

**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)
_____)

**REPLY BRIEF OF WATERPLUS IN RESPONSE TO CALIFORNIA-AMERICAN
WATER COMPANY'S OPENING BRIEF OF LEGAL ISSUES ON THE ISSUE OF
THE PREEMPTION**

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I. INTRODUCTION

WaterPlus submits the following reply brief in response to California-American Water Company (“Cal-Am”) Opening Brief of Legal Issues on the issue of the preemption. Specifically, Cal-Am’s claims that Monterey County Code Section 10.72.030(B) requiring that all applicants for a desalination facility permit provide assurances that each facility will be owned and operated by a public entity is preempted by state law.

II. ARGUMENT

A. Monterey County Code 10.72.030(B) is not expressly preempted.

1. Cal-Am Has Not Proven Express Preemption

Cal-Am argues in their brief that the field of regulated utilities is expressly preempted by state law. This is incorrect. Local legislation improperly enters an area fully occupied by general state law when the Legislature has expressly stated its intent to fully occupy the area. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.) In this case, Cal-Am has failed to identify any state law which expressly states that the Legislature intends to fully occupy the field of desalination utility regulation. Cal-Am relies upon California Constitution Article XII, section 8 and the Public Utility Code to claim express preemption. However, both the California Constitution and Public Utility Code also

grant authority to local agencies to regulate utilities. (See California Constitution Article XI, section 9 and Public Utilities Code section 2902.)

California courts have ruled similarly. “It has never been the rule in California that the commission has exclusive jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities.” (*Vila v. Tahoe Southside Water Utility* (1965) 233 Cal App 2d. 469, 477.) There is simply no express mandate from state legislature to exclude local control of utilities and thus no express preemption.

2. Cal-Am Has Not Proven Implied Preemption

Cal-Am claims that state law has fully occupied the field of regulation over privately owned water utilities. However, as noted above, the state has reserved to local agencies control over utilities. Cal-Am has failed to identify any state law wherein local government’s ownership of utilities is regulated, controlled or forbidden.

In fact, the opposite is true. The California Constitution (and legislative enactments) empowers 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. Thus, the field of publicly owned utilities preempts PUC authority.

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

Cal-Am has failed to address the issue of regulation of the brine waste water generated by any desalination plant. It goes without saying that any desalination plant is not

only a water treatment facility which converts saline water to potable water, but also is a waste water facility transferring and disposing of the industrial waste (brine) generated in the desalination process.

Cal-Am does not address the legality of local agencies regulating this brine wastewater disposal. This Commission's own regulations reserve to local county health departments the availability to regulate this brine industrial waste.

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).)

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 Monterey County ordinance.

4. If the local regulation is not preempted, Cal-Am is not prevented from pursuing this project

Cal-Am claims in its Opening Brief that if the Commission did not preempt the Monterey County Ordinance at issue, Cal-Am would be prevented from development of the desalination project (see Cal-Am's Opening Brief on Legal Issues, p.7). However, this is incorrect based upon Cal-Am's prior desalination application and its former partnership with

the Marina Coast Water District. Cal-Am has shown in the past that such a private/public partnership is feasible and Cal-Am has offered no reason why such a partnership could not take place in the near future. This is Cal-Am's burden to prove and they have offered no evidence in support of this allegation.

5. The Monterey County Ordinance is Not Vague or Ambiguous

Cal-Am claims that Monterey County's ordinance is internally inconsistent since the ordinance allows "any person firm, water utility, association, corporation..." to obtain a permit before commencing construction or operation of a desalination facility. The County ordinance then goes on to require "assurances that such a facility be owned and operated by a public entity. Cal-Am claims this is internally inconsistent and contradictory. This is not correct.

All that the Monterey County Ordinance sets forth is the time for performance of the permit process. Monterey County simply requires that before construction and operation of a desalination facility, a permit needs to be obtained. Further, the County requires that upon completion and initial operation, the permit holder shall provide assurances that the facility will be owned and operated by a public entity. This is not inconsistent or contradictory. This ordinance simply allows the permit holder up to the time of operation to find a public entity owner/partner.

III. 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; and (ii) Cal-Am be directed to undertake CEQA analysis of the proposed project prior to any PUC approval.

Dated: July 25, 2012

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