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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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 CONSOLIDATED COMMENTS AND REQUEST FOR DEFERRED HEARING ON MOTIONS TO APPROVE BRINE DISCHARGE SETTLEMENT AGREEMENT AND SETTLEMENT AGREEMENT ON DESALINATION PLANT RETURN WATER

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In accordance with Rule 12.2 of the Commission's Rules of Practice and Procedure ("Rules"), Marina Coast Water District ("MCWD") respectfully submits its comments on the Settling Parties' Motion to Approve Brine Discharge Settlement Agreement (the "Brine Settlement Motion") and the Joint Motion for Approval of Settlement Agreement on Desalination Plant Return Water (the "Return Water Settlement Motion"), both filed in this proceeding on June 14, 2016 (together, the "Motions"). MCWD also requests an evidentiary hearing on each of the settlement motions following the resolution of Phase 2 of this proceeding, completion of the joint federal/state environmental review process, and further development of the relevant factual record.

I. INTRODUCTION

MCWD participated in good faith in the multi-party discussions that led to the Motions. MCWD generally supports the goal of achieving the settlement of contested applications or of contested issues, subject to the Commission's overarching public convenience and necessity determination and the public interest. In addition, in connection with settlements proposing to resolve discrete aspects of an application that is subject to California Environmental Quality Act ("CEQA") review, MCWD supports the careful assessment of the potential environmental impacts of the application or project in its entirety and the goal of planning for adequate mitigation of such impacts. For a number of reasons, as discussed more fully below, MCWD cannot support the Motions here. Settlement of discrete brine discharge and "return water" issues improperly assumes approval of the full project.

MCWD must at this time oppose approval of the settlements concerning the proposed Monterey Peninsula Water Supply Project ("MPWSP"), primarily on the basis that the

settlements assume the MPWSP is necessary and can be carried out legally without engendering significant harms. However, the MPWSP cannot be legally constructed as the project is currently proposed by the California-American Water Company ("Cal-Am"), and therefore the Motions, and the settlements they address, cannot satisfy the criteria of Rule 12.1(d). As set forth in MCWD's August 30, 2013 consolidated comments opposing the two July 31, 2013 settlement motions in this application and in its more recent Protest of the Amended Application, MCWD continues to believe there are fundamental and irremediable legal and evidentiary deficiencies underlying Cal-Am's application as formulated in this proceeding. In addition, MCWD does not believe the Commission may lawfully approve settlements involving environmental impact mitigations without having completed its environmental review of the entire proposed project and without having considered the influence on the environment of the project in an evidentiary hearing.

Furthermore, MCWD believes that there are contested material facts relevant to its grounds for opposing the MPWSP and, therefore, the Motions. These material facts were not known or not adequately explored at the time of the 2013 evidentiary hearings, or they rest on an incomplete record that is outdated and impermissibly stale. These disputed material facts concern:

(1) the likely impacts on groundwater of Cal-Am's proposed extraction of up to 22 million gallons per day ("mgd") of sourcewater for a 9.6 or 6.4 mgd desalination plant from the CEMEX property (which overlies the 180/400 Foot Aquifer Subbasin of the Salinas Valley Groundwater Basin ("SVGB"), south of the Salinas River in close proximity to MCWD's service area);

(2) whether delivering desalinated water from the MPWSP to the SVGB north of the Salinas River will mitigate harms south of the Salinas River to the SVGB and lawful existing users of the basin; and

(3) the volume, *if any*, of additional replacement water supply Cal-Am must obtain in order to cease its illegal Carmel River withdrawals in light of the full scope of its available water supply portfolio and upon implementation of the Monterey Regional Water Pollution Control Agency's ("MRWPCA's") Pure Water Monterey or Groundwater Replenishment ("GWR") Project and expansion of the Monterey Peninsula Water Management District ("MPWMD")'s Aquifer Storage and Recovery ("ASR") program, including any SVGB return water obligation arising from extraction of SVGB groundwater for MPWSP operation;

(4) whether other feasible, less harmful alternative replacement water supplies that would fully satisfy the requirements of State Water Resources Control Board ("SWRCB") Orders WR 95-10 and WR 2009-0060 (the "Cease-and-Desist Order" or "CDO"), and thus obviate any need for the MPWSP, are available to Cal-Am.

A hearing is required in order to resolve contested issues of fact. (Rule 12.3.) However, MCWD believes that the Commission's prompt resolution of Phase 2, which seeks approval of Cal-Am's entry into a Water Purchase Agreement ("WPA") for the GWR Project, should move forward expeditiously and should precede any hearing on contested factual issues. None of the foregoing issues affects the Commission's ability to act on the matters before it in Phase 2.

Resolution of some, if not all, of the foregoing contested factual issues should await development of data that may become available upon completion of the Commission's environmental review and the conclusion, or halting, of Cal-Am's test slant well project. Resolution of the third and fourth of the foregoing contested issues of fact will affect the actual volume of return water, *if any*, and brine discharge, *if any*, that is the subject of the Motions. Resolution of the first issue above is closely related to the legal issue of Cal-Am's lack of an appropriative groundwater right to pump source water for the MPWSP from the SVGB via slant wells located on the CEMEX property, as it proposes to do. As noted on page six of MCWD's April 8, 2016 Protest of Cal-Am's Amended Application herein, and as the Commission has repeatedly and consistently recognized in its own past decisions, that issue must be resolved in the appropriate judicial forum before the Commission may render a decision on Cal-Am's pending application.

II. CRITERIA FOR COMMISSION APPROVAL OF SETTLEMENTS

Settlements approved by the Commission, whether or not they are contested, must be (1) reasonable in light of the whole record, (2) consistent with law, and (3) in the public interest. (Rule 12.1(d).) The Commission's Rules of Practice and Procedure forbid it from approving a settlement unless all three criteria are satisfied. (*Ibid*; *In re Application of Southern California Edison* (Cal. P.U.C. 1996) 1996 Cal. PUC LEXIS 23 ("D.96-01-011") at *33-34.) Neither of the proposed settlements meets these three criteria, because both settlements assume that the MPWSP can be carried out legally as proposed, without harm, and because they assume that the MPWSP is required by the public convenience and necessity. The record belies these assumptions.

A. <u>Neither of the Settlements is Reasonable in Light of the Whole Record</u>

First, the record pertaining to each of the settlements is incomplete. The Motions and the settlements for which they seek approval assume that the Commission will approve the MPWSP, as Cal-Am proposes the project, for either 6.4 or 9.6 mgd (approximately 6,752 or 10,627 acre-feet per year ("AFY")) of capacity, drawing as much as 22 mgd from up to ten brackish groundwater source wells on the CEMEX property. (Amended Application, p. 1, Amended Att. H thereto, p. 1; *see* Reporter's Transcript ("RT"), Vol. 9, pp. 1606:17-1607:4 (product to sourcewater ratio of approximately 42%).) The settlements assume, in the face of contradictory evidence, that Cal-Am will demonstrate that the public convenience and necessity require the construction of a 6.4 or 9.6 mgd desalination project. (Return Water Settlement Motion, pp. 1-2, Ex. A thereto at pp. 1-2; Brine Settlement Motion, p. 2, Att. A thereto at pp. 1-2.) The settlements also assume, in the face of contradictory evidence, that Cal-Am could legally operate the MPWSP without significant, unmitigable injury to (1) the groundwater basin underlying the proposed source well location, (2) existing water rights holders and users of that basin including MCWD, and (3) the environment generally. (*Ibid.*) But the record demonstrates that these assumptions are false. Therefore the settlements cannot be found reasonable on the current record.

1. Groundwater Impacts

The Commission's now-withdrawn April 2015 draft environmental impact report ("draft EIR") failed to demonstrate that many important, potentially significant project impacts – including emission of greenhouse gases, damage to sensitive habitat for endangered species, and adverse impacts to groundwater – could be sufficiently mitigated. (*See* Sept. 30, 2015 comment letter of the Salinas Valley Water Coalition on the draft EIR,

pp. 8-11, and Sept. 18, 2015 Technical Memorandum of Timothy Durbin, P.E., attached thereto[1]; *see also* Sept. 15, 2015 comment letter of the Monterey Peninsula Regional Water Authority on the draft EIR, pp. 3-5[2]; and Sept. 30, 2015 comment letter of Surfrider Foundation on the draft EIR, pp. 2-13[3].[4]) Cal-Am's witness testified in 2016 that the MPWSP would not result in significant adverse impacts to groundwater. (Ex. CA-39, App. B thereto at p. 2, ¶ 3.) Yet the evidentiary record shows that the MPWSP would significantly impact groundwater in the project vicinity and in close proximity to MCWD's source wells for its municipal supply. (RT Vol. 17, pp. 2832:26-2833:16; Ex. MCD-20, pp. 3-7, 7-13 and figures there referenced; Ex. MCD-27, pp. 2-5 and figures there referenced.) Indeed, Cal-Am's hydrogeological expert, Mr. Leffler, testified that one objective of the MPWSP is to "establish a direct connection between the aquifer and the seawater." (RT, Vol. 14, p. 2369:5-7.) This statement is plainly inconsistent with the simultaneous claim that the MPWSP would purportedly benefit the aquifer. (*Id.* at p. 2369:21-25.)

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[1] Available at http://www.cpuc.ca.gov/environment/info/esa/mpwsp/deir_comments/G_SVWC3.pdf.

The Commission has made available all written comments regarding its April, 2015 EIR, at http://www.cpuc.ca.gov/environment/info/esa/mpwsp/deir_comments.html.

[2] Available at http://www.cpuc.ca.gov/environment/info/esa/mpwsp/deir_comments/L_MPRWA2.pdf.

[3] Available at http://www.cpuc.ca.gov/environment/info/esa/mpwsp/deir_comments/G_Surfrider.pdf.

[4] Available at http://www.cpuc.ca.gov/environment/info/esa/mpwsp/deir_comments/L_MCWD5.pdf.

MCWD's written comments of July 29, 2015 were served on all parties when submitted. Its comments at that time were limited, but included discussion of its concerns regarding the incomplete state of the record (pp. 10-16), questionable integrity of the now-withdrawn draft EIR's groundwater modeling (pp. 1-7), and various other transparency and procedural issues under CEQA.

One of MCWD's production wells is within two miles of the project intake well location at the CEMEX property. (RT Vol. 17, pp. 2832:26-2833:16.) Protective freshwater present in the Dune Sand and 180/400 FTE aquifers south of the Salinas River would be subject to significant, unreasonable lowering of water levels, increased salinity and increased seawater intrusion from operation of the MPWSP. (RT Vol. 14, p.2369:2-11; 2370:4-27; Ex. MCD-20, pp. 3-7, 7-13 and figures there referenced; Ex. MCD-27, pp. 2-5 and figures there referenced.) The record developed during recent hearings confirms that operation of the MPWSP source wells as planned at the CEMEX site will would generate adverse impacts to groundwater over at least a five-mile range. (*Ibid*; RT, Vol. 18, pp. 3048:23-3051:2, 3061:9-12 and Exs. RWA-25 and MCD-34 as there referenced.)

2. Mitigation with "Return Water"

Cal-Am and the other parties to the Return Water Settlement Motion take the positions that their agreement for provision of desalinated water to the Castroville Community Services District ("CCSD") would satisfy the anti-export provision of the Agency Act and that it would adequately mitigate any harm to the groundwater basin engendered by the MPWSP source wells. (Return Water Settlement Motion, p 5.) However, Cal-Am has presented no evidence whatsoever that its providing desalinated MPWSP product water to CCSD, north of the Salinas River, would mitigate in any way adverse impacts to groundwater in the immediate area of the source wells from which groundwater is proposed to be withdrawn, including adverse impacts to MCWD and its groundwater rights. (Pub. Resources Code § 21002.1, subd. (b); Cal. Code Regs. tit.14 ("CEQA Guidelines"), § 15370; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1232-1233.) The settlement states that it addresses the moving parties' groundwater

concerns (*see, e.g.,* Return Water Settlement Motion, Ex. A thereto at p. 2, ¶¶ G, H, I and p. 4, ¶ AA; *see* Ex. CA-44, the "Large Settlement," pp. 4 and 9-10 at §§ 3, 5). The moving parties' agreement does nothing to mitigate the actual impacts of the project on the basin, MCWD, or others.

Nor is there any evidence whatsoever that the proposed 1:1 ratio of desalinated water to withdrawn source water deemed-to-be-groundwater could constitute sufficient mitigation for physical impacts resulting from the volume of withdrawals out of the groundwater basin at the CEMEX property. (*Banning Ranch Conservancy v. City of Newport Beach, supra,* 211 Cal.app.4th at 1233 (upholding 2:1 ratio for habitat impact mitigation, based on substantial record evidence), citing *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 495.) The Commission's environmental review should address whether or not the adverse impacts of MPWSP groundwater pumping south of the Salinas River can possibly be mitigated to insignificant levels merely by providing desalinated water to the basin north of the Salinas River. If mitigation to a less-than-significant level of impact were feasible, then the Commission would have to determine the volume and location for that sufficient mitigation of the MPWSP's adverse impacts from project pumping. (*Ibid.*)

Moreover, the Return Water Settlement Motion does not acknowledge evidence recently adduced concerning the state of the groundwater basin. As Mr. Hopkins, MCWD's hydrogeologist, testified, Cal-Am's own test slant well monitoring data indicate the presence of a much higher percentage of SVGB groundwater than anticipated in the water being pumped from the test slant well. (Ex. MCD-20, pp. 3-7, 7-13 and figures there referenced; Ex. MCD-27, pp. 2-5 and figures there referenced; RT, Vol. 17, pp. 2893:22-2894:6; *see also id.* at pp. 2847:25-2849:5.) The Return Water Settlement is premised upon the parties'

agreement concerning a formula for determination of that percentage. (Return Water Settlement Motion, p. 4 and Ex. A thereto as referenced.) Yet testimony by Cal-Am's and the Regional Water Authority's experts likewise confirmed that the assumptions concerning the state of the groundwater basin, upon which the "return water" settlement is based, are outdated and unsupported. (RT, Vol. 15, pp. 2426:2-2433:17 and Ex. MCD-33 as there referenced; RT, Vol. 18, pp. 3033:21-3035:4 and Ex. MCD-33 as there referenced, 3105:25-3106:7.) Discovery by MCWD on these issues is ongoing, as is Cal-Am's periodic publication of groundwater data gleaned from its test slant well program. (*See* Cal-Am's written response to MCWD's Fifth Set of Data Requests, **Attachment 1** hereto.) However, the grossly incomplete record on these contested issues of material fact does not support the sweeping assumption of the Return Water Settlement Motion that significant harms to groundwater can be adequately mitigated by providing desalinated water to CCSD.

3. Supply and Demand

The record concerning supply and demand sources demonstrates material factual disputes concerning Cal-Am's need for a desalination source of supply. Cal-Am claims that it requires at least a 6.4 mgd, or approximately 6,752 AFY, desalination project. (Amended Application, p. 1, Amended Att. H thereto, p. 1.) But Cal-Am's entire system requirements in calendar year 2015 were only 9,545 AFY. (Ex. CA-41, pp. 7, 8.) Future supply of approximately 4,800 AFY is anticipated from the ASR program and the GWR Project. (Ex. JE-2, pp. 13-15.) Cal-Am's current sources include legal Carmel River supply of 3,376 AFY, plus permitted ASR supply (depending upon winter river flow), the Sand City desalination plant, the Seaside Basin, and illegal Carmel River supply. (*Id.* at p. 10 and Att. 1 thereto.) These factual inconsistencies also call into serious question the propriety of the

Sizing Settlement that was presented to the Commission on July 31, 2013. (*See* MCWD's Consolidated Comments of August 30, 2013 in opposition, pp. 4, 9.)

The Commission recently noted in its own comments to the SWRCB that Cal-Am's average volume of Carmel River diversions over the past four years was 7,656 AFY. (Ex. PCL-7, p.3.) Subtracting Cal-Am's legal diversions of 3,376 AFY from that number leaves only 4,280 AFY of illegal Carmel River diversions that must be replaced. This portion of Cal-Am's annual supply may readily be replaced with 3,500 AFY from the GWR Project and by utilizing system improvements that will permit access to an estimated 1,300 AFY of ASR supply beginning in 2018. (Ex. JE-2, pp. 13-15; *see also* RT, Vol. 18, pp 2988:24-2992:2, *especially at* p. 2990:14-16.) Yet Cal-Am still insists, even with implementation of the GWR Project and maximum ASR utilization, that it requires a 6.4 mgd desalination project. The record does not support Cal-Am's application.

4. Other Feasible Replacement Sources

Cal-Am states that the chief purpose of the MPWSP is to "satisfy Cal-Am's obligations to meet the requirements of SWRCB Order 95-10." (Amended Application of March 14, 2016, Attachment H, p. 1.) The record shows that Cal-Am can do so through its own customers' continuing conservation efforts in combination with purchased water from the GWR Project under the WPA currently before the Commission in Phase 2 of this proceeding, and with full utilization of legal ASR sources. (Ex. CA-41, pp. 7, 8, 10; JE-2, pp. 13-15; *see also* RT, Vol. 18, pp 2988:24-2992:2.)[5] True, the volume of available ASR

[5] To MCWD's knowledge, Cal-Am has not provided current information in this proceeding regarding its efforts to reduce the volume of non-revenue water use in its Monterey service area. However, its recent report to the SWRCB indicates that good progress has been made by Cal-Am on that aspect of conservation as well. (*See* First Quarterly Report for WY 2015-

supply may be uncertain depending upon winter flows in the Carmel River. (RT, Vol. 16, p. 2663:3-18; Vol. 19, pp. 3166:18-3167:8, 3185:13-3186:7.) But other unexplored alternatives may also be available to Cal-Am, such as additional supply from GWR, making permanent certain temporary payments for pumping forbearance to other Carmel River rights holders (*see, e.g.,* Ex. PCL-8, Apr. 28, 2016 Amended Application to SWRCB at pp. 18-19), and additional supply above 94 AFY from the Sand City desalination plant (SWRCB Order WR 2009-0060, pp. 41, 58). Other potential sources include storm water capture from the lower Salinas River, and additional supply may also be available from the Seaside Basin. (*See* MCWD's July 12, 2016 comments to the SWRCB on Cal-Am's Amended Application for modification of the CDO, **Attachment 2** hereto, pp. 5-12 and sources and authorities there cited.) Other parties have also argued that alternatives to desalination as a supply source merit the Commission's attention. (*See* Phase 2 Opening Brief of Public Trust Alliance, pp. 16-17, Phase 2 Reply Brief of Public Trust Alliance, p. 12.[6]) Environmental review of the MPWSP should address all of these alternatives, but such review is still under way and thus does not at this time support the Motions. (*See* Sept. 30, 2015 Notice to All Parties.) Indeed, without having considered these and other feasible alternatives, it cannot be said that the MPWSP is necessary at all. On the current record, there is no adequate showing that an alternative other than the "no action" alternative is appropriate and in the public interest.

16, p. 5 at Table Five, *available at* http://www.amwater.com/files/SWRCB%201Q%20CDO%20WR%202009_0060%20WY%2015_16.pdf.)

[6] *See also* a recent opinion letter by Public Water Now's Managing Director: George T. Riley, *Parallel universes on local water*, Monterey Herald, July 10, 2016, *available at* http://www.montereyherald.com/opinion/20160709/george-t-riley-parallel-universes-on-local-water.

In light of the foregoing contested factual issues, the unsettled state of the record cannot support a Commission finding that the Return Water Settlement is reasonable. (Pub. Util. Code §§ 1705, 1757, 1757.1; *see Southern Pacific Co. v. Public Utilities Com.* (1968) 68 Cal.2d 243, 244 (a mere statement of necessity is insufficient for certification, the Commission must make sufficient findings on a sufficient record for each fact supporting its ultimate finding).)

B. <u>Neither of the Settlements is Consistent with Law</u>

In evaluating whether or not settlements are in the public interest, one of the factors the Commission must consider is whether or not such settlements are "consistent with law." (Rule 12.1(d); 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.") emphasis added.) The Commission may approve settlement of contested issues, as well as the settlement of an application as a whole. (Rule 12.1(a).) However, as will be discussed below, the MPWSP as a whole is contrary to law for numerous reasons. Therefore in this instance the Motions – which necessarily assume approval of the MPWSP – may not be separately granted by the Commission.

Cal-Am's proposal to operate the MPWSP by unlawfully and unsustainably pumping sourcewater from the SVGB at the CEMEX site is contrary to multiple requirements of law. In the first place, Cal-Am has no appropriative right to pump groundwater from the critically overdrafted 180/400 Foot Aquifer Subbasin of the SVGB. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241-42*; City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-26*; Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522, 531-32 (overlying users' reasonable beneficial use of all basin water left no surplus for

appropriation); *Monolith Portland Cement Co. v. Mojave Public Utility District* (1957) 154 Cal.App.2d 487, 493-94 (public utility violated overlyers' rights by exporting water when there was no surplus available); *see* Jan. 22, 2016 Direct Testimony of Nancy Isakson, p. 4, fn. 1 and Att. 2 thereto, Dept. of Water Resources publication listing the 180/400 Foot Aquifer Subbasin of the SVGB (rather than the SVGB as a whole) as "critically overdrafted.")) It is true, notwithstanding the existing body of case law, that the SWRCB's 2013 review opined that *if* Cal-Am could demonstrate that it could operate the project without harming the basin or existing users of the basin – such as MCWD – *then* Cal-Am *might* be able to legally pump sourcewater for the project at the CEMEX site. (Ex. MCD-17, pp. 33, 38, 40, 46-47, 48.) But the burden is and must be on Cal-Am to affirmatively prove that such pumping will not harm the basin or existing water rights holders in the basin. (*Id.* at pp 46-47 ("the burden is on Cal-Am to show no injury") and p. 35; *Allen v. California Water and Tel. Co.* (1946) 29 Cal.2d 466, 481*; see also Monolith Portland Cement Co. v. Mojave Public Utility District, supra,* 154 Cal.App.2d at 494.) This Cal-Am cannot do. Even the incomplete record presently before the Commission plainly shows that pumping for the MPWSP from the CEMEX location would result in harm to the basin and to existing lawful users of the basin. (RT, Vol. 14, p. 2369:4-27; RT Vol. 17, pp. 2832:26-2833:16; Ex. MCD-20, pp. 3-7, 7-13 and figures there referenced; Ex. MCD-27, pp. 2-5 and figures there referenced.)

In addition, the MPWSP would improperly circumvent the local control, local decision-making, and local protection in groundwater matters that is required under California's new Sustainable Groundwater Management Act. ("SGMA," Water Code §§ 10720-10736.6), effective January 1, 2015.)

What is more, it would be improper and unlawful for Cal-Am to seek the Commission's determination of whether or not the MPWSP would interfere with others' groundwater rights, whether as a factual or legal question. (*See* Code Civ. Proc., §§ 830-852; *see also* Water Code, §§ 2000-2900.) As the Commission has frequently stated in prior decisions, consistent with long-standing statutory and decisional law in California, the Commission is without authority to determine water rights. (D.10-12-016, p. 17 ("The Commission does not have jurisdiction over water rights . . . .") Rather, the jurisdiction to make such a determination lies with the judiciary or the SWRCB. (*City of Santa Maria v. Adam* (2012) 211 Cal. App. 4th 266, 286; *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480; *see* Ex. MCD-17, pp. 46-47, fn. 65.)

Second, although Cal-Am and the parties to the so-called "return water" settlement assert that their agreement ensures the MPWSP will comply with the anti-export provision of the Agency Act, they ignore that statute's equally important requirement of avoiding harm to the basin. (Water Code App. ch. 52, §§ 52-8, 52-9 at subd. (h)(7), 52-21.) As noted above, the record shows – and Cal-Am's expert admits – that the MPWSP is intended to and will exacerbate seawater intrusion and degrade water quality in the basin, over at least a five-mile range in the project area. (RT, Vol. 14, p. 2369:2-11.) It will also lower water levels in the basin. (*Id.* at p. 2370:4-17.) Therefore, operation of the MPWSP as proposed would clearly harm the basin and existing lawful users of the basin. (Ex. MCD-20, pp. 3-7, 7-13 and figures there referenced; Ex. MCD-27, pp. 2-5 and figures there referenced; *see* RT, Vol. 14, p. 2369:5-7 (objective of the MPWSP is to "establish a direct connection between the aquifer and the seawater").)

Cal-Am's proposal to provide desalinated water to Castroville on the other side of the Salinas River from the CEMEX property from which Cal-Am plans to withdraw its sourcewater will do nothing to diminish or mitigate these harms. Recent additional analysis by Mr. Hopkins confirms that there will be no mitigation for reduced water levels and no mitigation for increased seawater intrusion south of the Salinas River. (**Attachment 3** hereto, July 13, 2016 memorandum of Curtis G. Hopkins, especially at pp. 13-15[7]; *see also* Ex. MCD-27, pp. 2-3; RT; Vol. 18, pp. 3039:10-3041:11 and exhibits there referenced (reflecting groundwater flow toward Salinas, not Marina).) Violation of the Agency Act's protective provisions would 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-16, pp. 6-8 and Ex. MCD-21, pp. 5-6, and exhibits there referenced; *see also* Ex. MCD-1A, Revised Direct Testimony of Lloyd W. Lowrey, Jr., pp. 3, 7-10, 13-15, and exhibits there referenced.)

Third, operation of the MPWSP as proposed would require violation of the 1996 Annexation Agreement. (Ex. MCD-6.) The record shows that a primary purpose of the 1996 Annexation Agreement is to protect and enhance groundwater resources in the North Marina area, including efforts to reverse chronic seawater intrusion in local aquifers. (*Id.* at "Executive Summary and p. 1).) Pumping of groundwater on the CEMEX property is limited to 500 AFY, a mere fraction of the volume of sourcewater required for the MPWSP, and under the terms of the agreement, all groundwater so pumped must be used on the

[7] Documents and data being produced by Cal-Am on a rolling basis in response to MCWD's Fifth Set of Data Requests (Att. 1 hereto) were not received in sufficient time to permit Mr. Hopkins' review prior to his preparation of Attachment 3.

CEMEX property and not exported, regardless of its chemical composition or potable nature. (Ex. MCD-6, 1996 Annexation Agreement, §§ 5.1.1.3, 7.2.)

Groundwater pumping inconsistent with the limits set in the 1996 Annexation Agreement would be subject to litigation to enforce the agreement. (*Id.* at p. 22, § 9.3.)[8] During evidentiary hearings in 2013, no party challenged MCWD's understanding of either its own rights under the 1996 Annexation Agreement or the existence of the pumping limitation, as set forth in Mr. Lowrey's Revised Direct Testimony, as modified on the witness stand on April 30, 2013, and the referenced exhibits. (RT, Vol. 10, pp. 1824-1826; Ex. MCD-1A, Revised Direct Testimony of Lloyd W. Lowrey, Jr., pp. 14-15; Ex. MCD-6, §§ 4.1, 4.4, 5.1.1.3, 7.) Any decision by the Commission approving Cal-Am's preferred sourcewater configuration at the CEMEX property would violate the constitutionally-guaranteed sanctity of contract, as well as lawful pumping restrictions set forth in the Annexation Agreement in accordance with the authority of the Monterey County Water Resources Agency under the Agency Act. (U.S. Const. art. I, § 10, cl. 1; Cal. Const. art. I § 9; Water Code App. ch. 52, §§ 52-8, 52-9, 52-21.)

Fourth, the MPWSP – if approved – would be in direct conflict with the Monterey County ordinance that requires public ownership of desalination facilities. (Monterey County Code of Ordinances, chapter 10, section 10.72.030, subd. B (the "Desal Ordinance").) The Commission considered this possibility when it issued hypothetical advisory opinions earlier in this proceeding. (D.12-10-030, pp. 25-26, as modified by D.13-

[8] MCWD's challenges to the California Coastal Commission's grant of Cal-Am's application for a Coastal Development Permit to operate its test slant well on the CEMEX property and the Coastal Commission's modification of that permit are subject to ongoing, separate litigation.

07-048, p. 4 (unlike courts, the Commission may issue advisory opinions).) The settlements necessarily assume that the Commission will find it necessary to preempt the Desal Ordinance. But the Commission may not do so if the MPWSP is not certificated.

In other words, if a different replacement supply source, or combination of sources, for Cal-Am's Carmel River supply can equally or better serve the public convenience and necessity, the Commission may not lawfully preempt the Desal Ordinance and certificate the MPWSP. Moreover, the Commission's hypothetical "advisory" opinions purporting to address the preemption issue did not consider the effect of the enactment of California's new Sustainable Groundwater Management Act, which accords local authorities, not statewide agencies, the responsibility and authority to protect local groundwater resources. In modifying D.12-10-030, after MCWD sought rehearing, the Commission clarified that a term of settlement between Cal-Am and Monterey County approved by the Commission in proceeding A.13-05-017 whereby Monterey County appeared to grant Cal-Am a special exemption from the Desal Ordinance (which would be patently unconstitutional (*see Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 933, 937)), was merely the parties' agreement to follow the Commission's decisions concerning preemption.[9] A settlement agreement in which a public agency unconstitutionally confers a special exemption from legal requirements on a single private party without repealing the legal requirements generally is not consistent with law. (*Summit Media LLC v. City of Los Angeles, supra,* 211 Cal.App.4th at 933, 937; *see* Commission Rule 12.1(d).)

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[9] The Supreme Court granted MCWD's petition for a writ of review challenging the Commission's decision approving the settlement in A.13-05-017 on other grounds. (*See Marina Coast Water Dist. v. Pub. Util. Com.*, Supreme Court Case No. S230728, review granted Mar. 23, 2016.)

Parties to the proceeding have proposed a number of alternatives for consideration and, as noted above and in MCWD's comments to the SWRCB concerning Cal-Am's application for modification of its Order WR 2009-0060, there are a number of other feasible approaches available to Cal-Am. These alternatives must be fully explored by the Commission, both under its Public Utilities Code certification responsibilities and under CEQA, and all relevant factors must be considered, before the Commission may grant a CPCN for the MPWSP or approve any of the proposed settlements. (Pub. Util. Code § 1002, subd. (a); Pub. Resources Code § 21061.) Unless and until the Commission considers and rejects all other feasible water supply alternatives and actually certificates the MPWSP, its prior determinations concerning preemption of the Desal Ordinance, resting on less than a full record and a complete legal analysis, necessarily remain advisory in nature. (D.13-07-048, p. 4.)

Fifth, the settling parties here are proposing to settle an issue that cannot lawfully be resolved without completion of the Commission's review under CEQA. (*See* Pub. Resources Code §§ 21065, 21100 (project approval requires the lead agency's certification of an environmental impact report); CEQA Guidelines, § 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)). CEQA does not permit piecemeal review or approval of a project. (*Paulek v. Department of Water Resources* (2014) 231 Cal.App.4th 35, 45-46 (integral parts of the same project must be reviewed together), citing *Banning Ranch Conservancy v. City of Newport Beach, supra,* 211 Cal.app.4th at 1223; *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.) The

Commission cannot approve less than the whole project under CEQA, and it cannot curtail or shortcut its review merely because discrete issues have been settled among certain of the parties to the proceeding. The piecemeal settlement of discrete issues does not relieve the Commission of its statutory responsibility to balance and weigh all relevant factors in making a CPCN determination.

Instead, CEQA requires the Commission itself to consider the potential significant adverse effects of the project on the environment. (Pub. Resources Code §§ 21068, 21100.) The Commission must then base its approval or disapproval of the MPWSP on substantial evidence in the record. (Pub. Resources Code § 21168.5; *see* CEQA Guidelines § 15384, subd. (a); *Laurel Heights Improvement Assn. v. Regents of University of Calif., supra,* 47 Cal. 3d at 393.) CEQA does not permit the Commission, or any public agency, to approve a project that may have significant impacts in advance of completing its required environmental review. (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 environmental impact report for a project, reflecting its independent judgment).) Even without considering the Commission's duty to hold a hearing on the environmental impacts of the project (Pub. Util. Code § 1002, subd. (a)), under CEQA the Commission cannot approve the settlements or grant the requested Certificate of Public Convenience and Necessity ("CPCN") until it has completed and certified its EIR.

The Commission's review must include consideration of whether or not the 1:1 ratio of desalinated water to withdrawn water deemed-to-be-groundwater proposed in the Return

Water Settlement Motion could constitute sufficient mitigation for physical impacts of pumping groundwater at the CEMEX property. (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 527 (substantial record evidence supported 3:1 mitigation ratio); *Banning Ranch Conservancy v. City of Newport Beach, supra,* 211 Cal.app.4th at 1233 (upholding 2:1 ratio for habitat loss mitigation, based on substantial record evidence), *Mira Mar Mobile Community v. City of Oceanside, supra,* 119 Cal.App.4th at 495 (three to one mitigation ration adequate).) As noted above, the Commission's environmental review must address whether or not adverse impacts to groundwater south of the Salinas River can even be mitigated to insignificant levels by Cal-Am providing desalinated water to the SVGB north of the Salinas River. Then, *if* such mitigation were feasible, the Commission would still have to consider evidence of what volume of "return water" could achieve mitigation to a level of no significance, as well as precisely where that water should be delivered in order to effectively mitigate the adverse impacts of project pumping. (Pub. Resources Code § 21002.1, subd. (b); CEQA Guidelines § 15370; *Save Panoche Valley v. San Benito County, supra,* 217 Cal.App.4th at 527; *Banning Ranch Conservancy v. City of Newport Beach, supra,* 211 Cal.app.4th at 1233; *Mira Mar Mobile Community v. City of Oceanside, supra,* 119 Cal.App.4th at 495.)

Each of these five legal issues prevents the Commission's approval of either of the settlements before it. Even assuming that a desalination project were shown to be necessary to eliminate Cal-Am's illegal withdrawals from the Carmel River, at least three of these issues – Cal-Am's absence of water rights, violation of the Agency Act and violation of the Annexation Agreement – and likely CEQA review as well, could never be resolved in Cal-Am's favor as long as it insists on pursuing its illegal, unsustainable and patently harmful

intake of desalination sourcewater on the CEMEX property. However, as discussed above, MCWD believes the record clearly demonstrates that no desalination project is needed in order for Cal-Am to reduce its Carmel River withdrawals to lawful levels in compliance with the requirements of the SWRCB's CDO.

C. <u>The Settlements are not in the Public Interest</u>

Because the MPWSP as a whole, as it is presently proposed by Cal-Am, would harm the basin, MCWD and other lawful users of the basin; would violate statutes and water law, as detailed above; and would far exceed the volume of replacement supply required to be provided by Cal-Am, approval of the Motions is not in the public interest. In addition, the MPWSP would needlessly impose significant costs on Cal-Am ratepayers, including businesses on the Monterey Peninsula that employ many of MCWD's own ratepayers. Furthermore, the settlements improperly seek the Commission's unlawful prejudgment of impact and mitigation issues that must first be fully vetted in the environmental review process.

The Brine Settlement Motion (unlike the Return Water Settlement Motion) does cite certain record evidence that might be found to support certain terms of that settlement, assuming that the terms of the settlement would also be supported by the Commission's final environmental review. (*See* Brine Settlement Motion, pp. 3-7.) In contrast, the Return Water Settlement Motion's only citations to support in the record concern the settling parties' own agreements. (Return Water Settlement Motion pp. 7-8, citing Ex. CA-44 ("Large Settlement"), Att. 3 to Ex. CA-41 (Return Water Planning Term Sheet) and Ex. A to the Return Water Settlement Motion.) However, even a facially reasonable settlement of discrete issues is not in the public interest if the settlement requires the Commission to

premise its decision upon premature and false or unproven assumptions rather than facts. (*Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811, 813 (sufficient findings based on record facts help the Commission "avoid careless or arbitrary action"), citing Pub. Util. Code § 1705; *see also Southern Pacific Co. v. Public Utilities Com., supra,* 68 Cal.2d at 244.) The mere fact that the parties to a settlement met and negotiated the settlement does nothing to supply the Commission with a factual record upon which it could approve their settlement, particularly when, as here, the only record evidence the motion cites is their own agreements. (Return Water Settlement Motion, pp. 7-8.) The public interest would not be served by the Commission's piecemeal approval of brine discharge or groundwater impacts mitigation issues where the MPWSP as a whole is contrary to, and not required to serve, the present or future public convenience and necessity.

III. REQUEST FOR HEARING FOLLOWING RESOLUTION OF PHASE 2 AND FURTHER DEVELOPMENT OF THE RELEVANT FACTUAL RECORD

Where a settlement raises contested issues of fact, the Commission must grant a hearing of those issues, on a schedule that includes the opportunity for completion of discovery. (Rule 12.3.) Investigation of factual issues related to groundwater is and has been ongoing by and among the parties for some years now. (*E.g.,* Ex. CA-44, § 3, 5; Exs. MCD-28, 29, 30, 31, 32; Att. 1 hereto.) Although MCWD has challenged the permitting of Cal-Am's test slant well, information that is still being gathered from the related groundwater monitoring program instituted under section five of the so-called Large Settlement of July 31, 2013 (Ex. CA-44), along with expert evaluation of the test well and monitoring data – which could include the Commission's forthcoming EIR – will be crucial to resolving contested factual issues regarding likely groundwater impacts of the MPWSP and mitigation,

return water and the related issue of the volume of brine discharge. Information concerning demand that is now being periodically provided by Cal-Am pursuant to the November 17, 2015 Ruling of the Administrative Law Judge (p. 5), as well as supply portfolio information from ongoing proceedings in other fora, will be necessary to evaluate the contested factual issue of what volume of replacement water – if any – is necessary to eliminate Cal-Am's illegal Carmel River withdrawals.

Current supply and demand data are relevant to the ultimate question of public convenience and necessity, as well as issues of any potential requirement for "return water" and the volume of MPWSP brine discharge. The Commission's resolution of Phase 2, and Cal-Am's potential entry into a Water Purchase Agreement ("WPA") for the GWR Project along with the possible construction of the Monterey Pump Station and Monterey Pipeline allowing for full implementation of the ASR program, will provide additional, necessary information for the factual record concerning supply and demand. Thus, although Rule 12.3 contemplates promptly completing discovery and setting a hearing on contested factual issues related to proposed settlements, it is MCWD's view that the best interests of the Commission, the parties and the public would be served by deferring any hearing on the Motions until such time as a more robust factual record is available on the foregoing issues.

Moreover, as MCWD has argued previously, a CPCN determination must be made on the basis of the Commission's consideration after a full hearing of *all* relevant factors. (Pub. Util. Code § 1002, subd. (a); *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 any of the settlements before it, or the MPWSP as a whole, and grant a CPCN unless it has considered all relevant factors, including the evidence garnered through the conduct of a hearing that provides it with the opportunity for the parties' exploration of the evidence through testimony and cross-examination concerning each of those factors.

IV. <u>CONCLUSION</u>

The Brine Settlement Motion, the Return Water Settlement Motion, and the MPWSP as a whole, raise contested issues of fact that prevent the Commission's approval without (a) further development of an adequate record, including completion of environmental review, and (b) conduct of a deferred hearing on contested factual matters related to the settlements after all required information becomes available.

In addition, the MPWSP as a whole as it is presently proposed is not reasonable, consistent with law or in the public interest, as set forth above. Unless the threshold legal issues described above can be resolved in Cal-Am's favor – and MCWD maintains that they

cannot – the Commission must ultimately deny the application and therefore the Motions for approval of the settlements as well.

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Respectfully submitted,

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