

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



**FILED**  
2-14-14  
04:59 PM

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

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

**SURFRIDER FOUNDATION'S REPLY BRIEF ON THE PROPOSED  
SETTLEMENT AGREEMENT ON PLANT SIZE AND LEVEL OF OPERATION**

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**INTRODUCTION**

As Surfrider has previously explained, desalination plants cause serious environmental damage. Not only do their brine discharges threaten marine life, but they are energy intensive, yielding significant greenhouse gas emissions compared to other water sources. The pending environmental impact report for the proposed Monterey Peninsula Water Supply Project (the “Project”) may yet reveal further significant impacts.

The Sizing Agreement, proposed by a minority of the parties in this proceeding, is oblivious to these environmental concerns and contrary to legislative mandate: “[I]t is the policy of the state to . . . [e]nsure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.”<sup>1</sup> The Agreement requests approval of a desalination plant that is larger than the documented water needs on the

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<sup>1</sup> Pub. Res. Code § 210081(d).

Monterey Peninsula. It thus incurs needless environmental harm without corresponding benefit.

Specifically, the Sizing Agreement seeks over 1,600 acre feet of water for two demand categories, “lots of record” and “tourism bounceback,” that are not supported by the record before the Commission. As such, the agreement would lead to environmental impacts, and rate payer costs, that are disproportionate to the Project’s stated goal of securing water to replace supplies diverted illegally from the Carmel River and placed off limits by the State Water Resources Control Board’s 2009 Cease and Desist Order (the “CDO”).<sup>2</sup>

Following the supplemental evidentiary hearing, only six of the eight parties to the proposed Sizing Agreement have filed a substantive brief to support the Agreement’s water allocations. Although they bear the burden of showing that the record supports their proposal,<sup>3</sup> they cannot provide what the record lacks: evidence supporting the lots of record and tourism bounceback demand calculations. Without demand estimates based on the record, the Commission should reject the Sizing Agreement in its current form.

## **ARGUMENT**

### **I. The Settling Parties’ Opening Brief Confirms that the Tourism Bounceback Allocation Lacks Any Record Support.**

As Surfrider explained in its opening brief, the record lacks *any* support for the Sizing Agreement’s 500 acre foot “tourism bounceback” allocation.<sup>4</sup> The Settling Parties’

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<sup>2</sup> See Settling Parties’ Motion to Approve Settlement Agreement on Plant Size and Operation at 2.

<sup>3</sup> Rule of Practice and Procedure 12.1(d).

<sup>4</sup> Surfrider Opening Settlement Brief at 5-8.

opening brief only underscores the total absence of evidence. Nowhere do the Settling Parties explain how they determined that tourism bounceback required 500 annual acre feet, rather than any other amount of water. The best they offer is the bald assertion that this allocation “reflects and accounts for occupancy rates which have previously been achieved by the industry on the Peninsula.”<sup>5</sup> The Settling Parties offer no support for this claim because the record contains none.<sup>6</sup>

Facing this complete lack of evidence, the Settling Parties are reduced to the immaterial arguments that tourism is important to the Monterey Peninsula’s economy, and that hotel occupancy rates have been higher in the past.<sup>7</sup> These points may well be true, but they do nothing to justify any specific acre-foot-per-year water allocation, much less the 500 acre-feet allocated in the Sizing Agreement.

In particular, in arguing that past high occupancy rates justify the bounceback allocation, the Settling Parties themselves acknowledge that their preferred comparison year, 2000, “was a ‘banner year on the peninsula’ for the hospitality industry.”<sup>8</sup> They do not explain why it is reasonable to compare the current hospitality rates to the Peninsula’s “banner year” instead of considering other years, or rates in similar jurisdictions, or long-term averages. The Settling Parties want the desalination facility to include capacity to allow the tourism industry to reach a peak not seen before or since 2000. In the absence of countervailing evidence, it is reasonable to assume that the industry will not, in fact,

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<sup>5</sup> Joint Opening Brief on Plant Sizing in Support of Approval and Implementation of Settlement Agreements (“Settling Parties’ Opening Brief”) at 13.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *Id.*

achieve this level. Rather, much of the water purportedly allocated to “bounceback” likely will actually go to some other use. This excess capacity would represent unjustified environmental impacts by providing water for uses not contemplated in the Commission’s consideration of Cal-Am’s application or in the CDO.

Moreover, even if using 2000 as a baseline year were reasonable, the Settling Parties significantly overstate the difference between the “banner year” rates and current occupancy rates. At the hearing, John Narigi, of the Coalition of Peninsula Businesses, stated that occupancy rates in 2000 “hit 79 to 80 percent annualized out,”<sup>9</sup> and the Settling Parties’ brief cites only this number.<sup>10</sup> But when specifically questioned about historic occupancy rates, Mr. Narigi read from a hotel industry report and twice clarified that “73 to 74 percent is where [occupancy rates] were at in 2000.”<sup>11</sup> Current occupancy rates are 67 percent.<sup>12</sup> The record before the Commission therefore suggests a much smaller allocation for tourism bounceback than the Settling Parties claim—even accepting their inappropriate designation of 2000 levels as the goal.

In any event, even a reasonable occupancy rate comparison could not alone justify the Sizing Agreement’s tourism bounceback allocation. To justify a specific allocation, the record would need to show the relationship between occupancy rates and water

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<sup>9</sup> Transcript Vol. 13 2106:9-13.

<sup>10</sup> Settling Parties’ Opening Brief at 13.

<sup>11</sup> Transcript Vol. 13 2179:142180:7 (emphasis added).

<sup>12</sup> Transcript Vol. 13 2106:13-14.

demand. It is the Settling Parties' burden to show where the record provides this information.<sup>13</sup> As their opening brief makes clear, the evidence is not there.

## **II. The Settling Parties Cannot Save the Sizing Agreement's Unsupported "Lots of Record" Allocation.**

Like the tourism bounceback allocation, the Sizing Agreement's separate water allocation for "lots of record" is also inappropriate. As a general matter, Surfrider does not dispute that some water may appropriately be allocated to lots of record. But as a matter of law and policy, the record must support that allocation. It does not. In the absence of such support, the Agreement cannot be approved by the Commission, and neither the Commission nor the public are assured that the desalination facility is properly sized in proportion to its cost and environmental impacts.

The Sizing Agreement's 1,180 acre feet number apparently stems from a report that is over a decade old, and thus unable to account for development in the intervening years or recent conservation efforts on the Peninsula.<sup>14</sup> The Monterey Peninsula Water Management District ("MPWMD") "does not certify" that this number is even valid.<sup>15</sup> Moreover, as both Surfrider and the ALJ have previously noted,<sup>16</sup> the various lots of record studies that MPWMD has cited appear nowhere in the record. The Settling Parties apparently expect the Commission to simply take their word for what the studies contain,

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<sup>13</sup> D.92-10-051, *Re Pacific Gas and Electric Company*, 46 CPUC 2d 113, 124-25 (1992) ("the burden remains with the parties advancing a stipulation or settlement to show that it is reasonable, consistent with law, and in the public interest"); Rule of Practice and Procedure 12.1(d).

<sup>14</sup> Late Filed Exhibit WD-3, 2002 Lots of Record Breakdown at 1.

<sup>15</sup> Direct Testimony of David J. Stoldt at 9:15-16.

<sup>16</sup> *See, e.g.*, Surfrider Foundation's Opening Brief on the Proposed Settlement Agreement on Plant Size and Level of Operation, at 3; Transcript Vol. 13 2171:22-27/

and somehow use these representations to support the proposed agreement, even as the Settling Parties cannot themselves commit to the study. But the Court of Appeal recently confirmed that hearsay evidence such as these studies, cannot alone support an issue of contested fact before the Commission.<sup>17</sup> The Settling Parties offer hearsay testimony of the studies' contents as the sole support for the lots of record calculation. The law is clear: this evidence is insufficient and the Commission cannot approve the allocation.

The record similarly lacks support for the claim that the lots of record number “is extremely conservative because it omits those lots in the unincorporated county areas, which comprise over 30 percent of Cal-Am’s service area.”<sup>18</sup> First, MPWMD’s information suggests that its old survey *did include* “vacant lots on vacant parcels” in the unincorporated County.<sup>19</sup> It omitted only “vacant lots on improved parcels,” which were a minority of the vacant lots within almost every Monterey Peninsula jurisdiction.<sup>20</sup> Second, this “30 percent” statistic is essentially meaningless. Observing that County customers currently demand 30 percent of the service area’s water provides no insight into how much water future customers on newly developed lots might demand. The Settling Parties’ recitation of the “conservative” nature of their study does not support their proposed allocation. The confusion regarding these aspects of the lots of record calculation perfectly illustrates why hearsay evidence is insufficient: the ALJ.

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<sup>17</sup> *The Utility Reform Network v. Public Utilities Commission* (February 5, 2014) A138701, slip opinion at 13-17.

<sup>18</sup> Settling Parties’ Opening Brief at 5.

<sup>19</sup> Late Filed Exhibit WD-3, 2002 Lots of Record Breakdown at 2.

<sup>20</sup> *See id.*

Commission, parties, and the public must be able to review and challenge the studies supposedly supporting the Sizing Agreement.

The Settling Parties' other "evidence" proves equally flimsy. At best, they recite facts to support the general idea that there is demand for water for development on the peninsula. This is hardly news, and it entirely ignores the Settling Parties' burden: to demonstrate the evidence in the record supports *this* settlement, including its *specific* demand allocation for lots of record. Thus, they quote Carmel Mayor Jason Burnett's testimony that he knows of "a number of empty lots that [would line] up that day asking for a service connection" if the current moratorium on new service connections were lifted.<sup>21</sup> But Mayor Burnett later conceded that "not only have we not quantified [this demand], but I wouldn't know how you would quantify it."<sup>22</sup> Similarly, the "numerous public meetings" held on the matter and the Coalition of Peninsula Businesses' earlier desire for a larger desalination plant do not justify the 1,181 acre feet allocation included in the Sizing Agreement, or any allocation for that matter.<sup>23</sup>

Without evidence to support their lots of record calculation, the Settling Parties' more general argument that Cal-Am must have water to meet future lots of record demand is misplaced. For instance, in D.88-09-023 (upon which the Settling Parties rely<sup>24</sup>), the Commission approved a water supply to meet future demand *only after* evaluating a substantial record that contained (1) precise and current calculations of

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<sup>21</sup> Settling Parties' Opening Brief at 6; Transcript Vol. 13 2097:27-2098:1.

<sup>22</sup> Transcript Vol. 13 2179:10-12.

<sup>23</sup> Settling Parties' Opening Brief at 6, 12.

<sup>24</sup> Settling Parties Opening Brief at 8-9.

existing properties applying for water connections and (2) evidence of how many new service connections the system would add each year.<sup>25</sup> No such evidence exists here. Because the record does not reliably support either the number of undeveloped lots of record on the Monterey Peninsula or how much water each lot might demand,<sup>26</sup> the Sizing Agreement's lots of record allocation cannot be approved.

Notably, the Settling Parties have significantly softened their earlier claim that a Sizing Agreement without a lots of record allocation would somehow intrude on local agency's jurisdiction.<sup>27</sup> They concede that the Commission has jurisdiction over the desalination plant, including determining its appropriate size.<sup>28</sup> Instead, they now ask the Commission to "be mindful of unnecessarily constraining local land use control."

But all jurisdictions, including the Peninsula's local agencies, must exercise their authority and discretion within environmental constraints. Indeed, the Subdivision Map Act requires local jurisdictions to "include as a condition in any tentative map that includes a subdivision . . . that sufficient water supply shall be available."<sup>29</sup> After years of apparently approving development applications without water to support the development (or with only illegal diversions from the Carmel River), the Peninsula local agencies are

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<sup>25</sup> D.88-09-023, *Re Citizens Utilities Company of California*, 29 CPUC 2d 214, 217-18 (1988).

<sup>26</sup> *See* Surfrider Opening Brief at 3-4.

<sup>27</sup> *See* 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 at 7; Monterey Peninsula Regional Water Authority's, Monterey Peninsula Water Management District's and City of Pacific Grove's Reply Comments in Support of Motions to Approve the General Settlement Agreement and the Settlement Agreement Concerning Plant Size and Operation at 6-7.

<sup>28</sup> Settling Parties Opening Brief at 11.

<sup>29</sup> Government Code § 66473.7(b)(1).

essentially asking the Commission to make up the water deficit from their prior unsupported approvals.

The Settling Parties also suggest that the Commission should not concern itself with reducing the size of the desalination plant, because “economies of scale inherent in the plant” indicate that decreasing the desalination plant’s size by 22 percent would decrease its cost by 10 percent.<sup>30</sup> This argument ignores the fact that the desalination plant’s environmental impacts grow with the size of the plant, irrespective of the plant’s price tag.<sup>31</sup> It is also surprisingly callous to the concerns of the already overburdened Monterey ratepayers. A ten percent cost decrease could represent \$25.34 million in collective ratepayer savings.<sup>32</sup>

Nor should the Commission be swayed by the Settling Parties’ vague assertion that sizing the plant without lots of record demand “could result in litigation” from an inverse condemnation suit. The only *evidence* provided for this argument are statements by witnesses—Dave Stoldt and Richard Svindland—that someone might file a lawsuit.<sup>33</sup>

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<sup>30</sup> Settling Parties Opening Brief at 7, 21 (citing Transcript Vol. 13 2138:6-21).

<sup>31</sup> Surfrider Foundation’s Comments on the Proposed Settlement Agreement on Plant Size and Level of Operation at 6-8.

<sup>32</sup> See Settlement Agreement of California-American Water Company, 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, Salinas Valley Water Coalition, Sierra Club, and Surfrider Foundation, § 6.6(a) (agreeing to a \$253.4 million cost estimate for the 9.6 mgd desalination plant).

<sup>33</sup> Settling Parties’ Opening Brief at 9-10.

As one would expect, neither witness provided any legal analysis to support these assertions.<sup>34</sup>

The threat of an inverse condemnation lawsuit is not a factor the Commission should dwell on. Threats of lawsuits abound and such intimidation cannot, by itself, guide public policy. The Commission should be concerned about whether agency action would *in fact* effect a taking of property and give rise to a meritorious lawsuit. But the Settling Parties do not perform any serious legal analysis of such a claim's viability. They provide only hornbook-style citations to Supreme Court cases setting general standards for takings claims.<sup>35</sup> None of these cases actually touch on threatened lawsuits over water service connections that the Settling Parties contend should weigh so heavily here. Until the Settling Parties actually analyze the alleged takings threat, beginning with identifying *which* public agency could face inverse condemnation liability, this argument warrants no consideration.

In sum, the records still lacks evidence necessary to support the lots of record allocation despite the Settling Parties' best efforts to disguise this fact. Thus, the Commission should reject the Sizing Agreement as unreasonable because allocation for "lots of record" demand lacks necessary evidentiary support.

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<sup>34</sup> *Id.*; Transcript Vol. 13 2102:13-17; 2128:16-28.

<sup>35</sup> Settling Parties' Opening Brief at 9-10.

### **III. Any Demand Allocated for Lots of Record and Tourism Bounceback Must Serve Those Uses.**

Cal-Am has presented this Project to the Commission as serving specific categories of demand.<sup>36</sup> The Commission is thus asked to approve the Project at the requested size because it would serve valuable uses and therefore justify its cost and environmental impacts. But if water is not used for the claimed needs, and goes to other undiscussed uses instead, the Commission's careful weighing of costs and benefits is undone.

A settlement is not reasonable or in the public interest if it, like the proposed Sizing Agreement, purports to include capacity for specific uses, but then allows that capacity to be used elsewhere. Moreover, because the supposedly allocated water is not allocated in fact, the Sizing Agreement leaves open the real possibility that water will not be available to serve lots of record or tourism bounceback, uses that the Settling Parties insist are quite important.

Such a commitment would actually ease the plant's operation. In their opening brief, the Settling Parties emphasize that the desalination plant is "sized on the 'razor's edge.'"<sup>37</sup> Thus, they argue that a larger desalination plant that is operated less would benefit from flexibility. Requiring any water allocation for lots of record or tourism bounceback to be tied to those uses would add operational flexibility to the desalination

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<sup>36</sup> CA-12, Supplemental Testimony of Richard C. Svindland at 4-5, Attachment 1 at 5.

<sup>37</sup> Settling Parties' Opening Brief at 4.

plant. Until lots of record come online or tourism actually bounces back, the plant would operate at a reduced level, potentially much lower than the claimed 98 percent.<sup>38</sup>

In addition to being a necessary component of a reasonable Sizing Agreement, committing water to the claimed allocations is easily workable. For instance, land use agencies could annually certify new demand, informing Cal-Am that new lots of record were ready for water connections or that tourism occupancy rates were increasing. Such certification could happen retrospectively (based on the previous years' demand) or prospectively (based on supported projections of the next years' demand)—the agencies and Cal-Am may find one approach or the other more effective. Upon receiving these certifications, Cal-Am could increase desalination production to meet certified demand. This procedure would ensure that the water actually goes to the allocations claimed in Cal-Am's application, and that the Project operates in the manner studied and approved by the Commission. The Sizing Agreement is unreasonable without such a mechanism.

#### **IV. Surfrider Does Not Contest the Sizing Agreement's Other Demand Calculations.**

Elsewhere in their brief, the Settling Parties urge the Commission to accept the Sizing Agreement's other demand figures. Among other things, they argue that a five-year average is appropriate for determining existing demand, that water is needed for Seaside Basin payback, and that the desalination plant should have capacity to return

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<sup>38</sup> Similarly, incorporating the Pacific Grove Local Water Project into the Sizing Agreement's water supply portfolio, rather than merely paying lip service to it, would also allow the desalination plant to operate at a reduced level, further increasing the plant's reliability. *See* Surfrider Opening Settlement Brief at 10-11.

water to the Salinas Valley Basin, if needed.<sup>39</sup> Surfrider does not contest these allocations, which are intended to accommodate future water needs that have support in the record.

### CONCLUSION

For the foregoing reasons, Surfrider respectfully requests that the Commission reject the Sizing Agreement in its current form.

DATED: February 14, 2014

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<sup>39</sup> *Id.* at 2-4, 17-18.