

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



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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.

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

**CALIFORNIA-AMERICAN WATER COMPANY'S REPLY COMMENTS IN  
SUPPORT OF MOTIONS TO APPROVE BOTH THE GENERAL SETTLEMENT  
AGREEMENT AS WELL AS THE SETTLEMENT AGREEMENT  
ON PLANT SIZE AND OPERATION**

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**I. INTRODUCTION**

Pursuant to Rule 12.2 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure,<sup>1</sup> California-American Water Company ("CAW") provides these reply comments regarding two settlement agreements between numerous parties to this proceeding, which were submitted via motion on July 31, 2013. The first, titled "Settlement Agreement," was entered by sixteen parties<sup>2</sup> and is referred to hereafter as the "Large Settlement Agreement." The second, titled "Settlement Agreement on Plant Size and Level of Operation," was entered by nine parties<sup>3</sup> and is referred to hereafter as the "Sizing Agreement." In these reply comments, CAW has consolidated its responses (hereafter "Consolidated Reply

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<sup>1</sup> Unless otherwise stated, all further references to "Rules" are to the Commission's Rules of Practice and Procedure.

<sup>2</sup> CAW, Citizens for Public Water, City of Pacific Grove, Coalition of Peninsula Businesses, County of Monterey, Division of Ratepayer Advocates, Landwatch Monterey County, Monterey County Farm Bureau, Monterey County Water Resources Agency, Monterey Peninsula Regional Water Authority, Monterey Peninsula Water Management District, Monterey Regional Water Pollution Control Agency, Planning and Conservation League Foundation, Salinas Valley Water Coalition, Sierra Club, and Surfrider.

<sup>3</sup> CAW, Citizens for Public Water, City of Pacific Grove, Coalition of Peninsula Businesses, Division of Ratepayer Advocates ("DRA"), Monterey Peninsula Regional Water Authority, Monterey Peninsula Water Management District, Monterey Regional Water Pollution Control Agency, and Planning and Conservation League Foundation.

Comments”) to the comments submitted by the following four parties: Surfrider Foundation (“Surfrider”) which served comments on the Sizing Agreement; and Marina Coast Water District (“MCWD”), Public Trust Alliance (“PTA”), and Water Plus, all of which served comments on both settlement agreements.<sup>4</sup>

## **II. DISCUSSION**

### **A. Surfrider’s Comments Should Be Disregarded**

Surfrider’s comments regarding the Sizing Agreement lose sight of the fact CAW must have water to provide adequate, efficient, and reasonable service to customers in its Monterey County service area. The parties to the Sizing Agreement agreed that the desalination plant would be sized at 9.6 million gallons per day (“mgd”) without water from the Groundwater Replacement (“GWR”) Project, or at either 6.9 mgd with 3,000 acre feet per year (“afy”) from the GWR Project or at 6.4 mgd with 3,500 afy of water from the GWR Project.<sup>5</sup> While CAW is mindful of the possible environmental issues associated with desalination, it must also comply with the State Water Resources Control Board’s direct order to find an alternative to water currently obtained from the Carmel River and CAW’s obligation to maintain adequate supply for the customers in its service area.

Surfrider criticizes the Sizing Agreement for including water for lots of record, for allegedly ignoring possible reduced usage in response to rate increases, and for including water for the eventual bounce-back of tourism in Monterey. The recommendations in Surfrider’s comments, however, would put unreasonable constraints on CAW’s ability to provide adequate and efficient water service to its customers. Moreover, Surfrider’s comments ignore the scope of this proceeding pending before the Commission. Its comments also seek to micromanage both

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<sup>4</sup> Water Plus’s comments on the Sizing Agreement were not served until at the earliest September 9, 2013, well after the deadline for timely service.

<sup>5</sup> *Settling Parties’ Motion to Approve Settlement Agreement on Plant Size and Operation* (“Sizing Agreement Motion”), Attachment A, *Settlement Agreement on Plant Size and Level of Operation, Entered by the Following Parties: California-American Water Company, Citizens for Public Water, City of Pacific Grove, Coalition of Peninsula Businesses, Division of Ratepayer Advocates, Monterey Peninsula Regional Water Authority, Monterey Peninsula Water Management District, Monterey Regional Water Pollution Control Agency, and Planning And Conservation League Foundation*, filed July 31, 2013 (“Sizing Agreement”), § 2.3, p. 2.

CAW's operations far into the future as well as the ability of local cities and agencies to make land use decisions. Surfrider's comments, therefore, are inappropriate and unreasonable. On the other hand, the Sizing Agreement is reasonable in light of the whole record, consistent with law, and in the public interest, so it should be approved by the Commission.

**1. CAW Must Have an Adequate Water Supply for its Customers**

Despite Surfrider's allegations, the parties to the Sizing Agreement are not recommending an over-sized desalination plant. To the contrary, the desalination plant is relatively small based on the forecasted demand. As CAW's Vice President of Engineering Richard Svindland explained, the Monterey Peninsula Water Supply Project ("MPWSP") plant design is sized "on the razor's edge."<sup>6</sup> It is common in the water industry to plan for a water supply project to run at approximately forty to fifty percent of capacity based on forecasted demand.<sup>7</sup> The current plan calls for the MPWSP desalination plant to run at ninety-five percent capacity.<sup>8</sup> While there are multiple safeguards in place to ensure that CAW will be able to operate safely at this higher capacity, it is important to keep this factor in mind when evaluating Surfrider's request for a *smaller* desalination plant.

If the Commission directed CAW to reduce the size of the desalination plant portion of the MPWSP, as Surfrider recommends, that could negatively impact customers. Mr. Svindland explained:

Water plants are designed and ultimately sized to meet the daily needs of its customers. In order to meet customer needs we must produce enough water to maintain at least 30 pounds per square inch (psi) of pressure at all points in the system during high demands periods regardless of the location within the system. During a fire we are allowed to drop to 20 psi as the minimum pressure at any point in the water system. The reason for this minimum pressure requirement is to insure that no backflow or siphoning occurs within the system that could bring in unsafe or contaminated water. If the plant is sized too small and demands cannot be met, additional rationing measures would need to be taken to insure demand is reduced and pressures maintained. An option would be to continue to pull from the Carmel River but this would involve the illegal use of water and potential take of threatened species which carries considerable fines and

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<sup>6</sup> RT 994:21-996:20 (Svindland/CAW).

<sup>7</sup> RT 995:10-14 (Svindland/CAW).

<sup>8</sup> RT 996:13-15 (Svindland/CAW).

penalties.<sup>9</sup>

To the extent that demand decreases more than predicted, or the tourism bounce-back takes longer than expected, or additional water is available due to other projects or Table 13 water rights and that water is not needed for another use,<sup>10</sup> CAW may be able to reduce the operational capacity of the desalination plant, with the possibility for reduced operational costs and other benefits.<sup>11</sup> As DRA testified at the evidentiary hearings, it will also provide CAW with much-needed operational flexibility to meet its obligation to its customers.<sup>12</sup>

## **2. Consistent with Its Duty to Serve, CAW Must Be Able to Provide Water to Lots of Record**

In arguing that CAW should not serve lots of record using water from the MPWSP desalination plant, Surfrider is recommending that CAW *not* honor its duty to serve customers in the Monterey County District, in violation of Section 451 of the California Public Utilities Code. A utility may not abandon its duty to serve the customers in its certificated service area.<sup>13</sup> CAW has a legal obligation to provide water service within its certificated service area, in this case, the Monterey County District. Customers – and would-be customers – within the area have a right to demand service without prejudice or discrimination, and the utility must, upon demand, provide service. According to the California Public Utilities Code:

No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.<sup>14</sup>

According to the Commission, “a public service utility cannot choose its own customers, but must serve all who comply with its reasonable rules and regulations.”<sup>15</sup> Surfrider’s proposal

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<sup>9</sup> CA-6, *Direct Testimony of Richard C. Svindland*, dated April 23, 2012 (“Svindland Direct”), p. 21.

<sup>10</sup> For instance, any additional water could be used to replenish water taken from the Seaside Basin for the benefit of the Basin.

<sup>11</sup> RT 995:26-996:1 (Svindland/CAW).

<sup>12</sup> RT 1981:22 - 1982:14 (Rose/DRA).

<sup>13</sup> D.12-03-025, *Application of Golden Hills Sanitation Company (U438SWR) for Authority to Increase Rates Charged for Sewer Service by \$ 148,076 or 120% in January 2012, \$ 148,076 or 54% in January 2013, and \$ 148,076 or 35% in January 2014*, 2012 Cal. PUC LEXIS 608, \*10

<sup>14</sup> Pub. Util. Code §453(a).

<sup>15</sup> D.89003, *Complaint of Eugene S. Williams v. C. Wesley Bird (WesmltonWater System) for reconnection of*

would subject these customers to a disadvantage, in violation of the California Public Utilities Code. Surfrider’s recommendation would run afoul of CAW’s obligations and unfairly prejudice customers with lots of record.

Moreover, Surfrider mischaracterizes as “essentially surplus water” the estimated 1,181 afy of water for service to lots of record factored into the sizing of the desalination plant.<sup>16</sup> Rather than being “surplus,” however, provision of water for lots of record has been a key part of developing the water supply solution since at least the 1970’s.<sup>17</sup> Lots of record are not just vacant lots to which CAW may choose not to serve water. Following the issuance of a water permit, CAW must set a meter and provide service to the lots of record within its certificated service area, and they “may include vacant lots on vacant parcels, vacant lots on improved parcels, and remodels on existing improved, non-vacant parcels.”<sup>18</sup> The calculations for the size of the MPWSP desalination plant utilize the estimated demand for lots of record from the Environmental Impact Report for the Regional Desalination Project, which the Commission certified in D.09-12-017.<sup>19</sup> Although it is difficult to predict exactly how the lots of record will be developed,<sup>20</sup> those calculations provide a reasonable figure for estimating the demand for lots of record when determining the size of the MPWSP desalination plant.

At the evidentiary hearing, Fred Keeley, who represented the Monterey Bay Area in the California State Assembly from 1996 to 2002, discussed AB 1182, which in 1998 directed the

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*second water connection granted*, 1978 Cal. PUC LEXIS 230, \*\*9-10, citing *Citizens Utility Co. v Superior Court* (1963) 59 C 2d 805, 811.

<sup>16</sup> *Surfrider Foundation’s Comments on the Proposed Settlement Agreement on Plant Size and Level of Operation*, filed August 30, 2013 (“Surfrider Comments”), p. 12.

<sup>17</sup> See, e.g., D.86807, *California-American Water Co. Ordered to Modify Its Rule 11-A to Reflect an Increased Allocation of 25 Gallons of Water per Day in Its Water-Rationing Program for Single-Family Households Where Only One Person Resides*, 81 CPUC 204, 1977 Cal. PUC LEXIS 849, at pp. \*84-\*85, \*120-124 (Cal.P.U.C. 1977); D.87715, 82 CPUC 408, 1977 Cal. PUC LEXIS 779, at pp. \*5-\*11 (Cal.P.U.C. 1977). These Decisions in C.9530 recognized that property owners had the right to expect their needs to be met even though water was in short supply due to system constraints and a drought in the 1970’s.

<sup>18</sup> WD-5, *Direct Testimony of David J. Stoldt*, dated February 22, 2013 (“Stoldt Direct”), p. 9.

<sup>19</sup> D.09-12-017, *In the Matter of the Application of California-American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates*, 2009 Cal. PUC LEXIS 764, \*\*11-12, 34, Ordering ¶ 1; A.04-019, Reference Exhibit B, Final Environmental Report, dated October 30, 2009, Section 2.3.2.2.

<sup>20</sup> See WD-5, Stoldt Direct, p. 9.

Commission to help develop a long-term contingency plan to address Monterey's water supply needs. Mr. Keeley testified that satisfaction of the water demands for lots of record was part and parcel of the intent of AB 1182.<sup>21</sup> Mr. Keeley explained the process:

[T]here were multiple issues put on the table. One that was very big and ended up being resolved was the issue of whether the solution was sized as part of the problem solving. Was it trying to solve the problem of build-out of the general plans and zoning designations or build-out of lots of record? And there were months of debate on that question. And ultimately the final agreement that the parties reached was lots of record.<sup>22</sup>

In addition to the fact that service to lots of record has long been contemplated as part of a replacement water supply for Monterey, Surfrider ignores that the purpose of the proceeding was to determine the water supply project size needed to serve legally required water. On April 1, 2013, the assigned Administrative Law Judge ("ALJ") modified the scope of this proceeding in order to explicitly address the need for the MPWSP to allow CAW to meet its legal obligations, which include providing service to lots of record.<sup>23</sup> Where the original scope of consideration for the MPWSP was limited to "replacement water" for the Monterey County District, the ALJ clarified the scope of the proceeding to include "a water supply that meets Cal-Am's *legal requirements* for the Monterey District."<sup>24</sup> Since CAW is legally required to provide service to lots of record, Surfrider's claims that sizing the desalination plant to serve them is beyond the scope of the project or this proceeding are utterly without merit.

Although Surfrider "does not dispute the existence of these lots, their owners' rights, or CAW's obligation" to serve them, Surfrider nonetheless still argues that water from the desalination plant should not be provided to these customers.<sup>25</sup> Surfrider's position conflicts with the Commission's policy and Section 451 of the California Public Utilities Code, which require a utility to serve customers within its certificated area.

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<sup>21</sup> RT 964:22-26 (Keeley/PCLF).

<sup>22</sup> RT 964:11-21 (Keeley/PCLF).

<sup>23</sup> See *Administrative Law Judge's Ruling After Evidentiary Hearings*, filed May 30, 2013 (memorializing and confirming previous email rulings).

<sup>24</sup> *Id.*, Attachment A, pp. 2-3.

<sup>25</sup> Surfrider Comments, pp. 9-10.

Moreover the record does not support Surfrider’s attempt to control the land use and development process for the Monterey area through this proceeding. The Sizing Agreement provides for a separate process for the local agencies affected by the MPWSP to address the allocation of water for lots of record.<sup>26</sup> Surfrider’s suggestion that CAW, the other parties to the Sizing Agreement, or the Commission curtail the local agencies' authority to make land use decisions<sup>27</sup> is inappropriate and well beyond the scope of this proceeding. Surfrider’s comments, therefore, should be disregarded and the Sizing Agreement approved.

**3. The Proposed Sizes for the MPWSP in the Sizing Agreement are Prudent Based Upon Current Demand in the Monterey County District**

Contrary to Surfrider’s allegations, the Sizing Agreement is reasonable in light of the record on the issue of demand. Based upon the current projections for demand in the Monterey County District, which are supported by the expert studies and other evidence in this proceeding,<sup>28</sup> there is no need to adjust the proposed size of the MPWSP. Surfrider criticizes the parties to the Sizing Agreement for not reducing the proposed size of the MPWSP to account for the possibility of slightly reduced usage in reaction to rate increases. Surfrider claims “the Sizing Agreement assumes that ratepayers will not respond at all” to rate increases.<sup>29</sup> Surfrider’s claims lacks any evidentiary support. The record shows that CAW analyzed the currently available data, and, based upon what is known today about demand in Monterey, the MPWSP is prudently sized. While there will likely be fluctuation in usage, no one can predict the ultimate reaction of customers. Based upon expert testimony and the data currently available, the record shows that possible changes (including any reductions or increases) in demand would not be significant enough to affect the proposed size of the MPWSP.

As part of the process in determining the proposed size for the desalination plant, CAW

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<sup>26</sup> Sizing Agreement, § 2.6, p. 2.

<sup>27</sup> Surfrider Comments, p. 12.

<sup>28</sup> CA-10, *Supplemental Direct Testimony of Patrick Pilz*, dated January 11, 2013 (“Pilz Direct”), pp. 5-7, Attachment 1, *Monterey Demand Price Elasticity Study* (“Zetland Study”), p. 10; Attachment 2, *Monterey Demand Evaluation and Elasticity Study* (“Chestnutt Study”), p. 4; and Attachment 3, *Business Economic Analysis and Research* (“Paris Study”).

<sup>29</sup> Surfrider Comments, p. 13.

commissioned three separate studies on the issue of elasticity of demand in Monterey, and also ran its own analysis of recent data on demand.<sup>30</sup> Rather than ignore the issue of elasticity, as Surfrider's comments imply has been done,<sup>31</sup> CAW expended significant resources to determine whether demand in Monterey would be elastic enough to justify a change in the proposed size of the MPWSP. Unable to cite to evidence supporting its position, Surfrider resorts to mischaracterizing the testimony of CAW's witness and the results of the multiple studies commissioned by CAW on this issue. Surfrider cites the testimony of Patrick Pilz, CAW's manager of conservation and efficiencies, but mischaracterizes certain portions of his testimony and ignores others. For instance, Surfrider inaccurately states that Mr. Pilz testified that "CAW's consultants stated that demand *would* drop in response to a price increase."<sup>32</sup> In the portion of the transcript cited, Mr. Pilz acknowledges that one of the consultants' tables showed that it was *possible* that demand in certain tiers in Monterey *might* drop slightly in response to a price increase.<sup>33</sup> Surfrider ignores, however, Mr. Pilz's testimony that these same tables show that the *possible* changes in use for the first three tiers, which comprise roughly 85 percent of overall usage in Monterey, are relatively minor.<sup>34</sup> Moreover, Surfrider ignored Mr. Pilz's unrefuted testimony that the studies showed that any possible changes in demand due to increased rates would be so minor that the sizing should not be changed based upon current projections for Monterey.<sup>35</sup>

One of the factors affecting demand is the extent to which consumers are able to significantly reduce their usage in the face of higher prices. In its discussion about the possibility of reduced usage, Surfrider failed to mention that the average residential water use in the Monterey County District is already *less than half* of that in Santa Cruz, San Francisco, Los

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<sup>30</sup> CA-10, Pilz Direct, pp. 5-7, Attachment 1, Zetland Study, p. 10; Attachment 2, Chestnutt Study, p. 4; and Attachment 3, Paris Study.

<sup>31</sup> Surfrider Comments, pp. 13-14.

<sup>32</sup> Surfrider Comments, p. 14 (emphasis provided).

<sup>33</sup> RT 590:12-21 (Pilz/CAW), referring to CA-10, Pilz Direct, Attachment 4.

<sup>34</sup> RT 610:20 – 611:24 (Pilz/CAW).

<sup>35</sup> RT 585:17-27 (Pilz/CAW), referring to CA-10, Pilz Direct, pp. 5-7, Attachment 1, Zetland Study, p. 10; Attachment 2, Chestnutt Study, p. 4; and Attachment 3, Paris Study.

Angeles and other areas.<sup>36</sup> It is because of the long-standing conservation efforts by CAW and its customers that the effect of price on demand for water is limited.<sup>37</sup> One of the authors of the studies, Dr. Chesnutt, concluded, “[t]he historical implementation of conserving technologies will reduce future response of customers to rate increases.”<sup>38</sup>

Surfrider notes that one of the CAW studies acknowledged that there may be some benefit to calculating elasticity.<sup>39</sup> While this may be true in some circumstances, it is less applicable to the process of determining the proposed size of the MPWSP. The issue is not whether there is a possibility of any changes in demand due to increased rates, but whether it is likely that increased rates would reduce demand to such a significant extent that it would justify reducing the proposed size of the MPWSP. The record shows that any forecasted fluctuations in demand are not significant enough to affect the plant size.<sup>40</sup>

Contrary to Surfrider’s claims,<sup>41</sup> CAW did not ignore the calculations and findings of experts. The fact that CAW and the other eight parties to the Sizing Agreement did not include an elasticity factor in developing the proposed size of the MPWSP is not a “failure,” as Surfrider argues. The Sizing Agreement is fully supported by multiple studies on the projected demand in Monterey based upon current data. As such, there is no justification for reducing the proposed size of the MPWSP. Indeed, Surfrider’s proposal would imprudently require CAW to construct desalination facilities at a size which is known to be inadequate, with untenable results for the Monterey County District and increased costs for customers.

#### **4. Water for a Tourism Bounce-Back Is Vital for Monterey**

Finally, the Sizing Agreement is consistent with the Commission’s findings that water for a tourism bounce-back is vital for Monterey. In D.10-12-016, the Commission recognized the devastating economic consequences that would befall the Monterey community if CAW is

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<sup>36</sup> CA-10, Pilz Direct, Attachment 1, Table 4, p. 6.

<sup>37</sup> See also MPWMD Regulation XV and MPWMD’s Ordinance 92 (planning and implementing conservation rules applicable to the Monterey Peninsula).

<sup>38</sup> CA-10, Pilz Direct, Attachment 2, p. 3.

<sup>39</sup> Surfrider Comments, p. 14; see CA-10, Pilz Direct, Attachment 1, p. 10.

<sup>40</sup> RT 1591:11-23 (Svindland/CAW).

<sup>41</sup> Surfrider Comments, p. 14.

unable to develop a replacement water supply.<sup>42</sup> Tourism is the main economic driver in the Monterey area. Mr. Zimmerman, on behalf of the Coalition of Peninsula Businesses, testified: “The tourism is a primary business on the Monterey Peninsula; it's a \$2 billion business; it is the primary employer on the Peninsula.”<sup>43</sup>

Tourism was one of the hardest hit areas in the recent economic downturn. As the economy improves, tourism in the Monterey area is expected to return to former levels. This creates the need to include a tourism “bounce-back” amount in the forecasted demand, as Mr. Svindland explained:

The tourism industry pointed to recent reductions in their occupancy rates that will come back and since they are existing customers, the use of a 5 year historical average may not reflect their true demand.<sup>44</sup>

Surfrider’s comments imply that the hospitality industry did not pursue significant conservation measures until the State Water Resources Control Board issued the CDO.<sup>45</sup> To the contrary, CAW has worked with the Monterey hospitality industry for nearly two decades to take strong measures to reduce consumption. Mr. Zimmerman testified:

We've been working to conserve water for -- ever since this problem, the water issues, came up, I don't think you'll find an industry that has done more to conserve water and to alter its operations: the low flow; eliminating landscaping; you know, not serving water; laundry facilities. We've done about as much as we can do.<sup>46</sup>

This is consistent with the studies commissioned by CAW. Indeed, one of CAW’s demand experts observed:

The saturation of conservation devices on the Monterey Peninsula is high because of the years of active programs implemented, as a result of water conservation plumbing and energy codes over the past 20 years.<sup>47</sup>

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<sup>42</sup> D.10-12-016, *In the Matter of the Application of California-American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates*, 2010 Cal. PUC LEXIS 548 (“D.10-12-016, 2010 Cal. PUC LEXIS 548”), \*450.

<sup>43</sup> RT 1321:17-20 (Zimmerman/CPB).

<sup>44</sup> CA-12, *Supplemental Direct Testimony of Richard C. Svindland*, dated January 11, 2013 (“Svindland Supplemental”) p. 4.

<sup>45</sup> Surfrider Comments, p. 15.

<sup>46</sup> RT 1325:17-24 (Zimmerman/CPB).

<sup>47</sup> CA-10, Pilz Direct, Attachment 2, p. 3.

Thus, even when Monterey tourism rates were more robust, many commercial businesses had already implemented significant conservation measures. Surfrider’s concern that the tourism bounce-back did not adequately account for conservation measures is unfounded.

CAW developed its estimate for the tourism bounce-back through discussions with the hospitality industry and by comparing usage prior to the economic downturn with more recent averages.<sup>48</sup> As Mr. Svindland noted, these are existing CAW customers that it has an obligation to serve. Given the importance of tourism to the local economy, CAW would be doing its customers – and the Monterey region as a whole – a disservice if it did not include adequate provisions for this industry in determining the size of the desalination plant.

### **5. CAW Must Be Able to Maintain Operational Flexibility**

In addition to trying to use this proceeding to tie the hands of local land use officials, as discussed above, Surfrider also tries to micromanage CAW’s operations for decades to come. In its comments on the possibility of water from proposed Pacific Grove local projects and “Table 13” water rights, Surfrider urges the Commission to limit CAW’s ability to use this water to meet the needs of its customers.

It is difficult to predict at this time whether water from the Pacific Grove local projects will be available to CAW or whether the existence of such water would allow CAW to reduce its operating capacity.<sup>49</sup> The availability of water from “Table 13” water rights is similarly speculative, since it is not available in dry years.<sup>50</sup> Surfrider criticizes the parties to the Sizing Agreement for not *requiring* CAW to use possible water from these two sources to reduce the operating capacity of the MPWSP desalination plant.<sup>51</sup>

Such a requirement was not included for good reason: it would hinder CAW’s ability to provide adequate and efficient service to its customers. In many instances, the best use of water from Pacific Gove local projects or Table 13 water rights (to the extent available) may be to

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<sup>48</sup> CA-12, Svindland Supplemental, Attachment 1, p. 4; *see also* WD-5, Stoldt Direct, p. 9.

<sup>49</sup> CA-21, Svindland Rebuttal, p. 16.

<sup>50</sup> CA-21, Svindland Rebuttal, p. 14.

<sup>51</sup> Surfrider Comments, pp. 16-20.

reduce the operating capacity of the desalination plant.<sup>52</sup> However, it is possible that CAW may need to use that capacity to provide emergency service or to meet a currently unforeseen need of its customer base. The California Public Utilities Code obligates CAW – not Surfrider – to provide water to customers in the Monterey County District.<sup>53</sup> As such, the decision as to how to operate the desalination plant should be in the hands of CAW, not Surfrider.

## **B. Reply to MCWD’s Comments**

In its comments, MCWD advances several theories in support of its contention that CAW’s proposed MPWSP and the Settlement Agreements in support of the MPWSP should not be approved by the Commission. These Consolidated Reply Comments address each of the contentions raised in MCWD’s comments. For the reasons set forth below, the Commission should reject MCWD’s Comments, and grant the motions seeking approval of the Large Settlement Agreement and the Sizing Agreement, as requested by CAW and the other parties to those agreements.

### **1. The Proposed MPWSP Does Not Implicate or Violate the 1996 Annexation Agreement for the Lonestar (CEMEX) Property**

MCWD, Monterey County Water Resources Agency (“MCWRA”), J.G. Armstrong Family Members, and RMC Lonestar (“Lonestar”) entered into an agreement in 1996 to, among other things, annex the Lonestar property (now owned by CEMEX) to the MCWD and to MCWRA Zones 2 and 2A (“Annexation Agreement”). CAW’s current source water proposal for the MPWSP contemplates development of slant wells under Monterey Bay, with the well heads to be located on the CEMEX property (“Property”). The CEMEX Property has not been annexed to the MCWD or MCWRA, and currently is not located within the geographic boundary of the MCWD.

The Annexation Agreement states, in pertinent part: “Commencing on the effective date of

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<sup>52</sup> The Commission should *not* consider such water, to the extent such water becomes available, for purposes of determining the size of the MPWSP.

<sup>53</sup> Pub. Util. Code § 451.

this Agreement and Framework, Lonestar shall limit withdrawal and use of groundwater from the Basin to Lonestar's historical use of 500 afy of groundwater."<sup>54</sup> Following annexation of the Lonestar Property to MCWD (and MCRWA), which has not yet occurred, the 500 afy limitation also will apply to MCWD to the extent that MCWD increases withdrawals from the SVGB to supply water to the property.

If the Lonestar property has been annexed to the Zones, the other Parties will cooperate on MCWD's increased withdrawal of up to 500 afy from the Basin, on the condition that such withdrawals shall be used only to provide water to the Lonestar property, and, to the extent that such water is requested and accepted by Lonestar, such use shall in its entirety be applied to the satisfaction of Lonestar's entitlement under paragraph 7.2 of this Agreement and Framework.<sup>55</sup>

According to the terms of the Annexation Agreement, section 7.3, the "actual annexation" of the Lonestar/ CEMEX property to the MCWRA Zones 2 and 2A "will not take effect until the Lonestar Property has been approved for prior or concurrent annexation into MCWD. When such approval has been obtained, Lonestar shall notify MCWRA, and the MCWRA Board of Supervisors shall declare by resolution the effective date of the annexation."<sup>56</sup> MCWD cites to no evidence or resolution confirming that the annexation has gone into effect or that the CEMEX Property has been properly annexed to the MCWRA or MCWD. CAW is not aware that any such approvals have been made.

Moreover, it is not clear that the source of feed water to be accessed by the proposed MPWSP slant wells is even subject to the Annexation Agreement or within MCWRA Zones 2 and 2A by virtue of the Annexation Agreement. As noted in the State Water Resources Control Board's *Final Report on Analysis of Monterey Peninsula Water Supply Project Proposed in Application 12-04-019 by California American Water Company*, dated July 31, 2013 ("SWRCB Report"):<sup>57</sup>

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<sup>54</sup> Annexation Agreement at ¶ 7.2.

<sup>55</sup> *Id.* at ¶ 5.1.1.3.

<sup>56</sup> *Id.* at ¶ 7.3.

<sup>57</sup> Available at

<[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/caw\\_mpws/docs/cal\\_am\\_final\\_report.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_mpws/docs/cal_am_final_report.pdf)> (as of September 12, 2013).

The applicability of the Agency Act to the MPWSP is unclear. As currently proposed, the project would use slanted wells and have screened intervals located seaward from the beach. Although the project would serve areas within the territory of the MPWSP, the points of diversion for these proposed wells may be located outside the territory of MCWRA as defined in the Agency Act. (See Section 4 of the Agency Act, Stats. 1990, ch. 1159, West's Ann.Wat.Appen., §§ 52-4 (1999 ed.); Gov. Code § 23127 [defining boundaries as following the shore of the Pacific Ocean].)<sup>58</sup>

Besides this uncertainty, the Annexation Agreement is in any event inapplicable to the MPWSP. The Annexation Agreement does not address or consider the potential development of feed water in the vicinity of the Property as contemplated by the MPWSP, and therefore does not act to limit or affect the MPWSP. The Annexation Agreement speaks only to the manner in which the property owner or MCWD may develop groundwater from the Salinas Valley Groundwater Basin ("SVGB") for the use on the Property. Paragraph 15 of the Annexation Agreement states that the Annexation Agreement "and all of the terms, covenants, agreements and conditions . . . shall inure to the benefit of and be binding upon the successors and assigns of the parties."<sup>59</sup> The Annexation Agreement does not – and cannot – bind the MPWSP, as CAW is not a successor or assignee to the Agreement.

Paragraph 7.2 provides that Lonestar (or its successors or assignees) may pump up to 500 afy of groundwater for overlying use on the Lonestar property. The provision was intended to recognize and protect Lonestar's overlying groundwater rights for use on the Property.<sup>60</sup>

It is well-settled law in California that non-overlying water users may develop water from or upon overlying property for use on non-overlying lands, provided other legal users of water are not unreasonably injured by such development:

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<sup>58</sup> SWRCB Report, p. 39, fn. 58. Notwithstanding this legal uncertainty, CAW has been working closely with the MCWRA, its representatives, and representatives of other parties including SVGB water users, to ensure the MPWSP is developed and carried out so as not to negatively impact the SVGB, consistent with the purposes of the MCWRA Act.

<sup>59</sup> *Id.* at ¶ 15.

<sup>60</sup> See, Annexation Agreement, ¶¶ 5.1.1.3 [referring to the limitations as "*Lonestar's* entitlement" (emphasis added)]; 7.2 [*Lonestar* shall limit withdrawal" (emphasis added)]; Executive Summary [*Lonestar* will limit its pumping to its current use of 500 afy" (emphasis added)].

Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority. Any water not needed for the reasonable and beneficial uses of those having prior rights is excess or surplus water. In California, surplus water may rightfully be appropriated on privately owned land for non-overlying uses, such as devotion to a public use or exportation beyond the basin or watershed.<sup>61</sup>

The Annexation Agreement must be interpreted with these principles and with the Constitutional mandate requiring maximum beneficial use of the State's water resources, as discussed below.

From purely a policy perspective, the MPWSP does not violate the main purpose of the Annexation Agreement, which was to ensure a water supply for the CEMEX Property in a manner that does not exacerbate seawater intrusion or negatively affect the SVGB and its groundwater users. As the Commission is well-aware, the MPWSP has been designed with these objectives in mind.

Finally, MCWD appears to argue that because its attorney, Mr. Lloyd Lowery, offered his legal interpretation of the Annexation Agreement at the Commission's evidentiary hearings on the MPWSP, and the other Parties did not object to admission of Mr. Lowery's testimony, then the Commission must accept Mr. Lowery's interpretation as binding in this proceeding. This argument is obviously without merit. First, CAW objected to Mr. Lowery's "testimony" as offering legal opinion on the subject of the Annexation Agreement, which the ALJ allowed CAW to address in its legal briefings.<sup>62</sup>

Second, it is well established law that the opinions and arguments of counsel with respect to the meaning or scope of an agreement do not constitute evidence. Unless the interpretation of a contract turns on the credibility of extrinsic evidence, that interpretation is a question of law (i.e., a judicial function) and not a question of fact.<sup>63</sup> Here, the interpretation of the Annexation

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<sup>61</sup> *Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925-926.

<sup>62</sup> *California-American Water Company Motion to Strike the Testimony of Lloyd W. Lowery, JR. Submitted on Behalf of the Marina Coast Water District and Request for Expedited Treatment*, filed February 26, 2013, Appendix B, p. 2; RT 1824:1-4 (ALJ Weatherford).

<sup>63</sup> *Sierra Vista Regional Medical Center v. Bonta'* (2003) 107 Cal. App. 4th 237, 245 ["The interpretation of a

Agreement does not turn on the credibility of extrinsic evidence; the interpretation of the Agreement is solely a question of law for the administrative law judge to determine. Even assuming that MCWD’s counsel’s opinions were proper for consideration, they are not relevant to the interpretation of the Annexation Agreement; it is axiomatic that “[s]tatements and arguments of counsel are not evidence.”<sup>64</sup> Thus, counsel’s opinion about the Annexation Agreement offered during the evidentiary proceedings was not competent evidence appropriate for consideration, and should not be considered binding on the Commission.

## **2. The Proposed MPWSP Does Not Affect or Infringe Upon Any Authority of the MCWD**

MCWD’s Comments suggest that the MPWSP, and in particular the operation of the proposed slant wells on the CEMEX property, would interfere with the “regulatory” authority of MCWD. This argument is misplaced. MCWD is a county water district established under the County Water District Law (Water Code section 30000 *et seq.*), and as such MCWD does not possess any authority – express or implied – to “regulate” non-District groundwater extraction and use. MCWD’s authority extends only to regulation of its own water supply, and not to regulation of groundwater more generally.

The authority of a county water district to adopt rules, regulations and ordinances is related only to the water that the district supplies, and not to water that may be developed by third parties within the district:

A district shall have the power to restrict the use of *district water* during any emergency caused by drought, or other threatened or existing water shortage, and to prohibit the wastage of *district water* or the use of *district water* during such periods, for any purpose other than household uses or such other restricted uses as may be determined to be necessary by the district and may prohibit use of *such water* during such periods for specific uses which the district may from time to

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contract is a question of law unless the interpretation turns on the credibility of extrinsic evidence”]; *De Guere v. Universal City Studios* (1997) 56 Cal. App. 4th 482, 501 [“It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence”].

<sup>64</sup> *Gdowski v. Gdowski* (2009) 175 Cal. App. 4th 128, 139, citing *People v. Richardson* (2008) 43 Cal.4th 959, 1004; *People v. Lucas* (1995) 12 Cal.4th 415, 474.

time find to be nonessential.<sup>65</sup>

MCWD points to no authority in the County Water District Law that would authorize MCWD to regulate the source water wells for the MPWSP, whether those wells are located within the MCWD or not.

MCWD's own 2010 Urban Water Management Plan acknowledges that MCWD does not possess or exercise authority to regulate private groundwater extraction and use within the MCWD:

***Two regional water management agencies have jurisdiction over groundwater production in the vicinity of MCWD.*** The MCWRA is responsible for regulation and supply of water from the Salinas groundwater basin, which is MCWD's source of water supply. The Salinas Valley Groundwater Basin has not been adjudicated. The Monterey Peninsula Water Management District (MPWMD) is responsible for regulation and supply of water from the Seaside Groundwater Basin, which was formally adjudicated in 2006. These two basins are adjacent to each other under Ord Community lands. ***MCWD recognizes the jurisdiction of the two regional groundwater management entities, and so has not independently developed a groundwater management plan pursuant to Water Code § 10750.***<sup>66</sup>

The authority to regulate or manage groundwater extraction and use in California is generally not extended to limited-purpose agencies and water service providers such as the MCWD. The authority to regulate or manage groundwater is typically vested in (1) cities and counties, which possess the authority to regulate groundwater extraction and use under the municipal police power; (2) "watermasters," which are sometimes appointed by the courts to oversee a groundwater basin adjudication consistent with a court-imposed decree or judgment; (3) special groundwater management agencies, which may be formed by the Legislature pursuant

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<sup>65</sup> Wat. Code § 31026 [emphasis added]; see also, *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal. App. 3d 404 [water district's authority to adopt rules and regulations extends to district's supply, not water developed by third parties within the district].

<sup>66</sup> MCWD 2010 Urban Water Mgmt. Plan, § 4.2.2 [emphasis added], available at <[http://www.mcwd.org/docs/engr\\_files/MCWD%202010%20UWMP.PDF](http://www.mcwd.org/docs/engr_files/MCWD%202010%20UWMP.PDF)> (as of September 12, 2013); see also, California Department of Water Resources, *Groundwater Management in California* (1999), p. 18 [MCWD does not regulate groundwater within its water service area], available at <<http://www.water.ca.gov/publications/browse.cfm?display=topic&pub=120,125,226>> (as of September 12, 2013).

to specific legislation for the specific purpose of managing or regulating groundwater resources [the MCWRA is an example of such an agency]; (4) local agencies specifically granted statutory authority to exercise some forms of groundwater management; and, to a limited extent, (5) groundwater management entities formed pursuant to Water Code section 10750 *et seq.*, which provides a systematic procedure for groundwater management within a defined area.<sup>67</sup>

Non-statutory authorities for local groundwater regulation by cities and counties are founded on the municipal police power, derived from a provision of the California Constitution, which extends only to cities and counties.<sup>68</sup> MCWD is not a county or city and thus does not possess general police powers pursuant to which it can lawfully regulate groundwater extraction. The SVGB has not been adjudicated, and MCWD has not been established as a watermaster for the SVGB with authority to regulate groundwater extraction and use, even within the MCWD water service area. MCWD is not a groundwater management district with specific statutory authority to adopt ordinances regulating groundwater extraction and use.<sup>69</sup> MCWD has not developed and adopted a groundwater management plan pursuant to Water Code section 10750.<sup>70</sup> In short, MCWD simply cannot point to any basis of legal authority to regulate private groundwater extraction and use within its service area.

MCWD's comments also cite MCWD "code provisions" that purport to regulate non-District groundwater wells and groundwater use.<sup>71</sup> Such code provisions, to the extent MCWD

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<sup>67</sup> See e.g., DWR Water Facts No. 8: Groundwater Management in California (August 2000); this document can be found at <[http://www.waterplan.water.ca.gov/docs/meeting\\_materials/caucus/2012.08.22/water\\_facts\\_8\\_Six\\_Methods\\_for\\_GWM.pdf](http://www.waterplan.water.ca.gov/docs/meeting_materials/caucus/2012.08.22/water_facts_8_Six_Methods_for_GWM.pdf)> (as of September 12, 2013).

<sup>68</sup> See *Baldwin v. County of Tehama* (1994) 31 Cal.App.4<sup>th</sup> 166 [finding that the field of groundwater use is within the municipal police power set forth in art. XI, § 7 of the California Constitution]; Article XI, section 7 of the California Constitution states "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws" (emphasis added); *In re Maas* (1933) 219 Cal. 422 [general police powers under former art. XI, § 11 of the California Constitution (similar to current art. XI, § 7) allow county to adopt groundwater conservation ordinances].

<sup>69</sup> The 1996 Annexation Agreement cannot, as MCWD's Comments suggests, vest MCWD with groundwater management or regulatory authority vested in the MCWRA.

<sup>70</sup> MCWD 2010 Urban Water Mgmt. Plan, § 4.2.2.

<sup>71</sup> See e.g., MCWD Code, §§ 3.32.010-3.32.070; these code provisions can be viewed at <[http://www.mcwd.org/docs/mcwd\\_codes/Title\\_3\\_\\_WATER\\_SERVICE\\_SYSTEM.pdf](http://www.mcwd.org/docs/mcwd_codes/Title_3__WATER_SERVICE_SYSTEM.pdf)> (as of September 12, 2013).

would interpret them to authorize regulation of the MPWSP, are ultra vires and void:

***An agency that exceeds the scope of its statutory authority acts ultra vires and the act is void.*** (See *Turlock Irrigation Dist. v. Hetrick* (1999) 71 Cal.App.4th 948, 951 [84 Cal. Rptr. 2d 175].) For example, an irrigation district's attempt to provide natural gas service was held ultra vires because the statutes governing the district limited it to providing water, electricity, and drainage. (*Ibid.*) Similarly, contracts entered into by a district that exceeded the scope of its power were void. (*Allen v. Hussey* (1950) 101 Cal.App.2d 457, 472 [225 P.2d 674].) Thus, ***under the ultra vires doctrine conduct by an agency lacking authority to engage in that conduct is void.***<sup>72</sup>

As such, the Commission should disregard MCWD's claim that the operation of the proposed slant wells on the CEMEX property would somehow interfere with the "regulatory" authority of MCWD.

### **3. The Proposed MPWSP Does Not Affect or Violate any Rights or Obligations of MCWD to Provide Water Service within MCWD's Territory, Including the CEMEX Property**

MCWD separately argues that the MPWSP would violate MCWD's exclusive right to serve the CEMEX property. This argument, like the other arguments raised in MCWD's Comments, confuses the issue of water development with that of water service, and is without merit. As noted above, MCWD is not the water purveyor or water supplier for the CEMEX Property, as CEMEX has never requested annexation to the MCWD and the Local Agency Formation Commission has not approved annexation of the CEMEX Property to MCWD.

Even if MCWD were the purveyor to the CEMEX property, nothing in the record for this proceeding suggests that CAW proposes to provide water service to the CEMEX property or to any other properties in MCWD's service territory. Moreover, the MPWSP does not intend to utilize the water allocation or water rights recognition that was assigned to the Lonestar (CEMEX) property under the 1996 Annexation Agreement. The proposed MPWSP does not in any manner affect the rights and obligations that CEMEX may have inherited from Lonestar

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<sup>72</sup> *Water Replenishment Dist. of Southern California v. City of Cerritos* (2012) 202 Cal. App. 4th 1063 (emphasis added); see also, *Lamere v. Superior Court* (2005) 131 Cal.App.4th 1059, 1066 fn 4 (an agency that acts outside of the scope of its statutory authority acts ultra vires and the act is void).

under the Annexation Agreement, nor does the Project affect any rights or obligations of MCWD under that Agreement. MCWD's Comments do not identify any facts or legal justifications for the assertion that the MPWSP would interfere with MCWD's right to provide water service for use by CEMEX on the CEMEX property. Thus, MCWD's comments should be disregarded.

**4. The Proposed MPWSP Is Consistent with the Monterey County Water Resources Agency Act, Including Section 21 Thereof**

MCWD's comments suggest that the MPWSP is inconsistent with Section 21 of the Monterey County Water Resources Agency Act. MCWD's comments misconstrue Section 21 of the Agency Act, the Agency Act at large, and the provisions in the Large Settlement Agreement relating to the extraction of brackish water from the SVGB. MCWD fully supported a similar solution for return of water to the SVGB as part of the Regional Desalination Project previously reviewed by the Commission in A.04-09-019. In fact, MCWD jointly submitted an application to the California Coastal Commission to install wells which would be used to serve the CEMEX property and return water to the SVGB. MCWD's criticism of a physical solution for the MPWSP is unfounded, and reveals that its true motive in this proceeding is to oppose any project proposed by CAW, and that its true role is *not* of a concerned public agency. The amounts and effects of extractions from MPWSP wells are currently being studied by a group of technical experts convened by the parties to the Large Settlement Agreement, but it is not expected that the MPWSP will negatively affect the overall balance of recharge and extraction of basin groundwater (and possibly it will improve that balance). However, to the extent that a physical solution is necessary (e.g., the Project harms fresh (i.e., usable or non-contaminated) groundwater resources), CAW has proposed to return such water to the SVGB through the Castroville Seawater Intrusion Project, as set forth in CAW's MPWSP application.

To the extent Section 21 of the Agency Act applies to the Project,<sup>73</sup> the Agency Act vests sole discretion in the MCWRA to pursue appropriate remedies. Contrary to any of MCWD's claims with respect to Section 21, the Agency Act empowers and authorizes the

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<sup>73</sup> As noted above, it is not certain that the MCWRA Act applies to extractions by the MPWSP that occur under Monterey Bay and beyond the County line.

MCWRA to seek injunctive relief for export of SVGB groundwater and a court to grant such relief.

Moreover, MCWD's comments ignore Section 3.1 of the Settlement Agreement, which renders the comments irrelevant. Quoting from Section 3.1 of the LSA, which MCWD overlooks, the motion to approve the Large Settlement Agreement states:

Consistent with the Monterey County Water Resources Agency Act, the Settlement Agreement acknowledges MCWRA's authority in the SRGB: the Parties agree that a study and report to be undertaken under section 5 of the Settlement Agreement "do not constitute and shall not be taken as any agreement that affects MCWRA's authority with respect to the SRGB."

Thus, to the extent the Agency Act is applicable, the settlement does not affect MCWRA's authority under the Act.

Additionally, it is worth noting that MCWD's Comments do not mention the conclusions of the SWRCB on this issue, which are set forth in the SWRCB Report. The SWRCB Report was prepared at the specific request of the Commission to assist the Commission in its assessment of source water issues for the MPWSP. The SWRCB Report affirms the legal validity of the MPWSP, subject of course to confirmation of the technical assumption that the MPWSP not adversely affect usable SVGB groundwater supplies or unreasonably impact other legal users of water from the SVGB. The SWRCB Report specifically addresses the applicability of the Agency Act to the MPWSP:

Based on the State Water Board's analysis, as reflected in the Report, the Project as proposed would return any incidentally extracted usable groundwater to the Basin. The only water that would be available for export is new supply, or developed water [i.e., highly contaminated, brackish waters]. Accordingly, ***it does not appear that the Agency Act or the Ordinance [3709] operate to prohibit the Project.*** The State Water Board is not the agency responsible for interpreting the Agency Act or MCWRA's ordinances. It should be recognized, however, that to the extent the language of the Agency Act and Ordinance permit, they should be interpreted consistent with [sic] policy of article X, section 2 of the California Constitution, including the physical solution doctrine, discussed [in the Report].<sup>74</sup>

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<sup>74</sup> SWRCB Report, p. 40 [emphasis added].

**5. Contrary to MCWD’s Claims, the Commission May Approve the Settlements Agreements and Issue a Certificate of Public Convenience and Necessity**

At Section C of its Comments, MCWD again seeks to cause delay in the progress of this Application. Relying on the same contentions the Commission has repeatedly rejected, MCWD again argues, based on the same authority, that the motions seeking approval of the settlement agreements, and the underlying settlement agreements, seek permission to effectively commence construction of the MPWSP prior to the issuance of a certified Environmental Impact Report.

MCWD’s Comments should be rejected. First, they are an improper effort to, relying on previously rejected arguments, delay the Application and challenge prior Commission approved decisions. Second, neither the motions nor the settlement agreements seek to override or eliminate the Commission’s consideration of the FEIR. Indeed, they explicitly recognize that the Commission will conduct its environmental review pursuant to CEQA on a parallel track.

**a. MCWD’s Contentions Have Been Repeatedly Rejected**

Broad swathes of the argument set forth in Section C of MCWD’s Comments were lifted whole-cloth from MCWD’s prior filings, which also sought to delay the Application – and each of which was considered by ALJ Gary Weatherford and denied.<sup>75</sup>

In its Application for the MPWSP, CAW demonstrates that a Commission decision issued without unnecessary delay is crucial.<sup>76</sup> Indeed, even MCWD, in connection with the previously proposed project, noted that delay should be avoided, “time is truly of the essence here,” and urged the Commission to avoid taking actions that would extend the procedural schedule.<sup>77</sup> And the Commission has recognized the need for a timely resolution of this matter,<sup>78</sup>

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<sup>75</sup> Compare, for example, *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*, filed August 30, 2013 (“MCWD Comments”), at pp. 11-12 with *Marina Coast Water District’s Motion To Modify Procedural Schedule*, filed May 2, 2013 (“MCWD Motion to Modify Procedural Schedule”), at pp. 2-3 and *Marina Coast Water District’s Motion to Modify and Clarify Assigned Commissioner’s Scoping Memo and Ruling*, filed July 6, 2012 (“MCWD Motion to Modify Scoping Ruling”), pp. 4-5, all of which cite the same case and contain the same language simply cut and pasted from document to document.

<sup>76</sup> *Application of California-American Water Company (U210S) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover all Present and Future Costs in Rates*, filed April 23, 2012, at p. 2.

<sup>77</sup> A.04-09-019, *Marina Coast Water District’s Concurrent Reply Brief*, filed July 16, 2010, at pp. 17-19; *Marina Coast Water District’s Concurrent Opening Brief*, filed July 2, 2010, at p. 78.

<sup>78</sup> *Assigned Commissioner’s Scoping Memo and Ruling*, filed June 28, 2012 (“Scoping Ruling”), at p. 2 (“Cal-Am’s

specifically finding:

If replacement water supplies are not provided in a timely fashion, the water supply deficit that would result would lead to severe water rationing and possible water shortages throughout the CalAm service area. This would create substantial social hardships (e.g., reduced bathing, clothes washing and waste removal) and could lead to adverse public health and safety impacts (e.g., lack of adequate water for fire protection, public health, etc). The water supply for nearly one-fourth the population of Monterey County would be put in jeopardy and it could lead to economic losses of over \$1 billion per year, including 6,000 jobs.<sup>79</sup>

On June 28, 2012, President Peevey issued the Scoping Memo and Ruling, which set forth a schedule to govern the non-CEQA part of the proceeding.<sup>80</sup>

MCWD responded on July 7, 2012, with a Motion to Modify and Clarify Assigned Commissioner’s Scoping Memo and Ruling. MCWD’s motion conceded that the Commission intended to conduct the proceeding on two separate tracks (one for CEQA compliance and another for the CPCN). MCWD then argued “the Commission must consider the environmental impacts of the project in making the CPCN determinations.”<sup>81</sup> And it claimed the Scoping Memo should be changed to assure evidentiary hearings take place only after the FEIR.<sup>82</sup>

On August 29, 2012, ALJ Weatherford ruled “a finding that the deferral of prepared testimony or evidentiary hearings, or both, in the CPCN track until after the issuance of either the draft or final EIR is *not in the public interest* because it would substantially increase the risk of non-compliance by CAW with the December 2016 state-mandated deadline” to reduce CAW’s diversions from the Carmel River.<sup>83</sup>

MCWD took a second bite at the apple, on May 2, 2013, after two weeks of evidentiary hearings, when it filed a Motion to Modify Procedural Schedule. The motion relied on the same contentions and cases copied and pasted from MCWD’s July 7, 2012 Motion to Modify and

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application is now before us and the December 2016 Cease and Desist Deadline approaches”); D.10-12-016, 2010 Cal. PUC LEXIS 548, \*35 (Recognizing urgent need to find an alternative water supply).

<sup>79</sup> D.10-12-016, 2010 Cal. PUC LEXIS 548 at p. \*378.

<sup>80</sup> Scoping Ruling, at p. 3.

<sup>81</sup> MCWD Motion to Modify Scoping Ruling, p. 4.

<sup>82</sup> *Id.* at p. 5.

<sup>83</sup> *Administrative Law Judge’s Directives to Applicant and Ruling on Motions Concerning Scope, Schedule and Official Notice*, filed August 29, 2012, at p. 7 (emphasis added).

Clarify Assigned Commissioner’s Scoping Memo and Ruling. MCWD’s May 2, 2013 motion sought modification of the schedule to require “further hearings and full briefing on the issue of the proposed project’s influence on the environment, pursuant to section 1002, subdivision (a) of the Public Utilities Code.”<sup>84</sup>

On May 30, 2013, ALJ Weatherford ruled “[a]s stated earlier in this proceeding, no evidentiary hearing is required or, given the outstanding cease and desist order (CDO), appropriate for the environmental reporting track.” His ruling continued: “Consistent with CEQA, parties will have the opportunity to comment on the DEIR before the FEIR is certified. Those comments, reflected in the FEIR, will be considered in the Proposed Decision, and parties will also have the opportunity to comment on that PD before the Commission acts.”<sup>85</sup> Indeed, ALJ Weatherford’s ruling specifically recognized that MCWD was seeking another bite at the apple, stating “MCWD’s effort...to have project alternatives and environmental impacts addressed in evidentiary hearings was rejected in the August 29, 2012 ALJ’s Directives to Applicant and Ruling on Motions (at 5-7)”.<sup>86</sup>

MCWD’s Comments state that it “participated in good faith in the discussions that led to the settlements, and supports the goal of achieving the settlement of contested applications.”<sup>87</sup> The arguments set forth in Section C of MCWD’s Comments belie this statement. Rather than seek reconsideration of the prior rulings, as it should have done if it sought to challenge them, MCWD’s Comments seek a third bite at the apple. As it has done for more than a year, MCWD through its Comments again seeks to merge the two tracks (CEQA and CPCN) into one and to do so in a manner that delays the progress of the Application.

ALJ Weatherford, however, repeatedly ruled that keeping the tracks distinct is the best way to attempt to comply with the 2016 CDO deadline. He made clear that settlement of aspects in connection with the CPCN track could – in fact were required to – take place a year before the

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<sup>84</sup> MCWD Motion to Modify Procedural Schedule at p. 1.

<sup>85</sup> *Administrative Law Judge’s Ruling After Evidentiary Hearings*, filed May 30, 2013 (“Ruling After Evidentiary Hearings”), at p. 4.

<sup>86</sup> *Ruling After Evidentiary Hearings*, p. 4.

<sup>87</sup> MCWD Comments, at p. 1.

issuance of the FEIR.<sup>88</sup> MCWD's arguments contend that settlement of the CPCN issues could not take place until after the FEIR, in direct contravention of multiple rulings by ALJ Weatherford as well as MCWD's claim that it was negotiating in good faith. If you claim a settlement cannot currently be entered, your purported negotiations toward it were not in good faith.

The arguments set forth in Section C of MCWD's Comments, therefore, should be disregarded, and both settlement agreements should be approved.

**b. MCWD's Comments Are Without Merit**

The ALJ Scope and Schedule Ruling properly established separate procedural tracks for CEQA review and the CPCN process. And the ALJ specifically ordered settlement on CPCN matters be completed approximately a year before the FEIR is to be available. MCWD's contention that the CPCN process cannot advance and settlements concerning it cannot be approved until after the CEQA review is complete, with the FEIR issued, must therefore be rejected. The Commission has found that in CPCN proceedings the CEQA review process is the vehicle for consideration of a proposed project's environmental impacts as well as other factors in section 1002(a).<sup>89</sup> Nothing in the motions to approve the settlement agreements or in either of the two settlement agreements is to the contrary. The motion seeking approval of the Large Settlement Agreement specifically states that the Settling Parties "support granting the CPCN, with certain conditions, subject to the terms and condition of the [Large Settlement Agreement], including, for example, review under [CEQA], findings required by Public Resources Code Section 21081, and resolution of plant sizing. With the pending CDO deadline, time for implementing the MPWSP is of the essence."<sup>90</sup>

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<sup>88</sup> See, e.g., *id.* at pp. 6-7, which sets the deadlines for settling CPCN related matters in June 2012 (later extended to July 2013) while recognizing on the separate CEQA track that the FEIR will not be available until June 2014 – a year later.

<sup>89</sup> See D.10-12-025, *Application of Wild Goose Storage, LLC to Amend Its Certificate of Public Convenience and Necessity to Expand and Construct Facilities for Gas Storage Operations* (U911G), 2010 PUC LEXIS 463, \*8; D.10-07-043, *In the Matter of the Application of Southern California Edison Company (U-338-E) for a Certificate of Public Convenience and Necessity for the San Joaquin Cross Valley Loop Transmission Project*, 2010 Cal. PUC LEXIS 285, \*8.

<sup>90</sup> *Settling Parties' Motion to Approve Settlement Agreement*, filed July 31, 2013, at p. 4.

On the other hand, the case primarily relied upon by MCWD is inapplicable. In *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal.3d 370, the Court annulled a Commission order granting a CPCN for failing to give adequate consideration to antitrust issues. The case did not address CEQA or the sufficiency of the Commission's environmental review at all. At issue was a Commission decision that declined to address or make findings on antitrust concerns raised by a party to a CPCN proceeding.<sup>91</sup> In connection with the present Application, no effort is being made to preclude consideration of environmental factors in connection with section 1002(a); they are being carefully addressed through CEQA.

Finally, MCWD contends that treating the MPWSP and the GWR project as separate amounts to "piecemealing" environmental review in violation of CEQA.<sup>92</sup> Not so. Under CEQA, it is clear that "piecemealing" cannot occur where the activities are being approved by two different, independent agencies.<sup>93</sup> Here, the MPWSP is to be approved by the Commission, while GWR is to be approved by the Monterey Regional Water Pollution Control Agency. Thus, there is no piecemealing. As such, MCWD's Comments should be disregarded and the settlement agreements should be approved.

**C. PTA's and Water Plus' Comments Fail to Comply With Rule 12.2 and Should Be Disregarded**

Rule 12.2 requires that comments "specify the portions of the settlement that the party opposes, the legal basis of its opposition, and the factual issues that it contests."<sup>94</sup> PTA's and Water Plus' comments fail to meet Rule 12.2's specificity requirements, and should be disregarded.<sup>95</sup> Similarly, no support is provided for the numerous contentions of PTA and Water

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<sup>91</sup> *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal.3d 370, 379.

<sup>92</sup> MCWD Comments, at pp. 13-14.

<sup>93</sup> See *Sierra Club v. West Side Irrigation District* (2005) 128 Cal.App.4th 690, 699 [finding the rule prohibiting segmentation of a CEQA project into smaller projects does not apply where assignments are to separate projects approved by independent agencies].

<sup>94</sup> CPUC Rule 12.2.

<sup>95</sup> In violation of Rule 12.2, PTA and Water Plus provide no specific factual or legal support. Without sufficient citations, clarity, or particularity, Water Plus claims that the MPWSP is not reliable or cost-effective and that the Large Settlement Agreement "Balkanizes Alternative Projects." See *Comments By Water Plus on Settlement Agreement Attached to Settling Parties' Motion to Approve Settlement Agreement*, dated August 1, 2013 Comments at pp. 3-7. PTA's Comments begin with various theoretical statements that are largely irrelevant to the proceeding. See e.g., *Public Trust Alliance's Consolidated Comments on the Proposed Partial Settlements and Associated*

Plus, and they either refer to no specific sections of the Large Settlement Agreement or the Sizing Settlement or fail to articulate a meaningful arguments concerning referenced sections. As PTA's and Water Plus's comments concerning the Large Settlement Agreement are irrelevant, fall short of Rule 12.2's requirements, or are incorrect, they should be disregarded. Furthermore, PTA's and Water Plus' comments provide no material benefit to the proceeding and they make no meaningful contribution to discussions concerning the Settlement Agreements.

### **III. CONCLUSION**

For the foregoing reasons, CAW respectfully requests that the Commission reject the claims set forth in the Collective Comments regarding the Large Settlement Agreement and the Sizing Settlement Agreement.

Dated: September 16, 2013

*/s/ Sarah E. Leeper*

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*Motions Submitted in A.12-04-019*, filed August 30, 2013 ("PTA Comments"), at p. 2. Water Plus also incorrectly states that six parties that did not sign the Large Settlement Agreement when only it and two others would not.