

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



FILED

07-11-12
03:32 PM

In the Matter of the Application of California-
American Water Company (U 210 W) for
Approval of the Monterey Peninsula Water
Supply Project and Authorization to Recover All
Present and Future Costs in Rates.

A.12-04-019
(Filed April 23, 2012)

**MARINA COAST WATER DISTRICT'S
OPENING BRIEF ON LEGAL ISSUES REGARDING
THE FEASIBILITY OF THE APPLICATION**

MARK FOGELMAN
RUTH STONER MUZZIN
FRIEDMAN & SPRINGWATER LLP
33 New Montgomery Street, Suite 290
San Francisco, CA 94105
Telephone: (415) 834-3800
Facsimile: (415) 834-1044
Email: mfogelman@friedmanspring.com
Email: rmuzzin@friedmanspring.com

Attorneys for Marina Coast Water District

Date: July 11, 2012

TABLE OF CONTENTS

	<u>Page</u>
I. Is the County Ordinance Governing Desalination and Limiting Desalination Plant Ownership and Operation to Public Agencies Preempted by Commission Authority?	1
A. Preemption is applied narrowly, notwithstanding the Commission’s broad powers.....	1
B. There is no express preemption here, because the County Ordinance does not conflict with a specific legislative mandate.....	5
C. There is no clear case of implied preemption here by virtue of statewide Commission authority over water companies, because the legislature has not delegated statewide authority over water or desalination to the Commission, and the County Ordinance is not purely local.	6
D. Cal-Am’s ownership of a desalination plant does not appear to be necessary because there is a public agency that is capable of providing 8800 AFY of desalinated water to Cal-Am; therefore the County Ordinance at issue is not impliedly preempted.....	9
II. Does or Will Cal-Am, or Another Entity Participating in the Separate Groundwater Replenishment and Aquifer Storage Projects of Cal-Am’s Proposal for Replacement Water, Possess Adequate Rights to the Slant Well Intake Water, Groundwater Replenishment Water and to the Outfall for Purposes of Project Feasibility?	12
A. Neither Cal-Am nor any project partner it has yet identified may legally pump groundwater from the Salinas Valley Groundwater Basin for the proposed slant well intake water.....	12
B. Even if Cal-Am were to accept the Groundwater Replenishment component of the project, neither it nor any partner it has yet identified will be able to obtain recycled water in the volume the proposed project requires.	14
C. Cal-Am and any potential partners to the project would have a junior claim to outfall capacity for the proposed project.....	15
III. Additional Issues May Affect the Legal Feasibility of the Application.	15
A. The MPWSP cannot rely on the final EIR certified in A.04-09-019 unless the Ag Land Trust Superior Court decision is overturned.....	15
B. The MPWSP is not eligible for State Revolving Fund financing.....	16
C. Cal-Am must acquire land for MPWSP well and desalination plant sites.	16
D. The MPWSP does not appear to comply with the Agency Act.....	17
E. The MPWSP is not capable of meeting the SWRCB’s CDO Deadline.	17

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Ashbacker Radio Corp. v. F.C.C.</i> (1945) 326 U.S. 327	17
<i>Big Creek Lumber Co. v. County of Santa Cruz</i> (2006) 38 Cal.4th 1139	2, 4, 9, 10
<i>California Rifle & Pistol Assn. v. City of West Hollywood</i> (1998) 66 Cal.App.4th 1302	5
<i>California Water & Tel. Co. v. County of Los Angeles</i> (1967) 253 Cal.App.2d 16	2, 4
<i>Garcia v. Four Points Sheraton LAX</i> (2010) 188 Cal.App.4th 364	5
<i>Harbor Carriers, Inc. v. City of Sausalito</i> (1975) 46 Cal.App.3d 773	4
<i>Leslie v. Superior Court</i> (1999) 73 Cal.App.4th 1042	passim
<i>Northern California Power Agency v. Public Util. Com.</i> (1971) 5 Cal.3d 370	8, 10, 17
<i>People ex rel. Deukmejian v. County of Mendocino</i> (1984) 36 Cal.3d 476	2, 10
<i>PG&E Corp. v. Public Utilities Com.</i> (2004) 118 Cal.App.4th 1174	11
<i>San Diego Gas & Electric Co. v. City of Carlsbad</i> (1998) 64 Cal.App.4th 785	2, 4, 11
<i>San Diego Gas & Electric Co. v. Superior Court</i> (1996) 13 Cal.4th 893	3, 4
<i>Sherwin-Williams Co. v. City of Los Angeles</i> (1993) 4 Cal.4th 893	2, 6, 9
<i>Southern Cal. Gas Co. v. City of Vernon</i> (1995) 41 Cal.App.4th 209	4
<i>Ventura County Waterworks v. Public Util. Com.</i> (1964) 61 Cal.2d 462	passim
Statutes	
Pub. Res. Code § 30006.5	7
Pub. Util. Code § 1001	8, 10, 18
Pub. Util. Code § 1002	18
Pub. Util. Code § 1005	8, 18
Pub. Util. Code § 2701-2714.5	5, 6

Water Code § 174.....	6
Water Code § 10004.5	7
Water Code § 10537	7
Water Code Appendix § 52-21	17

Commission Decisions

D.03-05-038.....	11, 18
D.09-12-017.....	12, 15
D.10-12-016.....	passim
<i>In re Southern Cal. Water Company's Advice Letter</i> (Cal. P.U.C. 1980) 3 C.P.U.C. 2d 385, 1980 WL 129549, at *3	11

Constitutional Provisions

California Constitution, article XI, section 7.....	2
California Constitution, article XII.....	5

In accordance with the provisions of the Assigned Commissioner’s Scoping Memo and Ruling (the “Scoping Memo”) issued June 28, 2012, Marina Coast Water District (“MCWD”) hereby submits its opening brief on legal issues that affect the feasibility of the instant Application, including, but not limited to, the “Legal Issues That Warrant Early Resolution” identified in the Administrative Law Judge’s Ruling issued June 1, 2012 by Assigned Administrative Law Judge Gary Weatherford (“ALJ”).

The ALJ’s June 1, 2012 Ruling identified two broad issues, which MCWD addresses in turn below. In addition, in order to further assist the Commission in expeditiously examining other threshold legal issues that may affect project feasibility, MCWD briefly addresses additional legal issues that could render the proposed Monterey Peninsula Water Supply Project (“MPWSP”) infeasible.

MCWD believes that the issues identified by the ALJ, as well as the other legal issues, cannot be resolved in Cal-Am’s favor expeditiously enough to meet the December 31, 2016 Cease-and-Desist Order (“CDO”) deadline, if they can be resolved at all. As outlined below, MCWD believes that several issues – particularly the inapplicability of the doctrine of preemption and the lack of sufficient rights to groundwater and recycled water use – clearly render the Application legally infeasible.

I. Is the County Ordinance Governing Desalination and Limiting Desalination Plant Ownership and Operation to Public Agencies Preempted by Commission Authority?

A. Preemption is applied narrowly, notwithstanding the Commission’s broad powers.

Preemption is a legal principle by which state law supersedes or supplants a local law if the local law “duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication.” (*San Diego Gas & Electric Co. v. City of Carlsbad*

(1998) 64 Cal.App.4th 785, 792-93 (“*Carlsbad*”), citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98. See California Constitution, article XI, section 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”)) The California Supreme Court has made it clear that the principle of preemption is to be applied narrowly. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-1150; *Carlsbad, supra*, 64 Cal.App.4th at 793, citing *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484 (“[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.”)) The party seeking preemption bears the burden of establishing preemption. (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1149.)

Where the two laws at issue are not in direct conflict, both must be given effect, if possible. (*Carlsbad, supra*, 64 Cal.App.4th at 793, 802 (“courts do not readily find implied preemption of a field of endeavor where it is deemed possible to read conflicting enactments in such a way as to uphold both”); *California Water & Tel. Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 27-28, citing article XI of the California Constitution.) For example, in *Big Creek Lumber Co.*, the Supreme Court held that a county zoning ordinance that restricted timber harvesting to specific districts was not impliedly preempted by state forestry law, because it was “reasonably possible” to comply with both laws. (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1161 (the county ordinance at issue “does not mandate what general forestry law forbids or forbid what general forestry law mandates”).) In *Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, the Court of Appeal upheld a provision of the Ventura County building code that regulated grading of dirt access roads because it was not a purely local law, and enforcing the code did not

conflict with the Commission’s authority over the electric utility that argued for preemption. (The Commission “has not promulgated rules concerning the construction, maintenance or grading of access roads. Nor has it purported to exercise its authority over such matters.”) (*Id.* at 1048.) The decision noted the Supreme Court’s caution that “ ‘[i]t has never been the rule in California that the [PUC] has exclusive jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities.’ ” (*Id.* at 1051, *citing San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 944 (“*Covalt*”).)

Here, Cal-Am has suggested that a two-page letter from the Commission’s General Counsel to Monterey County Counsel establishes the unlawfulness of Monterey County Ordinance 10.72.030, section (B) (the “County Ordinance”). (Direct Testimony of Richard C. Svindland, p. 36; Attachment 7 thereto.) The County Ordinance requires any desalination plant in Monterey County to be publicly owned and operated. The General Counsel’s letter opines that the County Ordinance “would be preempted and of no legal validity under settled principles of California law.” (Attachment 7 to Direct Testimony of Richard C. Svindland, p. 1.)

The General Counsel’s letter of April 18, 2012 describes the Commission’s authority to preempt local ordinances “to the extent they interfere” with the Commission’s statewide regulation of water utilities. (*Ibid.*) However, the authorities cited in support of this proposition do not by any means make it clear that, on the specific facts presented in this Application, the County Ordinance necessarily interferes with the Commission’s statewide regulatory authority over water companies, and that the County Ordinance therefore *must* be preempted in considering Cal-Am’s newest application for a Certificate of Public Convenience and Necessity (“CPCN”) to serve its Monterey District.

The Commission is a statewide agency with broad statutory and constitutional powers. (*Leslie v. Superior Court, supra*, 73 Cal.App.4th at 1047, *citing Covalt, supra*, 13 Cal.4th at 914, 915.) Where a purely local law or regulation directly interferes with the Commission’s statewide regulation of public utilities, the local law is clearly preempted. (*Carlsbad, supra*, 64 Cal.App.4th at 802-03 (dredging, which had been ongoing at the site for over forty years, was essential to an electric company’s continuing ability to operate and maintain its existing power plant facility and was incompatible with a recent local ordinance regulating floodplain dredging, therefore the local ordinance was preempted under the Commission’s statewide regulatory authority); *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217 (local ordinance preempted by statewide Commission authority to regulate gas transmission pipelines); *Harbor Carriers, Inc. v. City of Sausalito* (1975) 46 Cal.App.3d 773, 775-76 (where the Commission had issued a CPCN to operate a ferry service, a city zoning ordinance was held invalid, but only to the extent that it prohibited construction of the “terminal and docking facility [that was] a necessity to the operation of a ferry service” anywhere in the city’s downtown, with the court noting that the “municipality should be afforded the initial voice in such a determination”; *California Water & Tel. Co., supra*, 253 Cal.App.2d at 31 (because the Commission has a statewide interest in regulating water utilities and has promulgated specific rules, including for design and construction of water delivery systems, a county ordinance requiring county review and approval of the details of water delivery system design, construction and operation was preempted).)

However, if the law in question does not conflict with statewide authority, it must be upheld. (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1161-62 (holding that, by enacting statewide forestry law, the legislature did not intend to preempt local zoning authority over

timber operations, and affirming the appellate court’s ruling upholding the county ordinance).) An ordinance that is not purely local in nature should also be upheld where there is no conflict. (*Leslie v. Superior Court, supra*, 73 Cal.App.4th at 1052-53 (upholding county grading requirements against a regulated utility, based on mandatory statewide application of the Uniform Building Code and the California Building Standards Code, from which the county regulations largely derived, and based on the absence of Commission regulations governing access road grading).)

B. There is no express preemption here, because the County Ordinance does not conflict with a specific legislative mandate.

The California Constitution has vested regulation of public utilities in the Commission. (California Constitution, article XII.) That regulatory authority expressly encompasses the sale and delivery of water. (Pub. Util. Code §§2701-2714.5.) However, there is no specific provision of the Public Utilities Code that extends the Commission’s express authority over public utilities’ sale and delivery of water to include regulation of the *source* of that water.¹ Noting the presumption against preemption, the Court of Appeal has stated its reluctance to find preemption, and has also upheld local legislation against preemption under the Labor Code. (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374 *citing California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1317 (“Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances.”) *emphasis* in original.)

¹ Section 789 merely acknowledges that the “state’s limited water supply will require investment by water corporations in infrastructure, plant, and facilities to develop new sources of supply,” and Section 770 requires water supply standards to be consistent with the Health and Safety Code. Section 781 requires consistency with the Water Code in metering water delivery service. The Commission’s General Order (“G.O.”) 103-A (Cal. P.U.C., Sept. 10, 2009, Rules Governing Water Service, Including Minimum Standards for Operation, Maintenance, Design and Construction) generally addresses water sources only insofar as to require that sources be safe, legal and sufficient. (*See, e.g.*, G.O. 103-A, §II.2. “Water Quality and Supply Requirements”.)

There is no provision of the Public Utilities Code that addresses desalination plants in any way. Neither has the Commission “promulgated rules concerning the construction, maintenance,” operation or ownership of desalination plants, “[n]or has it purported to exercise its authority over such matters,” just as it did not exercise authority over access roads to preempt the Ventura County code. (*Leslie v. Superior Court, supra*, 73 Cal.App.4th at 1048.) Thus, based on the foregoing provisions of the California Constitution and the Public Utilities Code, and in the absence of the exercise of Commission authority over desalination plants, the legislature has not expressly authorized Commission preemption of a local ordinance that requires public ownership of a desalination plant.

C. There is no clear case of implied preemption here by virtue of statewide Commission authority over water companies, because the legislature has not delegated statewide authority over water or desalination to the Commission, and the County Ordinance is not purely local.

The Commission has comprehensive authority over its regulated utilities’ sale and distribution of water. (Pub. Util. Code §2701.) But neither the Public Utilities Code nor any Commission rule or regulation vests the Commission with authority over the ownership of its regulated water companies’ sources of supply. There is simply no indication that the legislature has implied an intent for the Commission to “fully occupy” the field of water sources, including desalination plant regulation. (*Sherwin-Williams Co., supra*, 4 Cal.4th at 897-98.)

On the other hand, statewide regulation of the sources of groundwater, to the extent that the Application contemplates extraction of groundwater as a component of the proposed desalination plant’s brackish source water, is expressly and ultimately vested in the State Water Resources Control Board (“SWRCB”). (*See* Water Code §174 (the SWRCB “shall exercise the adjudicatory and regulatory functions of the state in the field of water resources”).)

As for the emerging field of desalination plant regulation, it is not yet the subject of any final rules or regulations promulgated by a statewide agency. However, the legislature has recently included desalination as a potential water source for California as an element of integrated regional water management plans, and has directed the SWRCB to include desalination in its Updates to the California Water Plan. (See, e.g., Water Code §§10537; 10004.5.) The Desalination chapter in the SWRCB’s 2009 Update does not express a position on public or private ownership;² a draft of the Desalination chapter for the 2013 Update is scheduled for release on July 15, 2012.³ Meanwhile, a publication of the California Coastal Commission, which is charged by the legislature with providing “sound and timely scientific recommendations” concerning desalination (Coastal Act, Pub. Resources Code §30006.5) noted that “[p]rivate seawater desalination may result in an inherent conflict between the interest of a community in having a local and reliable supply of water while at the same time placing the decisions about how that water is used, priced, and managed outside of the community’s control.” (California Coastal Commission, “Seawater Desalination and the California Coastal Act” (March, 2004), §4.1.2.⁴) The Legislature is currently considering, in various committees, A.B. 2595, in part based on the 2004 Coastal Commission report results, which would amend the Public Resources Code to provide for development of a desalination plant permitting process to be managed by the regional water quality control boards. (Sen. Amend. to Assem. Bill. No. 2595 (2011-2012 Reg. Sess.) June 14, 2012.)

In addition, these publications and the legislature’s directions to the SWRCB indicate that regulation of desalination projects, like the building code in *Leslie v. Superior Court*, is an issue of statewide interest, not a purely local issue. Furthermore, on the basis of the foregoing

² Available at http://www.waterplan.water.ca.gov/docs/cwpu2009/0310final/v2c09_desalination_cwp2009.pdf.

³ See Advisory Committee Review Draft page at <http://www.waterplan.water.ca.gov/cwpu2013/ac-draft/index.cfm>.

⁴ Available at <http://www.coastal.ca.gov/energy/14a-3-2004-desalination.pdf>.

provisions of the California Constitution and the Water Code, it would appear that the legislature has, to some extent, implied that regulatory authority over desalination plants and their ownership may ultimately lie elsewhere than with the Commission.

Therefore, the only remaining basis upon which the County Ordinance could be preempted by the Commission's statewide regulatory powers in this specific case appears to turn on the necessity of private ownership, *i.e.*, whether or not the Commission will ultimately determine that private ownership of a desalination plant is required by "the present or future public convenience and necessity" in order for Cal-Am to comply with its obligation to sell and distribute water to its Monterey District. (Pub. Util. Code §§1001, 1005.) (*See Northern California Power Agency v. Public Util. Com.* (1971) 5 Cal.3d 370, 378-380 (order granting CPCN annulled due to Commission's failure to give adequate consideration to relevant factors bearing on public convenience and necessity, in that case "anticompetitive factors"); *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal.2d 462, 465-66 (order granting CPCN annulled due to Commission's exclusion at hearing of evidence that a public entity could provide better and more economical service than the regulated utility, preventing the public agency from receiving a fair hearing on its protest, which "in effect delegated [the Commission's] power to decide the question of public convenience and necessity."))

Unless the Commission should find in this case that the public convenience and necessity require Cal-Am's private ownership of a desalination plant in order to secure 8800 AFY of water which Cal-Am could then sell and deliver to its Monterey District ratepayers, the County Ordinance cannot be preempted, since it would still be compatible with legislative intent and the Commission's authority to regulate Cal-Am's sale and delivery of water to its ratepayers. Since the "local ordinance 'does not prohibit what the statute commands or command what it

prohibits’,” it is not preempted as long as there is a public entity capable of supplying desalinated water to replace Cal-Am’s current illegal use of Carmel River water. (*Big Creek Lumber Co.*, *supra*, 38 Cal.4th at 1161, *citing Sherwin-Williams Co. v. City of Los Angeles*, *supra*, 4 Cal.4th at 902.)

D. Cal-Am’s ownership of a desalination plant does not appear to be necessary because there is a public agency that is capable of providing 8800 AFY of desalinated water to Cal-Am; therefore the County Ordinance at issue is not impliedly preempted.

In D.10-12-016, the Commission approved a water supply project for Cal-Am’s Monterey District that included a desalination plant owned by MCWD, a public agency. (D.10-12-016, p. 169 Finding of Fact (“FOF”) 75.) The plant was intended to deliver 8800 AFY of desalinated water to Cal-Am. (*Id.* at p. 182 FOF 153.) MCWD already owns land that is appropriate for brackish water wells and land that may be used for construction of a desalination plant. MCWD has sufficient water rights in the Salinas Valley Groundwater Basin (“SVGB”) and sufficient outfall capacity rights. The only thing Cal-Am would have to do in order to receive 8800 AFY of desalinated water in ample time to meet the December 31, 2016 deadline is to construct its already-approved and certificated “Cal-Am only facilities” in conjunction with a Commission-approved take or pay contract for purchase of water from MCWD. As MCWD has repeatedly said to the Commission and the parties, it is still willing and able to work with Cal-Am to provide desalinated water for Cal-Am’s purchase and delivery to the Monterey Peninsula. (MCWD’s April 30, 2012 Motion to Dismiss, p. 21; MCWD’s Response to Cal-Am’s Motion to Deny MCWD Party Status, p. 4 fn. 1; MCWD’s June 4, 2012 Notice of Ex Parte Communication, p. 4. *See also* MCWD’s April 23, 2012 Notice of Ex Parte Communications *filed in* A.04-09-019, p. 4.) Alternatively, other parties to this proceeding may raise additional feasible public options for supply of desalinated water for the Commission’s consideration.

Under *Northern California Power Agency, supra*, 5 Cal.3d at 378-380 and *Ventura County Waterworks, supra*, 61 Cal.2d at 466, the Commission must consider all of the feasible alternatives at a hearing.

Therefore, it is possible for Cal-Am to safely and economically provide its ratepayers with a replacement supply of water without resort to the Commission's preemption powers. (*Big Creek Lumber Co., supra*, 38 Cal. 4th at 1160 (the general statutes "fall short of 'indicat[ing] clearly that a paramount state concern will not tolerate further or additional local action' "), citing *People ex rel Deukmejian, supra*, 36 Cal.3d at 485.) Here, Cal-Am's Application does not demonstrate to the Commission that there is no public agency that can provide it with a timely water supply for its Monterey District, and so private ownership of a desalination plant is not "necessary" in order for Cal-Am to deliver and sell a replacement supply of water to its existing ratepayers and comply with the SWRCB's December 31, 2016 CDO deadline. (*In re San Diego Gas & Electric Company, Order Denying Rehearing*, ("D.03-05-038"), 2003 WL 21179852 (Cal. P.U.C. 2003) at *1, *7-8 (upholding order denying CPCN upon Commission's independent assessment of need under Section 1001 of the Public Utilities Code, finding that approval of the application "would amount to rubber-stamping" a project that was "not needed" in an "unlawful delegation" of Commission authority).)

Moreover, the Commission has the duty, in its consideration of Cal-Am's request for a CPCN, to consider the possibility that the "requirements of public convenience and necessity . . . may be better met by a public rather than a private system." (*Ventura County Waterworks, supra*, 61 Cal. 2d at 466.) In the Supreme Court's review of a Commission order granting a CPCN to the Camino Water Company to serve Camarillo, Justice Traynor observed that:

It is for the commission to decide whether the public convenience and necessity require the certification of a private water utility when service by a public water

district is also available, but it can properly make its decision only after considering what the alternatives are. In the present case it did not do so. [¶] The order is annulled.”

(*Ibid.*) By drawing the Commission’s attention to *Ventura County Waterworks*, MCWD does not mean to suggest that the solution for the Monterey Peninsula’s water supply problems should not involve Cal-Am. However, the Commission is bound to “properly make its decision only after considering what the alternatives are.” (*Ibid.*)

A *Ventura*-type of proceeding typically arises when a public utility and a public agency are vying for the opportunity to provide exclusive utility service to a previously unserved area. (See, e.g., *In re Southern California Water Company’s Advice Letter* (Cal. P.U.C. 1980) 3 C.P.U.C. 2d 385, 1980 WL 129549, at *3, citing *Ventura County Waterworks*, *supra*, 61 Cal. 2d 462.) MCWD believes that the *Ventura* analysis must apply to the Commission’s consideration here of a water source – desalination – that has not previously been provided by any entity and which most parties to this proceeding appear to agree is a necessary element of the future water supply in Cal-Am’s Monterey District.

Preemption, disfavored and narrowly construed, must be based on the totality of the circumstances in the specific case at issue. The Commission may not “abandon its statutorily mandated duty to make a need determination under Section 1001” where an apparent conflict of laws has been raised. (D.03-05-038 at *5, citing *Carlsbad*, *supra*, 64 Cal.App.4th at 793 (denying CPCN).) The Commission, like the courts, has a well-established policy of refraining from issuing advisory opinions. (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1214.) Thus, the Commission cannot declare that it has the authority to preempt the County Ordinance in this case as a hypothetical matter. To do so would be to render an impermissible advisory opinion. It must first examine and define in detail the specific factual context underlying Cal Am’s specific request for preemption.

In this case, Cal-Am cannot demonstrate that a privately-owned desalination plant is a necessary component of the solution of the Monterey Peninsula water supply deficit. Therefore the County Ordinance does not “interfere with this Commission’s statewide regulation of water utilities” as the General Counsel’s letter opines. Accordingly, the Commission cannot say that its power to preempt local ordinances applies and may be exercised in this case.

II. Does or Will Cal-Am, or Another Entity Participating in the Separate Groundwater Replenishment and Aquifer Storage Projects of Cal-Am’s Proposal for Replacement Water, Possess Adequate Rights to the Slant Well Intake Water, Groundwater Replenishment Water and to the Outfall for Purposes of Project Feasibility?

With the exception of the possible voluntary incorporation of a Groundwater Replenishment (“GWR”) element which would be carried out in collaboration with public agencies (the Monterey Peninsula Water Management District (“MPWMD”) and the Monterey Regional Water Pollution Control Agency (“MRWPCA”)), Cal-Am proposes to implement a “variation” on the North Marina project alternative that was evaluated at a project level in the Commission’s certified Final Environmental Impact Report (“EIR”) in A.04-09-019. (D.10-12-016, pp. 39-40; D.09-12-017, pp. 16-17.) Therefore, to the extent they are relevant here, MCWD will direct the Commission’s attention to the Commission’s applicable Findings of Fact and Conclusions of Law in D.10-12-016.

A. Neither Cal-Am nor any project partner it has yet identified may legally pump groundwater from the Salinas Valley Groundwater Basin for the proposed slant well intake water.

Since Cal-Am has no groundwater rights in the SVGB, sufficient rights must be obtained to permit extraction of the volume of groundwater that is contained within the brackish source water. Without test well results, it is unclear precisely what percentage of source water will constitute groundwater, but Cal-Am’s application plainly states, in agreement with the Commission’s certified EIR, that the brackish source water will contain some percentage of

SVGB groundwater. (Application, Appendix H, p. 10; D.10-12-016, pp. 39-40, 55, 109-118; p. 181 FOF 148; p. 185 FOFs 173-174; p. 206 Conclusion of Law (“COL”) 45.) However, even if Cal-Am does decide to incorporate the GWR proposal into its proposed MPWSP, Cal-Am has provided no evidence that MPWMD or MRWPCA possesses groundwater rights in the SVGB. Nor has Cal-Am explained how it or either of these agencies, if they actually participate in the MPWSP, plans to acquire groundwater rights.

Section 7.2 of MCWD’s executed 1996 Annexation Agreement and Groundwater Mitigation Framework (“Agreement and Framework”) with RMC Lonestar (the predecessor-in-interest to CEMEX) limits CEMEX’s ability to draw more than 500 acre feet per year of groundwater from the SVGB and requires that the water so drawn must be used by CEMEX and may not be used outside the Basin. The Application proposes Cal-Am’s use of property currently owned by CEMEX for installation of brackish source water wells. (See Application, Appendix C.) However, the Application proposes to draw significantly more water from the CEMEX property than is allowed under the Agreement and Framework. (Application, Appendix H, p. 10.) Thus, even assuming incorrectly as Cal-Am apparently does that CEMEX’s water rights would automatically transfer with its property⁵ when and if that property were acquired by Cal-Am through eminent domain proceedings or otherwise, there are insufficient water rights available for the MPWSP.

The operation of the Agreement and Framework and its relation to Cal-Am’s proposal to use the CEMEX property, as well as its location in the Commission’s records and availability to the public, is described in detail in MCWD’s May 25, 2012 Response in Opposition to the

⁵ The Agreement and Framework, at section 5.1, operates to assign the right to draw 500 AFY to serve the Lonestar/CEMEX property to MCWD upon annexation. The Agreement and Framework, in sections 3 and 5.1, also sets forth MCWD’s extensive additional existing rights to draw SVGB water.

Motion of California-American Water Company to Deny MCWD Party Status, at pp. 6-8.⁶

Simply put, Cal-Am and its identified partners do not have the groundwater rights required to implement the proposed MPWSP. Nor has Cal-Am provided evidence that any of them can obtain such rights.

B. Even if Cal-Am were to accept the Groundwater Replenishment component of the project, neither it nor any partner it has yet identified will be able to obtain recycled water in the volume the proposed project requires.

As MCWD also discussed in its May 25, 2012 Response in Opposition at pp. 6-8, its 2009 Three-Way Recycled MOU with MRWPCA and MCWRA governs the terms and conditions under which replenishment and recycling projects may be undertaken with recycled water provided by MRWPCA, and the MOU requires MCWD's approval for any such project or project components. Furthermore, the MOU and the "Annexation Agreement Between The Marina County Water District⁷ And The Monterey Regional Water Pollution Control Agency," dated April 25, 1989, as amended on or before December 1, 1995 (MRWPCA Annexation Agreement) lay the groundwork for allocation of recycled water, including for use in the Castroville Seawater Intrusion Project ("CSIP"). The location in the Commission's records and availability to the public of the 2009 Three-Way Recycled MOU and the MRWPCA Annexation Agreement are also detailed at pp. 6-8 of the Response in Opposition.⁸

Based on pre-existing commitment in these agreements for full distribution of an approximate 22,000 AFY of recycled water as seasonally required for agricultural use in CSIP and for required delivery to MCWD and MRWPCA, MCWD does not believe that there will be

⁶ Agreement and Framework available at <http://www.friedmanspring.com/cpucdocs.htm>, Exhibits LWL-22A, LWL-22B and LWL-22C.

⁷ "Marina County Water District" is the former name of MCWD.

⁸ The draft of the 2009 Three-Way Recycled MOU that was received in evidence in A.04-09-019 is available at <http://www.friedmanspring.com/documents/LWL13.PDF>. The MRWPCA Annexation Agreement is available at <http://www.friedmanspring.com/documents/LWL25.PDF>.

a sufficient residual volume of recycled water available for the GWR element of the proposed MPWSP. Thus, to the extent that the MPWSP requires incorporation of a GWR element, MCWD does not believe that the project is feasible due to the senior rights of MCWD, CSIP and MRWPCA to the available volume of recycled water.

C. Cal-Am and any potential partners to the project would have a junior claim to outfall capacity for the proposed project.

As the Commission is aware, MCWD has a senior interest in firm capacity in the MRWPCA Outfall, as evidenced by the Outfall Agreement attached to the Settlement Agreement that was considered and approved by the Commission in A.04-09-019. If Cal-Am were to proceed with the MPWSP, MCWD is not prepared to relinquish its senior firm outfall capacity to Cal-Am. MCWD believes that there is not sufficient capacity available in the Outfall for MRWPCA to ensure the exercise of MCWD's full rights and to simultaneously serve the MPWSP. As the Commission noted in D.10-12-016, the Outfall Agreement is between MCWD and MRWPCA, not Cal-Am. (D.10-12-016, p. 59 fn. 55.)

Thus, should MCWD require the use of its full rights in the MRWPCA Outfall, the MPWSP may be infeasible if MCWD is correct that capacity is insufficient to accommodate both the full exercise of MCWD's rights and the demands of the MPWSP.

III. Additional Issues May Affect the Legal Feasibility of the Application.

A. The MPWSP cannot rely on the final EIR certified in A.04-09-019 unless the Ag Land Trust Superior Court decision is overturned.

Cal-Am's Application seeks to rely in part on the final EIR certified by the Commission in A.04-09-019, but that final EIR was determined by the Monterey Superior Court in the Ag Land Trust lawsuit to be "inadequate" under CEQA. That decision is contrary to final, non-appealable Commission decisions. (*See, e.g.*, D.10-12-016, p. 196 COL 22; p. 205 Ordering Paragraph 7 (EIR was certified as compliant with CEQA, project approved); D.09-12-017, p. 203

Ordering Paragraph 1 (EIR certified).) MCWD, with *amicus curiae* briefing by the Commission, has sought to defend the Commission’s jurisdiction and overturn the Superior Court’s decision on a petition for a writ of mandate currently pending in the Court of Appeal, Sixth Appellate District. However, Cal-Am contends that MCWD must abandon its writ petition and acquiesce in the Superior Court’s erroneous decision. Cal-Am’s incomprehensible position urging acceptance of the Superior Court’s *ultra vires* Ag Land Trust decision would leave its own proposed MPWSP legally infeasible without the preparation of an entirely new EIR, a process that could take several years.

B. The MPWSP is not eligible for State Revolving Fund financing.

The Application asserts that Cal-Am will have access to low-cost Clean Water Act State Revolving Fund (“SRF”) financing for non-point source mitigation projects. However, SRF financing for non-point source mitigation is not available to a private entity in California. (*See* SWRCB SRF page, http://www.waterboards.ca.gov/water_issues/programs/grants_loans/srf/.) The Application does not explain how, or if, a public agency will serve as a financing conduit in relation to an exclusively Cal-Am-owned desalination plant in order to qualify for low-interest public agency SRF financing.

C. Cal-Am must acquire land for MPWSP well and desalination plant sites.

Location of slant wells for intake of source water, as well as location of the proposed desalination plant, is proposed for property that Cal-Am does not currently own. Therefore, Cal-Am must provide the Commission with evidence that the acquisition and use of these sites for the proposed MPWSP purposes is legally feasible. The plan to locate slant wells west of sand dunes in an area that appears to be sensitive habitat for endangered species, as well as within the 50-year erosion zone could also present problems with environmental review and permitting, even if Cal-Am is able to obtain the property. The proposed re-alignment of pipelines from the

configuration that was proposed and reviewed in the Commission's existing EIR could also complicate the environmental review process. These issues could potentially render a Supplemental EIR insufficient for the MPWSP and require the preparation of an entirely new EIR, which would likely be a multi-year process.

D. The MPWSP does not appear to comply with the Agency Act.

In D.10-12-016, the Commission found in its CEQA Findings of Fact that the North Marina alternative would not be capable of supplying the required volume of desalinated water while also complying at all times with the Agency Act's prohibition on export of SVGB water. (Water Code Appendix § 52-21.) (See D.10-12-016, CEQA Findings, pp. 84-85.) This difficulty is also related to the seasonal fluctuation of winter surplus Carmel River water and the seasonally required deliveries of recycled water for agricultural use in CSIP, discussed above. Thus, it is not clear from the Application that the MPWSP, similar to the North Marina alternative that was reviewed in the existing EIR, could comply with legislature's directive in the Agency Act that no SVGB water be exported from the basin.

E. The MPWSP is not capable of meeting the SWRCB's CDO Deadline.

Finally, in light of the need to resolve all of the foregoing issues, MCWD believes that the MPWSP is incapable of meeting the December 31, 2016 project deadline, if it can be constructed at all. The Commission should not grant a CPCN for a project that will not meet the primary mandatory project objective, as it was defined in the EIR and in D.10-12-016. (D.10-12-016, pp. 35-36.) Under the *Ashbacker* doctrine (*Ashbacker Radio Corp. v. F.C.C.* (1945) 326 U.S. 327), as well as the California Supreme Court's decisions in *Northern California Power Agency, supra*, 5 Cal.3d at 378-380 and *Ventura County Waterworks, supra*, 61 Cal.2d at 466, the Commission must conduct its own independent review of the public convenience and necessity, considering all relevant factors, including impact on the environment and whether or

not the public convenience and necessity would be better served, at least in part, by a public agency. (*See also* Pub. Util. Code §§1001, 1002, 1005.) In order to include consideration of effect on the environment in the Commission's independent review of the Application, the EIR process (be it a Supplemental EIR or a completely new EIR) must be completed before hearings are conducted, so that the witnesses' testimony may be based on a complete record. MCWD believes that failure to do so would constitute reversible error. (*Ventura County Waterworks, supra*, 61 Cal.2d at 466 (order granting CPCN annulled due to Commission's exclusion of evidence at CPCN hearing); D.03-05-038 at *7-8 (the Commission must make its independent assessment of need under Section 1001 before granting a CPCN).) Bearing these factors in mind, along with a construction timeline of approximately two and a half years following resolution of pre-construction permitting and approvals as set forth in the existing EIR (Final EIR, vol. 1, p. ES-9, Revised Figure ES-1b), MCWD believes that it will be impossible to resolve these issues over the next eighteen to twenty-four months in order to construct and bring the MPWSP into service in advance of the December 31, 2016 CDO deadline.

IV. Conclusion.

Key issues identified by the ALJ appear to render the Application legally infeasible. First, the County Ordinance is neither expressly preempted in this case, nor can the Commission find that it is necessarily impliedly preempted. Rather, the Commission must first conduct a full investigation of the public convenience and necessity in this case and make an independent assessment. If it concludes that a privately-owned desalination plant is the *only* feasible source of water for Cal-Am to sell and deliver to its ratepayers, only then can the Commission attempt to invoke its powers of preemption to invalidate the County Ordinance.

However, because it is feasible for a public agency to timely and economically provide a supply of water for Cal-Am's purchase and delivery to its ratepayers, it appears that Cal-Am

cannot meet its burden of demonstrating that private ownership of a desalination plant is necessary in order to meet its obligation to its Monterey service area. Therefore, the County Ordinance is not preempted and Cal-Am's MPWSP is infeasible as proposed.

Second, the lack of sufficient rights to groundwater and recycled water for use in the proposed MPWSP presents an insurmountable roadblock to Cal-Am's successful implementation of its proposed MPWSP. Therefore, these issues, in addition to the others discussed above, render the MPWSP incapable of meeting the December 31, 2016 CDO deadline, if not entirely infeasible.

DATED: July 11, 2012

Respectfully submitted,
FRIEDMAN & SPRINGWATER LLP

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