future users and include that source or sources in the MPWSP.

In addition to this problem, the Sizing Agreement leaves open the very real possibility that the plant will include far more water than is needed for the lots of record. It simply hazards an estimate of the demand associated with the lots of record that lacks support in the record. This proposal strays far from the goal of replacing the Carmel River water.

The capacity needed to meet CAW's obligations to the lots of record is equal to the lots' added demand over the life of the MPWSP. Since undeveloped and unchanged lots generate no new demand (and do not trigger CAW's obligation to serve), actual demand can be projected by estimating the acreage and land uses of the lots that are likely to be developed during that time period. From the record, however, it appears that CAW estimated demand based on the total acreage of the lots of record, not on a

projection of probable development. In other words, CAW seems to have estimated that every single lot within the incorporated cities would be developed and require water.³⁰ This approach completely ignores the Water Management District’s evidence that “not all legal lots are buildable.”³¹ The City of Pacific Grove, for example, has testified that it “is almost entirely built out, with 8,032 existing housing units [and] fewer than 100 vacant lots.”³² Pacific Grove’s testimony, in fact, notes numerous aspects of its growth potential that have been overestimated.³³ The Sizing Agreement ignores this evidence, just as it ignores the economic reality that not all buildable lots will be improved within the life of the desalination plant. Consequently, it does not provide for the project with the minimal necessary environmental impacts. Such a project would rely on a more rigorous, accurate estimate of CAW’s potential obligations and would not produce water, and impacts, beyond those needs.

Furthermore, the MPWSP set out in the Sizing Agreement does not actually meet CAW’s obligation to serve lots of record. It allocates water for the lots’ demand, but allows that water to be used for any purpose. As the record makes clear, nothing ties the “lots of record” water to those lots. The jurisdictions within the Monterey Peninsula Water Management District may allocate that water however they wish—to lots of record, to intensified use in existing development, or to new development outside of the

³⁰ Stoldt Testimony at 9:7-22.

³¹ *Id.* at 9:11.

³² Direct Testimony of Sarah Hardgrave (“Hardgrave Testimony”) at 4:12-13.

³³ *Id.*

lots of record.³⁴ Once water is allocated to one of those other uses, it will no longer be available to the lots of record. This will impair CAW's ability to meet its legal obligation to serve those lots.

The settling parties could have agreed to earmark the lots of record allocation for those lots.³⁵ The Sizing Agreement could, for example, provide capacity to meet the lots' potential demand, but allow CAW to use that capacity only when and to the extent that the Water Management District demonstrates that the water would be used to meet CAW's obligations to the lots of record. Instead, it does nothing to ensure that the capacity labeled "lots of record" will actually be used for that purpose. Thus, the MPWSP, under the Sizing Agreement, would provide a water supply that may or may not meet "Cal-Am's legal requirements." If the Water Management District and its constituent jurisdictions commit the water to other uses, then MPWSP will not allow CAW to meet its obligations. Those obligations, however, will remain, and will pressure CAW to soon expand the size of the plant or seek other water. Instead the Sizing Agreement proposes a project in which 10 percent of capacity (and potential environmental impacts) is essentially surplus water, which will not achieve the goals set out for the MPWSP by the ALJ, the State Board, and CAW itself. This Commission should not approve a project with that excess capacity, and therefore should not accept the Sizing Agreement.

³⁴ *Id.*; Transcript Vol. 9 1446:14-17 (cross-examination of Stoldt).

³⁵ Transcript Vol. 9 1447:9-15.

2. The Desalination Plant Should Not Include Capacity for Nonexistent Demand.

It is a truism of economics, well supported by the record, that in general demand falls when prices rise.³⁶ Although CAW has presented only limited evidence regarding the rate impact of the MPWSP, its expert testified that the MPWSP could increase water rates by up to 85 percent for some customers in the Monterey District.³⁷ CAW's own studies indicated that this price increase will lead to some reduction in demand.³⁸ Despite this evidence, the Sizing Agreement assumes that ratepayers will not respond at all to this price jump.³⁹ Instead, it assumes that demand will stay at its current level into the future. The record, as one would expect, demonstrates that per capita demand will shrink; the Sizing Agreement thus overstates demand and proposes an overbuilt project.

CAW's expert Patrick Pilz presented testimony describing a series of studies of Monterey ratepayers' price elasticity—the degree to which their demand responds to price changes. Economists describe demand as elastic when a price increase creates a large change in customer's demand, and demand as inelastic when the same increase would create a relatively small change in demand.⁴⁰ But with both elastic and inelastic demand, customers water usage should change in response to a price change. Thus, although the experts found that demand was inelastic, they determined that demand would respond to a price increase—that is, they showed that ratepayers will reduce their

³⁶ Supplemental Direct Testimony of Patrick Pilz (“Pilz Supplemental”), Attachment 2 at 3.

³⁷ Direct Testimony of David P. Stephenson at 43:3-16, Attachment 8.

³⁸ Pilz Supplemental at 6:20-23, 7:23-27, Attachment 2 at 10-11, Attachment 3, Attachment 4.

³⁹ See Sizing Agreement § 3.

⁴⁰ Transcript Vol. 4 584:8-20 (Pilz Cross Examination).

water use when rates increase.⁴¹

CAW nevertheless decided not to account for elasticity in its sizing proposal, even though CAW's consultants stated that demand would drop in response to a price increase.⁴² On cross examination, Mr. Pilz clarified that regardless of whether demand were elastic or inelastic, CAW's experts predicted that demand would shrink in response to price increases.⁴³ The experts further recognized that calculating elasticity was better than not doing so.⁴⁴ But CAW ignored such calculations and experts' findings—it failed to incorporate *any* elasticity assumptions into its demand calculation.⁴⁵ The Sizing Agreement repeats this failure.⁴⁶

The record is clear that demand will go down once the public faces rates that include the costs of the MPWSP. The Sizing Agreement assumes this reduction away and proposes a project with capacity to meet more demand that will actually exist. This capacity is entirely needless and offers only excess cost and environmental impact, without any corresponding advancement of the project's goals. The Sizing Agreement relies on an assumption that is both irrational and undermined by clear evidence in the record. It is therefore unreasonable in light of the record, contrary to the public interest, and inconsistent with the state's fundamental environmental policy.

⁴¹ See Pilz Supplemental Attachment 1 at 10, Attachment 2 at 10-11, Attachment 3, Attachment 4; Transcript Vol. 4 587:28-588:28 (Pilz Cross Examination).

⁴² Pilz Supplemental at 10:2-7.

⁴³ Transcript Vol. 4 590:12-21 (Pilz Cross Examination).

⁴⁴ *Id.* Vol. 4 593:2-15.

⁴⁵ *Id.* Vol. 4 604:5-11.

⁴⁶ See Sizing Agreement § 3.

3. The Plant's Capacity Should not be Based on Demand Projections Lacking Support in the Record.

The Sizing Agreement also includes capacity to produce 500 annual acre-feet for “tourism bounceback.” Total demand in the Monterey District has decreased since 2007.⁴⁷ The agreement assumes that some part of this decrease is due to the depression of tourism business following the 2008 economic downturn. The “tourism bounceback” capacity is added to current demand in order to provide water for this business to return to its pre-downturn level.⁴⁸

Some such capacity may be appropriate, but there is no support in the record for the 500 afy provided under the Sizing Agreement. CAW's testimony simply asserts this figure. The Water Management District's testimony provides an outline of a method for determining the needed capacity, but this method does not result in 500 afy: “the difference between water use in the commercial sector in the year 2000, when visitor-serving occupancy rates were considered robust, and the average of the past three years is 440 AFY.”⁴⁹ This method likely inflates the reduction in demand by comparing current usage to usage at the peak of the dotcom bubble, but nonetheless results demand that is less than the bounce back number in the Sizing Agreement.

Moreover, the reduction in demand since 2007 includes some decreases due to conservation measures imposed pursuant to the Water Board's cease-and-desist order.⁵⁰

⁴⁷ Svindland Supplemental, Attachment 1 at 3.

⁴⁸ Svindland Supplemental at 4:20-24.

⁴⁹ Stoldt Testimony at 9.

⁵⁰ CDO at 10, 62.

The desalination plant should not include capacity to reverse such gains in conservation. Because there is no evidence supporting the claim that the tourism bounceback estimate is accurate and excludes demand reductions from conservation, the Sizing Agreement is not reasonable in light of the entire record.

B. The Agreement Ignores Available Sources of Water Supply.

On August 29, 2012, ALJ Weatherford directed CAW “to seriously consider in good faith” any public agency proposal for participation in the MPWSP.⁵¹ In response to this ruling, the City of Pacific Grove presented a proposal for three local water projects.⁵² Combined, these projects could produce hundreds of acre feet per year of non-potable water (the City has suggested that *each* project could produce up to 500 acre feet per year⁵³). The projects would provide a one-for-one offset for MPWSP water that would otherwise be used for irrigation. Within Pacific Grove itself, the local projects will replace at least 125 acre feet per year of irrigation potable water.⁵⁴ The City notes that with other water agreements in place, the projects “could offset existing potable water usage at the upper end of their potential capacity.”⁵⁵ Such offsets would directly advance conservation by reducing the demand for desalinated water, and thus, brine discharge and greenhouse gas emissions.⁵⁶ Moreover, the projects would advance statewide recycled

⁵¹ Administrative Law Judge’s Directives to Applicant and Ruling on Motions Concerning Scope, Schedule and Official Notice at 16.

⁵² Brezack Testimony Exhibit PG-7.

⁵³ Notice of Ex Parte Communications of City of Pacific Grove at 2 (Nov. 20, 2012).

⁵⁴ Brezack Testimony at 5:11-15.

⁵⁵ Notice of Ex Parte Communications of City of Pacific Grove at 2.

⁵⁶ Brezack Testimony at 17:9-12, Exhibit PG-5; Transcript Vol. 8 1298:24-1299:2 (Minton Cross

water policies.⁵⁷

Despite this evidence and the requirement to give good faith consideration to public participation proposals, the Sizing Agreement fails to integrate Pacific Grove’s projects into the plant’s size or operation level. The Sizing Agreement merely pays lip service to these projects, acknowledging that they could replace potable water used for irrigation but making no effort to include them in the MPWSP.⁵⁸

The record is clear that Pacific Grove’s projects can directly reduce the size of the desalination plant, reduce the plant’s operation level, or a combination of the two.⁵⁹ At the very least, the projects’ minimum potable water offset—125 acre foot per year—should directly reduce the size of the desalination plant by that amount.

CAW has labeled the projects “speculative” to justify their omission from the desalination plant sizing calculation.⁶⁰ Contrary to this contention, Pacific Grove has presented detailed evidence about the design and operation of these projects.⁶¹ The record further shows that the local projects have fewer permitting hurdles than the MPWSP.⁶² Thus, the projects’ completion timeframe is shorter than those of the desalination plant and GWR, both of which are included in the Sizing Agreement.⁶³ In fact, two of Pacific

Examination).

⁵⁷ Hardgrave Testimony at 9:19-14:2.

⁵⁸ Sizing Agreement § 4.

⁵⁹ Brezack Testimony at 6:9-12, 17:9-12; Frutchey Testimony at 10:13-16.

⁶⁰ Supplemental Testimony of Richard C. Svindland (“Svindland Supplemental”) at 5:17-6:2.

⁶¹ *See, e.g.*, Brezack Testimony at 6:19-13:12.

⁶² Frutchey Testimony at 10:20.

⁶³ *See* Sizing Agreement § 3(c).

Grove's projects will be complete by October 2014.⁶⁴ In contrast, the earliest that the desalination plant will be online is December 2017,⁶⁵ and the Commission might not make a decision on the GWR project until July 2015.⁶⁶ Moreover, CAW will not have reached a "decision point" on the desalination plant's sizing before July 2015, well after the completion of the Pacific Grove projects. CAW will have ample time to incorporate Pacific Grove's projects into its sizing calculation.⁶⁷ In short, if CAW can adjust the desalination plant's size to account for GWR, it can do the same for the Pacific Grove projects.

Moreover, even if CAW were unable to adjust the desalination plant's size, the Pacific Grove projects could reduce the plant's level of operation, regardless of its overall capacity. Both CAW and the City of Pacific Grove have not only acknowledged that such a reduction in operations is possible, but pointed out that it would increase the MPWSP's reliability.⁶⁸ (Under the Sizing Agreement, the plant would regularly operate at 95% capacity, leaving little margin for demand spikes or equipment failures.⁶⁹) The Sizing Agreement, however, makes no commitment to such reductions.

In light of this record, it is unreasonable for the Sizing Agreement to omit the Pacific Grove projects. To advance the public interest, the MPWSP must size the

⁶⁴ Brezack Testimony at 13:23-14:15.

⁶⁵ Svindland Supplemental at 6:9-12.

⁶⁶ See Settling Parties' Motion to Bifurcate Proceeding at 10 (August 21, 2013).

⁶⁷ *Id.* at 9.

⁶⁸ Svindland Supplemental at 5:17-6:2; Frutchev; Transcript Vol. 6 994:2-12 (Svindland Cross Examination).

⁶⁹ Rebuttal Testimony of Richard C. Svindland ("Svindland Rebuttal") at 16:17-21.

desalination plant so that it accommodates these projects and/or commit to reduce plant operation levels for each acre foot of potable water that is offset by supply from the Pacific Grove projects.

Similarly, the Sizing Agreement fails to ensure that “Table 13” water rights will reduce plant operations. The State Water Resources Control Board has issued a draft permit to allow CAW to divert up to an additional 1,488 acre feet per year from the Carmel River basin (“Table 13” rights).⁷⁰ Although these water rights might be unavailable in dry years, CAW has stated that Table 13 water can directly reduce the desalination plant’s operations.⁷¹

The settling parties’ motion claims that if Table 13 water rights are available, the parties agree that CAW “*will* lower the operating level of the plant or use those rights first in the year” or save other rights for emergencies later in the year.⁷² In fact, the Sizing Agreement makes no such commitment. Instead, CAW has merely agreed that it “*shall be able to* lower the operating level of the desalination plant,” but has no obligation to do so.⁷³ The Sizing Agreement fails to make a commitment that CAW says is feasible, that its signatories purport to support, and that would reduce the MPWSP’s impacts with no harm to its ability to meet its goal. Without such a commitment, the Sizing Agreement is

⁷⁰ See State Water Resources Control Board, Notice of Application 30215A and Draft Permit for Diversion and Use of Water (Sept. 12, 2012) (included as Attachment 3 to Surfrider Foundation’s concurrent Request for Official Notice). Section 5 of the Sizing Agreement refers to a draft permit, published January 29, 2013, that is not in the record of this proceeding. Searches have found the draft permit dated September 6, 2012, but none more recent.

⁷¹ Svindland Rebuttal at 13:23-14:15.

⁷² Sizing Motion at 4 (emphasis added).

⁷³ Sizing Agreement § 5.3 (emphasis added).

unreasonable, contrary to the public interest, and inconsistent with California's statutory mandate to minimize environmental impacts.

CONCLUSION

For all of these reasons, Surfrider Foundation respectfully urges the Commission to reject the Sizing Agreement. The settling parties have not carried their burden; the Commission should therefore make an independent determination of the appropriate size of the desalination component of the MPWSP and impose appropriate conditions to ensure that the project advances the public interest and meets the relevant environmental mandates. Without the EIR, the record is incomplete and cannot support the Sizing Agreement. If the Commission determines that the record will be insufficient to support the agreement even after the EIR's release, the Commission should direct further evidentiary hearings at the earliest reasonable date. The Commission's determination could require further evidence on topics including, but not limited to: (1) the amount of water that lots of record are reasonably likely to demand, (2) the expected demand from tourism bounce back, (3) how customer demand in each tier will change in response to the rate increases that the MPWSP will cause, and (4) how much potable water the Pacific Grove projects will offset. The current schedule for this proceeding, which includes briefing in April and May of 2014⁷⁴ and proposed evidentiary hearings regarding GWR in February 2015,⁷⁵ could easily accommodate such hearings.

⁷⁴ Administrative Law Judge's Ruling After Evidentiary Hearings at 7.

⁷⁵ Settling Parties' Motion to Bifurcate Proceeding at 10.

DATED: August 30, 2013

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