



**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 (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)

**JOINT REPLY COMMENTS IN SUPPORT  
OF BRINE DISCHARGE SETTLEMENT AGREEMENT**

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Dated: July 29, 2016

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**I. Introduction**

Pursuant to Rule of Practice and Procedure 12.2, Surfrider Foundation (“Surfrider”), California-American Water Company (“Cal-Am”), Monterey Peninsula Regional Water Authority (“MPRWA”), Monterey Regional Water Pollution Control Agency (“MRWPCA”), the Coalition of Peninsula Businesses and the Planning and Conservation League submit these reply comments in support of the Brine Discharge Settlement Agreement (“Brine Settlement”).

Of the 20 parties in this proceeding, only Marina Coast Water District (“MCWD”) filed comments contesting the Brine Settlement. But MCWD’s comments do not raise substantive challenges to the Brine Settlement. Instead, they purport to challenge the proposed return water settlement and other aspects of Cal-Am’s application.

As MCWD apparently recognizes, there is no factual or legal dispute regarding the reasonableness of the Brine Settlement. For these reasons, the Commission should disregard MCWD’s comments on the Brine Settlement and deny its request for an evidentiary hearing on this agreement.

**II. Background**

Cal-Am’s application to construct the Monterey Peninsula Water Supply Project

(“MPWSP” or “Project”) has been pending before the Commission since April 2012. During this time, parties have had the opportunity to develop a factual record through multiple rounds of testimony and evidentiary hearings. On November 17, 2015, ALJ Weatherford issued a ruling setting “issues and schedule for evidentiary hearings . . . necessary to complete the record for both Phases 1 and 2” of this proceeding.<sup>1</sup> Among other issues, that ruling instructed parties to submit evidence addressing “post-approval monitoring of the impacts of brine disposal on the marine environment and organisms” and “measures to reduce or avoid impacts detected by such monitoring.”<sup>2</sup>

In response to this ruling, on January 22, 2016, MPRWA served testimony from its expert, Al Preston, that discussed the Project’s proposed brine discharge and the need to monitor and (potentially) mitigate that discharge.<sup>3</sup> No party served rebuttal testimony that challenged Mr. Preston’s written testimony or sought to cross examine him.

On June 14, 2016, Surfrider, Cal-Am, MPRWA, MRWPCA, the Coalition of Peninsula Businesses, the Monterey Peninsula Water Management District, and the Planning and Conservation League filed a Motion to Approve Brine Discharge Settlement Agreement (“Brine Settlement Motion”). That same day, Cal-Am and other parties filed a motion seeking approval of a separate settlement agreement regarding supplying return water to the Salinas Valley groundwater basin (“Return Water Settlement”).<sup>4</sup>

The Brine Settlement relies on Mr. Preston’s testimony, as well as earlier testimony from

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<sup>1</sup> See Administrative Law Judge’s Ruling Setting Evidentiary Issues and Schedule to Complete the Record for Phases 1 and 2 at 1.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> See RWA-22 (Preston Testimony).

<sup>4</sup> See Joint Motion for Approval of Settlement Agreement on Desalination Plant Return Water, filed June 14, 2016.

Surfrider’s witnesses.<sup>5</sup> If the Commission ultimately approves a certificate of convenience and necessity for Cal-Am’s Project, the Brine Settlement establishes a monitoring and mitigation protocol for discharge of Project Brine into Monterey Bay.<sup>6</sup> In this manner, the Brine Settlement seeks to resolve one of the key remaining contested issues in this proceeding.<sup>7</sup>

### **III. The Brine Settlement Does Not Prejudge the Commission’s CPCN Determination.**

MCWD bases its objection to the Brine Settlement on a fundamental misconception—that the settlement somehow “assume[s] that the MPWSP can be carried out legally as proposed, without harm, and . . . assume[s] that the MPWSP is required by the public convenience and necessity.”<sup>8</sup>

MCWD is twice wrong. Neither the Brine Settlement nor the related motion prejudge the ultimate impact, approval or public convenience and necessity of Cal-Am’s MPWSP. Instead, the Brine Settlement focuses solely on the brine that the Project would discharge *in the event* it is approved. Under that scenario, the settlement establishes a framework for monitoring and mitigating the MPWSP’s brine discharge. This contingent framework is clear on the face of the Brine Settlement Motion:

The Parties request that the Commission approve the [Brine] Settlement Agreement without modification *as part of any decision* to grant California American Water a certificate of public convenience and necessity for the Project.<sup>9</sup>

The Brine Settlement thus does not assume, or advocate for, a decision one way or the other

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<sup>5</sup> See Brine Settlement Motion at fn 3, 6.

<sup>6</sup> See Brine Settlement at 3-11.

<sup>7</sup> See July 31, 2013 Settling Parties’ Motion to Approve Settlement Agreement, Attachment A § 3.1(a) (conditioning Surfrider’s support of a CPCN “upon a reasonable resolution of brine discharge for the MPWSP”).

<sup>8</sup> MCWD Comments at 4.

<sup>9</sup> Brine Settlement Motion at 1-2, 7 (emphasis added).

regarding the Project approval. It similarly recognizes that its effectiveness is contingent on the Commission's completion of CEQA review and discretionary decision on the MPWSP.<sup>10</sup>

While the Brine Settlement exclusively focuses on monitoring and mitigation of the proposed brine discharge, MCWD's comments ignore these issues entirely.<sup>11</sup> MCWD thus fails to carry its burden of "specify[ing] the portions of the settlement that [it] opposes, the legal basis of its opposition, and the factual issues that it contests."<sup>12</sup> Instead, MCWD's comments are a transparent attempt to challenge other aspects of the MPWSP, including project sizing and alleged groundwater harms.<sup>13</sup> To the extent that MCWD intends to make these arguments directly, it should do so in merits briefing. The Brine Settlement does not raise these issues, and comments on this agreement are a wholly inappropriate forum for MCWD's challenges. The Commission should therefore reject MCWD's attempt to thrust its unrelated legal and evidentiary disputes upon the Brine Settlement.

#### **IV. MCWD's Request for An Evidentiary Hearing on the Brine Settlement Is Unjustified.**

Had MCWD identified any contested factual questions regarding the Brine Settlement, it could have requested an evidentiary hearing.<sup>14</sup> But MCWD has not made any such factual identification. Without material issues of contested fact, there is no basis for an evidentiary hearing on a proposed settlement.<sup>15</sup>

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<sup>10</sup> Brine Settlement § 6.9.

<sup>11</sup> MCWD's Response in Opposition to the July 22, 2016 Joint Motion to Strike Its Consolidated Comments adds nothing, entirely ignoring the terms of the Brine Settlement.

<sup>12</sup> Commission Rule of Practice and Procedure 12.2.

<sup>13</sup> See MCWD Comments at 5-22 (challenging the MPWSP's proposed slant well intake, return water mitigation, project sizing issues, CEQA compliance, *but not* the Brine Settlement's proposed monitoring and mitigation program.)

<sup>14</sup> Commission Rule of Practice and Procedure 12.2.

<sup>15</sup> Commission Rule of Practice and Procedure 12.3.

Instead of challenging any fact underlying the Brine Settlement, MCWD generally asserts that the ultimate size of the desalination project will determine the quantity of brine discharged into Monterey Bay.<sup>16</sup> This is true, but irrelevant. This factual issue is not contested: Numerous parties have recognized that brine impacts increase with the size of the desalination plant.<sup>17</sup> Another evidentiary hearing would add nothing useful to this record. Moreover, this uncontested point does nothing to undermine the Brine Settlement, which establishes a monitoring and mitigation program that would apply to any discharge of MPWSP brine into Monterey Bay, regardless of the Project's ultimate size.<sup>18</sup>

Indeed, MCWD acknowledges that the "Brine Settlement Motion . . . does cite certain record evidence that might be found to support certain terms of that settlement."<sup>19</sup> But MCWD does not contest any of this cited record evidence in its comments. Nor did MCWD conduct cross examination on the proposed settlement term sheet attached to Al Preston's testimony or the reasonableness of proposed brine monitoring and mitigation program.

MCWD has failed to raise any contested facts material to the proposed Brine Settlement. As a result, there is no basis for MCWD's requested hearing on the Brine Settlement.<sup>20</sup>

## **V. Conclusion**

For all of these reasons, the Commission should disregard MCWD's comments on the Brine Settlement, and deny its request for evidentiary hearings on this issue.

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<sup>16</sup> MCWD Comments at 22-23.

<sup>17</sup> CA-41 at 5-6 (Svindland Testimony); WD-9 at 9 (Stoldt Testimony); WD-14 at 2-3 (HDR Final Report, Economic Evaluation of GWR Project Externalities); DRA-16 at 9 (Rose Testimony); RWA-17 at 5 (Burnett Testimony); *see also* Surfrider Foundation's Comments on the Proposed Settlement Agreement on Plant Size and Level of Operation at 6-8.

<sup>18</sup> *See generally* Brine Settlement.

<sup>19</sup> MCWD Comments at 21.

<sup>20</sup> *See* Commission Rules of Practice and Procedure 12.2 and 12.3.

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