



**FILED**  
7-29-16  
04:59 PM

**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.

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

**JOINT CONSOLIDATED REPLY COMMENTS IN SUPPORT OF THE JOINT  
MOTION FOR APPROVAL OF THE SETTLEMENT AGREEMENT ON  
DESALINATION PLANT RETURN WATER**

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**I. INTRODUCTION**

Pursuant to Rule 12.2 of the California Public Utilities Commission (“Commission”) Rules of Practice and Procedure,<sup>1</sup> California-American Water Company (“California American Water”), Coalition of Peninsula Businesses (“CPB”), LandWatch Monterey County (“LandWatch”),<sup>2</sup> Monterey County Farm Bureau (“MCFB”),<sup>3</sup> Monterey County Water Resources Agency (“Agency”), Monterey Peninsula Regional Water Authority (“Authority”), and Salinas Valley Water Coalition (“SVWC”)<sup>4</sup> (collectively, the “Joint Parties”) provide these reply comments in support of the *Joint Motion for Approval of Settlement Agreement on Desalination Plant Return Water*, which was filed on June 14, 2014 in this proceeding (the “Settlement Agreement”).<sup>5</sup> These reply comments consolidate the Joint Parties’ responses

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<sup>1</sup> Unless otherwise stated, all further references to “Rules” are to the Commission’s Rules of Practice and Procedure.

<sup>2</sup> LandWatch signs on to all portions of these Joint Consolidated Reply Comments except section II(A)(2)(B).

<sup>3</sup> MCFB signs on to all portions of these Joint Consolidated Reply Comments except section II(A)(2)(B).

<sup>4</sup> SVWC signs on to all portions of these Joint Consolidated Reply Comments except section II(A)(2)(B).

<sup>5</sup> The Return Water Settlement was entered by California American Water, Coalition of Peninsula Businesses, LandWatch Monterey County, the Monterey County Farm Bureau, the

(hereafter “Consolidated Reply Comments”) to the comments submitted by the following parties: Marina Coast Water District, Water Plus, and Public Water Now.<sup>6</sup>

## II. DISCUSSION

### A. MCWD’s Comments Should Be Disregarded Because They Are Irrelevant and Without Merit

Although long and filled with arguments, citations, allegations, and conclusions – MCWD’s Comments kick up a lot of dust but do not address the actual issues raised by the Settlement Agreement. MCWD’s Comments do not focus on provisions of the Settlement to which MCWD objects. Instead, the Comments, often relying on misleading contentions, make arguments in opposition to the entire MPWSP, including whether a CPCN should be issued and whether the environmental review for the project can be approved. Thus, the Settlement Agreement should be approved and MCWD’s comments should be disregarded because they are both incorrect and irrelevant.

#### 1. In Arguing the Commission Lacks Authority to Approve the Settlement Agreement Without First Approving the Entire Application – MCWD’s Comments Get It Wrong and Miss the Point

The Commission has broad authority to approve settlements. Rule 12.1 provides that parties may propose settlements resolving *any material issue of law or fact* or on any mutually agreeable outcome to a proceeding. Settlement of issues of law or fact need not be joined by all parties to an application. The Rule requires only that the applicant be among the parties signing onto the settlement.<sup>7</sup> Moreover, nothing in Rule 12.1 even suggests the Commission must wait

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Monterey County Water Resources Agency, Monterey Peninsula Regional Water Authority, Planning and Conservation League Foundation, and the Salinas Valley Water Coalition (collectively, the “Settling Parties”).

<sup>6</sup> Public Water Now (“PWN”) provided comments by email on June 16, 2016, which focused on the issue of potential impacts to customers. There is no indication those comments were filed with the Commission. On July 26, 2016, PWN states it filed “Reply Comments to Marina Coast Comments and Request for Deferred Hearing on Motion to Approve Settlement Agreement on Desalination plant Return Water.” PWN’s “Reply Comments,” however, are mostly just a repackaging of PWN’s June 16, 2016 un-filed comments. While the use of “reply comments” to serve what are in essence untimely initial comments is improper and should be rejected, this Joint Consolidated Reply will (below) nonetheless address PWN’s concerns.

<sup>7</sup> Rule 12.1(a) (emphasis supplied).

until the final decision in a proceeding before approving a settlement limited to only certain issues of fact or law. Yet the “primary” argument in MCWD’s Comments argues the Commission must wait. This argument is wrong on the law and misses the point.

MCWD’s argument is wrong because without citing any on-point authority, MCWD’s Comments “oppose approval of the settlements ... *primarily* on the basis that the settlements *assume* the MPWSP is necessary and can be carried out legally without engendering significant harm.”<sup>8</sup> MCWD’s main argument is that “[t]he Motions and the settlements ... *assume* that the Commission will approve the MPWSP, as ... proposed,” and according to MCWD this is improper because such assumptions are somehow prohibited.<sup>9</sup> MCWD’s position makes no sense. Rule 12.1 specifically permits settlement of individual issues, *i.e.*, those that do not comprise a resolution of the entire application. Nothing in the Rule even suggests the Commission must wait until it enters a final decision on all aspects of the proceeding before ruling on a motion to approve a settlement of individual or limited issues.<sup>10</sup> The absence of such a limitation makes sense. Allowing earlier decisions on settlements concerning individual issues provides the opportunity for the proceedings to then be narrowed so the final decision must only address the matters remaining unsettled.

MCWD’s argument misses the point because the Settlement Agreement is necessarily contingent on issuance of the Certificate of Public Convenience and Necessity (“CPCN”) based on the application for the Monterey Peninsula Water Supply Project (“MPWSP”). The Settlement’s impact comes only if the MPWSP approved. So there is no expectation the

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<sup>8</sup> MCWD Comments, at pp. 1-2 (emphasis supplied).

<sup>9</sup> *Id.* at p. 5, *see also* pp 1, 2, 4 (emphasis supplied).

<sup>10</sup> In most, if not all, cases where an individual issue is settled there is a general assumption the ultimate application would be approved. Without such an assumption, there would be no point to enter settlements. Indeed, without an assumption that an application will eventually be granted, there would be no point in even filing an application in the first place or for a party to take steps to move forward in a proceeding. Assuming the granting of an application for the purposes of proposing a settlement, contingent on approval of the application, is not the same as actually approving the application. Conflating the two unmistakably distinct concepts, as the “primary” argument in MCWD’s Comments does, is neither compelling nor warranted.

Commission will necessarily rule on the Settlement Agreement before issuing its final decision in the proceeding. MCWD seeks to create an issue where none exists so its Comments should be disregarded.

**2. MCWD’s Request for Hearings Should Be Denied**

**a. MCWD’s Comments Fail to Show Hearings on the Settlement Agreement Is Warranted**

MCWD’s Comments repeatedly request evidentiary hearings on “each of the settlement motions.”<sup>11</sup> MCWD claims hearings should occur after “completion of the joint federal/state environmental review process, and further development of the relevant factual record.”<sup>12</sup> And MCWD contends that hearings are “required in order to resolve contested issues of fact.”<sup>13</sup> Finally, MCWD concludes 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.”<sup>14</sup>

As will be discussed in greater detail below, the Settlement does not ask for the granting of the CPCN. Nor does it purport to be a substitute for the joint federal/state environmental review being undertaken in connection with this proceeding. The Settlement merely resolves limited factual or legal issues between and among certain parties. MCWD’s Comments ignore this. They also ignore the fact that over several years, the Commission has held extensive hearings in this proceeding, which included written testimony as well as cross examination. There are at least 18 volumes of hearing transcripts spanning more than 3,000 pages. MCWD’s Comments, although they request more hearings, do not show why hearings are even needed –

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<sup>11</sup> MCWD Comments, at pp. 1, 3, 23, 24.

<sup>12</sup> *Id.* at pp. 1, 23.

<sup>13</sup> *Id.* at pp. 3, 22.

<sup>14</sup> *Id.* at p. 24 (emphasis supplied).

especially in connection with the Settlement.

The “contested issues” MCWD’s Comments purport to raise (and which relate to CPCN and environmental review issues outside of the scope of the Settlement) rely mainly on testimony either supplied in written testimony prior to the hearings that have already occurred or on examination at those hearings.<sup>15</sup> Hearings are an important tool to produce a full record. They are not, as MCWD’s Comments suggest, a means to generate more hearings. MCWD’s request for even more hearings, therefore, should be denied.

**b. MCWD’s Comments Attempt an End-Run Around Prior Commission Rulings**

In MCWD’s current Comments, MCWD attempts an end-run around prior Commission rulings. Those prior rulings stated the Commission would not hold evidentiary hearings on potential environmental impacts. Specifically, on June 28, 2012, President Peevey issued the Scoping Memo and Ruling, which set forth a schedule for the non-CEQA part of the proceeding.<sup>16</sup> On July 7, 2012, MCWD responded with a Motion to Modify and Clarify Assigned Commissioner’s Scoping Memo and Ruling. MCWD’s motion conceded the Commission intended to conduct the proceeding on two separate tracks (one for CEQA compliance and another for the CPCN). MCWD then argued “the Commission must consider the environmental impacts of the project in making the CPCN determinations.”<sup>17</sup> And it claimed the Scoping Memo should be changed to assure evidentiary hearings take place only after the FEIR<sup>18</sup> just as MCWD’s current Comments now claim hearings are necessary after the FEIR.

On August 29, 2012, ALJ Weatherford ruled “a finding that the deferral of prepared testimony or evidentiary hearings, or both, in the CPCN track until after the issuance of either the

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<sup>15</sup> Further, many of the citations in MCWD’s Comments appear to come from new information MCWD improperly seeks to introduce through its Comments. California American Water, CPB, the Agency, the Authority, MCFB and SVWC have, in a separate motion to strike, moved to strike that material.

<sup>16</sup> Scoping Ruling, at p. 3.

<sup>17</sup> MCWD Motion to Modify Scoping Ruling, p. 4.

<sup>18</sup> *Id.* at p. 5.

draft or final EIR is *not in the public interest* because it would substantially increase the risk of non-compliance by CAW with the December 2016 state-mandated deadline” to reduce California American Water’s diversions from the Carmel River.<sup>19</sup>

On May 2, 2013, MCWD filed a Motion to Modify Procedural Schedule, which sought modification of the schedule to (again) require “further hearings and full briefing on the issue of the proposed project’s influence on the environment, pursuant to section 1002, subdivision (a) of the Public Utilities Code.”<sup>20</sup>

On May 30, 2013, ALJ Weatherford ruled “[a]s stated earlier in this proceeding, no evidentiary hearing is required or, given the outstanding cease and desist order (CDO), appropriate for the environmental reporting track.” His ruling continued: “Consistent with CEQA, parties will have the opportunity to comment on the DEIR before the FEIR is certified. Those comments, reflected in the FEIR, will be considered in the Proposed Decision, and parties will also have the opportunity to comment on that PD before the Commission acts.”<sup>21</sup> Indeed, ALJ Weatherford’s ruling specifically recognized that MCWD was seeking a second bite at the apple, stating “MCWD’s effort...to have project alternatives and environmental impacts addressed in evidentiary hearings was rejected in the August 29, 2012 ALJ’s Directives to Applicant and Ruling on Motions (at 5-7)”.<sup>22</sup>

On August 30, 2013, rather than seek reconsideration of the prior rulings, as it should have done if it sought to challenge them, MCWD filed comments to the Large Settlement Agreement and the Sizing Agreement which argued for a third time that evidentiary hearings on potential environmental impacts were necessary.<sup>23</sup> During the April 2016 evidentiary hearings,

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<sup>19</sup> *Administrative Law Judge’s Directives to Applicant and Ruling on Motions Concerning Scope, Schedule and Official Notice*, filed August 29, 2012, at p. 7 (emphasis added).

<sup>20</sup> MCWD Motion to Modify Procedural Schedule at p. 1.

<sup>21</sup> *Administrative Law Judge’s Ruling After Evidentiary Hearings*, filed May 30, 2013 (“Ruling After Evidentiary Hearings”), at p. 4.

<sup>22</sup> Ruling After Evidentiary Hearings, p. 4.

<sup>23</sup> MCWD’s Consolidated Comments on the Settling Parties’ 1) Motion to Approve Settlement Agreement and 2) Motion to Approve Settlement Agreement on Plant Size and Operation, filed

MCWD yet again was told by ALJ Weatherford: “We are not going to entertain testimony here about the Environmental Impact Report and the EIR process.”<sup>24</sup> In CPCN proceedings generally, the Commission has repeatedly found that the CEQA review process is the proper vehicle for consideration of a proposed project’s environmental impacts.<sup>25</sup>

Ignoring the Commission’s prior rulings and directives, MCWD repeats the very same arguments in its Comments by again arguing that the Commission must hold evidentiary hearings on environmental impacts as part of the CPCN determination.<sup>26</sup> ALJ Weatherford rejected that argument and specifically stated that MCWD will have its chance to debate environmental impacts through its comments on the DEIR.<sup>27</sup> MCWD’s attempt in its current Comments to backdoor its repeatedly rejected request to have evidentiary hearings on CEQA impacts must be rejected.

**3. Because They Focus on Matters Outside the Settlement Agreement, MCWD’s Comments Should Be Disregarded**

**a. The Settlement Agreement Is Limited in Scope and Straight-Forward**

When the contents of the Return Water Settlement Agreement are considered, the irrelevance of MCWD’s Comments is clear. The Return Water Settlement was negotiated and entered by ten parties to this proceeding, representing a broad range of interests – agricultural, governmental, business, utility, and environmental. Under it, California American would deliver “Return Water”<sup>28</sup> to the Castroville Community Service District (“CCSD”) and to the

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August 30, 2013, pp. 10-13.

<sup>24</sup> RT, Vol. 18, April 15, 2016, at p.2964: 6-9.

<sup>25</sup> See D.10-12-025, *Application of Wild Goose Storage, LLC to Amend Its Certificate of Public Convenience and Necessity to Expand and Construct Facilities for Gas Storage Operations* (U911G), 2010 PUC LEXIS 463, \*8; D.10-07-043, *In the Matter of the Application of Southern California Edison Company (U-338-E) for a Certificate of Public Convenience and Necessity for the San Joaquin Cross Valley Loop Transmission Project*, 2010 Cal. PUC LEXIS 285, \*8.

<sup>26</sup> MCWD’s Comments, pp. 23.

<sup>27</sup> Ruling After Evidentiary Hearings, at p. 4.

<sup>28</sup> “Return Water” is defined at ¶ H of the Return Water Settlement, which states: “The Project’s slant intake wells are designed to produce source water for treatment by the selected desalination plant.... To meet applicable requirements of the Agency Act, Cal Am has proposed as part of

Castroville Seawater Intrusion Project (“CSIP”) to satisfy possible return water requirements of the Monterey County Water Resources Agency Act, CEQA, or California groundwater law, subject as set forth in section 17 of that Agreement to completed CEQA review.<sup>29</sup>

The Return Water Settlement does not purport to eliminate the Agency Act, CEQA, or water rights requirements. The Settlement unmistakably states “Cal Am shall comply with the Agency Act” and “the Agency will retain all rights... under the Agency Act to ensure that the pumping ... complies with the Agency Act, and to protect the long-term viability of the SRGB ...”<sup>30</sup> Nor does the Return Water Settlement suggest it represents a substitute for environmental review or mitigation of water right impacts. It notes “[t]he CPUC is conducting environmental review of the Project under ... CEQA... and the Monterey Bay National Marine Sanctuary is conducting environmental review of the Project under ... NEPA.”<sup>31</sup> And “Cal Am could be legally required by a regulatory agency, including the CPUC in this proceeding, or by a court, to make water deliveries to other locations in the SRGB to the extent necessary to mitigate any groundwater impacts from the Project that were demonstrated in relation to a specific location overlying the SRGB....”<sup>32</sup> Thus, the Return Water Settlement is not incompatible with and does not prejudge potential CEQA mitigation requirements. Instead, it “helps to define a stable and finite project description that will facilitate the CPUC’s completion of CEQA review for the Project.”<sup>33</sup>

The Settlement Agreement recognizes the Commission retains full discretion with respect to CEQA. The settling parties to the Return Water Settlement agreed the “legal effectiveness of

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the Project to make available for delivery to groundwater users overlying the SRGB a volume of water (‘Return Water’) equal to the percentage of SRGB groundwater in the total Project Source Water Production....”

<sup>29</sup> Return Water Settlement, at ¶ AA.

<sup>30</sup> *Id.* at § 3.

<sup>31</sup> *Id.* at ¶ L.

<sup>32</sup> *Id.* at § 4.

<sup>33</sup> *Id.* at § 17.

this Settlement Agreement is contingent on the completion of CEQA review....”<sup>34</sup> Thus, regardless of whether the Commission approves the Settlement, the Commission, as lead agency under CEQA, retains its full discretion to approve or disapprove the project, to consider and approve project alternatives, and to consider and adopt other mitigation measures (including alternatives and other mitigation measures involving return water).<sup>35</sup>

As such, contrary to the broad arguments in MCWD’s Comments attacking the MPWSP as a whole, the Settlement Agreement in question covers narrow issues and does not purport to piecemeal or commit the Commission to a course of action with respect to CEQA review of the MPWSP. Indeed, as noted above, the Settlement Agreement’s impact comes if the MPWSP is approved, so the Settlement will take effect if the EIR is certified so that a CPCN for the MPWSP may issue.

**b. Because They Focus on Matters Outside the Settlement Agreement – MCWD’s Comments Should Be Disregarded**

Rule 12.2 requires a detailed, targeted assessment that addresses the specific portions of a settlement the party supplying the comments opposes. Although MCWD’s Comments contain a flood of citations, just a handful are to the Settlement Agreement at issue.<sup>36</sup> And few of those citations focus on specific issues MCWD claims to have with the actual provisions from the Settlement.<sup>37</sup> Instead, MCWD’s Comments are a parade of old and new arguments MCWD makes not against the Settlement but in connection with the MPWSP, *i.e.*, as to the CPCN and environmental review for the project. Because they focus on matters outside of the Settlement, MCWD’s Comments should be ignored. MCWD, like all the parties to this proceeding, will

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*; for this reason, many of MCWD’s arguments regarding CEQA fail. For example, MCWD’s argument concerning the proposed 1:1 ratio of desalinated and source water really addresses not the ratio but alleged potential mitigation issues. MCWD Comments, at p. 8. Mitigation is to be examined during the CEQA process.

<sup>36</sup> *See, e.g.*, MCWD’s Comments, at pp. 5, 7, 8, 9, 21, 22.

<sup>37</sup> *See, e.g.*, MCWD’s Comments at p. 5 (not citing specific provisions of the Settlement Agreement that MCWD takes issue with, but instead citing them for the general proposition the Settlement assume the MPWSP will be approved).

have an opportunity for briefing on the CPCN and to comment on the DEIR. Comments on the Settlement Agreement at issue in the motion, however, are not the proper vehicle for MCWD to raise issues concerning those matters.

While mostly disregarding the Settlement, MCWD's Comments attack the MPWSP. MCWD argues "the record demonstrates" public convenience and necessity for the MPWSP cannot be shown<sup>38</sup> and Cal-Am cannot legally operate the MPWSP without significant, unmitigable injury to the groundwater basin and the environment.<sup>39</sup> Oddly, on the one hand MCWD argues the Settlement cannot be approved because doing so improperly assumes the approval of the MPWSP, while on the other hand MCWD argues the Settlement cannot be approved because MCWD assumes the MPWSP will not be approved. Similarly, MCWD claims additional hearings are needed when its very same Comments claim there is already enough in the record to establish the project cannot be approved.<sup>40</sup>

In focusing on the CPCN for the MPWSP, MCWD misses the point. It is the Settlement – not the CPCN – that the pending motion currently ask the Commission to address. And, as noted above, the Rules permit the Commission to do just that.

MCWD's Comments also take a CEQA detour rather than directly addressing the Settlement. The Comments argue that CEQA does not permit piecemealing,<sup>41</sup> and CEQA

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<sup>38</sup> MCWD's Comments, at p. 5.

<sup>39</sup> *Ibid.*

<sup>40</sup> The arguments and precedent MCWD relies upon to challenge the MPWSP, when fully considered, do not support its position. For example, there is nothing in the discussions of groundwater rights law in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, *Allen v. California Water & Tele. Co.* (1946) 29 Cal.2d 466, *Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522, or *Monolith Portland Cement Co. v. Mojave Public Utility District* (1957) 154 Cal.App.487, all cited by MCWD, that renders the MPWSP "unlawful." Indeed, *City of Barstow*, *City of Pasadena*, *Allen*, and *Corona Foothill* were all addressed in the SWRCB Final Review of California American Water Company's Monterey Peninsula Water Supply Project dated July 31, 2013, and the SWRCB concluded that California American Water could pump brackish water, subject to certain conditions. (See MCWD Ex. MCD-17 at pp.33-48.)

<sup>41</sup> MCWD's Comments, at p. 18. It should, however, be noted that MCWD fails to cite any authority supporting its claim that approval of the Return Water Settlement Agreement is "piecemealing" the CEQA review process. In *Paulek v. Department of Water Resources* (2014) 231 Cal.App.4th 35 and in *Rio Vista Farm Bureau Center v. County of Sonoma* (1992) 5

requires the Commission to consider potential significant adverse effects of the project on the environment.<sup>42</sup> MCWD then goes on to discuss the now withdrawn April 2015 DEIR<sup>43</sup> and what the Comments claim are alternatives to the MPWSP.<sup>44</sup> The Comments then provide a general recitation of what MCWD believes the Commission must do to undertake a proper review under CEQA.<sup>45</sup> None of this is relevant to the Settlement. The Settlement does not purport to piecemeal CEQA review. Quite the opposite: it recognizes that CEQA/NEPA review is taking place<sup>46</sup> and the Settlement “helps to define a stable and finite project description that will facilitate the Commission’s completion of CEQA review.”<sup>47</sup> Indeed, the Return Water Settlement recognizes the environmental review is taking place and that Cal Am could be legally required by a regulatory agency or a court to make other water deliveries to other locations in the SRGB.<sup>48</sup> Thus, the CEQA-related arguments in MCWD’s Comments are irrelevant to a decision on whether to approve the Return Water Settlement.

In attacking the MPWSP (and not focusing on the Settlement Agreement), MCWD’s Comments also invoke a number of irrelevant legal issues. In one instance, and despite a Commission decision already addressing the issue, MCWD asserts the MPWSP would violate the Monterey County ordinance that requires public ownership of desalination facilities.<sup>49</sup> MCWD then argues “MPWSP would improperly circumvent the local control ... and local

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Cal.App.4th 351, the two cases cited by MCWD, the court rejected challenges to final EIRs on the grounds of “piecemealing” because the projects at issue in each case were separate projects, each of which had or would have its own CEQA review process. Here, there is only one project going through one CEQA review process, and both the Brine Settlement Agreement and the Return Water Settlement Agreement explicitly recognize they are subject to that CEQA process.

<sup>42</sup> MCWD’s Comments, at p. 19.

<sup>43</sup> *Id.* at p. 5.

<sup>44</sup> *Id.* at p. 18.

<sup>45</sup> *Id.* at pp. 19-20.

<sup>46</sup> Return Water Settlement, at ¶ L and § 17.

<sup>47</sup> *Id.* at § 17.

<sup>48</sup> *Id.* at § 4.

<sup>49</sup> MCWD’s Comments, at p. 16.

protection in groundwater matters that is required under California’s new Sustainable Groundwater Management Act [‘SGMA’].”<sup>50</sup> And MCWD asserts the Commission’s decision concerning the Monterey County ordinance did not consider the effect of SGMA and that the terms of the settlement between Cal Am and the county would allegedly be unconstitutional.<sup>51</sup> MCWD neither explains how it reaches these conclusions nor, more importantly, why they would be relevant to specific provisions of the Settlement Agreement in question. Such arguments are another reason why MCWD’s Comments should be disregarded.

MCWD’s Comments also argue there are four disputed issues: (1) impacts on groundwater from wells obtaining source water for the desalination plant, (2) locations where return water must be provided, (3) whether the MPWSP is necessary, and (4) if there are other feasible, less harmful alternatives to the MPWSP.<sup>52</sup> Three of these broad claims (numbers 1, 3, and 4) made by MCWD are not relevant to the specific provisions of the Settlement Agreement at issue and instead simply attack the MPWSP as a whole and its environmental review, which is ongoing. With respect to MCWD’s second issue, that matter was the subject of extensive written and oral testimony at the April 2016 hearings.<sup>53</sup> No need exists for further evidentiary hearing on this issue. MCWD will have opportunities to submit comments on the DEIR/DEIS concerning groundwater impacts and will be able to discuss the competing evidence on the return water location submitted in the prior hearing in its briefing on the CPCN. MCWD’s comments should be disregarded.

Finally, MCWD’s Comments should be rejected for the additional reason that they rely on incomplete or misleading descriptions of the record. Not only are MCWD’s Comments

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<sup>50</sup> *Id.* at p. 13.

<sup>51</sup> *Id.* at p. 17. The Commission roundly rejected these constitutional arguments in D.15-10-052, stating the arguments “lack merit.” *Id.*, *mimeo*, at p. 8. This MCWD argument should be rejected as an impermissible collateral attack on D.15-10-052. Pub. Util. Code §§1709 & 1731(b)(1); D.02-01-037, *mimeo*, pp. 14-15.

<sup>52</sup> *Id.* at pp. 2-3.

<sup>53</sup> See e.g., MCWD Rev. Ex. MCD-27 at pp.2-4; EX RWA-19 pp. 2-3 and Attachment 2, pp. 4-6; RT Vol. 17, pp 2848-2851; 2876-2877, 2922-2923.

irrelevant to the narrow issues to be addressed by the Commission in determining whether to approve the Return Water Settlement Agreement, but in making its Comments MCWD relies on misrepresentations concerning the record.

For example, MCWD claims California American Water has admitted the “MPWSP is intended to and will exacerbate seawater intrusion.” Specially, MCWD’s Comments state the following:

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).<sup>54</sup>

\* \* \*  
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.)<sup>55</sup>

A review of the portions of the record that MCWD’s Comments cite for this proposition shows MCWD’s Comments are misleading. At RT, Vol. 14, p. 2369:2-10, MCWD’s counsel asks Cal Am’s expert, Mr. Leffler, the following question:

Is it true that if the Monterey Peninsula Water Supply Project were to operate as intended the project would take in very little groundwater, would establish a direct connection between the aquifers and the seawater at the project site by inducing downward leakage of ocean water through the sea floor, and yet would not harm the inland aquifers; is that correct?

MCWD’s question is vague and compound. It asks at least three separate questions, so MCWD’s effort to unequivocally latch onto any one of them is misleading. Moreover, Mr. Leffler responded to the compound question, at RT, Vol. 14, p. 2369:11, by stating “I think that is generally correct.” He did not mention an intent or objective to exacerbate seawater intrusion. His answer to the question was general, equivocal, and not absolute. MCWD’s counsel did not follow-up to clarify, leaving a general answer on the record that does not state what MCWD claims. Moreover, MCWD’s question states the MPWSP would “not harm the inland aquifers.” It is misleading for MCWD to now claim “Cal-Am’s expert admits – that the MPWSP is

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<sup>54</sup> MCWD’s Comments, at p. 6.

<sup>55</sup> *Id.* at p. 14.

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.” MCWD’s question stated the very opposite: the MPWSP “would not harm the inland aquifers.” And on the same transcript page, California American Water’s expert, Mr. Leffler, testified, and it is California American Water’s position, the MPWSP would “improve the situation” with respect to seawater intrusion and not exacerbate it.<sup>56</sup> While all settling parties may not agree with Mr. Leffler’s testimony, it speaks for itself. The point here is that MCWD’s mischaracterization of the testimony does not advance its argument. Because they are misleading, MCWD’s comments should be disregarded.

**B. Water Plus’s Comments Are Legally Incorrect and Should Be Ignored**

Water Plus’s Comments include several legal arguments opposing the Return Water Settlement. Water Plus argues the Agency Act requires all water taken from the MPWSP slant wells to be returned to the SRGB because Water Plus contends that all such water is groundwater.<sup>57</sup> Water Plus attacks the MPWSP’s use of “return water” to ensure compliance with the Agency Act’s anti-export provisions, claiming such use has no basis in law or fact<sup>58</sup> and mischaracterizing the anti-export provisions of the Monterey County Water Resources Agency Act<sup>59</sup> (“Agency Act”).<sup>60</sup> Water Plus also claims after source water is desalinated, any salty water remaining must also be returned to the Basin.<sup>61</sup> Water Plus’s erroneous legal arguments require no hearings and miss the mark for several reasons.

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<sup>56</sup> RT, Vol. 14, p. 2369:24-27.

<sup>57</sup> Water Plus Comments, at pp. 5-7.

<sup>58</sup> *Id.* at pp. 3-4.

<sup>59</sup> The Agency Act was adopted in 1990 (Stats. 1990 c. 1159), not in 1995 as Water Plus erroneously states. See Water Plus Comments, at p. 3. The Agency Act succeeded the Monterey County Flood Control and Water Conservation District Act (Stats 1947, c. 699), which was repealed in 1990. The Agency Act is found in c. 52 of the Appendix to the Cal. Water Code.

<sup>60</sup> Water Plus Comments, at p. 3.

<sup>61</sup> *Id.* at p. 7.

**1. Ample Law Supports Use in the MPWSP of Return Water to Prevent Export of Water from the Salinas River Groundwater Basin**

Water Plus cites to only one of a number of provisions of the Agency Act relating to extraction and exportation in an effort to fashion an anti-exportation rule that prohibits the use of a return water plan in the MPWSP. Water Plus’s spokesperson, Mr. Weitzman, asserts he has not seen the basis for the return water concept “expressed explicitly anywhere.”<sup>62</sup> Water Plus omits key introductory language in citing to the anti-export provision of the Agency Act, i.e., section 21.<sup>63</sup> The pertinent portions of section 21 provide:

The Legislature finds and determines that the Agency is developing a project which will establish a substantial balance between extraction and recharge within the Salinas River Groundwater Basin. *For the purpose of preserving that balance, no groundwater from that basin may be exported...*<sup>64</sup>

However, numerous other provisions of the Agency Act are also relevant to the issue of prevention of exportation of SRGB water with respect to the MPWSP, including various subsections of section 9, which empower the Agency to “reclaim water,” enter into an agreement to exchange water or transfer water or deliver water or a water right “for other water, water right, or water supply” with a public or private entity, and to “otherwise manage and control water for the beneficial use of persons or property within the Agency.”<sup>65</sup>

First, a simple statutory analysis of sections 9 and 21 of the Agency Act reveals that Water Plus’s argument is inconsistent with the purposes and express provisions of the Agency Act relating to exportation. One of the objects and purposes of the Act is “to increase and prevent the waste or diminution of the water supply in the Agency, including the control of groundwater extractions as required to prevent or deter the loss of usable groundwater through intrusion of seawater and the replacement of groundwater ... through ... a substitute surface

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<sup>62</sup> *Id.* at p. 4.

<sup>63</sup> *Id.* at p. 3.

<sup>64</sup> Agency Act § 21 (emphasis supplied).

<sup>65</sup> See Agency Act §§ 9(d)(2), (h)(6) & (o); see also §§ 9(d)(7) (Agency may prevent unlawful exportation of water) & (m) (Agency may exchange water).

supply.”<sup>66</sup> The Return Water Settlement Agreement, as part of the MPWSP Agency Act compliance, requires that there will in effect be an exchange of the freshwater component of SRGB groundwater for an equal amount of desalinated water which will be returned to the SRGB through the delivery of the desalinated water for use by Castroville and at the CSIP in lieu of equivalent production of native groundwater by each of them. Through this process, the Agency, exercising its authority under the Agency Act, reclaims water for present and future use, prevents unlawful export of SRGB water, and manages and controls water for beneficial use. Statutes are to be construed as a whole,<sup>67</sup> and it is clear that the Return Water Settlement Agreement advances the Agency Act’s purpose to maintain balance in the SRGB while preventing export of groundwater and in fact helping to develop usable groundwater in exchange for unusable water.

Second, the Agency is charged with interpretation and implementation of the Agency Act, and as discussed above, section 8 of the Agency Act expressly allows the “control of groundwater extractions as required to prevent or deter the loss of usable groundwater through intrusion of seawater”<sup>68</sup> and section 9 authorizes Agency reclamation and exchange of water, including by contract, and further authorizes the Agency to “otherwise manage and control water for the beneficial use of person or property within the Agency.” The Agency Act need not use the precise words “return water” for it to authorize what Water Plus calls the “return water doctrine,”<sup>69</sup> as envisioned in the MPWSP. Water Plus’s assertion that the basis for the “return water doctrine” is not “explicitly” expressed ignores that the Agency Act does not in any manner prohibit the “return water doctrine.” As already shown, the overall statute supports use of return water in the MPWSP to maintain basin balance while complying with Agency Act exportation restrictions, both of which fall within section 9(o)’s authorization of the Agency to “otherwise

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<sup>66</sup> Agency Act § 8.

<sup>67</sup> *Cummins Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.

<sup>68</sup> Agency Act § 8 (emphasis added).

<sup>69</sup> Water Plus Comments, p. 4.

manage and control water for the beneficial use of persons or property within the Agency.”

It is also of note that the SWRCB’s analysis of the MPWSP supports the return water concept. In its July 2013 review of the MPWSP,<sup>70</sup> the SWRCB concluded that returning only the fresh water portion of treated water to the Basin would lead to no net effect and be consistent with the purposes of the Agency Act.<sup>71</sup>

Further, in D.10-12-016, the Commission approved of the return water concept in the context of the withdrawn Regional Desalination Project (“RDP”). The Commission recognized that “[c]ompliance with the Agency Act is within [the Agency’s] jurisdiction.”<sup>72</sup> It fully indicated its understanding of the use of brackish source water containing groundwater and ocean water.<sup>73</sup> The Commission found that the RDP, which also included a return water component, “satisfies the prohibitions on exporting water from” the SRGB.<sup>74</sup> The Commission approved the “Settlement Agreement and Implementing Agreements,” the latter of which included the Water Purchase Agreement in issue in A.04-09-019.<sup>75</sup> As part of that approval, the Commission necessarily approved a formula, contained in Exhibit E to the Water Purchase Agreement approved in D.10-12-016, used to calculate of the percentage of SRGB water in brackish source water:

$$(\text{seawater salinity})(\text{Percentage of seawater}) + (\text{inland water salinity})(\text{Percentage of Salinas Basin water}) = \text{brackish water salinity}$$

This previously-approved formula is precisely the same formula agreed to on the first page of Appendix D to the Return Water Settlement Agreement to determine the percentage of

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<sup>70</sup> See Exhibit MCD-17.

<sup>71</sup> *Id.* at 40; see also discussion related to return of only the fresh water component of the source water at pp. 42 & 49.

<sup>72</sup> D.10-12-016, *mimeo*, p. 113; see also FoF 149-152, p. 181.

<sup>73</sup> *Id.*, pp. 109-110.

<sup>74</sup> *Id.*, FoF 65, p. 168.

<sup>75</sup> *Id.* Ord. ¶ 1, p. 203 & p. 8 (defining “Implementing Agreements”); see also CoL 61, p. 202 (“It is reasonable to find that the Settlement Agreement and Water Purchase Agreement are reasonable in light of the entire record, in compliance with the law, and in the public interest.”)

SRGB water in brackish water:

$$(seawater\ salinity) \times (Percentage\ of\ seawater) + (inland\ water\ salinity) \times (Percentage\ of\ Salinas\ Basin\ water) = (brackish\ water\ salinity)^{76}$$

The Commission previously approved, in D.10-12-016, both the return water concept and the very formula to be used to determine the amount of desalinated water that must be returned to the SRGB – a key component to the return water concept for the MPWSP. Since D.10-12-016 approved a settlement, it is not precedential, but it is binding.<sup>77</sup> D.10-12-016 remains subject to law forbidding collateral attacks on Commission decisions. In light of the Commission’s approval of the precise same formula at issue in D.12-12-016, Water Plus’s attack on the return water concept at this point is not only wrong, it is an impermissible collateral attack on that decision.<sup>78</sup>

2. **Both Logic and the Agency Act Compel Rejection of the Argument that “Salty” Water Must be Returned to the SRGB**

Water Plus nonsensically argues that after water is desalinated, any salty water that remains must be returned to the SRGB.<sup>79</sup>

Through the Return Water Settlement Agreement and Return Water Purchase Agreement, the Agency has exercised its discretion to determine that the exchange of water under the MPWSP and included in the implementation of agreements to return water to the Salinas River Groundwater Basin complies with the Agency Act. If the Commission approves the MPWSP and the project thereafter is implemented, product water from the desalination plant will be returned to the CCSD and to the CSIP for in lieu use and groundwater recharge. In both of those instances, Cal-Am's exchange (or return) of water in an amount equivalent to the water that is extracted will slow the rate of well pumping in areas where seawater intrusion is advancing and

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<sup>76</sup> Italics in original. MCWD’s argument about the 1:1 ratio of desalinated water to source water ignores the identity of these two formulae. See MCWD Comments, at p. 8.

<sup>77</sup> Rule 12.6.

<sup>78</sup> Pub. Util. Code §§1709 & 1731(b)(1); D.02-01-037, *mimeo*, pp. 14-15.

<sup>79</sup> Water Plus Comments, at p. 7.

threatening the quality of the groundwater.

As already demonstrated, the previously-cited provisions of the Agency Act amply support that plan for the MPWSP.

Further, it would defy logic as well as the purposes of the Agency Act to require water whose saltiness has only become more concentrated to make its way back into the SRGB. Under section 21 of the Agency Act, SRGB groundwater is not to be exported so that the balance between extraction and recharge within the SRGB may be preserved. That balance would not be preserved, but instead would be decidedly tilted toward salinity, if Water Plus's bizarre argument were accepted.

### **3. The Petition for Writ of Mandate Submitted as Attachment A to the Water Plus Comments Should be Ignored**

Water Plus complains that it has made some filings with the Commission indicating the MPWSP violates the Agency Act, but “[t]hese filings have not deterred the Commission from continuing to countenance the violations. To address this problem, Water Plus has filed a petition for writ of mandamus” against the County of Monterey, the Agency and the California Coastal Commission.<sup>80</sup>

First, the Commission has not yet approved the MPWSP and thus cannot have countenanced any violations. Second, the Petition for Writ of Mandate may well interfere with the function and jurisdiction of the Commission in this proceeding, leading to a question regarding the propriety of Superior Court jurisdiction in the Petition action. Regardless, for the present, the Commission need only know that the Agency (and County) will respond to the Petition in due course and expect to seek its dismissal on various grounds.

#### **C. Public Water Now's Comments Should Be Disregarded**

The Return Water Settlement provides the formulas used to determine pricing for Return Water and Excess Water. Generally, the CCSD rate for Return Water is intended to represent the

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<sup>80</sup> Water Plus Comments, p. 7. The Petition was actually filed by Water Ratepayers Association of the Monterey Peninsula “on behalf of and in the name of the State of California.” Water Plus Comments, Att. A, ¶ 1.

avoided costs to produce groundwater to meet customer demand.<sup>81</sup> For CSIP, the rate for Return Water is intended to represent the CSIP customers' marginal avoided cost for groundwater produced for use by CSIP customers.<sup>82</sup> The CCSD rate for Excess Water is intended to represent the marginal operation and maintenance for the MPWSP to produce one acre-foot of potable water.<sup>83</sup> Given that these prices are based on the avoided costs for CCSD and CSIP they are not, as PWN, claims, subsidies. Moreover, the Commission has accepted this approach previously, in connection with the Regional Desalination Project.<sup>84</sup>

PWN is incorrect when it claims that that “no attention of any significance was given to ratepayer interests.” The Return Water Settlement Agreement furthers customer interests by forestalling future disagreement and litigation regarding the planned production of source water for the MPWSP desalination plant, the anti-export provisions of the Agency Act, and the SRGB conditions and potential groundwater rights. It also helps define the MPWSP project description, which will facilitate the Commission's completion of CEQA review.

Moreover, as noted in the Settlement Motion, the rates are subject to annual review and update through Tier 2 advice letter filings.<sup>85</sup> This ensures that the rates take into account changing circumstances and costs, provides for additional Commission review and oversight, and gives interested parties the opportunity to evaluate and protest. Additionally, the Return

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<sup>81</sup> Settlement Agreement on MPWSP Desalination Plant Return Water (“Return Water Settlement”), §5.a.i, p. 10.

<sup>82</sup> Return Water Settlement, §5.a.ii, p. 11.

<sup>83</sup> Return Water Settlement, §5.b, p. 11.

<sup>84</sup> See D.10-12-016, *Application of California American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates*, Decision Approving Regional Project, Adopting Settlement Agreement and Issuing Certificate of Public Convenience and Necessity for California-American Water Facilities. Indeed, MCWD advocated for this same approach in connection with the Regional Desalination Project. While under Rule 12.6 the Commission's adoption of the settlement in D.10-12-016 is binding but not precedential, it is nonetheless of note that the Return Water Settlement's avoided cost pricing approach is not novel and has in similar circumstances previously been found persuasive.

<sup>85</sup> Return Water Settlement, §5, pp. 10-11.

Water Settlement includes provisions that protect against duplicative liability should California American Water be ordered to undertake other Return Water obligations.<sup>86</sup> Finally, if, upon termination, expiration or nonrenewal of the Return Water Purchase Agreements, California American Water demonstrates Return Water is not needed to prevent legal injury to prior groundwater rights holders in the SRGB or to avoid significant adverse effects to SRGB groundwater resources, California American Water may end its obligation to continue to make Return Water available for delivery to the SRGB for use in lieu of existing groundwater production.<sup>87</sup>

While the Settling Parties believe that the Return Water Settlement reflects a fair and equitable resolution of the disputed issues, it also reflects certain compromises. Some of the assurances that PWN criticizes are necessary to justify needed capital investments. For example, it would be unreasonable to expect CCSD to invest in the capital facilities necessary to convey the Return Water from the MPWSP to the CCSD without assurances of a specific volume of Return Water. The conditions that PWN would place on the agreement are unreasonable and would prevent any agreement from being reached.

Contrary to PWN's claims, the Return Water Settlement is not "excessively open-ended." PWN criticizes the Return Water Settlement for its reliance on existing models and notes that circumstances may change when data from the new models becomes available. However, the Return Water Settlement takes into account the data currently available and provides for the possibility of new information and/or changed circumstances. Some of the issues raised by PWN are not appropriate here as they will be clarified as part of the CEQA review process. Indeed, the Settling Parties made the Return Water Settlement expressly contingent on the Commission's completion of the CEQA review for the MPWSP.<sup>88</sup>

Instead of dealing with the specifics of the Return Water Settlement, PWN, as did

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<sup>86</sup> Return Water Settlement Agreement, §4, p. 9.

<sup>87</sup> *Id.*, §8, pp. 11-12.

<sup>88</sup> *Id.*, §17, p. 14.

MCWD, focuses more on criticizing the MPWSP in general. PWN simply repeats complaints that it has made before. The viability of the MPWSP as a whole, as well as the costs and impact on customers, will be addressed by the Commission when it issues its decision on California American Water's request for a CPCN.

The Return Water Settlement benefits customers and the community because it establishes a return water delivery arrangement that assures compliance with the Agency Act, delivers Return Water for beneficial use in the SRGB, and helps to address the public health and water supply challenges CCSD has experienced due to water quality degradation of its water supplies.<sup>89</sup> It is reasonable in light of the whole record, consistent with law, and in the public interest. As such, it should be approved and adopted by the Commission.

### **III. CONCLUSION**

For the foregoing reasons, the Joint Parties respectfully request that the Commission reject the comments filed by MCWD, Water Plus, and PWN. The Joint Parties respectfully request the Commission to approve the Return Water Settlement Agreement.

Dated: July 29, 2016

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<sup>89</sup> Joint Motion for Approval of Settlement Agreement on Desalination Plant Return Water, p. 7.

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