

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



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In the Matter of the Application of California-
American Water Company (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
PROTEST OF AMENDED APPLICATION 12-04-019**

MARK FOGELMAN
RUTH STONER MUZZIN
FRIEDMAN & SPRINGWATER LLP
350 Sansome Street, Suite 210
San Francisco, CA 94104
Telephone: (415) 834-3800
Facsimile: (415) 834-1044
Email: mfogelman@friedmanspring.com
Email: rmuzzin@friedmanspring.com

Attorneys for Marina Coast Water District

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In accordance with Rule 2.6 of the Commission’s Rules of Practice and Procedure, and pursuant to the February 22, 2016 Assigned Commissioner’s Ruling Directing California-American Water Company to Amend Application with New Project Description, Marina Coast Water District (“MCWD”) respectfully submits its Protest of Amended A.12-04-019, 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 (the “Application”), which was filed by California-American Water Company (“Cal-Am”) on March 14, 2016 (“Amended Application”).

I. PROTEST AND GROUNDS

MCWD protests the Amended Application for a Certificate of Public Convenience and Necessity (“CPCN”) for the proposed Monterey Peninsula Water Supply Project (“MPWSP”). The MPWSP remains essentially the same project as the North Marina alternative that the Commission previously analyzed and ultimately rejected in A.04-09-019. (See MCWD’s Protest of A.12-04-019, filed May 25, 2012, p. 2, citing D.10-12-016.) The Amended Application suffers from a number of the same legal and practical impediments that MCWD raised in its initial protest in this proceeding, and MCWD reaffirms and incorporates by reference into this protest each and every position, objection and legal argument it has raised in this proceeding, whether by its initial protest, its pleadings filed in this proceeding, its oral statements and arguments to the Presiding Officer, or otherwise.

The chief obstacle to the project described in the Amended Application is still the threshold problem of Cal-Am’s lack of an appropriative groundwater right to carry out the project in the preferred configuration, *i.e.*, utilizing slant wells drawing from the CEMEX property in North Marina within the now-designated Critically Overdrafted 180/400 Foot

Aquifer Subbasin¹ of the Salinas Valley Groundwater Basin. Cal-Am admits that its test slant well draws groundwater, and that its fully operational source wells will draw far more groundwater. The State Water Resources Control Board’s assessment of this legal obstacle in July 2013 did nothing to cure this fundamental problem; rather, it simply suggested that there may be a potential path for Cal-Am to lawfully utilize for desalination purposes any groundwater pumped from source wells at the CEMEX site if Cal-Am is able to demonstrate that the project would not harm the groundwater aquifers and lawful groundwater users within the vicinity of the CEMEX property. (Ex. MCD-17, pp. 48, 50-51.) MCWD is one of those users. The SWRCB properly emphasized that the burden falls on Cal-Am to demonstrate there will be no injury. (*Id.* at 46.)

MCWD believes that each of the following issues presents a serious impediment – or at least an unresolved potential impediment – to the preferred configuration for the MPWSP as proposed by Cal-Am in its Amended Application.

- Cal-Am’s lack of an appropriative groundwater right for the MPWSP;
- The Monterey County “Desal Ordinance,” Monterey County Code of Ordinances, chapter 10, section 10.72.030, subd. B, which requires public ownership of desalination facilities in Monterey County;²

¹ In January 2016, the 180/400 Foot Aquifer Subbasin was designated by the California Department of Water Resources as a “Critically Overdrafted Basin.” *See* http://www.water.ca.gov/groundwater/sgm/pdfs/COD_BasinsTable.pdf.

² True enough, the Commission’s concededly “advisory” opinion on this question stated in dictum that the Commission does have the ability to preempt the Desal Ordinance so as to approve and certificate a necessary public utility facility. (D.12-10-030, as amended by D.13-07-048.) However, that power, if it exists at all, can only be exercised here to the extent that the MPWSP has actually been certificated by the Commission in a configuration that demonstrably conflicts with the Desal Ordinance. The Desal Ordinance cannot be

- The anti-export provision of the Agency Act (Water Code Appendix, ch. 52, *see* sections 52-9(u) and 52-20), which requires groundwater pumped in the Salinas Valley Groundwater Basin to remain in the basin;
- A 500 acre-foot per year pumping limitation and other restrictions, which apply to the CEMEX property. (1996 Annexation Agreement, Ex. MCD-6).³

Therefore the MPWSP, in the configuration preferred by Cal-Am as set forth in its Amended Appendix H (Project Description) and filed with the Commission as part of the Amended Application, is not feasible.

II. CATEGORY, HEARING, ISSUES AND SCHEDULE

MCWD understands that the Application remains a Ratemaking Proceeding, and that the bar imposed on *ex parte* communications by the January 23, 2015 Administrative Law Judge (“ALJ”) Ruling remains in place. Following the currently-scheduled prehearing conference and supplemental hearings set for the week of April 11-15, 2016, MCWD supports an early decision on Phase II, *i.e.*, whether Cal-Am should enter into a water purchase agreement for the Pure Water Monterey, or Groundwater Replenishment (“GWR”),

preempted in the hypothetical, where no actual conflict between the Desal Ordinance and a certificated project and hence no concrete controversy exists. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171.) Moreover, the Commission’s advisory preemption rulings were rendered prior to the enactment of California’s new Sustainable Groundwater Management Act, SB 1168 (Pavley) and AB 1739 (Dickinson), a new statutory scheme that assigns the protection of groundwater resources to local authorities under the local police power rather than to statewide agencies.

³ MCWD’s separate challenges to the California Coastal Commission’s improper grant of a coastal development permit for Cal-Am’s Test Slant Well at the CEMEX site in violation of the City of Marina’s Local Coastal Program and to that Commission’s improper approval of Cal-Am’s amended permit application are presently proceeding before the courts. MCWD continues to protest Cal-Am’s utilization of the CEMEX property for its sourcewater wells, which MCWD believes is environmentally objectionable and violates the 1996 Annexation Agreement (Ex. MCD-6) and the Agency Act (Water Code App. ch. 52).

project that has already undergone review under the California Environmental Quality Act (“CEQA”) and has been approved by the Monterey Regional Water Pollution Control Agency.

MCWD suggests the Commission schedule briefing and a decision on GWR as promptly as possible following the April, 2016 hearings. An early separate decision on GWR will assist the Commission and the parties in more accurately evaluating other issues that are the subject of the supplemental hearings, such as updated project costs, the proper sizing of any desalination plant that may be certificated, accurate supply and demand figures, and mitigation for more accurately projected volumes of brine discharge, as well as an accurate evaluation of any proposed return groundwater obligation and method for return.

As to procedure for resolving the desalination component of the proposed MPWSP, notwithstanding the Commission’s clear disagreement, MCWD maintains its belief that the parties and the public are entitled to an evidentiary hearing that encompasses all of the relevant factors concerning an application for a CPCN under the Public Utilities Code, including environmental issues. (Pub. Util. Code §§ 1001, 1002; *Northern California Power Agency v. Public Util. Com.* (1971) 5 Cal.3d 370, 378-380; *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal.2d 462, 465-66.) MCWD submits that the Commission’s heretofore-unchallenged two-track separation of CEQA and CPCN issues unfairly, improperly and unlawfully compartmentalizes the Commission’s consideration of the Amended Application and denies the parties full and fair exploration and development at the CPCN evidentiary hearing of one abundantly relevant and critically important factor – the environmental impact of the project. That factor is entitled to as much weight and as full an evidentiary record as any other factor that must be balanced in the Commission’s CPCN

determination. Though MCWD acknowledges that its request for an evidentiary hearing on environmental impacts has repeatedly been denied by the Presiding Officer, MCWD nevertheless continues to urge that such a hearing be granted and that the Commission keep its CPCN record open through and including the issuance of its final environmental impact document in order to receive such evidence and test it through cross-examination.

Concurrent consideration of the full scope of record evidence by the Commission is particularly crucial in this case because the very same data, test results and modeling that will reveal the project's likely significant environmental impacts could also be determinative of the practical question of whether Cal-Am's MPWSP, in its preferred configuration, could extract sourcewater for the project from the Critically Overdrafted 180/400 Foot Aquifer Subbasin at the CEMEX site without harming groundwater quality and quantity, MCWD, or other users in the vicinity of the site.

The July 2013 settlement among Cal-Am and a number of other parties specifically provides for intake alternatives. Yet Cal-Am has, so far, indicated little interest in exploring less problematic methods and/or locations for its desalination sourcewater intake. Therefore, and in spite of the Commission's solicitation of early briefing on a number of legal issues, the most critical legal issue – Cal-Am's lack of an appropriative groundwater right – remains an absolute impediment to the project. As long as Cal-Am continues to insist on its preferred project configuration, it is unlikely that this critical question can be resolved through an agreement among the parties, because the basin conditions and test well impacts evidenced by data from Cal-Am's own test well monitoring program (*see* Ex. MCD-20, Hopkins report) clearly indicate that (a) carrying out the project in Cal-Am's preferred configuration would result in significant harm to the groundwater aquifers and lawful groundwater users, like

MCWD, in the vicinity of the CEMEX property and (b) this harm would not be mitigated by Cal-Am's proposal to return water to the subbasin north of the Salinas River.

Thus, any final decision by the Commission in this proceeding that approves the MPWSP in Cal-Am's preferred configuration of intake wells drawing from the Critically Overdrafted 180/400 Foot Aquifer Subbasin at the CEMEX site would still require, and be subject to, a resolution in the appropriate judicial forum of the issue of Cal-Am's lack of an appropriative groundwater right for the project.

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Respectfully submitted,

FRIEDMAN & SPRINGWATER LLP

By: /s/ Mark Fogelman
Mark Fogelman
Ruth Stoner Muzzin
Attorneys for
MARINA COAST WATER DISTRICT