



**FILED**  
7-28-16  
04:59 PM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Application of California-American Water )  
Company (U 210 W) for Approval of the ) Application 12-04-019  
Monterey Peninsula Water Supply Project ) (Filed April 23, 2012)  
and Authorization to Recover All Present )  
and Future Costs in Rates. )  
)  
)  
)  
)

---

PUBLIC TRUST ALLIANCE REPLY TO MCWD CONSOLIDATED COMMENT  
ON PROPOSED SETTLEMENT AGREEMENTS

Michael Warburton, Executive Director Patricia Nelson, CSBN 133643,  
Public Trust Alliance, Attorney for the Public Trust Alliance,  
a project of the Resource Renewal Institute 130 Edward Ave.  
187 E. Blithedale Ave. San Rafael, CA 94903  
Mill Valley, CA 94941 415-497-1147  
Michael@rri.org nelsonp34@hotmail.com

TABLE OF AUTHORITIES

**Statutes/Rules**

Page

Rule of Practice and Procedure 12.2	5
Rule of Practice and Procedure 12.1	14
Water Conservation Act of 2009	15
Sustainable Groundwater Management Act	16-17
Pub. Util. Code § 1002	18

**SWRCB Orders**

Order 2009-0060	19
-----------------	----

**Executive Orders**

Executive Order S-06-08	16
Executive Order B-29-15	16

**Cases/Decisions**

2014 Cal. PUC LEXIS 395	6
1992 Cal. PUC LEXIS 867	7
2016 Cal. PUC LEXIS 15	8
2009 Cal. PUC LEXIS 346	9, 15
2007 Cal. PUC LEXIS 444	10
2009 Cal. PUC LEXIS 503	14
2007 Cal. PUC LEXIS 173	14
2002 Cal. PUC LEXIS 306	14
1993 Cal. PUC LEXIS 688	14
2011 Cal. PUC LEXIS 258	15
<i>County of Siskiyou v. Superior Court</i> (2013) 217 Cal. App. 4th 83	18
<i>Northern California Power Agency v. Public Utilities Com.</i> (1971) 5 Cal.3d 370	18
<i>Marks v. Whitney</i> , 6 Cal. 3d 251 (1971)	19
<i>National Audubon Society v. Superior Court of Alpine County</i> , 33 Cal. 3d 419 (1983)	19
<i>Just v. Marinette County</i> , 56 Wis.2d 7, 18, 201 N.W.2d 761 (1972)	19
<i>Baykeeper, Inc. v. California State Lands Commission (Hanson Marine Operations, Inc., et al., Real Parties In Interest)</i> (1st Dist., Div. 4, 2015) 242 Cal.App.4th 202	20

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**Record Documents**

MCWD Comment 5-18

Commission Scoping Ruling 19

**Secondary Authorities**

Tim Eichenberg et al., *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE UNIV.

ENVIRONMENTAL L.J. 243, 253 n. 55 (2010)  
THE OCEAN AS A PUBLIC TRUST RESOURCE 20

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

TABLE OF CONTENTS

Topic	Page
I. Introduction	4
II. Argument	4
A. Standard for Reviewing Settlement Agreements	4
B. Cal-Am Supply-and-Demand Figures Are Inaccurate/Misleading	6
C. Existing Sources and Other Feasible Replacement Sources May Suffice to Achieve Compliance with SWRCB Orders	9
D. The Settlements Make Implicit Assumptions re Necessity of MPWSP and Promote Adoption of an Ill-Advised Project	12
E. Changed Circumstances Should Be Considered	13
F. Groundwater Impacts and Return Water Issues Cast Doubt on the Legality and Viability of the Project Underlying the Settlement Agreement	17
G. Environmental Harms Are a Relevant Consideration	17
III. Conclusion	19

1           **I. Introduction**

2           Pursuant to Rule 12.2 of the Commission’s Rules of Practice and Procedure, the Public  
3 Trust Alliance (“PTA”) respectfully submits its comments in reply to the comments of Marina  
4 Coast Water District (“MCWD”) on the Joint Motion for Approval of Settlement Agreement on  
5 Desalination Plant Return Water (the “Return Water Settlement Motion” filed in this proceeding  
6 on June 14, 2016). PTA supports MCWD’s request for close scrutiny of Cal-Am’s supply and  
7 demand estimates, the purported necessity for the project, and the needless imposition of  
8 enormous costs on Cal-Am ratepayers.  
9

10           **II. Argument**

11           PTA agrees in substance with much of MCWD’s consolidated comment on the proposed  
12 settlement agreements on brine discharge and return water. We find particularly cogent its  
13 arguments regarding supply and demand and the sufficiency of other sources of replacement  
14 water.  
15

16           **A. Standard for Reviewing Settlement Agreements**

17           MCWD states: “The public interest would not be served by the Commission’s piecemeal  
18 approval of brine discharge or groundwater impacts mitigation issues where the MPWSP as a  
19 whole is contrary to, and not required to serve, the present or future public convenience and  
20 necessity.” MCWD Consolidated Comments, p. 22.

21           It is indeed appropriate to examine the individual settlements in light of the whole  
22 project, especially in view of the contested nature of the settlements. As the Commission has  
23 explained:  
24  
25

1 The Commission's policy is that contested settlements should be subject to more  
2 scrutiny compared to an all-party settlement. As explained in D.02-01-041:

3 “In judging the reasonableness of a proposed settlement, we have sometimes  
4 inclined to find reasonable a settlement that has the unanimous support of all  
5 active parties in the proceeding. *In contrast, a contested settlement is not entitled*  
6 *to any greater weight or deference merely by virtue of its label as a settlement; it*  
7 *is merely the joint position of the sponsoring parties, and its reasonableness*  
8 *must be thoroughly demonstrated by the record.* (D.02-01-041, mimeo., at 13.)

9 *Accordingly, for the proposed settlement which is contested, we consider the*  
10 *merits of the objections raised by EPUC, and the substantive merits of the*  
11 *underlying disposition of the issues.”*  
12

13 2014 Cal. PUC LEXIS 395, 968 (emphasis added).

14 In a foundational case articulating its approach to settlement agreements, the Commission  
15 cited with approval the decisions of Commissions in other states.

16 In *Re Cleveland Electric Illuminating Company*, 99 PUR4th 407, 449-50 (1989),  
17 the Ohio Public Utilities Commission declared that:

18 “[t]he ultimate question to be answered by the Commission is whether, in light of  
19 the whole record, the Stipulation is reasonable. In considering the reasonableness  
20 of a settlement, the Commission has . . . recognized a need to analyze the  
21 following criteria:

22  
23 1) Is the settlement a product of serious bargaining among capable,  
24 knowledgeable parties[?]

25 2) ***Does the settlement, as a package, benefit ratepayers and the public interest?***

1           3) Does the settlement package violate any important regulatory principle or  
2           practice?”

3           1992 Cal. PUC LEXIS 867, \*16-17, 46 CPUC2d 538, (Cal. App. 1992) (emphasis added).

4           The approval of settlement agreements that focus problem-solving on the most expensive  
5           means of obtaining a replacement water supply is clearly not in the interest of ratepayers. This is  
6           noted by MCWD on p. 22 of its Consolidated Comment. “MPWSP would needlessly impose  
7           significant costs on Cal-Am ratepayers. . .” We agree.

8  
9           **B. Cal-Am Supply-and-Demand Figures Are Inaccurate/Misleading**

10           PTA concurs with MCWD’s point that “Current supply and demand data are relevant to  
11           the ultimate question of public convenience and necessity, as well as issues of any potential  
12           requirement for “return water” and the volume of MPWSP brine discharge.” MCWD  
13           Consolidated Comment, p. 23.

14           We also concur that there is a material factual dispute regarding supply-and-demand  
15           figures, a dispute that must be resolved before approval of any settlement agreements that tend to  
16           support a proposed desalination project. We also agree that discrepancies in supply and demand  
17           figures go to the heart of the actual need for the proposed Cal-Am desalination project. At pp. 9-  
18           10 of its Consolidated Comment, MCWD states that “Cal-Am claims that it requires at least a 6.4  
19           mgd, or approximately 6,752 AFY, desalination project. (Amended Application, p. 1, Amended  
20           Att. H thereto, p. 1.) But Cal-Am’s entire system requirements in calendar year 2015 were only  
21           9,545 AFY. (Ex. CA-41, pp. 7, 8.)”

22           MCWD provides substantial evidence, from the project proponents’ own submissions,  
23           anticipated sources of supply, other than desal water, are sufficient to meet Cal-Am’s actual  
24

1 demand and to comply with the SWRCB's pending cease and desist orders: "Future supply of  
2 approximately 4,800 AFY is anticipated from the ASR program and the GWR Project. (Ex. JE-2,  
3 pp. 13-15.) Cal-Am's current sources include legal Carmel River supply of 3,376 AFY, plus  
4 permitted ASR supply (depending upon winter river flow), the Sand City desalination plant, the  
5 Seaside Basin . . ." (*Id.* at p. 10 and Att. 1 thereto.)

6  
7 At p. 10 of its Consolidated Comment, MCWD goes on to note: "The Commission  
8 recently noted in its own comments to the SWRCB that Cal-Am's average volume of Carmel  
9 River diversions over the past four years was 7,656 AFY. (Ex. PCL-7, p.3.) Subtracting Cal-  
10 Am's legal diversions of 3,376 AFY from that number leaves only 4,280 AFY of illegal Carmel  
11 River diversions that must be replaced. This portion of Cal-Am's annual supply may readily be  
12 replaced with 3,500 AFY from the GWR Project and by utilizing system improvements that will  
13 permit access to an estimated 1,300 AFY of ASR supply beginning in 2018. (Ex. JE-2, pp. 13-  
14 15; *see also* RT, Vol. 18, pp 2988:24-2992:2, *especially at* p. 2990:14-16.) Yet Cal-Am still  
15 insists, even with implementation of the GWR Project and maximum ASR utilization, that it  
16 requires a 6.4 mgd desalination project. The record does not support Cal-Am's application."

17  
18 We find this argument persuasive. We would like to add, in support of MCWD's general  
19 point regarding inaccurate figures that appear to support the project that underlies the proposed  
20 settlement agreements: There is a systemic problem of inaccurate forecasting that leads water  
21 utilities to overestimate demand for water, in a time when water consumption in Monterey and  
22 elsewhere is declining. See 2016 Cal. PUC LEXIS 15, 16-18, which notes utilities' "inaccurate  
23 sales forecasts that over-estimate consumption." Decision 12-04-048 called for a more vigorous  
24 review of sales forecasting, to be conducted in each applicant's pending or next GRC  
25 proceeding.

1 The Commission has explicitly rejected Cal-Am’s “tried and true” forecasting  
2 methodology, which overstates customer demand and then posits an essential need to have  
3 facilities available to meet this demand “adequately, dependably, and safely.” . . . 2009 Cal. PUC  
4 LEXIS 346 at [\*18]:

5 “This Commission has a long-standing policy supporting reduced water consumption and  
6 has adopted significant ratepayer-funded conservation programs for all Class A water utilities.  
7 Specifically, we adopted consumption reduction targets of 3 to 6% per three-year rate case cycle  
8 in Investigation 07-01-022. For Cal-Am, in A.07-12-010, the parties have reached a settlement  
9 agreement providing for a 3% consumption reduction target over the course of the three-year rate  
10 case cycle.”

11  
12 “Cal-Am's Comprehensive Planning Study, and the significant capacity increases it  
13 recommends, appear to be inconsistent with the lack of customer growth, the history of declining  
14 consumption, and the Commission's policy of water conservation. Cal-Am bears the burden of  
15 demonstrating convincingly that the proffered justification for these expensive capital projects is  
16 a sound planning approach for the Monterey System.” Id. at [\*18-\*20].

17 “We are compelled to note that the consequences of overestimating Maximum Daily  
18 Demand in a system with increasing demand is having plant available in advance of need, a  
19 consequence which time and demand growth ameliorate. In contrast, however, with stable or  
20 declining customer demand, overestimating Maximum Daily Demand can lead to overbuilding  
21 resources that may never be used.” Id at [\*31] – [\*32].

22  
23 We should note that Cal-Am’s forecasting of consumer demand is associated with the  
24 Water Revenue Adjustment Mechanism and associated accounts designed to compensate Cal-  
25 Am for undercollections resulting from to Cal-Am’s implementation of water conservation

1 measures. One identifiable cause for inaccurate forecasting is that the Monterey District  
2 mechanism is intended to capture revenue shifts that are caused by an inverted-block  
3 conservation rate design; it does not capture revenue shifts due to changes in consumption. 2007  
4 Cal. PUC LEXIS 444, \*50-51. Yet changes in consumption patterns are precisely what is  
5 occurring—throughout California and in Cal-Am’s Monterey District as consumers adjust to  
6 long-term changes in climate, water availability, and in the regulatory environment.

7  
8 We believe that Cal-Am/the Commission should incorporate known patterns of declining  
9 demand and increasing regulatory restrictions in its forecasting. For example, the Commission is  
10 required to ensure that any adopted conservation goal at least meets the statewide goal, 20%  
11 reduction in consumption by 2020, embodied in SBX7-7. See 2011 Cal. PUC LEXIS 258 at  
12 [\*10]. It is also known that consumption has been declining consistently in Monterey County,  
13 and that climate change is a force driving a less reliable water supply and increased water-use  
14 regulation by the state.

15 **C. Existing Sources and Other Feasible Replacement Sources May Suffice to Achieve**  
16 **Compliance with SWRCB Orders**

17 In its list of disputed material facts, beginning on p. 2 of its Consolidated Comment,  
18 MCWD includes:

19 (3) the volume, *if any*, of additional replacement water supply Cal-Am must  
20 obtain in order to cease its illegal Carmel River withdrawals in light of the full  
21 scope of its available water supply portfolio and upon implementation of the  
22 Monterey Regional Water Pollution Control Agency’s (“MRWPCA’s”) Pure  
23 Water Monterey or Groundwater Replenishment (“GWR”) Project and expansion  
24 of the Monterey Peninsula Water Management District (“MPWMD”)’s Aquifer  
25

1 Storage and Recovery (“ASR”) program, including any SVGB return water  
2 obligation arising from extraction of SVGB groundwater for MPWSP operation;  
3 MCWD illustrates graphically the feasibility of achieving compliance with SWRCB  
4 directives, using available water supply sources and without resorting to a costly desal project.

5  
6 MCWD’s NO DESAL Option is based upon the following water sources, which should  
7 be available to Cal-Am when the GWR Project becomes operational and on January 1, 2022:

8

Cal-Am’s NO DESAL Water Sources When GWR becomes operational and on January 1, 2022	Acre Feet per Year
Carmel River Legal Limit	3,376
Seaside Basin Adjudicated Groundwater Supply	774
Sand City Desalination Plant	250
Aquifer Storage & Recover (ASR) Project Phases 1 and 2	1,970
Groundwater Replenishment (GWR) Project	3,500
Additional Water: Seaside Basin, ASR, and GWR	330
Total No Desal Water Supply	10,200

9  
10  
11  
12  
13  
14  
15

16 See Exhibit 2 to MCWD Consolidated Comment, p. 6.

17 MCWD’s comment documents statements by Cal-Am and evidence in the record,  
18 illustrating that other feasible replacement water sources may be enough to bring Cal-Am into  
19 compliance with SWRCB orders:

20 Cal-Am states that the chief purpose of the MPWSP is to “satisfy Cal-Am’s  
21 obligations to meet the requirements of SWRCB Order 95-10.” (Amended  
22 Application of March 14, 2016, Attachment H, p. 1.) The record shows that Cal-  
23 Am can do so through its own customers’ continuing conservation efforts in  
24 combination with purchased water from the GWR Project under the WPA  
25

1 currently before the Commission in Phase 2 of this proceeding, and with full  
2 utilization of legal ASR sources. (Ex. CA-41, pp. 7, 8, 10; JE-2, pp. 13-15; *see*  
3 *also* RT, Vol. 18, pp 2988:24-2992:2.) True, the volume of available ASR supply  
4 may be uncertain depending upon winter flows in the Carmel River. (RT, Vol. 16,  
5 p. 2663:3-18; Vol. 19, pp. 3166:18-3167:8, 3185:13-3186:7.) But other  
6 unexplored alternatives may also be available to Cal-Am, such as additional  
7 supply from GWR, making permanent certain temporary payments for pumping  
8 forbearance to other Carmel River rights holders (*see, e.g.*, Ex. PCL-8, Apr. 28,  
9 2016 Amended Application to SWRCB at pp. 18-19), and additional supply  
10 above 94 AFY from the Sand City desalination plant (SWRCB Order WR 2009-  
11 0060, pp. 41, 58). Other potential sources include storm water capture from the  
12 lower Salinas River, and additional supply may also be available from the Seaside  
13 Basin. (*See* MCWD's July 12, 2016 comments to the SWRCB on Cal-Am's  
14 Amended Application for modification of the CDO, **Attachment 2** hereto, pp. 5-  
15 12 and sources and authorities there cited.) Other parties have also argued that  
16 alternatives to desalination as a supply source merit the Commission's attention.  
17 (*See* Phase 2 Opening Brief of Public Trust Alliance, pp. 16-17, Phase 2 Reply  
18 Brief of Public Trust Alliance, p. 12.) Environmental review of the MPWSP  
19 should address all of these alternatives, but such review is still under way and thus  
20 does not at this time support the Motions. (*See* Sept. 30, 2015 Notice to All  
21 Parties.) Indeed, without having considered these and other feasible alternatives, it  
22 cannot be said that the MPWSP is necessary at all. On the current record, there is  
23  
24  
25

1 no adequate showing that an alternative other than the “no action” alternative is  
2 appropriate and in the public interest.

3 We find MCWD’s marshalling of evidence convincing and far more protective of  
4 ratepayer interests than the proposed settlement agreements.

5 **D. The Settlements Make Implicit Assumptions re Necessity of MPWSP and Promote**  
6 **Adoption of an Ill-Advised Project**

7 MCWD points out that the “Settlements assume the MPWSP is necessary and can be  
8 carried out legally without engendering significant harms.” MCWD Consolidated Comment, p.  
9 1. We believe that MCWD is correct in suggesting that the settlements of discrete brine  
10 discharge and return-water issues tend to assume or promote approval of the full project.

11 The Brine Discharge Settlement Agreement states at section 1.2 that “The purpose of the  
12 project is to replace a significant portion of the existing water supply from the Carmel River as  
13 directed by the State Water Resources Control Board (“SWRCB”). (SWRCB Order Nos. WR  
14 95-10 (July 6, 1995) and; WR 2009-0060).” But MCWD raises the very basic and very material  
15 question about this statement: Is the project actually needed to accomplish the stated purpose?  
16 We recognize the genuine and sincere efforts of parties to compromise, balancing environmental  
17 harm against community needs. However, if the community can have its needs met without the  
18 underlying desal project, there is no need to compromise regarding brine-related harms to  
19 important public trust assets. We find this a compelling prospect meriting the most serious  
20 scrutiny.  
21

22 The logical order for considering replacement water supplies is to address the most  
23 environmentally sound and cost-effective approaches first. If, and only if, those sources are not  
24 adequate to secure the required replacement water, should other sources be considered.  
25

1 Conservation and the use of recycled water are the most environmentally sound and cost-  
2 effective supplies. This is consonant with the Commission's legal duty is to ensure cost-  
3 effectiveness and reasonable use of ratepayer monies. 2009 Cal. PUC LEXIS 503 at [8] (re cost  
4 effective and reasonable use of ratepayer monies).

### 5 **E. Changed Circumstances Should Be Considered**

6 Pursuant to Rule 12.1(d) of the Commission's Rules of Practice and Procedure (Rules),  
7 the Commission approves settlements that it finds "reasonable in light of the whole record,  
8 consistent with law, and in the public interest." Rule 12.1 requires every settlement, whether  
9 contested or not, to be reasonable in light of the whole record, consistent with the law, and in the  
10 public interest. Contested settlements are subject to additional scrutiny to ensure that the  
11 contested elements of the settlement fairly balance the interests at stake, are consistent with  
12 Commission policy objectives, and comply with Rule 12.1. 2007 Cal. PUC LEXIS 173, \*375.  
13 For a settlement to be approved, it must satisfy all three requirements. If it fails to satisfy any one  
14 of the requirements, it cannot be adopted. 2002 Cal. PUC LEXIS 306, \*12.

15  
16 The "whole record" includes changed circumstances. See, e.g., 2007 Cal. PUC LEXIS  
17 173, in which several parties' contentions re changed circumstances constituted part of the  
18 context of a dispute regarding a settlement agreement. See also, 1993 Cal. PUC LEXIS 688, \*6-  
19 7, 52 CPUC2d 24 (Cal. App. 1993), in which the parties reached agreement regarding expenses  
20 related to changed circumstances. MCWD implicitly raises the issue of changed circumstances at  
21 p. 2 of its comment when it states that "material facts were not known or not adequately explored  
22 at the time of the 2013 evidentiary hearings, or they rest on an incomplete record that is outdated  
23 and impermissibly stale."  
24  
25

1 In Monterey and in California as a whole, several circumstances have changed since that  
2 consensus was reached among a very limited subset of people. For example, accelerating  
3 climate change, with declining/less reliable precipitation, has made it obvious that an era of  
4 reduced water consumption is here to stay. American Water is out of step with this reality. See,  
5 e.g., 2009 Cal. PUC LEXIS 346 at [\*14], indicating that American Water's general objective is  
6 to provide capacity to meet projected growth and that customer restrictions should not be  
7 considered a permanent solution to meeting capacity need.  
8

9 The Commission has acknowledged its obligation to implement a California statewide  
10 goal of 20% reduction in consumption by 2020. See 2011 Cal. PUC LEXIS 258 at [\*10]. See  
11 <http://www.water.ca.gov/wateruseefficiency/sb7/> which provides the SWRCB analysis of the  
12 Water Conservation Act of 2009. This Act calls upon all water suppliers to increase water use  
13 efficiency. Urban water suppliers are subject to the following requirements under this Act:

- 14 • Each urban retail water supplier shall develop water use targets and an interim  
15 water use target by July 1, 2011.
- 16 • An urban retail water supplier shall include in its water management plan due  
17 July 2011 the baseline daily per capita water use, water use target, interim  
18 water use target, and compliance daily per capita water use. The Department  
19 of Water resources, through a public process and in consultation with the  
20 California Urban Water Conservation Council, shall develop technical  
21 methodologies and criteria for the consistent implementation of this part  
22
- 23 • The Department of Water Resources shall adopt regulations for  
24 implementation of the provisions relating to process water.  
25

- 1 • A Commercial, Institutional, Industrial (CII) task force is to be established  
2 that will develop and implement urban best management practices for  
3 statewide water savings.
- 4 • Effective 2016, urban retail water suppliers who do not meet the water  
5 conservation requirements established by this bill are not eligible for state  
6 water grants or loans.

7 See SWRCB summary at <http://www.water.ca.gov/wateruseefficiency/sb7/>

8  
9 Statewide legislative and executive mandates will only become more demanding as  
10 climate change intensifies. Governor Schwarzenegger issued Executive Order S-06-08 in 2009  
11 that called for a 20 percent reduction of per capita water use in the urban sector by 2020. In  
12 November 2009, Senate Bill (SB) X7-7 (Steinberg) made that order a state law by amending the  
13 California Water Code. See, further, Governor Brown’s Executive Order B-29-15 of April 1,  
14 2015, ordering a statewide 25% cut in urban water use, which was followed by regulations from  
15 the State Water Resources Control Board implementing the cutbacks. There is a new ethos  
16 abroad, which looks to responsible behavior by water suppliers and consumers first, and large  
17 water supply projects last.

18 A changed legal regime regarding groundwater regulation is a further, important changed  
19 circumstance, relevant to the objections that MCWD raises at pp. 5-8 in its Consolidated  
20 Comment. On September 16, 2014, Governor Brown signed into law three bills, SB 1168, AB  
21 1739, and SB 1319, collectively called the Sustainable Groundwater Management Act  
22 (“SGMA”). Effective January 1, 2015, the bills established a new paradigm for management of  
23 the state’s groundwater. The Sustainable Groundwater Management Act (“SGMA”) calls for the  
24  
25

1 establishment of Groundwater Sustainability Agencies, which will be required to develop  
2 Groundwater Sustainability Plans for each groundwater basin within their jurisdiction.

3 The primary goal of SGMA is to sustainably manage all high- and medium-priority  
4 groundwater basins to avoid “undesirable results,” which the law defines as:

- 5 ● Chronic lowering of groundwater levels indicating a significant and unreasonable  
6 depletion of supply if maintained;
- 7 ● Depletions of surface water that have significant and unreasonable adverse impacts on  
8 beneficial water users;
- 9 ● Significant and unreasonable:
  - 10 ○ reduction of groundwater storage;
  - 11 ○ seawater intrusion;
  - 12 ○ degraded water quality; and/or
  - 13 ○ land subsidence.

14  
15 Moran & Cravens, *California’s Sustainable Groundwater Management Act of 2014:*  
16 *Recommendations for Preventing and Resolving Groundwater Conflicts* (April 2015, Water in  
17 the West, Stanford University), SGMA\_RecommendationsforGWConflicts\_2.pdf. The  
18 opportunity for creative change is particularly pronounced in Monterey County, where an  
19 estimated 95 percent of all water used in Monterey County is derived from groundwater wells.  
20 MONTEREY COUNTY LEGISLATIVE PROGRAM 2015 – 2016, p. 25,  
21 [https://www.co.monterey.ca.us/cao/igla/pdf/2015-](https://www.co.monterey.ca.us/cao/igla/pdf/2015-16%20Legislative%20Program%20(adopted).pdf)  
22 [16%20Legislative%20Program%20\(adopted\).pdf](https://www.co.monterey.ca.us/cao/igla/pdf/2015-16%20Legislative%20Program%20(adopted).pdf) (last accessed June 6, 2016).

23  
24 Under the Act, Section 113 is added to the Water Code, stating that “It is the policy of the  
25 state that groundwater resources be managed sustainably for long-term reliability and multiple

1 economic, social, and environmental benefits for current and future beneficial uses. Sustainable  
2 groundwater management is best achieved locally through the development, implementation, and  
3 updating of plans and programs based on the best available science.”

4 We would like to add, in support of MCWD’s pointes, that the Act co-exists with a  
5 relatively recent ruling that the public trust doctrine protects navigable waterways from harm  
6 caused by groundwater extraction. *County of Siskiyou v. Superior Court* (2013) 217 Cal. App.  
7 4th 83, modified at 2013 Cal. App. LEXIS 551, writ denied, writ denied 2015 Cal. LEXIS 1046.

8  
9 **F. Groundwater Impacts and Return Water Issues Cast Doubt on the Legality and  
10 Viability of the Project Underlying the Settlement Agreement**

11 MCWD raises several compelling points about the legality of the groundwater impacts  
12 and of the proposed desal projects and mitigation by way of Cal-Am’s proposed return water  
13 regime. MCWD Consolidated Comments, pp. 5-8. At the very least, these comments indicate  
14 that the desal project underlying the proposed return water settlement will be mired in extended  
15 litigation and might well be found to be illegal. In such circumstances, it is far better (and  
16 cheaper, and more consistent with ratepayer interests and community values) to focus on meeting  
17 water sources requirements with feasible alternative sources. MCWD has presented a forceful  
18 and persuasive argument that it is possible to do so.

19  
20 **G. Environmental Harms Are a Relevant Consideration**

21 MCWD asserts that “a CPCN determination must be made on the basis of the  
22 Commission’s consideration after a full hearing of *all* relevant factors. (Pub. Util. Code § 1002,  
23 subd. (a); *see Northern California Power Agency v. Public Utilities Com.* (1971) 5 Cal.3d 370,  
24 378.) Impact, or influence, on the environment is a relevant factor to be considered at the CPCN  
25

1 hearing in determining whether the public convenience and necessity requires the construction of  
2 the project. (Pub. Util. Code § 1002, subd. (a).)” MCWD Consolidated Comment, p. 23.

3 PTA recognizes, without necessarily agreeing with the Commission’s underlying legal  
4 conclusions, that the Scoping Order in this action precludes consideration of pending CEQA  
5 findings in this action.

6 However, we would like to point out, in support of MCWD, that there is an obligation to  
7 consider public trust impacts that is largely separate from the Commission’s CEQA obligation.  
8 In the context of the enforcement proceedings for Order 2009-0060, the SWRCB considered  
9 harm to public trust resources in the course of formulating an appropriate remedy. In Section 7 of  
10 the Order, Evidence Pertaining to Public Trust Resources, the Board noted that “. . . Where the  
11 parties propose different remedies, public trust impacts will also be relevant to . . . the choice of  
12 remedies.” Note 15, citing the Board’s May 13, 2008 ruling on procedural issues.

13 In *Marks v. Whitney*, the California Supreme Court concluded that the public uses  
14 protected by the public trust doctrine are flexible and evolve to encompass changing public needs  
15 and values. 6 Cal. 3d 251, 491 P.2d 374, 380 (1971). Public values encompass effects on  
16 seawater as well as surface water affected by groundwater withdrawals. For state agencies, there  
17 is an “affirmative duty to take the public trust into account in the planning and allocation of  
18 water resources, and to protect public trust uses whenever feasible.” “Unnecessary and  
19 unjustified harm to trust interests” should be avoided. *National Audubon Society v. Superior*  
20 *Court of Alpine County*, 33 Cal. 3d 419, 446-447 (Cal. 1983), *cert. denied* 454 U.S. 977 (1983).  
21 The state’s duty of continuing supervision is the “core of the public trust doctrine.” *Id.*

22 A state’s affirmative duty under the public trust doctrine is delegable to local units of  
23 government. See *Just v. Marinette County*, 56 Wis.2d 7, 18, 201 N.W.2d 761 (1972). See also,

1 Tim Eichenberg et al., *Climate Change and the Public Trust Doctrine: Using an Ancient*  
2 *Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE UNIV.  
3 ENVIRONMENTAL L.J. 243, 253 n. 55 (2010); THE OCEAN AS A PUBLIC TRUST RESOURCE 2,  
4 <http://www.mass.gov/eea/docs/czm/oceans/waves-of-change/tech-pt.pdf> (last accessed June 6,  
5 2016), citing PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2nd Ed.) (1997 Coastal States  
6 Organization).

7  
8 A recent case addresses the basic question of whether the public trust doctrine imposes  
9 any obligation to demonstrate affirmatively that a decisionmaking agency has taken the public  
10 trust into account when making a decision about the management and use of trust property,  
11 whether in the context of a CEQA review or otherwise. *Baykeeper, Inc. v. California State Lands*  
12 *Commission (Hanson Marine Operations, Inc., et al., Real Parties In Interest)* (1st Dist., Div. 4,  
13 2015) 242 Cal.App.4th 202, 242, review denied 2016 Cal. LEXIS 1429. The court concluded  
14 that the agency has such an obligation where it is not clear that the project under consideration is  
15 a recognized public trust use, or even a trust consistent use.

### 16 **III. Conclusion**

17 For the reasons stated above, PTA urges the Commission to reject the proposed  
18 settlement agreements and to focus instead on the use of available alternative sources of water.  
19 We believe that these sources, properly administered, would be adequate to protect the Carmel  
20 River, a public trust resource that we value highly.

21  
22 Signed: July 28, 2016

23 \_\_\_\_\_/s/\_\_\_\_\_  
24 Patricia Nelson, CSBN 133643,  
25 Attorney for the Public Trust Alliance,  
130 Edward Ave.  
San Rafael, CA 94903  
Telephone: 415-497-1147

nelsonp34@hotmail.com

\_\_\_\_\_/s/\_\_\_\_\_  
Michael Warburton, Executive Director  
Public Trust Alliance,  
a project of the Resource Renewal Institute  
187 E. Blithedale Ave.  
Mill Valley, CA 94941  
Michael@rri.org

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25