



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

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Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates	Application 12-04-019 (Filed April 23, 2012)
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**REPLY BRIEF OF THE SALINAS VALLEY WATER COALITION
ON LEGAL ISSUES**

Nancy Isakson, President
Salinas Valley Water Coalition
PO Drawer 2670
Greenfield, Ca 93927
Telephone: (831) 224-2879
Facsimile: (831) 886-1528
Email: nisakson@mbay.net

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I. Introduction

The Salinas Valley Water Coalition (SVWC) submits the following in response to the Administrative Law Judge’s Ruling of June 1, 2012, inviting reply briefs on the Legal Issues That Warrant Early Resolution.

II. Groundwater Rights

The SVWC joins in the Reply Brief of LandWatch Monterey County Regarding Groundwater Rights, dated July 25, 2012, to the extent its discussion relates to overdraft of the native safe yield of the Salinas Valley Groundwater Basin (Basin), and agrees that there is no surplus water in the Basin available for appropriation by Cal-Am.

However, as stated in the SVWC's Pre-hearing Conference Statement, dated June 4, 2012, the Basin's groundwater has been augmented by the Nacimiento Reservoir, the San Antonio Reservoir, Castroville Seawater Intrusion Project, the Salinas Valley Reclamation Project, and the Salinas Valley Water Project; which enhancement(s) are dedicated to the Salinas Valley Basin residents, businesses and landowners who paid for these projects. That water is dedicated to these residents, businesses and landowners and is not available for appropriation by Cal-Am.

III. Rights to the Groundwater Replenishment Water

: As part of their application, Cal-Am includes a component that relies on groundwater replenishment (GWR) from the Monterey Regional Pollution Control Agency's (PCA) reclaimed water plant. The success of the GWR is dependent on the PCA having secure, stable, and adequate rights to the wastewater needed for the GWR.

As indicated in the Opening Brief of the Monterey Regional Water Pollution Control Agency (PCA), dated July 11, 2012, there are many agreements, often overlapping, among various parties, that establish and allocate the rights associated with the tertiary treatment plant. To date, there has not been a reconciliation of the various agreements and the associated rights held by the various parties.

The July 11, 2012 Opening Brief of the PCA was the first opportunity the public has had to review PCA's attempt at a reconciliation of the agreements. We thank them for this opportunity, but must disagree with their conclusions. There may be adequate water available for a GWR

project, but the PCA does not hold adequate rights to the waste water for the GWR project contemplated.

The SVWC does not agree with the calculations presented by the PCA in their July 11, 2012 Opening Brief, but rather than focus our reply on the calculations, the key to the validity of the calculations, and the ultimate conclusions, are the underlying assumptions. Many of the underlying assumptions that are used as the basis for establishing and allocating the waste water rights, were not discussed within the PCA's Opening Brief and yet are critical to allow the Commission to fully understand who has which rights, on what condition, and how can those rights be utilized and by whom. This is the focus of our reply.

1. Rights under Amendment No. 3

The PCA's Opening Brief admits in the original 1992 Agreement between Monterey County Water Resources Agency (MCWRA) and the PCA, the PCA commits all of its incoming wastewater flows to the *project* from sources within the 2001 PCA service area to the Castroville Seawater Intrusion Project (CSIP)¹, up to 29.6 million gallons per day (mgd). They further state they have rights to 3,900 AFY in the Initial Term of the Agreement². Both of these statements require further clarification.

The '*project*' is defined within the recitals of the 1992 Agreement, which states, "One element in the SIP (seawater intrusion program) is the construction of a 29.6 MGD *tertiary treatment system* (hereinafter referred

¹ Monterey Regional Water Pollution Control Agency Opening Brief Regarding Water Rights for a Groundwater Replenishment Project, July 11, 2012, p.6

² Id at p. 7

to as “*the project*”³. (emphasis added) Current incoming flows are approximately 22, 400 acre feet/yr.

Sec. 3.03 of the Original 1992 Agreement states, the PCA “will commit *all* of its incoming wastewater flows to the *project*, up to the project capacity of 29.6 MGD”⁴. (emphasis added)

Amendment No. 3 appears to have modified Sec. 3.03 of the Original Agreement, in that in Amendment No. 3 Sec. 3.03 which states the PCA will “commit *all* of its incoming wastewater flows to the *regional treatment plant*” to the project⁵. (emphasis added) It is difficult to ascertain why this modification occurred, but in any event, it remains clear within Amendment No. 3 that the ‘project’ is as defined in the 1992 Agreement; “the construction of a 29.6 MGD *tertiary treatment system* (hereinafter referred to as “*the project*”).” (emphasis added)

Recital E. of Amendment No. 3 provides a clear picture as to the intention of Amendment No. 3, and it reads, in part:

“WRA and WPCA now desire to enter into this Amendment No. 3 to the June 16, 1992 agreement in order to specify a WPCA allocation of *tertiary treated water* for municipal and industrial uses via interties with the SVRP. A further purpose and benefit of this Amendment No. 3 is to ensure WRA of a dedication of tertiary treated water for the CSIP and related seawater intrusion projects in the Salinas Valley....”⁶ (emphasis added)

Sec 17.02 of Amendment No. 3 states the following:

³ Id at Exhibit 3 p. 1

⁴ Id at Exhibit 3 p. 5

⁵ Id at Exhibit 3 p 1

⁶ Id. at Exhibit 4, p 2.

“Quantity and Timing of WPCA Water Entitlement. Subject to the limitations set forth in Section 3.03 and adjustments allowed in Section 17.03, WPCA is entitled to take up to but no more than the following amounts of *tertiary treated water* during the initial term⁷.”

Looking further at the definitions contained in Amendment No. 3, they include the following:

“The terms ‘reclaimed water’, ‘reclaimed wastewater’, recycled water’, and ‘tertiary treated water’ as used in the June 16, 1992 Agreement and Amendments No. 1 and 2 all refer to the water produced by the 29.6 MGD tertiary treatment system and are all hereinafter referred to simply as ‘*tertiary treated water*’.”⁸ (emphasis added)

Amendment No. 3 clarifies that any right, or entitlement, or allocation, of waste water the PCA may have, is based on having the right to ‘*tertiary treated water*’. This is an important distinction because of potential impacts to existing project commitments, and one not discussed in the PCA’s Opening Brief, but discussed further below.

The PCA’s July 11, 2012 Opening Brief correctly states MCWRA’s basic demand in the Initial Term of the 1992 Agreement, as amended, is capped at 19,500 acre feet (AF)⁹. Sec. 4.02 of Amendment No. 3 also states the MCWRA may request water deliveries of up to 19,500 AF/Yr each and every year in the Initial Term. In other words, MCWRA and its growers and ratepayers, have first priority to 19,500 AF/Yr of wastewater each year. If they choose not to take the full 19,500 AF/Yr, there may be some tertiary

⁷ Id at Exhibit 4, p. 16

⁸ Id at Exhibit 4, pg 7

⁹ Id. at p 7

treated water available for the PCA's entitlement, subject to the rights held by others such as Marina Coast Water District.

In the Initial Term, any amount available to meet the PCA's allocation pursuant to Sec. 17.02 of Amendment No. 3, would not be a long-term supply and would be considered interruptable because of the MCWRA's first priority.

The attached Exhibit 'A' is a July 24, 2012 letter from several of the growers who receive project water through the CSIP delivery system, to MCWRA. This letter informs MCWRA that the Salinas Valley residents, growers and landowners who paid millions of dollars for the CSIP and SVRP, with the expectation that the water contractually provided by those projects would be available when they needed it, expect the first 19,500 acre feet produced by the Projects to be provided to the Salinas Valley¹⁰.

2. Project Water

As previously stated, in the Agreements with the MCWRA, the PCA commits all of its incoming wastewater flows to the regional treatment plant. In order to fully understand what rights are held, by whom and on what basis, within the context of the various Agreements, the Commission must first understand what is considered 'project water'.

As stated above, the Original 1992 Agreement between the MCWRA and the PCA define 'Project' as the construction of a 29.6 MGD *tertiary treatment system*.

This question was also considered in a report prepared for the PCA in January 2008 by The Center of Integrated Water Research, UC Santa Cruz. The report primarily focused on how the "PCA could expand the use of

recycled water for nonagricultural uses without being penalized by additional interest charges as would be required under the existing repayment contract.” The options offered within the Report recognized the limitations surrounding the term ‘Project Water’, and the manner in which it was defined within various documents, were key to any future use and/or change in use not originally contemplated.

The “Final Environmental Impact Statement-Salinas Valley Seawater Intrusion Program, March 1993”, and subsequent 1994 final plans and specifications for the Salinas Valley Reclamation Program, provide the basis for the definition of “project water”. They define the ‘Project’ as the construction of a tertiary treatment plant and the pipeline system to distribute the reclaimed wastewater for agricultural irrigation. The Final EIR further states that a priority goal of the system would be to provide a *minimum* of 19,450 af/yr of reclaimed wastewater for agricultural use.

3. United States Bureau of Reclamation Loans

MCWRA and the PCA obtained Federal Small Reclamation Project Act funding for the Castroville Seawater Intrusion Project (CSIP) and the Salinas Valley Reclamation Project (SVRP) to build the reclamation plant and the distribution system¹¹. The loans totaled approximately \$70,000,000.00, with a remaining debt owed of approximately \$46,000,000.00. These loans are paid through assessments collected by the MCWRA from the growers and ratepayers within the Salinas Valley. The growers and ratepayers within the Salinas Valley were willing to pay for the

¹⁰ July 24, 2012 letter to MCWRA, attached as Exhibit ‘A’

¹¹ US. Bureau of Reclamation Contract No. 5-07-20-W1283 with MCWRA dated May 26, 1995; US Bureau of Reclamation Contract No. 5-07-20-1W1284 with PCA dated May 23, 1995. These documents are being filed separately and concurrently with a request for Official Notice of Facts

cost of the loans, along with the cost of operation and maintenance of the facilities, in exchange for the rights to and delivery of tertiary treated wastewater as an irrigation water supply.

The US Bureau of Reclamation (USBR) Loan documents have very strict conditions and dictate the manner in which the ‘project water’ may be used. Both sets of Loan Documents contain identical set of terms and conditions. The section of the USBR repayment contract entitled “Definitions” defines two types of water, “Irrigation Water” and “M&I Water.” The term “Project Water” is not specifically defined, although it could be inferred from the section entitled “Repayment by the Contractor” that states project water is “the *total amount of water available for delivery* for all purposes.” (emphasis added)

The section of the repayment contract entitled “Use of Project Water” defines the conditions under which “Project Water” can be used for M&I purposes and the resulting impact this use of water would have on the interest owed on the unpaid balance of USBR loans. This section stipulates that compliance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) are required before “Project Water” can be delivered for M&I use. Approval by the USBR is also required.

The “Use of Project Water” section includes the following conditions with regards to the Use of Project Water:

- a) Project water cannot be provided for any use other than as Irrigation Water except as provided within the terms of the contract;
- b) If there is a commitment to deliver Project water for more than one year to any party for use as M&I Water, *even is such deliveries*

will be interruptable and/or seasonal in nature, then the outstanding, unamortized balance of the loan will be reallocated to reflect this change in function of providing Irrigation Water to the function of providing M&I Water, and the amounts so reallocated will bear increased interest rate – which equates to an increase from 2.5% to 7.625%.

4. Conclusion

SVWC has actively supported the development of water projects within the Salinas Valley. Its members have built and paid, or continue to pay, for two reservoirs, the Castroville Seawater Intrusion Project, The Salinas Valley Reclamation Project and the Salinas Valley Water Project—all in an effort to solve its basin’s water problems. They have worked with their neighbors to resolve their difference so these projects could be successfully financed and implemented. The stability and security of their water resources and water rights are potentially at stake in this proceeding.

There may be adequate wastewater available to consider the development of a Groundwater Replenishment Project, but the PCA does not hold the rights to do so, they are held by others.

Here are the known facts:

- a) The PCA has committed **all** of its incoming wastewater flows to the *tertiary treatment plant*, the ‘project’;
- b) The 1992 Agreement, including amendments, between PCA and MCWRA give a priority of right to 19,500 AF/Yr to MCWRA for agricultural irrigation water, in the Initial Term;
- c) Any entitlement PCA may have pursuant to the various agreements, is an entitlement to ‘*tertiary treated wastewater*’,

subject to certain terms and conditions and should be considered, at the very least, an interruptible source of water in the Initial Term;

- d) Current inflow is approximately 22,400 AF/Yr;
- e) There are additional wastewater rights allocated to Marina Coast Water District and to the RUWAP;
- f) The Use of Project Water is dictated by the two USBR loans;
- g) Any change of use to include M&I will trigger the approval by the USBR, a change in loan terms and including an increase in the interest rates.

The PCA states in their Opening Brief, they are “coordinating with Cal-Am and MPWMD, and *will seek* to coordinate with the MCWRA¹².” (emphasis added) The SVWC supports these efforts, but they do not extend far enough – the PCA must also coordinate with the ratepayers and growers of the Salinas Valley who built and paid for the PCA’s tertiary treatment plant, and who continue to pay for the operation and maintenance of the plant. These ratepayers and growers hold the entitlements to the wastewater rights as the basis for building and paying for the tertiary treatment plant, and are an integral part of any ‘coordination’ by the PCA in furtherance of the GWP. We have attempted to meet with PCA representatives since April and they have not been willing to meet with us.

Even if we agreed with the calculations presented by the PCA in their Opening Brief, M&I use of *any* of the incoming flows up to 29.6 MGD, will be based on tertiary treated water, will require approval by the USBR and a

¹² Opening Brief of Monterey Regional Water Pollution Control Agency, dated July 11, 2012, p.15

change in the terms of the loan. This in and of itself, could deem the project fatally flawed.

These issues must first be resolved before the GWR project can be considered a viable component for Cal-Am's purposes. Unless and until these issues are resolved, the GWR project has the potential to significantly impact the growers, ratepayers of the Salinas Valley, and the projects they built to stop seawater intrusion, and thus potentially exacerbate seawater intrusion.

Respectfully submitted,

/s/ Nancy Isakson
Nancy Isakson, President
Salinas Valley Water Coalition
3203 Playa Court
Marina, Ca 93933
Telephone: (831) 224-2879
Facsimile: (831) 886-1528
Email: nisakson@mbay.net

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