

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



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In the Matter of the Application of California-American Water Company (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
REPLY BRIEF ON LEGAL ISSUES REGARDING
THE FEASIBILITY OF THE APPLICATION**

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Marina Coast Water District (“MCWD”) hereby submits its reply brief on legal issues that affect the feasibility of the instant Application.

I. The County Ordinance Is Not Preempted by Commission Authority in this Case.

California American Water (“Cal-Am”) has failed to meet its burden to demonstrate how the Commission’s exclusive jurisdiction over investor-owned public utilities either expressly or impliedly preempts Monterey County Code section 10.72.030, subdivision (B) (the “County Ordinance”).

A. Cal-Am ignores clear legislative mandate concerning water sources.

Cal-Am states that the County Ordinance conflicts with state law vesting the Commission with exclusive regulatory authority over investor-owned utilities, but it cites no basis for extending that authority to encompass regulation of water sources, particularly desalination facilities. (Opening Brief of Cal-Am, pp. 1-6.) Cal-Am’s superficial argument points to no factually analogous case in which the Commission’s broad, general powers were sufficient to override a local law that did not contradict or undermine general law or Commission authority. Rather, Cal-Am relies on several cases in which zoning or city ordinances were preempted. Those cases are readily distinguished, because in each instance the Commission had clear jurisdiction over the public utility activity at issue, and specific constitutional or legislative language supported the exemption. None of those cases purports to extend the Commission’s regulatory authority to encompass determining the ownership of water sources, including desalination facilities, as Cal-Am seeks to do here.

For instance, Cal-Am cites *Southern California Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, to support its argument for express preemption. In that case the gas company was under the exclusive jurisdiction of the Commission, and the Commission had promulgated specific rules establishing minimum requirements for pipelines. (*Id.* at 216-17.) The Court noted that the city did not object on other, permissible grounds such as traffic or safety concerns related to location, but rather impermissibly denied the utility an encroachment permit based on purportedly improper pipeline design and construction plans, an area that is fully occupied by the Commission. (*Id.* at 219.)

Cal-Am’s reliance on *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, is also misplaced. There, the preempted local ordinance, as applied to the public utility, impermissibly attempted to regulate design and operation of water utility

transmission systems, not the utility's source of water, in contravention of Commission authority under specific sections of the Public Utilities Code. (*Id.* at 29-31.) Similarly, *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal.2d 779, 787, was a case in which a local regulation was preempted because it conflicted with specific Commission rules concerning streetcar operations. Likewise, in *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App.3d 437, 454, the Commission's exclusive jurisdiction over power transmission lines was upheld pursuant to a specific provision of the Public Utilities Code. Finally, in *Harbor Carriers, Inc. v. City of Sausalito* (1975) 46 Cal.App.3d 773, 775-76, a local zoning ordinance was preempted only to the extent that it prohibited location within the city limits of a project element that was a "necessity" to Commission-certificated ferry service. (*See* Pub. Util. Code § 1001 (no utility may begin construction of a system "without having first obtained from the commission a certificate that *the present or future public convenience and necessity require or will require* such construction") *emphasis added.*)

In contrast, in *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, there was no preemption despite the Commission's statewide regulatory authority over public utilities. In that case, Supreme Court found that both the Commission and the local air pollution control district had jurisdiction over the proposed construction of electric generation facilities, and it annulled the Commission's order granting a CPCN on account of the project's failure to comply with existing air pollution regulations. (*Id.* at 954.)

Cal-Am's argument that the Commission's comprehensive regulation of investor-owned public utilities expressly or impliedly extends to exclusive regulation of the ownership of water sources, including desalination facilities, mischaracterizes the reach and scope of the Commission's authority. To the contrary, regulation of water sources is vested in the State Water Resources Control Board and the local and regional water agencies (*see, e.g.* Water Code, §§ 174-188.5; 380-387; 13200-13208). As MCWD noted, specific regulatory authority over desalination facilities has yet to be delegated by the Legislature, but existing legislation indicates that it will not likely be the Commission that is ultimately vested with such authority. (*See* Opening Brief of MCWD, p. 7, *citing* Water Code §§ 10004.5, 10537 and Sen. Amend. to Assem. Bill No. 2595 (2011-2012 Reg. Sess.) June 14, 2012 (proposing an amendment to the Public Resources Code that would delegate management of desalination plant permitting to local water boards).)

Cal-Am asserts that the Commission must find that its proposed project is “reasonable and prudent” (Opening Brief of Cal-Am, p. 7), but this is not the proper standard for a CPCN determination. The Commission must decide whether the public convenience and necessity *require* Cal-Am’s private ownership of a desalination plant and more particularly the specific privately-owned project proposed by Cal-Am. (Pub. Util. Code § 1001.) It is true that the Assigned Commissioner’s Scoping Memo and Ruling of June 28, 2012 defines the scope of the proceeding as resolving the question of whether the proposed Monterey Peninsula Water Supply Project (“MPWSP”) is a “reasonable and prudent means” of securing a replacement water supply that would “be in the public interest.” As noted by MCWD in its pending Motion to Modify and Clarify Assigned Commissioner’s Scoping Memo,” the CPCN inquiry presents a more stringent standard – the standard of “necessity.” (MCWD’s Motion to Modify and Clarify, pp. 1-2.)

The County Ordinance is not expressly preempted, because it does not conflict with any legislative mandate or Commission rule or regulation. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1161; *Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, 1048.) Nor does the Commission “fully occupy” the field of desalination plant regulation. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98.) The County Ordinance may only be impliedly preempted in this case if the Commission finds, after considering all relevant factors and all feasible, mutually-exclusive project alternatives, “that the present or future public convenience and necessity require or will require” such preemption. (Pub. Util. Code §§ 1001, 1005; *Northern California Power Agency v. Public Util. Com.* (1971) 5 Cal.3d 370, 378-380; *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal.2d 462, 465-66.)

B. DRA’s argument is similarly flawed.

Like Cal-Am, the Division of Ratepayer Advocates (“DRA”) also suggests that the Commission’s broad authority over its regulated utilities’ water supply systems and water sales must extend to water sources as well. DRA’s contention that the County Ordinance is clearly preempted as applied to Cal-Am’s proposed MPWSP is belied by its own correct assertion that “section 701 further authorizes the Commission” to do all things which are *necessary* and convenient in the exercise of its jurisdiction. (Opening Brief of DRA, p. 3, *citing San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893.) In this case, as in any other, an outcome preempting the local ordinance would require the Commission’s prior full inquiry into

whether or not the public convenience and necessity *require* preemption. (Pub. Util. Code §§ 1001, 1005.)

C. The County’s suit is not ripe without the Commission’s issuance of a CPCN.

The Monterey County Water Resources Agency (“MCWRA”) and Monterey County correctly caution that preemption is uncertain in this case. (Opening Brief of MCWRA and Monterey County, p. 1.) They have informed the Commission that the County is seeking a judicial determination of the validity of the County Ordinance, attaching the Complaint filed June 26, 2012 in San Francisco Superior Court to their opening brief herein. The County’s Complaint notes that Cal-Am has applied to the Commission for a CPCN, but also states that Cal-Am intends to “proceed with plans to construct and operate the facility.” (*Id.*, Ex. A at ¶ 8.) The Complaint does not mention that Cal-Am cannot proceed with its plans absent this Commission’s grant of a CPCN.

MCWD believes that the County’s suit does not at this time present a justiciable controversy, because the Commission has not yet determined whether Cal-Am’s ownership of a desalination plant, in contravention of the County Ordinance, is necessary in order for Cal-Am to serve its Monterey Peninsula district. (*Pacific Legal Found. v. California Coastal Com.* (1982) 33 Cal.3d 158, 171-173.) In contrast, the utility’s suit in *California Water & Telephone, supra*, 253 Cal.App.2d at 23-25, was ripe because it presented an actual controversy over a local ordinance’s conflict with *existing* specific provisions of the Public Utilities Code. In the absence of a conflict between the County Ordinance and any specific legislation or Commission rule, there is no actual controversy that is ripe for the courts to resolve until the Commission issues a CPCN for the MPWSP that specifically requires Cal-Am’s construction of a clearly-delineated, privately-owned desalination plant. Like the Commission, the Superior Court does not render advisory opinions. There can be no court determination of the validity of preemption until a specific preemption order made in connection with a CPCN determination exists.

II. Cal-Am States No Basis for Any Appropriation of Water Rights.

Cal-Am asserts in its opening brief that water rights do not affect the feasibility of its MPWSP. (Opening Brief of Cal-Am, p. 10.) Notably, not one other party’s opening brief agrees with this assertion. Specifically, Cal-Am states that the MPWSP either does not require water rights in the Salinas Valley Groundwater Basin (“SVGB”), or alternatively, to the extent it may extract groundwater (1) the extraction would not constitute an appropriation, or (2) it would be a

valid appropriation. (Opening Brief of Cal-Am, pp. 10-15.) Cal-Am's argument reveals a remarkable failure to grasp basic principles of California water law. Cal-Am states that, even if the SVGB is in overdraft, it will still be able to appropriate rights to surplus groundwater. (Opening Brief of Cal-Am, pp. 15-16.) The law simply does not permit what Cal-Am proposes.

Appropriative groundwater rights apply only to surplus water, but if the full safe yield of a basin is in use, or if the basin is in overdraft, no surplus exists and no water is available for appropriation. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241-42; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-26; *Corona Foothill Lemon Co. v. Lillibridge* (1937) 8 Cal.2d 522, 531-32 (overlying users' reasonable beneficial use of all basin water left no surplus for appropriation); *Monolith Portland Cement Co. v. Mojave Public Utility District* (1957) 154 Cal.App.2d 487, 493-94 (public utility violated overliers' rights by exporting water when there was no surplus available).) The burden of proving that a surplus exists beyond senior rights that are already held is on the would-be appropriator. (*Allen v. California Water & Tel. Co.* (1946) 29 Cal.2d 466, 481; *Monolith Portland Cement Co. v. Mojave Public Utility District*, *supra*, 154 Cal.App.2d at 494.)

Even assuming that the SVGB basin is not in overdraft, since overdraft is a state that must be determined by an adjudicative procedure (*California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480-81, *citing City of Barstow*, *supra*, 23 Cal.4th 1224), Cal-Am's Application and the argument presented in its opening brief provide absolutely no evidence that any surplus is available for appropriation in the SVGB. In contrast, as the Salinas Valley Water Coalition ("SVWC") pointed out in its opening brief, the Regional Desalination Project ("RDP") that was approved by the Commission in D.10-12-016 was a feasible project due to MCWD's clear existing right to draw a sufficient amount of SVGB to provide desalinated water for Cal-Am's purchase. (Opening Brief of SVWC, p. 10.)

Furthermore, MCWRA and many of the current holders of rights to SVGB water have taken numerous steps and entered into complex agreements over past decades to protect the balance of the basin, including agreements for annexation into the zones of benefit established under the Agency Act. (*See, e.g.*, Opening Brief of MCWD, pp. 12-14; Opening Brief of SVCW, pp. 10-14; Opening Brief of Monterey County Farm Bureau, pp. 3-5.) The parties to these protective actions and agreements have spent many millions of dollars to protect the groundwater basin in the public interest. The Annexation Agreement mentioned in MCWD's

opening brief is just one such agreement. (Opening Brief of MCWD, pp. 13-14.) Cal-Am cannot evade the strict provisions of those agreements, including the Annexation Agreement limitation on the right to draw water in connection with the Lonestar/CEMEX property that Cal-Am proposes to use for the MPWSP intake wells.

III. GWR Must Recognize Senior MCWD Rights, Proposition 218 Requirements and Agreed Planning Process.

MCWD generally favors recycled water projects and does not oppose the Groundwater Replenishment (“GWR”) component of the MPWSP so long as it is implemented in accordance with relevant legal requirements. However, MCWD believes that MRWPCA ratepayers that will not benefit from the project should not be required to pay for it. Moreover, the proposed GWR project must recognize senior MCWD rights, must comply with the requirements of Proposition 218, and must comply with the agreed planning process established by MCWD, MRWPCA and other public agencies.

In their briefs, the Monterey Regional Water Pollution Control Agency (“MRWPCA”) and MCWRA have both acknowledged that due to senior rights to recycled water, as noted in the opening briefs of MCWD and others, the potential GWR element of the MPWSP is not a “firm” or “uninterruptible” source. (Opening Brief of MCWRA, p. 3; Opening Brief of MRWPCA, pp. 9-12. *See also* Opening Brief of SVWC brief, pp. 12-14 (noting need to review and reconcile all agreements among holders of wastewater rights prior to proceeding); Opening Brief of Monterey County Farm Bureau, p. 3-4 (noting complex nature of agreements related to GWR capacity and availability).) While MRWPCA’s Opening Brief does not directly reference the 2009 Three-Way Recycled MOU among it, MCWRA and MCWD (*see* Opening Brief of MCWD, p. 14¹), the provision in the Three-Way Recycled MOU and related agreements for allocation of recycled water is an important factor in the seasonally variable, and thus interruptible, nature of MRWPCA’s ability to provide recycled water to a possible GWR element of the proposed MPWSP. The 3-Way Recycled MOU applies to analyzing the feasibility of all proposed recycled water projects and future urban recycled water projects.

¹ The members of the joint committee of parties to the 2009 Three Way Recycled MOU, including MCWD, are to review and prioritize proposed projects using unallocated recycled water. (MOU, p. 2.) MCWD noted such a requirement on page 14 of its Opening Brief. The MOU mentions both the RDP and MCWD’s Regional Urban Water Augmentation Project (“RUWAP”), but does not in any way restrict the parties’ consideration of future recycled water uses to the RDP or RUWAP.

Cal-Am incorrectly asserts that the Commission need not address rights to the GWR supply. (Opening Brief of Cal-Am, p. 24.) However, MRWPCA's ability or inability to provide the proposed MPWSP with a consistent supply of water is directly related to the Commission's requirement that regulated utilities provide a safe, legal and sufficient source of water to their ratepayers. (General Order 103-A, Cal. P.U.C., Sept. 10, 2009, § II.2.)

MRWPCA proposes to offset the interruptible nature of its recycled water supply by potentially incorporating a new source of water from the Salinas Industrial Wastewater Treatment Facility. (Opening Brief of MRWPCA, p. 13.) It is unclear whether this water would be treated at existing facilities or new facilities (*see id.* at pp. 3, 13), and thus it is presently unclear whether and to what extent environmental review must also be conducted for this project element. Because MRWPCA's "discussions" with the City of Salinas regarding access to this potential new recycled source are "very preliminary" (*id.*, p. 13), and no further details have yet been provided to the parties, MCWD is unable at this time to assess whether this potential new source would improve the viability of the possible GWR element of the proposed MPWSP.

As a member of the MRWPCA, and pursuant to the 3-Way Recycled Water MOU and other agreements, MCWD can work with the MRWPCA to analyze "expansion of urban reuse to include groundwater replenishment." Such planning and analysis must recognize MCWD's senior contractual rights to recycled water, follow the agreed planning process under the 3-Way Recycled Water MOU, and comply with the requirements of Article XIII D of the California Constitution.

IV. RDP Failure Does Not Excuse Performance of the Outfall Agreement.

Cal-Am asserts that the RDP was an "implied condition" to the February 12, 2010 Outfall Agreement between MCWD and MRWPCA (Attachment 2 to the Settlement Agreement filed with the Commission on April 7, 2010 in proceeding A.04-09-019), and that the failure of the RDP will therefore excuse performance of the Outfall Agreement. (Cal-Am's Opening Brief, pp. 19-23.) On that basis, Cal-Am contends that sufficient outfall capacity is available for the MPWSP. Cal-Am is wrong: the RDP is not an implied condition to the performance of the Outfall Agreement.

MCWD's future operation of a desalination plant producing "up to the quantity and composition" of desalinated water that was proposed for the RDP plant will require MRWPCA's performance of the Outfall Agreement. (Outfall Agreement, § 1.12.) MCWD's right to outfall

capacity for brine from production of that desalinated water is unquestionably senior to any later agreement by MRWPCA to provide outfall capacity, pursuant to section 7.2 of the Outfall Agreement. The Outfall Agreement contains no condition or contingency requiring implementation of the RDP, and it specifically references the RUWAP project as well.²

Cal-Am is not a party to the Outfall Agreement, as the Commission previously noted. (D.10-12-016, p. 59, fn. 55 (“the parties have clarified on the record that they do not expect the Commission to approve or have oversight over the Outfall Agreement, which is an agreement exclusively between MCWD and MRWPCA”).) Consequently, Cal-Am is in no position to speculate concerning the intent of the parties to that agreement or to make any representations to this Commission concerning the parties’ intent. The written Outfall Agreement as executed “embodies the entire agreement between MCWD and MCWRA relating to the subject matter hereof and supersedes all prior agreements and understandings, written or oral.” (Outfall Agreement, § 27.3.)

V. The MPWSP Does Not Appear to Comply With the Agency Act.

Cal-Am contends that the MPWSP will comply with the Agency Act by returning any SVGB water extracted in the project source water to the SVGB. (Opening Brief of Cal-Am, p. 18.) MCWRA, the agency responsible for ensuring compliance with the Agency Act’s anti-export provision, states that the MPWSP description “appears consistent” with the Agency Act. (Opening Brief of MCWRA, p. 2.) Cal-Am and MCWRA are wrong. The MPWSP is essentially the North Marina project that the Commission evaluated at a project level in its EIR, with modifications to “the locations of the intake slant wells and the desalination treatment plant.” (Application, p. 22.) One of the reasons that the Commission did not grant a CPCN for the North Marina alternative in the first place was that “[w]hile the North Marina Alternative is intended to be operated so as to return desalinated water to the SVGB in an amount equal to the

² MCWD, which had plans to construct its own desalination plant as early as 1990, made clear on the record of the evidentiary hearing in A.04-09-019 that the Outfall Agreement was intended to be an effective agreement between MCWD and MRWPCA, even if the RDP were never approved. With Cal-Am and MRWPCA voicing no disagreement, MCWD’s counsel represented to Judge Minkin on the record of the RDP evidentiary hearing that the Outfall Agreement need not be approved by the Commission since MCWD and MRWPCA were the only parties and “whatever happens in [this] proceeding, the Outfall Agreement will continue to be an executed and effective document.” (A.04-09-019, Transcript of June 11, 2010, pp. 1679-1680.)

volume of SVGB-groundwater that is extracted from the North Marina wells, the parties have raised serious concerns about the practical and legal feasibility of this operational measure.” (D.10-12-016, CEQA Findings at p. 84; *see also* p. 174 at Finding of Fact 104 (“litigation related to private ownership . . . and compliance with the Agency Act could ensue” with the North Marina alternative).)

Cal-Am has raised the possibility that the MPWSP could deliver desalinated water to MRWPCA for use in the SVGB in a sufficient quantity to comply with the Agency Act. (Opening Brief of Cal-Am, p. 18.) However, the seasonal nature of MRWPCA’s ability to accept additional water for in-basin uses, such as delivery to CSIP participants in the summer, does not clearly appear to correlate with the MPWSP’s own needs based on a reduced supply of Carmel River flow in the drier summer season. This was the reality of supply and demand that led to the Commission’s determination in D.10-12-016 that there were “serious concerns” about the North Marina alternative’s ability to fully comply with the Agency Act. Nothing Cal-Am states in its Application or its Opening Brief provides the Commission with new information that would permit the Commission to reach a different conclusion now than it did in D.10-12-016.

VI. MCWD Was Not the Lead Agency for the RDP.

Finally, MCWD notes that the opening brief of WaterPlus states that MCWD “was designated the lead agency” for the RDP. (Opening Brief of WaterPlus, p. 4.) That is a misstatement. The Commission was the California Environmental Quality Act lead agency for the RDP. (*See, e.g.*, D.03-09-022, *generally*; D.10-12-016, pp. 15, 193 at Conclusion of Law 5.)

VII. Conclusion.

Cal-Am has failed to meet its burden of demonstrating that a privately-owned desalination plant is necessary in order to serve its Monterey Peninsula customers, and it has failed to meet its burden of demonstrating that surplus water rights exist for its appropriation in the SVGB in order to operate the MPWSP. These failures are fatal to the project as proposed.

It appears that the possible GWR element of the proposed project may not be sufficient for the project’s needs. It is not clear that MRWPCA’s outfall capacity is sufficient to accommodate the MPWSP and the prior, senior rights of others to the outfall. In addition, Cal-Am has not demonstrated that the MPWSP will be any more likely to comply with the Agency Act than was the similar, rejected, North Marina alternative.

For all these reasons, as well as those set forth in MCWD's Opening Brief, the MPWSP as it is proposed is a legally infeasible project. Accordingly, the MPWSP is not in the public interest and Cal-Am should not be granted a CPCN to construct it. Since the project is legally infeasible, the application should be dismissed.

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Respectfully submitted,

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