



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

**FILED**  
1-21-14  
04:59 PM

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

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

**MARINA COAST WATER DISTRICT'S  
OPENING BRIEF ON THE SETTLING PARTIES' MOTIONS TO  
APPROVE SETTLEMENT AGREEMENT AND SETTLEMENT  
AGREEMENT ON PLANT SIZE AND OPERATION**

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Date: January 21, 2014

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## **I. INTRODUCTION AND BACKGROUND**

Marina Coast Water District (“MCWD”) respectfully submits its Opening Brief on the settling parties’ motions to approve a Settlement Agreement (the “MPWSP Settlement”) and a Settlement Agreement on Plant Size and Operation (the “Sizing Settlement”) (collectively the “Settlements”), both of which were filed with the Commission on July 31, 2013.

Notwithstanding the additional informational evidentiary hearing on the Settlements conducted on December 2, 2013 by Assigned Administrative Law Judge (“ALJ”) Angela Minkin, fundamental legal deficiencies prevent the Commission, on the present record, from approving the Settlements and granting a Certificate of Public Convenience and Necessity (“CPCN”) for the Monterey Peninsula Water Supply Project (“MPWSP”) as proposed by the Applicant, California-American Water Company (“Cal-Am”).

Over fifteen years ago, the California Legislature tasked this Commission with finding a solution that would halt unlawful pumping to supply water to Cal-Am’s Monterey Peninsula district, which the State Water Resources Control Board (“SWRCB”) determined had resulted in longstanding and significant degradation of the Carmel River environment including endangered steelhead habitat. (A.B 1182 (1998 stats., ch. 797); SWRCB Order WR 95-10, pp. 38-45.) From that time forward, the Commission has overseen multiple complex and challenging proceedings, involving a large number of diverse stakeholders, in attempting to solve the problem. (*E.g.*, A.04-09-019, A.09-04-015, A.10-09-018, A.12-04-019.) In 2009, the SWRCB issued a Cease-and-Desist Order (“CDO”) establishing a December 31, 2016 deadline for the replacement water supply, with potentially harsh impacts to the economy and health and safety of the Peninsula and the County at large if a solution were not implemented in advance of the deadline. (SWRCB Order WR 2009-0060, pp. 57-58.)

In D.10-12-016, to solve the Monterey Peninsula water supply crisis, the Commission approved a Regional Desalination Project (“RDP”) which was to be carried out together by Cal-Am, MCWD and the Monterey County Water Resources Agency (“MCWRA”). (D.10-12-016, pp. 202-206.) When MCWRA took the position shortly thereafter that the RDP contracts were invalid, Cal-Am sought modification of D.10-12-016 to allow it to construct its Cal-Am-owned RDP pipeline facilities, whether or not the RDP went forward. (D.12-07-008, pp. 1, 4, 23, 25.) Meanwhile, the three RDP parties attempted to negotiate their differences and continue with the RDP, but they were unsuccessful. (*Id.* at 11-12.) Then, in D.12-07-008, the Commission declined to enforce or address claims concerning cost responsibility among the three RDP parties under the RDP contracts, but permitted Cal-Am to withdraw from that project and proceed with this Application for a substitute water supply project. (*Id.* at 23-26.)

This Application seeks a CPCN for the MPWSP which would be owned and operated by Cal-Am alone, similar to the North Marina alternative (Application, p. 5) that was considered and rejected in D.10-12-016. (D.10-12-016, pp. 54-56.) MCWD participated in settlement negotiations in this proceeding, but was unable to join in the Settlements because it does not believe they meet the requirements of Commission Rule of Practice and Procedure 12.1(d). As explained below, a number of impediments prevent the Commission from finding at this time and on the record before it that the Settlements are “reasonable in light of the whole record, consistent with law, and in the public interest.” (Rule 12.1(d).)

## **II. THE PREFERRED SLANT WELL LOCATION**

The current preferred intake configuration for the MPWSP places the location of the slant wells back on the CEMEX (fka “Lonestar”) property. (Dec. 2, 2013 Hearing Tr., pp. 2150:6-2151:7.) The wells would be constructed within an active sand-mining area on property of CEMEX, located north of the City of Marina. (MPWSP Settlement, §§ 6.5, 10.2.) Secondary

intake contingency options for the MPWSP permit Cal-Am's consideration of different intake well locations, if the CEMEX location proves legally or technically infeasible. (*Id.*, § 10.2.) The record and the MPWSP Settlement acknowledge existing coastal erosion issues at the property. (Dec. 2, 2013 Hearing Tr., p. 2145:13-19; MPWSP Settlement, § 9.1.)

In addition to the Commission's environmental review process, the MPWSP Settlement requires expert consultation on erosion conditions and Cal-Am's consideration of existing studies. (*Ibid.*) At least one such existing study indicates that ongoing sand mining continues to impact coastal erosion significantly, calling into question the reasonableness of placing intake wells on the CEMEX property while the property owner remains actively engaged in sand mining. (See MPWSP Settlement, § 9.1(a)(iv), ESA PWA (2012) "Evaluation of Erosion Mitigation Alternatives for Southern Monterey Bay," pp. 106-113, 180, *available at* <http://montereybay.noaa.gov/new/2012/erosion.pdf> (noting at p. 110 that the Sierra Club's 2009 request for the Coastal Commission to require a sand mining permit remains under review).)

Another factor impacting the feasibility of the CEMEX location is the issue of endangered snowy plover habitat, which restricts construction activity for Cal-Am's test well (and presumably all project wells located on the CEMEX property) to the winter season. (See Marina City Council agenda and packet, Dec. 17, 2013, item 8g(2)<sup>1</sup> (consideration of contract for environmental planning services regarding application of Cal-Am for Coastal Development Permit for slant test well), *available at* <http://ca-marina.civicplus.com/ArchiveCenter/ViewFile/Item/5547>; Dec. 2, 2013 Hearing Tr. p. 2141:16-22.) Thus, commencement of construction of the test well is estimated for fall of 2014. (*Ibid.*) The current schedule projects publication of a final subsequent environmental impact report ("EIR") some months before that date, relying on

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<sup>1</sup> The Commission may take official notice of a city council's acts and records, pursuant to Evid. Code §§ 452(c) and 452(h) and Commission Rule of Practice & Procedure 13.9.

data being collected from boreholes. (*Id.* at 2141:16-2142:7; Amended Scoping Memo of Sept. 25, 2013, p. 7.) However, besides informing the technical feasibility of the well design, the test well results may be required in order for the Commission to complete a sufficient environmental review on potential adverse impacts to the Salinas Valley Groundwater Basin (“SVGB”), further delaying completion of a final Subsequent EIR. (*See* section III.B., *infra*).<sup>2</sup>

**A. Locating the Slant Wells on the CEMEX Property Illegally Interferes with the 1996 Annexation Agreement**

Whether or not CEMEX will continue mining sand on its property north of Marina for the life of the proposed MPWSP and notwithstanding seasonal restrictions due to snowy plover nesting, placement of intake wells on the CEMEX property would impair the rights of MCWD and the other entities that have worked for decades to protect the SVGB, violating the constitutionally-guaranteed sanctity of the contract (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9), violating county pumping restrictions and unlawfully intruding into MCWD’s service territory and regulatory authority. By locating the slant wells on the CEMEX property, Cal-Am would be in clear violation of the 500 acre-foot per year (“AFY”) pumping restriction that was established in the 1996 Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands and it would be interfering with MCWD’s right to provide water to that property upon annexation into the MCWRA zones of benefit. (*See* Ex. MCD-6, the “1996 Annexation Agreement” at §§ 4.1, 4.4, 5.1.1.3, 7.) The pumping restriction and the annexation scheme are part of a decades-long effort to reverse seawater intrusion and protect the rights of existing users of the basin. (Ex. MCD-1A, Revised Direct Testimony of Lloyd W. Lowrey, Jr.,

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<sup>2</sup> In the case of the RDP, the Commission was able to complete environmental review and approve the project prior to installation of a test well. (D.10-12-016, § 11.5, pp. 109-122.) However, in that case there were no post-environmental review issues concerning water rights, potentially significant unevaluated adverse impacts to the basin, or Agency Act compliance by virtue of MCWD’s participation in the project. (D.10-12-016, pp. 58-59.)

pp. 14-15, as modified on the witness stand on April 30, 2013; Ex. MCD-6, §§ 4.1, 4.4, 5.1.1.3, 7.)

The pumping restriction on the CEMEX property precludes sufficient source water pumping to meet the needs of the MPWSP, whether for a 9.6 mgd or smaller desalination plant. Pursuant to the 1996 Annexation Agreement among MCWRA, MCWD, the City of Marina, the Armstrong Family and RMC Lonestar, the predecessor-in-interest to CEMEX, pumping on the CEMEX property is limited to 500 AFY and to be used only to provide water for use on the CEMEX property. (Ex. MCD-6, 1996 Annexation Agreement, §§ 5.1.1.3, 7.2.) The Sizing Settlement places desalination production requirements for the MPWSP in a range from 6,252 to 9,752 AFY, based on potential inclusion of a Groundwater Replenishment Project (“GWR”) component in a maximum amount of 3,500 AFY. (Sizing Settlement, p. 4.) Calculating source water intake requirements at roughly twice the volume of production therefore yields a potential intake requirement of between 12,500 and 19,500 AFY for the MPWSP project wells, or, on the basis that four percent of intake is equal to 875 AFY, as high as 21,875 AFY (*see* Dec. 2, 2013 Hearing Tr., pp. 2139:13-2140:27), an amount vastly in excess of the 500 AFY that may legally be drawn on the CEMEX property.

The Constitution empowers the Commission to regulate public utilities. (Cal. Const., art. XII.) However, the Commission’s regulatory powers do not extend to water rights. (D.10-12-016, p. 17 (considering and declining to interfere with state and local water agencies’ jurisdiction, in granting a CPCN).) In Monterey County the Legislature has vested local regulatory power over surface and groundwater, including production and conservation, in MCWRA pursuant to the Monterey County Water Resources Agency Act (the “Agency Act”). (Water Code, Appendix, ch. 52, § 52-09; *see also id.*, §§ 52-01 through 52-91.) Pursuant to

Division 12 of the Water Code, MCWD is empowered to manage its own, smaller service area within Monterey County. (*See* Water Code §§ 30000-33901; MCWD Code §§ 1.01-7.08 and Appendices.) As noted, the 1996 Annexation Agreement brings the CEMEX property within MCWD's regulatory territory upon a request for annexation, as part of MCWRA's performance of its statutory duty to preserve and protect the SVGB, including ongoing efforts to reverse seawater intrusion within the basin.

The MPWSP, in its currently-preferred intake configuration, would require as much as forty times the amount of source water that may legally be drawn on the CEMEX property. Therefore, operation of the project would violate the pumping restriction that the landowner agreed upon with MCWRA and MCWD, the bodies with regulatory authority over water use on the property, as well as potentially interfering with MCWD's regulatory authority within its service territory. (Ex. MCD-6, 1996 Annexation Agreement, §§ 5.1.1.3, 7.2.) The project, as proposed, would violate MCWD's exclusive right to provide water to the CEMEX property pursuant to the 1996 Annexation Agreement, and to increase its own withdrawals by up to 500 AFY in exchange for a commensurate decrease of on-site pumping by the property owner. (*Ibid.*) Therefore, the Settlements that propose Cal-Am's implementation of the MPWSP as currently configured are not consistent with law.

In addition, the settling parties' proposal to have the Commission validate a state-approved intrusion into the 1996 Annexation Agreement would be in violation of both the state and federal constitutions, as it would plainly contravene the prohibition against the State of California adopting a law that impairs the obligation of contract. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) The 1996 Annexation Agreement has been in effect some 17 years, and,

like MCWRA, the Commission is constitutionally prohibited from modifying it now without the concurrence of all of the parties to the agreement.

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

Moreover, the public interest, especially the interests of the many entities who have worked for decades at great expense to protect SVGB groundwater by various projects and by entry into numerous agreements including the 1996 Annexation Agreement, would not be served by the Commission approving Cal-Am's preferred test well location on the bare record before it today. Even absent the 1996 Annexation Agreement, completion of hydrogeologic testing, erosion studies and the Commission's environmental review for the MPWSP may well require relocation of the intake wells to a different location.

In evaluating whether or not the Settlements are in the public interest, one of the factors the Commission must consider is whether or not the settlement is "consistent with law." (*In re Application of Southern California Edison* (Cal. P.U.C. 1996) 1996 Cal. PUC LEXIS 23 ("D.96-01-011") at \*33-34, *citing* D.94-04-088, slip op. at p. 8 ("we consider individual elements of the

settlement in order to . . . assure that each element is consistent with our policy objectives and the law.”.) In a decision issued prior to resolving proceeding R.88-08-018, *Order Instituting Rulemaking into Natural Gas Procurement and System Reliability Issues*, the Commission rejected a settlement as not in the public interest where – as here – not all settlement provisions were consistent with law. (D.94-04-088, slip. op.) After making recommendations for modification and upon the parties’ subsequent modification of the proposed settlement, the Commission granted approval of the settlement in D.94-07-064. (*Order Instituting Rulemaking into Natural Gas Procurement and System Reliability Issues* (Cal. P.U.C. 1994) 1994 Cal. PUC LEXIS 976 (“D.94-07-064”) at \*5-7.)

Similarly here, the Commission cannot approve the MPWSP unless it requires and the settling parties agree to relocate the source wells to a different location that is reasonable, “in the public interest” and “consistent with law.” (Rule 12.1(d).) On a more fully developed record, the Commission could well conclude that the CEMEX location is not reasonable for other reasons as well, including erosion study and taking into account seasonal activity restrictions relating to Coastal Development Permit requirements. Moreover, any decision by the Commission that the MPWSP source wells *must* be configured on the CEMEX property as Cal-Am prefers, so as to preempt local regulations, could not lawfully proceed without the Commission’s full consideration of the effect and reasonableness of the local regulatory scheme as well as the necessity for preemption. (*City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal. App. 4th 566, 593-594 (reversing Commission conclusion that local telephone line undergrounding ordinances were preempted by virtue of project approval, without analysis of an issue omitted from stated scope of proceeding).)

For all of the foregoing reasons, the Commission should not approve the CEMEX location and should require Cal-Am to look to its contingency well locations. (MPWSP Settlement, § 10.2.)

### **III. THE MPWSP, AS PROPOSED, IS NOT CONSISTENT WITH LAW**

The MPWSP is inconsistent with specific laws and ordinances in Monterey County which would apply to the MPWSP, if constructed and operated as proposed in the Settlements. The MPWSP – unlike the RDP – does not include a partner such as MCWD that possesses both existing pumping rights in the SVGB and the ability to take sufficient desalinated product water to ensure that the project complies with the Agency Act prohibition on export of SVGB groundwater. (Water Code, Appendix, ch. 52, § 52-21; D.10-12-016, pp. 58-59, 200 at Conclusion of Law (“COL”) 43.) Thus it is unclear at this juncture that the MPWSP would be capable of operating without violating the Agency Act and/or injuring current users of groundwater in the SVGB by impermissibly pumping or exporting groundwater.

Other inconsistencies with law include the MPWSP Settlement’s potentially improper delegation to the Regional Water Authority’s Governance Committee of Commission authority to determine whether or not the GWR component will be included in the project. (MPWSP Settlement, §§ 16, 4.2(a)(iii)(1) (power to interpret, rule on contract rights), and Attachment 1 thereto, §§ IV.A, V.D (power to direct Cal-Am and make GWR approval).) Furthermore, as MCWD argued in its application for rehearing of D.12-10-030 and as the Commission acknowledged in ruling on the applications for rehearing in D.13-07-048, the question of the Commission’s ability in this case to preempt the Monterey County ordinance which requires public ownership of desalination facilities (Monterey County Code of Ordinances, Title 10, Chapter 10.72 (the “Desal Ordinance”)) has not been finally resolved. (D.13-07-048, p. 6 (the Commission’s issuance of an advisory opinion on preemption “does not in any way pre-judge”

its approval of the proposed Cal-Am project).) Meanwhile, MCWD emphatically disagrees that compliance with the Desal Ordinance may lawfully be the subject of negotiation among Monterey County and Cal-Am for a blanket exemption, as proposed in the RDP costs settlement agreement that is currently before the Commission in proceeding A.13-05-017. (*See* Application in A.13-05-017, Ex. A, pp. 8-9 at § 7 (“The [Desal] Ordinance shall not apply to CAW [(Cal-Am)] or the MPWSP.”).) Moreover, even if the County of Monterey could lawfully exempt a single party from the applicability and enforcement of a county ordinance by virtue of a settlement of litigation, granting an exemption to one party subject to the ordinance and not all others would constitute a blatant violation of the state and federal constitutional guarantees of equal protection of the laws.

**A. The Agency Act**

Section 21 of the Agency Act prohibits any export of groundwater from the SVGB. (Water Code, Appendix, ch. 52, § 52-21.) The Commission’s decision approving settlement of Cal-Am’s prior application for the Regional Desalination Project acknowledged the need to comply with this legal requirement. (D.10-12-016 at Finding of Fact (“FOF”) 79 (“Because the source water cannot be exported from the Salinas Valley, this factor becomes a critical component . . .”) and COL 11 (“Pursuant to the Agency Act, no groundwater from the Salinas Basin may be exported for use outside the basin . . . and MCWRA may obtain an injunctive relief from the court prohibiting the exportation of such groundwater.”).)

The MPWSP Settlement does not set forth any concrete plan for compliance with the non-export provision of the Agency Act. The *only* mention of the groundwater export prohibition is a passing reference in one of the attachments to the MPWSP Settlement – in the “Definitions” section of the agreement among Cal-Am, the Monterey Peninsula Regional Water Authority, and the Monterey Peninsula Water Management District to form the MPWSP

Governance Committee – to “facilities that may be required to prevent export” of SVGB water. (MPWSP Settlement, Appendix 1, § 2.H.)

Cal-Am’s testimony during the informational evidentiary hearing on the Settlements convened by ALJ Minkin remained vague as to how the MPWSP will return to the basin any groundwater that the project extracts from the basin. (Dec. 2, 2013 Hearing Tr., pp. 2134-2135, 2140-2147; *see also*, Ex. CA-6, Svindland Direct Testimony, pp. 26 (final selection of method of compliance to be based on outcome of EIR and engineering recommendations); 36 (Cal-Am will comply with the groundwater export prohibition “to the extent it applies”).) Cal-Am has merely indicated its support of MCWRA’s conduct of a groundwater monitoring program. (*See* Ex. CA-12, Svindland Supplemental Testimony, p. 7.)

During hearings on the Application, Cal-Am’s witnesses indicated that the preferred approach might be to return groundwater to the SVGB by sending desalinated water to the Castroville Seawater Intrusion Project (“C-SIP”), although they admitted there could be feasibility issues related to seasonal availability of capacity and demand for that option. (*See* Ex. CA-12, Supplemental Testimony of Richard Svindland, Attachment 11, p. 8 (describing only the methods to be utilized during “irrigation season”).) Thus, it is not at all clear that C-SIP return could provide a year-round workable solution to ensure Agency Act compliance. In answer to MCWD’s Data Requests, Cal-Am stated that it had no firm commitments for a basin return plan, but that this is not a “critical path” item. (Cal-Am response to MCWD Data Requests 1-4 and 1-5 herein.<sup>3</sup>) Like the answers to many of the parties’ questions concerning technical aspects of the proposed project, the issue “will be addressed upon completion of the groundwater modeling work that is contemplated in the EIR.” (Attachment 1, Cal-Am response to MCWD Data

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<sup>3</sup> Attached hereto as Attachment 1.

Request 1-5; Dec. 2, 2013 Hearing Tr., p. 2141 (in gathering data for Agency Act compliance “the most critical part is [the] test slant well,” now expected to commence work in the fall of 2014).)

As noted above, the Sizing Settlement calls for the production of desalinated water in a volume of up to 9,752 AFY. (Sizing Settlement, p. 4, *citing* Ex. CA-12, Svindland Supplemental Testimony, Attachment 1, p. 5.) When the additional estimated 875 AFY of desalinated water that will likely be required to be returned to the SVGB in order for Cal-Am to maintain the project’s compliance with the Agency Act is included, the volume of product water required rises to 10,627 AFY, bringing routine operation of a 9.6 mgd plant very close to 100% capacity.<sup>4</sup> (Dec. 2, 2013 Hearing Tr., pp. 2120-2121; Ex. CA-12, Svindland Supplemental Testimony, Attachment 1, p. 5.) Ongoing operation at 100% capacity is not a reasonable or realistic assumption.

Notably, several of the settling parties have conditioned their support for the MPWSP upon the outcome of hydrogeologic testing which could bear upon the project’s ability to avoid exporting groundwater. (MPWSP Settlement, § 3.1(b).) These parties have reserved “all rights to challenge production of water” from the SVGB. (*Ibid.*) Thus, the Commission cannot declare the MPWSP to be feasible, let alone required by the present or future public convenience and necessity, or declare the proposed Settlements to be consistent with the requirements of Rule 12.1(d), until after the hydrogeologic testing is completed with favorable results. The MPWSP Settlement is, in reality, an agreement for development of a more complete record that *might* lead to the parties’ future support of the MPWSP. (MPWSP Settlement, § 3.1.) Those parties that

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<sup>4</sup> This number is far in excess of industry standards, which Cal-Am’s representative testified can range between 50 and 80%. (Dec. 2, 2013 Hearing Tr., pp. 2120-2121.)

have joined the MPWSP settlement should be free to withdraw from it if the hydrogeologic testing ultimately shows that the project, as proposed, is not in the public interest.

Without a clear plan for compliance with the Agency Act prohibition on export of groundwater from the SVGB, the Settlements appear to seek Commission approval of the project and grant of a CPCN when the MPWSP would not be consistent with law. Violation of the Agency Act's prohibition on export of groundwater would also work against the public interest, to the detriment of MCWD and all of the SVGB users of groundwater that have worked so diligently for so many years and at great expense to protect the basin. (Ex. MCD-1A, Revised Direct Testimony of Lloyd W. Lowrey, Jr., pp. 3, 7-10, 13-15, and exhibits there referenced.) Because the voluminous record in this Application still fails to demonstrate the Applicant's commitment to a concrete, feasible mechanism for the proposed MPWSP to achieve Agency Act compliance, the Commission cannot find the Settlements reasonable at this time.

#### **B. Water Rights**

The related and crucial question of what water rights, if any, would be required for Cal-Am to legally extract source water for the MPWSP remains unanswered, because the project's likely impacts on the SVGB are not yet known. As the opinion of the State Water Resources Control Board ("SWRCB") solicited by and provided to the Commission concluded, "additional information is needed to accurately determine MPWSP impacts on current and future Basin conditions." (July 31, 2013 SWRCB "Final Review of California American Water Company's Monterey Peninsula Water Supply Project," p. 50, *available at* [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/caw\\_mpws/docs/cal\\_am\\_final\\_report.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_mpws/docs/cal_am_final_report.pdf).)

The information that is needed may be forthcoming with conduct of the hydrogeologic testing and investigation that Cal-Am has agreed to complete in cooperation with the Salinas

Valley Water Coalition. (MPWSP Settlement, § 5.) Until it is determined whether or not extraction of MPWSP source water is likely to cause injury to existing users of the SVGB, the question of Cal-Am's ability lawfully to extract the project's source water will remain unanswered and the "consisten[cy] with law" of the Settlements cannot be determined.

It is interesting to note that Cal-Am's current (2010) Urban Water Management Plan ("UWMP") proposes to use "ocean desalination" in its future water supply sources, and it does not reference any use of groundwater or some combination of ocean and groundwater for its desalination plans.<sup>5</sup> (Cal-Am's Final 2010 UWMP for Central Division – Monterey County District, pp. 4-15 through 4-16, *available at* [http://www.water.ca.gov/urbanwatermanagement/2010uwmps/Cal-Am%20Water%20-%20Monterey%20District/2010%20UWMP\\_Monterey%20District\\_Final.pdf](http://www.water.ca.gov/urbanwatermanagement/2010uwmps/Cal-Am%20Water%20-%20Monterey%20District/2010%20UWMP_Monterey%20District_Final.pdf).) Cal-Am's MPWSP, on the other hand, proposes to extract the source water for the desalination plant from coastal slant wells in the SVGB, which Cal-Am acknowledges are likely to yield some as-yet unknown proportion of groundwater, despite its best efforts to extract 100% seawater. (Dec. 2, 2013 Hearing Tr., pp. 2139-2142.) Thus, on the present record, the proposed source water wells are not a legal source of water for Cal-Am under the criteria set forth in section II.2.B.(1) of Commission General Order 103-A. Cal-Am is due to complete its next UWMP in 2015. (Cal-Am 2010 UWMP, p. 1-1.)

Until Cal-Am can demonstrate that its pumping will not have a substantial adverse impact on other users of the SVGB and that its source water meets the criteria of General Order 103-A, it may not legally extract brackish source water for the MPWSP from the SVGB, and therefore the MPWSP as proposed would not be consistent with law.

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<sup>5</sup> So far as MCWD is aware, there was no objection to ALJ Minkin's notice of intent to take official notice of Cal-Am's UWMP, as set forth in the Ruling of Nov. 4, 2013, pp. 3-4.

## **C. Jurisdictional Issues**

### **1. GWR/Sizing Decision and Phasing**

The size of the desalination plant, dependent upon inclusion or exclusion of the GWR component of the project, and thus the environmental impacts and impacts on the SVGB of the MPWSP, will not be known until the Commission has conducted bifurcated phase 2, including GWR environmental review. It appears, as noted above, that the Regional Water Authority's Governance Committee is the body that will be responsible for determining whether or not the GWR component will be included in Cal-Am's future water supply.

The impropriety of such an arrangement will not be cured by bifurcation of these proceedings, unless the Commission clearly retains final authority to determine on a complete record, including environmental review of the whole project, *both* whether the MPWSP is necessary for the public convenience and necessity, no matter the size of the desalination plant, *and* if so, whether a GWR component should be pursued and how the GWR component may affect the size of any desalination plant the Commission may approve. Approval of the MPWSP prior to consideration of the GWR element raises both issues under the California Environmental Quality Act (Pub. Resources Code §§ 21000-21189.3, or "CEQA"), addressed below, as well as concerns regarding the scope and finality of the Commission's CPCN decision and its compliance with legal requirements such as the requirement that the Commission consider all relevant factors in making a CPCN decision. (*Northern California Power Agency v. Public Utilities Com.* (1971) 5 Cal.3d 370, 378-380 (Commission must consider all relevant factors before granting CPCN).)

By the provisions of the Governance Committee Agreement, including for GWR determination, the settling parties appear to be impeding the Commission's jurisdiction to make

the final decision as to inclusion of GWR and plant sizing. (MPWSP Settlement, §§ 4.2, 16; Appendix 1 thereto, §§ IV.A, V.D.) Thus, the Settlements are not consistent with law.

## **2. Preemption of the Desal Ordinance**

As noted above, the Commission has issued what it has admitted is an “advisory” opinion concerning its preemption authority as to the Desal Ordinance as applied to public utility facilities or operations such as the MPWSP. (D.13-07-048, pp. 6, 11.) However, an advisory opinion not based on a concrete set of facts or an actual controversy is not binding. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-71.) Such advisory opinions have been overturned as not ripe for decision. (*Ibid.*; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 542; *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1217; *California Water & Telephone Company v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 26-28.) MCWD reserves the right to challenge the advisory ruling or any ripe preemption decision the Commission may render at the time it issues a CPCN.

Notwithstanding the Commission’s advisory opinion that it *may* preempt the ordinance if it finds that the public convenience and necessity requires the MPWSP be certificated, it remains to be seen whether or not the Commission will approve the MPWSP as it is currently proposed. Financing mechanisms and other physical and technical project characteristics under consideration for the MPWSP may require some form of public ownership or interest in the funded project. (Dec. 2, 2013 Hearing Tr. pp. 2242-2243.) In addition, MCWD understands that the group Public Water Now recently gathered sufficient signatures to place an initiative for exploration of a public buyout of Cal-Am’s Monterey assets on the June, 2014 ballot in Monterey County. (Article, *Activist group Public Water Now tells Cal Am: Time to sell and get out of the way*, Monterey County Weekly (Jan. 9, 2014), available at [http://www.montereycountyweekly.com/archives/2014/0109/article\\_947103ec-78ac-11e3-8ca3-](http://www.montereycountyweekly.com/archives/2014/0109/article_947103ec-78ac-11e3-8ca3-)

[0019bb30f31a.html](#) (last visited Jan. 21, 2014).) Thus, there may ultimately be some public aspect of ownership of the project, and the need for and propriety of a final Commission decision of the preemption issue is unclear at this time.

#### **IV. ENVIRONMENTAL REVIEW MUST BE COMPLETED**

The Settlements ask the Commission to approve the MPWSP in violation of the requirements of CEQA that agencies refrain from prematurely approving projects prior to completion of their objective environmental review and without “piecemealing” that review. The Commission’s compliance with CEQA in objectively considering the proposed MPWSP cannot possibly be achieved before a sufficient final EIR evaluating the potential environmental impacts of the project as a whole has been certified under CEQA. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128-132.) Moreover, the Commission in its function of determining the public convenience and necessity and public interest of a project is also required to conduct hearings and receive evidence on all relevant factors, which includes the potential environmental impacts of the proposed project and alternatives. (Pub. Util. Code § 1002.)

However, the Commission’s Subsequent EIR for the MPWSP has not yet been completed or even released in draft form. Thus, the Commission has not yet been able to consider evidence on environmental factors at a hearing. Therefore, the Commission’s granting of the motions for approval of the Settlements and the requested CPCN prior to completing its environmental review would constitute an impermissible and premature project approval, both under the Public Utilities Code (Pub. Util. Code § 1002, subd. (a)), as well as the requirements of CEQA (Pub. Resources Code §§ 21065, 21100 (project approval requires the lead agency’s certification of an environmental impact report); CEQA Guidelines, 14 Cal. Code Regs., § 15378(a) (a project evaluated under section 21065 of the Public Resources Code must include the “whole of an action” that will have an impact on the environment)). Neither the Commission nor any other

public agency can approve a project that may have a significant impact on the environment without first engaging in such environmental review as is required by CEQA. Nor can the public agency signatories to the Settlements join settlements that commit them to a particular project alternative before completion and consideration of a final, certified EIR.

The Settlements require Cal-Am to undertake, in cooperation with the Salinas Valley Water Coalition, substantial hydrogeologic testing activities. (MPWSP Settlement, § 5.) Presumably, information developed during the agreed-upon hydrogeologic testing will also inform the Commission's review of the MPWSP's potential significant effects on the environment, to the extent that data is available prior to release of the EIR. (Pub. Resources Code §§ 21068, 21100.) The MPWSP application is proceeding on two separate tracks, a CEQA compliance track and a CPCN track. Although this dual-track Commission procedure permitted full environmental review prior to the Commission's consideration of the RDP settlement in A.04-09-019, that is not the case here. Thus, the evidentiary hearings that were conducted in April, May and December of 2013 included very little relevant environmental and technical information. Indeed, much of the parties' cross-examination of Cal-Am's technical witnesses during the hearings was met by a representation that the answers would be revealed in the Commission's EIR, as with Cal-Am's responses to MCWD's data requests (*see* Attachment 1 hereto) and the parties' questions at the recent evidentiary hearing on the Settlements (*e.g.*, Dec. 2, 2013 Hearing Tr., pp. 2137-2138 (EIR completion one of two "drivers" for project schedule), 2195 (EIR needed to address 9.6 mgd plant size), 2249-2250 (EIR needed for SRF funding determination).) Thus, the Commission does not yet have a sufficient record on the MPWSP application or the Settlements. For these reasons, the record is not presently complete, and the Settlements are not reasonable, consistent with law or in the public interest.

**A. Section 1002 of the Public Utilities Code**

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

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

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

Under *Northern California Power Agency* and the Public Utilities Code, the parties have a right to have an evidentiary hearing on environmental issues before the Commission makes any CPCN or public interest determination.<sup>6</sup> The Commission cannot properly weigh all factors

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<sup>6</sup> As noted in MCWD’s Consolidated Comments on the proposed Settlements, its request for modification of the schedule to permit hearings on environmental issues following finalization of

bearing on the public interest when it has allowed some factors to be the subject of testimony, evidence and cross-examination while immunizing environmental factors from the same level of evidentiary scrutiny. Parties will be limited to commenting on the un-cross-examined and untested conclusions of Commission staff and consultants in the CEQA compliance track of this proceeding.

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

**B. CEQA Review Must Be Objective**

CEQA does not permit the Commission, or any public agency, to approve a project in advance of certification of an EIR. (Pub. Resources Code §§ 21100, 21151 (project approval requires the lead agency's certification of an environmental impact report); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128-132. *See also, e.g.,* D.09-12-017, p. 20, *citing* Pub. Resources Code § 21082.1, subd. (c)(3) (lead agency must certify EIR for a project, reflecting its independent judgment).) This is an issue of improper procedure which goes to the "required

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the Commission's Subsequent EIR and its request for subpoenas to examine the Commission staff and consultants preparing the Subsequent EIR during hearings were both denied. (May 30, 2013 ALJ's Ruling After Evidentiary Hearings, pp. 3-5 (modifying schedule to permit briefing after issuance of Draft EIR, but denying hearing on environmental issues); March 18, 2013 email ruling of ALJ Weatherford, memorialized in May 30, 2013 ALJ's Ruling After Evidentiary Hearings, Attachment A at pp. 2-3 (denying request to examine).) Still, MCWD remains hopeful that the parties will have an opportunity to assist the Commission in developing a sufficient record on environmental impacts.

timing” of a lead agency’s actions. (*Save Tara, supra*, 45 Cal.4th at 131.) “[T]he law presumes the lead agency is neutral and objective and that its interest is in compliance with CEQA” prior to completion of its EIR and its decision on project approval. (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 917-918.) The Fifth Appellate District observed, in determining that a lead agency and project proponent were not in privity prior to approval of the project, that:

It is this neutral role which could cause [the lead agency] to reject the project or certify an EIR supporting one of the project alternatives or calling for mitigation measures to which the applicant is opposed. The agency’s unbiased evaluation of the environmental impacts of the applicant’s proposal is the bedrock on which the rest of the CEQA process is based.

(*Ibid.*, citing *Save Tara, supra*, 45 Cal.4th at 132 (“CEQA forbids an agency to be committed to accepting an applicant’s proposal before environmental review has been completed.”).)

Typically, environmental review must be conducted early in the process of considering a project. (*Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540, 548, citing *Save Tara, supra*, 45 Cal.4th at 134-135.)

In this case, EIR completion is not expected until the summer of 2014, at the earliest. Accordingly, even without considering the Commission’s duty to hold a CPCN hearing on the environmental impacts of the project, under CEQA the Commission cannot approve the Settlements or grant the requested CPCN until such time as it has completed and certified its EIR. Notwithstanding the contingency for CEQA compliance (MPWSP Settlement, § 3.1) as well as the perhaps atypical circumstances of urgency surrounding the instant Application, it is worth noting the First Appellate District’s observation of the Supreme Court’s caution: “postponing environmental analysis can permit ‘bureaucratic and financial momentum’ to build irresistibly behind a proposed project, ‘thus providing a strong incentive to ignore environmental concerns.’” (*Neighbors for Fair Planning, supra*, 217 Cal.App.4th at 548, citing *Save Tara*,

*supra*, 45 Cal.4th at 135.) The Commission must remain open to adopting whatever changes, mitigations or alternatives the environmental review reveals are necessary prior to approving the MPWSP, or any project.

**C. CEQA Review Cannot “Piecemeal” the Project**

In addition, the settling parties are requesting that the Commission treat the potential GWR component of the proposed water supply that is being explored by other local agencies on the Monterey Peninsula as an entirely separate project. (Sizing Settlement, §§ 2, 3; MPWSP Settlement, § 4. *See* Settling Parties’ Motion to Bifurcate Proceeding; Amended Scoping Memo and Commissioner’s Ruling of Sept. 25, 2013 granting Motion to Bifurcate at pp. 4-5.) This approach runs the danger of violating the requirements of CEQA that an agency’s environmental review encompass the entirety of a proposed project’s potential impact on the environment. (*See* CEQA Guidelines, Cal. Code Regs., tit. 14, § 15378(a) (a project evaluated under section 21065 of the Public Resources Code must include the “whole of an action” that will have an impact on the environment).)

To the extent that the settling parties’ separate approach to GWR is a “piecemealing” of environmental review, that would also constitute a violation of CEQA if the Commission were to approve less than the “whole” of the project. (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370 *citing* *Laurel Heights Improvement Assn. v. Regents of University of Calif.* (1988) 47 Cal. 3d 376, 394 (“reasonably anticipated future projects” must be considered in conducting environmental review).) At a minimum, the GWR project’s own environmental review must be considered in the Commission’s final Subsequent EIR discussion of cumulative impacts for the MPWSP. (*Ibid.*)

Environmental review for the MPWSP, as well as the potential GWR component of the water supply project, is not yet completed and the potential effects of the project on the SVGB

are not yet known. Therefore, the Commission may not, at this time and on the existing record, find the Settlements to be reasonable, consistent with law or in the public interest and the motions for approval of the Settlements must be denied. (Rule 12.1(d).)

V. **CONCLUSION**

Because the MPWSP Settlement and the Sizing Settlement, as proposed, are not reasonable in light of the whole record, are not consistent with law, and are not in the public interest, they cannot be approved.

The project must be configured to avoid impairment of the 1996 Annexation Agreement and injury to MCWD and other users of SVGB groundwater, and to comply with the Agency Act and other applicable laws. The *entire* project's potential environmental impacts and reasonable alternative projects must be thoroughly examined through the Commission's completion, evaluation and certification of its Subsequent EIR, *and* its exploration of the environmental impacts of the project at a hearing.

Absent revisions to the MPWSP and the Settlements that resolve the legal problems posed by the project's non-compliance with law and its impairment of MCWD's interests, and absent the Commission's lawful resolution of the environmental review issues raised above, MCWD respectfully requests that the Commission deny both the motion for approval of the MPWSP Settlement and the motion for approval of the Sizing Settlement.

DATED: January 21, 2014

Respectfully submitted,  
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