

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

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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

Application 12-04-019
(Filed April 23, 2012)

**REPLY BRIEF OF PLANNING AND CONSERVATION LEAGUE
FOUNDATION ADDRESSING POSITIONS ON GROUNDWATER RIGHTS**

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The Planning and Conservation League Foundation (PCLF) submits this brief pursuant to the Administrative Law Judge's June 1, 2012 ruling, which invited parties to submit responsive briefing on specific legal issues warranting early resolution in this proceeding. In the Commission's June 29, 2012 ruling, Judge Weatherford confirmed the granting of PCLF's motion for party status.

Groundwater rights are central to the present call for briefing, which inquires of the parties whether project applicant California American Water Company (Cal-Am) or another entity involved in Cal-Am's proposed approach to secure replenishment water, possesses adequate water rights to support the underlying feasibility of the Monterey Peninsula Water Supply Project (project). PCL joins in the position of LandWatch Monterey County (LandWatch) that the groundwater rights supporting the project remain critically unresolved (Opening Brief, pp. 1-6; Reply Brief, pp. 3-11), and supports LandWatch's call for prompt appointment of an independent hydrologist to address the project's potential impacts on groundwater rights. Prompt resolution of uncertainties as to the project's potential use of groundwater are needed here to meaningfully address looming conflicts over water rights, and enable the Commission to address the project's influence on the environment prior to its decision on the project. (Pub. Util. Code, §1002(a)(4).)

Read in context, Cal-Am's own discussion of the record vindicates the importance of promptly securing this timely groundwater analysis. Unable to represent that its project will not require water rights, Cal-Am's opening brief instead seeks to show that it is not "likely" to do so (page 3), relying on analysis that is by Cal-Am's own recognition incomplete. Cal-Am concedes that its project, which proposes the use of slant wells, "may" include water originating from the Salinas Valley Groundwater Basin (SVGB), but characterizes the amount as small based upon "preliminary" modeling results that assume "full and successful"

implementation of other projects. (*Id.*) Similarly, while Cal-Am’s project application projects that 97 percent of the pumped water would be seawater, it also acknowledges the need for a test well and further groundwater modeling. (See LandWatch Opening Brief, p. 4 (citing Cal-Am Application, Appendix H, p. 10 and Direct Testimony of Richard C. Svindland, April 23, 2012, p. 10:8- 11).) Cal-Am recognizes that the modeling work done in the predecessor EIR for the now-defunct Regional Desalination Project includes data limitations and potential errors. These errors will require further refinement and improvement in the groundwater analysis, as well as adaptation of the modeling Cal-Am’s distinct stand-alone project. (*Id.*)

Unless and until this additional modeling work is done and test wells are constructed and used in the project assessment, the project’s need for groundwater remains fundamentally unknown, and may well exceed the preliminary estimate relied upon in the application. As LandWatch discussed in its opening brief (page 4), available data suggest that the percent of freshwater taken up by the project’s intake wells may well increase beyond the applicant’s initial projection. Notably, the Monterey County Superior Court found the predecessor project’s EIR deficient in part because it “assumes that groundwater rights will be perfected in the future and that such rights do not need to be addressed in an EIR.”¹ Here, given the immense potential for disputes over groundwater to delay or derail timely implementation of the applicant’s water supply project, the Commission’s duty to examine this issue also cannot be consigned to a later CEQA phase of project review.

Despite disagreeing on other issues, numerous parties to this proceeding recognize that fundamental uncertainties remain as to the project’s need for

¹ The Superior Court’s Statement of Intended Decision in *Ag Land Trust vs. Marina Coast Water District* (Monterey Superior Court Case No. M105019, Dec. 19, 2011, p. 30) is appended as Exhibit A to the Opening Brief of WaterPlus Regarding Groundwater Rights and Public Ownership, filed on July 11, 2012.

groundwater. To provide just several illustrations of this recurring theme, Monterey County and Monterey County Water Resources Agency (MCRWA) recognize that the “legal character” of the project, and whether it ultimately requires water rights, depend upon a configuration that “has yet to be determined” and an “in-depth water rights analysis” for the project that has yet to be conducted. (County Opening Brief, p. 2.) The county reserves the opportunity to “exercise its regulatory authority,” particularly its water management responsibilities under the District Act. (*Id.*, pp. 2-3).² The Salinas Valley Water Coalition argues that Cal-Am ignores evidence of overdraft in the SVGB, and lacks documentation for a “claim to valid water rights” that could withstand scrutiny under the California Supreme Court’s standards articulated in its seminal recent ruling on groundwater law, *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224. (SVWC Opening Brief, p. 9.)

The Division of Ratepayer Advocates (DRA) similarly observes that “significant factual determinations that may be relevant to the question of whether Cal-Am currently possesses, or can timely secure, adequate groundwater rights for the [project], such that it would be entitled to pump brackish water from the SVGB via the intake wells for the project, have not been made.” (DRA Opening Brief, pp. 11-12.) As DRA also emphasizes, Cal-Am’s own data confirm that “data from the test slant well and more groundwater modeling are necessary to confirm the company’s operating assumption that 97% of the water extracted from the SVGB will be seawater.” (*Id.*, p. 12.) In light of the “factual uncertainties and legal disagreements” surrounding the project’s potential reliance on groundwater, DRA observes that unaddressed groundwater issues could lead to litigation that could “significantly

² See also *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166 (discussing local authority to manage groundwater, and rejecting preemption claim against groundwater regulation).

delay” project construction and “potentially prevent” Cal-Am from curtailing its illegal diversions under the outstanding Cease and Desist Order. (*Id.*, p. 13.)

The short time frame remaining for Cal-Am’s curtailment of those diversions underscores the need for timely completion of test wells, and a prompt decision from the Commission ordering an independent assessment of project hydrology. As noted in its motion for party status, PCLF initiated, and was a central participant in, proceedings before the State Water Resource Control Board culminating in the State Board’s issuance on October 20, 2009 of the Cease and Desist Order directing the California American Water Company (Cal-Am) to terminate its unlawful diversions from the Carmel River by the end of 2016. (State Board Order WR 2009-0060, p. 57.) The imperative of meeting the State Board’s Cease and Desist Order serves as the major impetus behind Cal-Am’s April 23, 2012 application.

Cal-Am’s new stand-alone project application, and withdrawal from its previous Regional Desalination Project (regional project) amid a host of legal setbacks and disagreements with earlier project partners, makes the key task of securing compliance with the Cease and Desist Order even more challenging.³ As the primary cause of the lack of flow in the lower 6.5 miles of the Carmel River for five to six months each year, Cal-Am’s ongoing unlawful diversions create significant environmental harm to riparian habitat and animals along the river, including the threatened California Central Coast steelhead. (State Board Order WR 2009-0060, p. 55.) Yet without prompt Commission action to achieve greater clarity on

³ As one of California’s leading organizations promoting robust enforcement of environmental laws, PCLF also seeks to ensure timely and lawful environmental review and honor the strong public interest in environmental protection. The June 1, 2012 ruling authorizing the present filing does not include the California Environmental Quality Act (CEQA) in its list of issues for early resolution. The June 28, 2012 scoping memo and ruling indicates that the Commission’s Energy Team will separately provide notice of the CEQA schedule. Accordingly, PCLF reserves the opportunity to address CEQA issues as they arise.

groundwater issues, project review is likely to experience more delay. Seasonal restrictions on test well construction could create additional delay here due to the potential presence of special-status birds. Indeed, the typical nesting season of these birds—March 1 to September 1⁴—might push construction of the test wells back more than six months. In this setting, further delay in assessing a potential alternative to Cal-Am’s illegal pumping would risk additional harm to the environment.

Prompt review here, however, must not become a euphemism for circumvention of the law or avoidance of environmental protection. PCLF therefore takes strong exception to Cal-Am’s attempts in its briefing to derail the Commission’s prompt review of the facts relating to the project’s reliance on groundwater. Under California’s cornerstone doctrine of correlative rights, overlying owners may make reasonable and beneficial use of water supply in connection with their land, based upon their reasonable share of groundwater when supply is insufficient for all. (See, e.g., *Katz v. Walkinshaw* (1903) 141 Cal. 116; *City of Barstow*, 23 Cal.4th at pp.863-65 (discussing rights of overlying owners and rules of priority).)

In places, Cal-Am appears to recognize that the opportunity to pump groundwater for the project will require a showing that project water is “surplus” to the needs of other SVGB users and will not adversely affect them. (Cal-Am Opening Brief, p. 15; see also *City of Pasadena v. City of Alhambra* (1949) Cal.2d 908, 926 (unless prescriptive rights are involved, appropriators are limited to surplus and must yield to overlying owners during shortages).) Yet even as it concedes areas of overdraft exist, Cal-Am encourages the Commission to proceed on the untested premise that the water is actually surplus, based upon the legally irrelevant truism that no “judicial determination” has established that overdraft. (Cal-Am Opening Brief, p. 16.)

⁴ See Monterey Bay Regional Desalination Project, Addendum to the Coastal Water Project – Environmental Impact Report for the Test Well Program (April 7, 2011), p. 51.

Acceptance of this premise would needlessly compromise the Commission's ability to fully consider evidence of groundwater conditions within the basin, including that drawn from the Department of Water Resources Bulletin 118, from analysis of the State Board, and even from the Commission's EIR for the Regional Desalination Project, which elsewhere figures heavily in Cal-Am's own analysis. The Commission should not, and need not, impose this artificial constraint, which would interfere with the Commission's ability to determine that granting of the application is in the public interest.

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Respectfully submitted,

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