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

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)

**PUBLIC TRUST ALLIANCE'S COMMENTS ON THE PROPOSED
SCHEDULE DELAY IN PHASE 2 OF A. 12-04-019**

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PUBLIC TRUST ALLIANCE'S COMMENTS ON THE PROPOSED SCHEDULE DELAY IN A. 12-04-019

In compliance with the Administrative Law Judge's August 21, 2014 Ruling Updating the Schedule for A. 12-04-019, The Public Trust Alliance Submits these comments. We completely support the reasoning behind the proposed delay in the preparation of the DEIR and publication of the FEIR associated with the MPWSP. We support a corresponding delay in the start of Phase 2 of the proceeding to enable informed discussion of the matter. However, we are deeply concerned about the possibility of inappropriate allocation of public resources during the delay and the equally possible production of misleading information for the Commission. We believe we are engaged in a public decision-making process which is not yet "over." A "Problem" is being solved and all essential investigations required by the challenge must be engaged and any further avoidance of consideration of reasonable alternatives cannot be tolerated.

The people of Monterey County, their public utilities, agricultural providers, marine resource protectors, stakeholders of all stripes and governance institutions have been debating for decades about constructing and paying for a sustainable water supply infrastructure for cities located on the Monterey Peninsula and replacing the grievously overdrawn Carmel River and Seaside Groundwater Basins to stop known and continuing injury to valuable public resources. Two decades ago, in 1995, the State Water Resources Control Board issued an order to compel Monterey County authorities and the California-American Water Company to diligently seek a sustainable new supply. In 2008, it became clear that more enforcement authority would have to be applied if anything would actually be done (at least partially because it was economically advantageous for most involved parties that illegal diversions continue to be allowed), and in a year-long proceeding, the State Board issued a Cease and Desist Order with a date certain for the illegal diversions to be stopped. Surely, it can't be a surprise to anyone with experience in this

epic, that six years later, we still seem to know so little about the underlying facts of the case and we still don't have an institutionally viable path forward. This is the just the inevitable, cumulative result of numerous deliberate actions.

While we can't pretend to be in current possession of "answers," the Public Trust Alliance does submit that we can locate some extremely effective tools to implement a timely, reasonable, feasible and responsible response to the long term water supply challenges now facing the Monterey Peninsula. We see the key in recognizing the profound changes in physical and legal circumstances that have occurred during the pendency of this proceeding and the need for applying adaptive techniques across a wide range of disciplines and professions. It is something that can and must be done to proceed in compliance with applicable laws. The physical and legal contours of our "problem" have changed significantly as we have been engaged in trying to solve it. Some aspects that seemed only a few years ago to be "unsolvable in our lifetimes" have been transformed into questions that must be "answered as soon as possible in the public interest." Some projects that might have been "solutions" at particular points in the past are no longer appropriate or credible public responses to a serious and developing public challenge. The law is forgiving to those who deal reasonably with changing circumstances, but it never gives a free pass to deliberately unreasonable behavior. The proposed delay in this proceeding presents a unique opportunity for all parties to hold frank discussions and try to be reasonable with regard to the public interest. This is something that can actually happen in Monterey County and the California Public Utilities Commission in upcoming months.

II. WHAT IS THE CONTEXT OF THE DELAY?

The Energy Division has requested a delay to ensure that it can be in compliance with applicable laws as necessary information is gathered and analyzed to make rationally defensible

choices regarding water intake and treatment strategies for the proposed MPWSP. This is as it should be. The ALJ Ruling and supporting Energy Division letter identify three main concerns urging delay: 1) the legal requirement that the PUC actually analyze whether the project can proceed without violating other users' groundwater rights, 2.) actual, defensible analysis of cumulative impacts of the project while taking into consideration changing CSIP and SVWP activities and 3.) the implications of the delay in producing key information for the Groundwater Replenishment aspect of the project. We wholeheartedly endorse each and every one of these arguments. But the Public Trust Alliance wonders how important these particular concerns are in relation to the alleged focus of this entire proceeding: A CPCN can only be awarded to a project if the Commission determines that it is an appropriate project, and this must be done in compliance with applicable laws. This particular "local" delay has been appropriately sought, but we hope that no additional effort will be expended in the avoidance of required analysis of reasonable alternatives to this particular architecture of the MPWSP.

It seems to this intervenor that at least two "landscapes" intersect to shape the local question sought to be answered: Can the project be implemented in such a way as not to injure present groundwater right holders? One "landscape" is defined by the physical behavior of water in the ecosystem (which includes both geology and biology) in which the project will function, and the other is the "institutional landscape" in which water rights are created and administered. The earlier phases of this proceeding related mainly to selective "test bores" in the institutional landscape which was dealt with as if it might actually be "bifurcated" from the physical one (environmental analysis). While it makes perfect sense to those stakeholders who want to implement a particular project, broader public interests involved in the public decision-making process have repeatedly been raising serious concerns throughout this proceeding and it's various derivatives in various venues. What, exactly, is happening in parallel or serial process? Because

so much is occurring behind closed doors, this intervenor has had a hard time determining what alternatives are being considered by the Energy Division, much less why or how. There has been an astounding lack of public disclosure of public action, or meaningful opportunities for public participation in this decision making process (by which I include the various machinations of local as well as State Agencies). But in an era of “Climate Change,” business as usual is no longer appropriate and all parties owe a higher allegiance to the public interest than their private ambitions. This creates an eminently “solvable” problem.

III. THERE IS NO ‘MONTEREY AGREEMENT’ IN MONTEREY COUNTY

Because Public Water Supplies in Monterey County are not linked to the State Water Project, the product of the closed-door meeting of Project Contractors which resulted in the “Monterey Agreement” to apportion shortages in that system does not apply to the Rivers of Monterey County nor does it regulate the responsibilities of public agencies in Monterey County under the Water Code to protect first domestic uses of public water, and then irrigation supplies. While there is no shortage of complex Agency Act interpretation that needs to be engaged, the fundamental contours of public responsibility are actually much clearer for water management in Monterey County as a singular entity than they are in the multi-county landscape of the rest of California. It is unreasonable to force Monterey County cities to desalinate seawater when other sources of public water may in fact be available for appropriation or transfer.

This means that a “reasonable” search for an alternative public water supply in Monterey County might actually begin where one is most likely to find public water. Officers of the Monterey County Water Resources Agency are collectively responsible to all inhabitants of the County and one might think that all reasonable accommodations are consistently considered and evaluated. But this has not always been the case. In fact, it might seem that a succession of

infeasible alternatives has been investigated instead.

A great deal of the economic development in California is related to the familiar ambition to convert “public water” into “private water” or at least create the appearance of custom in dealing with it as such. But this is not yet a process which is “complete” or enforceable with any degree of certainty. A general momentum has been under way for generations in Monterey County while at the same time, even more general reflections of statewide public interests have prevailed in other parts of the state. Some of these transitions have been punctuated in the recognition of ever more public assets under the rubric of “the public trust doctrine” accompanied by a steady erosion of local Superior Court jurisdiction over “State trust property.” In this changing institutional environment, arguments for particular water development schemes have to be scrutinized far more carefully than they have been in the past, and Statewide public interests have to be protected rather than being inadvertently abandoned by assumption by local entities.

IV. “REASONABLENESS” IN USE AND DIVERSION OF WATER IS ALREADY LONG-ESTABLISHED UNDER THE CALIFORNIA CONSTITUTION, WATER CODE, ENVIRONMENTAL LAW, AND THE REGULATION OF PUBLIC AND PRIVATE UTILITIES

There is no longer any question whatsoever that California enforces a “reasonable” standard in the use and diversion of public water. This was established in 1926 as a result of private litigation which asserted that a California Water Right included the choice to flood-irrigate a field at a time when water supply was short for other State inhabitants. While even then the Courts predictably sided with the private claimant, the California Legislature swiftly and clearly protected a more obvious statewide public interest by enacting the Constitutional Amendment promoting reasonable use and avoidance of waste of public assets as the centerpiece of California water regulation. That standard is nowhere close to “up for argument” in today’s regulatory environment. In fact, from the Constitution down, a distinctly discernible “try not to be stupid”

standard is clearly visible in public works regulation.

One problem with moving ahead with the MPWSP without meaningful consideration of obvious alternatives is that the people of the Monterey Peninsula may end up being financially responsible for an unnecessary and very expensive, energy intensive and environmentally undesirable bit of public infrastructure in an increasingly vulnerable coastal zone. One of the most profound changes in the pendency of this proceeding has been the occurrence of Hurricane Sandy on the Eastern Seaboard of the United States. The scale of damage and cost of reconstruction have forever impacted what sorts of economic and legal assumptions can be justified as “reasonable” in an era of climate change. We have been told we can expect larger and stronger storm events with increasing energy being stored in a warming atmosphere. Sea Ice and glaciers are melting far more quickly than predicted and almost everyone knows that sea level is rising. The Public Trust Alliance has not seen what sorts of assumptions are being incorporated in the water modeling studies associated with the project, but a layman’s guess is that rising sea level would have an overwhelming effect on salt water intrusion in the project area. We have no idea what range of assumptions might be considered in this area, and it is only one in a rather large black box of public analysis of this project. And what is the risk of concentrating so much public infrastructure so close to the coast? Wouldn’t it make more sense to move inland for a new source of public drinking water? These comments are not being prepared in a vacuum; we are all reading about flood damage, fatalities and mass evacuations because of increasingly severe storms.

Dated: September 11, 2014

Respectfully Submitted,

By _____/s/_____

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