

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



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Application of California-American Water) Application 12-04-019
Company (U210W) for Approval of the)
Monterey Peninsula Water Supply Project and) (Filed April 23, 2012)
Authorization to Recover All Present and)
Future Costs in Rates)
_____)

**OPENING BRIEF OF WATERPLUS REGARDING GROUNDWATER RIGHTS
AND PUBLIC OWNERSHIP**

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I. SUMMARY

On April 23, 2012, California American Water Company (“Cal-Am”) filed application A.12-04-019 seeking a Certificate of Public Convenience and Necessity to authorize the Monterey Peninsula Water Supply Project (the “Project”).

The Public Utilities Commission (“PUC”) has requested briefing on two issues: (i) the impact of groundwater concerns on the Project, and (ii) whether the Project is subject to Monterey County Health and Safety Code Section 10.72, which requires public ownership of any desalination plant in Monterey County.

These are not discrete issues of law that can be resolved in a PUC hearing. Issues of brine safety, financial feasibility, water rights, contingency plans, the assumption of (and effects of) constant pumping, the exportation of groundwater from the Salinas Valley basin, and effects on adjacent properties, each raise significant environmental concerns that must be fully fleshed out in a detailed Environmental Impact Report.¹

The PUC has segmented its analysis and provided that environmental review will occur later in the process – perhaps relying on Cal-Am’s assertion that previous

¹ Even the applicability of Monterey Health and Safety Code 10.72 – and whether it is preempted by PUC jurisdiction – does not raise solely legal claims. As discussed below, this ordinance is predicated on significant local environmental concerns.

environmental analysis has already occurred and all that remains is a “supplemental” EIR. This is erroneous.

First, significant environmental analysis remains. The Monterey County Superior Court recently held that the EIR relied upon by Cal-Am in this case was defective in several critical respects

Second, a “supplemental” EIR would be insufficient. A supplemental EIR is appropriate only where only “minor additions or changes” are required to the initial EIR. (*See* CEQA Guidelines Section 15163.) Where (i) there are “substantial changes” to the Project or “new information of a substantial nature,” or (ii) “the project will have one or more significant effects not discussed in the previous EIR,” then a “Subsequent” EIR is required. (CEQA Guidelines Section 15163.) A Subsequent EIR must be given the same level of public notice and review as an initial EIR. (*Id.*)

As the PUC has noted in several instances, this application is of tremendous importance to the Monterey Peninsula and is extremely time sensitive. If this Project is approved (even preliminarily) *prior* to full CEQA compliance, litigation will almost inevitably follow pursuant to *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, which is discussed below.

WaterPlus respectfully requests that the issues raised by the PUC – including groundwater and the health and safety issues raised by the County ordinance – be fully fleshed out in an Environmental Impact Report. This may cause temporary delay now, but it will save significant time and expense in the long run.

II. FACTS

On April 23, 2012, Cal-Am filed application A.12-04-019 seeking a Certificate of Public Convenience and Necessity to authorize the Monterey Peninsula Water Supply Project. This application seeks approval from the PUC for Cal-Am to construct and operate a privately owned 9 MGD or a 5.4 MGD capacity desalination plant, located north of the city of Marina, California. This application follows more than 20 years of local oversight of and planning for a desalination plant in Monterey County.

In 1989, the County of Monterey enacted Health and Safety Code Section 10.72 et. seq. which requires that any desalination plant in Monterey County be publicly owned. *See Supervisors Pass First Desalinization Plant*, Monterey County Herald, November 29, 1989. Monterey County Code 10.72.010 requires all parties seeking to build or operate a desalination treatment facility to obtain a permit from the Monterey County Director of Environmental Health. Monterey County Code Section 10.72.030(B) requires that all applicants for such a permit provide assurances that each facility will be owned and operated by a public entity.

The County's rationale was two-fold. First, the County was concerned with environmental impacts. As noted in 1989, "saltwater conversion plants produce waste that is between sewage and hazardous waste" and the County wanted to maintain public oversight of disposal. Second, the County was concerned about the financial feasibility of an privately-owned desalination plant and the potential a private plant's failure would require a hookup to the existing water supply. *Id.*

This issue took on increased urgency in 1995, when the State Water Resources Control Board ("SWRCB") found that Cal-Am did not have legal rights to about 10,730

acre-feet water it had been diverting from the Carmel River. The SWRCB issued order 95-10, which required Cal-Am to find a replacement source of water by December 2016.

In 2004, Cal-Am submitted to the PUC an application for a desalination plant. The application looked at two variants: a desalination plant in Moss Land (the “Coastal Water Project”) and an alternate plant in unincorporated North Monterey County (the “North Marina Project.”) The PUC was the lead agency for these two projects, and in 2006 it issued a Notice of Preparation for an EIR.

In 2008, Cal-Am partnered with Marina Coast Water District and the Monterey County Water Resources Agency to investigate a Regional Desalination Project (the “Regional Project”). The PUC included the Regional Project in the EIR, and in December 2009 the PUC certified the Final EIR, albeit without identifying a preferred project.

The parties proceeded with the Regional Project. Marina Coast was designated the lead agency for the Regional Project, and rather than performing independent environmental review, Marina Coast simply adopted the PUC’s existing environmental analysis.

On December 19, 2011, the Hon. Lydia Villarreal of the Superior Court, County of Monterey, ruled that the EIR supporting the Regional Desalination Project was insufficient. She amended (and expanded) her ruling in February 2012, holding that (i) Marina Coast should not have been the lead agency, and (ii) the EIR failed to evaluate significant environmental impacts, including water rights, contingency plans, effects of constant pumping, exportation of groundwater from the Salinas Valley Groundwater Basin, brine impacts on the outfall, impacts on overlying adjacent properties, and water quality. (Amended Decision at 30.)

Cal-Am has attempted to circumvent the court ruling by reverting to the PUC as lead agency and modeling its current application on the North Marina Project – thereby trying to avoid the issues raised by the Court with respect to the Regional Project. Cal-Am concedes, however, that its current proposal is not co-extensive with the “North Marina Project” but rather requires modifications to the locations of the intake slant wells and the desalination treatment plant itself. (Cal-Am Application 12-14-019, at 22; *see generally* Application Appendix H.) And, Cal-Am has not discussed why the environmental concerns applicable to the Regional Project are not likewise applicable to the current project.

In short, significant environmental analysis remains.

III. LEGAL ANALYSES

As part of these proceedings, the PUC has asked the parties to address two issues: (i) the effect of this Project on groundwater, and (ii) whether Cal-Am is required to comply with Monterey County Code 10.72.030(B).

WaterPlus contends that the Monterey County Code is enforceable as a permissible health and safety requirement. That being said, WaterPlus strongly objects to the current process. Cal-Am’s application raises significant environmental concerns of critical importance to the residents of Monterey County, and those issues *must* be addressed in a full-blow environmental impact report. Party briefing on discrete issues is not a proper substitute for CEQA analysis.

A. Monterey County Code 10.72.030(B) is an Enforceable Local Ordinance.

1. Cal-Am Has Not Proven Pre-Emption

Cal-Am argues that the Ordinance is pre-empted by exclusive PUC jurisdiction. The burden of proving preemption rests on the party asserting preemption. *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149; *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 189.

Cal-Am has not provided any evidence or argument in favor of pre-emption. Therefore, WaterPlus reserves its right to address Cal-Am's argument more fully after Cal-Am has explained its position. In the interim, WaterPlus offers the following observations.

If a local regulation conflicts with state law, it is preempted and invalid. *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897. A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *O'Connell*, at p. 1067, quoting *Sherwin-Williams*, at 897.

Where there is an apparent conflict between two statutes, the courts will attempt to harmonize them by giving effect to both statutes if possible. *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 84-85. Courts are cautious in applying the doctrine of implied preemption: "in 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." *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal. 3d 476, 484.

Where local legislation clearly serves local purposes, and state legislation that appears to be in conflict actually serves different, statewide purposes, preemption will not be found. *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 868-69.

Preemption by implication occurs only when: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th at 898.

Cal-Am appears to argue that subsection three applies: the subject matter has been partially covered by general law and state interest trumps local interest.

Cal-Am is incorrect. First, the PUC allows local agencies to retain their powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public. *See* Public Utilities Code section 2902. As noted above, the ordinance was passed for the “health, convenience, and safety of the general public” and is allowable under section 2902.

Second, the California Constitution (and legislative enactments) empower municipal ownership and operation of public utilities to furnish water to its citizens. *See* California Constitution Article XI, section 9; Government Code section 29732; Public Utilities Code § 10001 *et seq.* And, the PUC’s “jurisdiction to regulate public utilities extends only to the regulation of privately-owned utilities.” *County of Inyo v. Public Utilities Comm’n* (1980) 26 Cal.3d 154, 167.

In light of the acknowledgement that municipal control of water facilities is permissible – and local regulation for health and safety is contemplated – the burden is on

Cal-Am to support its pre-emption argument. Cal-Am has not identified a single state law wherein the state has expressed any interest to control (or remove control) of who (or what) may run a desalination water treatment and wastewater (brine) disposal facility.

2. The PUC has reserved to local agencies authority to regulate wastewater

Pursuant to Section II(1)(C) of PUC General Order 103-4, each wastewater utility shall ensure that it complies with the State Board, Regional Board and County Health Department permit requirements and all applicable regulations.

A wastewater utility is defined as “any corporation or person owning, controlling, operating or managing any wastewater system subject to the Commission’s regulation.” A wastewater system is defined as any “sewer system,” which is further defined as “any and all other works, property or structures necessary or convenient for the collection or disposal of . . . industrial waste” (See PUC, General Rule 103-A section I(2).)

Desalination plants generate wastewater (brine): “saltwater conversion plants produce waste that is between sewage and hazardous waste.” In other words, the desalination plant falls within the technical definition of a “wastewater system” Pursuant to the PUC’s own rules, Cal-Am must comply with the Monterey County Health Department permit requirements “and all applicable regulations” – including the applicable ordinance.

* * * * *

Ultimately, the issue of pre-emption must be proven by Cal-Am. In the absence of concrete arguments by Cal-Am as to pre-emption, the observations provided by WaterPlus are by their nature preliminary only, and WaterPlus respectfully requests the opportunity to more fully address this issue via supplemental briefing after Cal-Am has fully briefed its position.

B. Environmental Analysis Must Be Performed Prior to Any PUC Decision

Approval of Cal-Am's Application constitutes "approval" of a "project" within the meaning of CEQA, which should have been preceded by preparation of an EIR under the analysis adopted in the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

1. Overview of CEQA

Under CEQA, all lead agencies must "prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project that they intend to carry out or approve which may have a significant effect on the environment." Public Resources Code § 21151; see § 21080, subd. (d).

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies...." (§ 21080, subd. (a).) "'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

- (a) An activity directly undertaken by any public agency.
- (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

(Public Resources Code § 21065; see Cal.Code Regs., tit. 14, §§ 15357 [defining "discretionary project"]; 15378 [defining "project"].)

The term "project" "means the whole of an action" (Cal.Code Regs., tit. 14, § 15378, subd. (a)) and "refers to the activity which is being approved and which may be subject to

several discretionary approvals by governmental agencies.” (Cal.Code Regs., tit. 14, § 15378, subd. (c).)

2. *Save Tara v. City of West Hollywood*

The issue of *when* an EIR should be prepared – and whether an EIR can be postponed until later in a project’s development – was discussed at length in the seminal Supreme Court case, *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

In *Save Tara*, two nonprofit community housing developers proposed developing approximately 35 housing units for low-income seniors on property owned by the City of West Hollywood. (*Id.* at 122.) The city council voted to approve a preliminary Conditional Agreement for Conveyance and Development of Property between City and Laurel Place, including a \$1 million City loan to the developer, in order to facilitate development of the project and begin the process of working with tenants to explore relocation options. (*Id.* at 124.) CEQA compliance was scheduled to take place at a date in the future.

The *Save Tara* court declined to draw any bright lines in defining project approval. Critically, however, the Court rejected the notion that “approval” was limited only to “unconditional agreements irrevocably vesting development rights.” *Id.* As the Court noted, “if postapproval environmental review were allowed, EIR’s would become nothing more than *post hoc* rationalizations to support actions already taken.” *Id.* The Court further noted that

the later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project. For that reason, EIRs should be prepared as early in the in the planning process as possible to enable environmental considerations to influence project, program or design.

Id. at 130 (quoting *Laurel Heights Assn. of Regents of Univ. of Cal.*(1988) 47 Cal.3d 376, 394-95). The Supreme Court continued its analysis in broad, sweeping language:

When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval.

We note as well that postponing EIR preparation until after a binding agreement for development has been reached would tend to undermine CEQA's goal of transparency in environmental decisionmaking. Besides informing the agency decision makers themselves, the EIR is intended “to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions.” When an agency reaches a binding, detailed agreement with a private developer and publicly commits resources and governmental prestige to that project, the agency's reservation of CEQA review until a later, final approval stage is unlikely to convince public observers that before committing itself to the project the agency fully considered the project's environmental consequences. Rather than a “document of accountability” the EIR may appear, under these circumstances, a document of *post hoc* rationalization.

* * * * *

We apply the general principle that before conducting CEQA review, agencies must not “take any action” that significantly furthers a project “in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.” Courts should “determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project.

Id. at 138-39.

The Court determined that the City of West Hollywood's conditional agreement was, for CEQA purposes, an approval of the project that required a prior EIR. Even though the development agreements conditioned conveyance of the property on subsequent CEQA compliance,” the draft agreement “significantly circumscribed” and cast doubt upon City's

authority to act under CEQA. *Id.* The court considered statements made by city officials and staff indicating that the City was committed to the project. *Id.* at 141–42.

Save Tara's admonitions are particularly pertinent in this case, as there are significant environmental concerns.

First, approval of the project by the PUC will generate significant “bureaucratic and financial momentum” behind the application, and CEQA review will be relegated to *post hoc* rationalization. Commissioner Michael Peevey has noted that “this proceeding is for the purpose of determining whether the applied-for project should be approved.” (Scoping Memo, at 2.) This is not a procedural step – it is “approval” of a “project” subject to CEQA, as discussed in *Save Tara*.

Further, all parties acknowledge the time sensitive nature of this project. ALJ Gary Weatherford noted that “against a backdrop of years of failed initiatives [and a 2016 deadline] this proceeding can be expected to be time sensitive throughout.” (ALJ Ruling Setting a Prehearing Conference, at 1-2.) If this project gets approved before CEQA analysis, there will be tremendous time and bureaucratic pressure to perform a rubber-stamp CEQA analysis. Rather than expedite the process, this will entail lengthy delays should litigation develop. All CEQA analysis should be performed now, in compliance with state law.

Second, as the County has argued as far back as 1989, “saltwater conversion plants produce waste that is between sewage and hazardous waste.” Monterey County is also concerned about the financial feasibility of a privately-owned desalination plant, and the

potential that a private plant's failure will require a hookup to the existing water supply.² Any environmental analysis must address these issues before definitive steps are taken.

This concern is not simply theoretical. In her decision invalidating the previous EIR on this project, Judge Villareal specifically noted that the lead agency would need to address brine impacts and effects on water quality. This analysis must be done *before* this project is approved.

Third, as determined by Judge Villareal, and as discussed in much greater detail in the Opening Brief of Landwatch Monterey County, there are significant environmental questions about (i) water rights, (ii) contingency plans, (iii) the assumption of constant pumping, (iv) the exportation of groundwater from the Salinas Valley basin, and (v) effects on adjacent properties. *See, e.g.* Amended Intended Decision at 20 *et seq.* The environmental concerns are not minimal.

Fourth, Cal-Am takes the position that most of the environmental analysis has been performed and all that remains is clean-up analysis pursuant to a Supplemental EIR. That is not correct. The analysis that remains is sufficiently broad that, at least, a Subsequent EIR is required – including public participation, notice and review. *See* CEQA Guidelines Sections 15162 and 15163. This process cannot be circumvented for convenience.

² The PUC recognizes the applicability of local concern. PUC's General Order 103-4, section II(1)(C), provides that wastewater utilities must comply with "County Health Department permit requirements and all applicable regulations" – an acknowledgment that local considerations must be taken into account.

CONCLUSION

For the foregoing reasons, WaterPlus respectfully requests a ruling that (i) the Monterey County Ordinance 10.72.030(b) is not pre-empted by PUC rule (or in the alternative, that WaterPlus be allowed file a supplemental brief in response to Cal-Am's arguments) and (ii) Cal-Am be directed to undertake CEQA analysis of the proposed project prior to any PUC approval.

Dated: July 11, 2012

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