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

In the Matter of the Application of) Application No. 04-09-019
California-American Water Company)
(U 210 W) for a Certificate of Public) (Filed September 20, 2004)
Convenience and Necessity to)
Construct and Operate its Coastal) Amended July 14, 2005
Water Project to Resolve the Long-)
Term Water Supply Deficit in its)
Monterey District and to Recover)
All Present and Future Costs in)
Connection Therewith in Rates.)
_____)

**COMMENTS ON SETTLEMENT BY
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**

David C. Laredo, CSBN 66532
De LAY & LAREDO
606 Forest Avenue
Pacific Grove, CA 93950-4221
Telephone: (831) 646-1502
Facsimile: (831) 646-0377
Email: dave@laredolaw.net

Frances M. Farina, CSBN 185035
De LAY & LAREDO
389 Princeton Avenue
Santa Barbara, CA 93111
Telephone: (805) 681-8822
Facsimile: (805) 681-8823
Email: ffarina@cox.net

Attorneys for
**MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT**

April 30, 2010

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**COMMENTS ON SETTLEMENT BY
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**

INTRODUCTION

The Monterey Peninsula Water Management District (“Water Management District” or “MPWMD”) hereby submits comments¹ on the proposed Settlement lodged by California American Water (“Cal-Am” or “CAW”), Marina Coast Water District (“MCWD”), Monterey County Water Resources Agency (“MCWRA”), Monterey Regional Water Pollution Control Agency (“MRWPCA”), Surfrider Foundation, and Public Trust Advocates (collectively “Settling Parties”) in this proceeding.

The Water Management District submits these comments in accord with Article

¹ On April 7, 2010, the Water Management District filed a statement (“Notice of Non Settlement”) that it did not join the proposed Settlement in this proceeding. The Notice of Non Settlement clarified that at its Special Meeting of April 5, 2010, the MPWMD Board of Directors confirmed the District supports the Regional Water Project, but provided direction that it did not support the proposed Settlement or its attached Water Purchase Agreement (“WPA”) as presently drafted. The Notice affirmed the Water Management District has questions, issues and concerns regarding the Settlement Agreement and its attachments.

12 of the CPUC Rules of Practice and Procedure. Rule 12.2 provides “Parties may file comments contesting all or part of the settlement within 30 days of the date that the motion for adoption of settlement was served.” On April 13, 2010, the Assigned Commissioner and Administrative Law Judge (“ALJ”) issued a Phase 2 Joint Amended Scoping Memo Ruling requiring comments on the Proposed Settlement Agreement and Implementing Agreements to be filed and served no later than Friday, April 30, 2010².

The Water Management District has questions, issues and concerns regarding the terms of the Settlement Agreement (“Settlement”) and the Water Purchase Agreement (“WPA”) and the Outfall Agreement attached thereto. MPWMD also shares and adopts issues of concern as stated by the Division of Ratepayer Advocates (“DRA”) and the City of Pacific Grove,³ and disagrees with the Settling Parties statement that the terms of settlement are “fairly representative of affected interests.”⁴

² The April 13, 2010 Phase 2 Joint Amended Scoping Memo Ruling also provides: 1) evidentiary hearings shall be convened in San Francisco on May 10, 2010 – May 14, 2010; 2) additional workshops to share cost information and understand the proposals may also be set during the weeks of May 10, 2010 and June 1, 2010; and reserves 3) additional hearing dates for the week of June 7, 2010; and 4) June 28, 2010 and June 29, 2010 for an additional set of Public Participation Hearings that may be held. The Amended Scoping Ruling also clarified that the assigned ALJ will establish a briefing schedule upon the conclusion of evidentiary hearings.

³ The City of Pacific Grove, although not a Party to these proceedings, has stated concerns that parallel those set forth in these Comments. On April 21, 2010, the City Council adopted its Resolution 10-029 that “calls for and supports efforts by involved stakeholders to address and resolve [the City’s] expressed concerns” and stated “there are also concerns regarding the ultimate costs of the project and the potential economic impacts to the ratepayers who will ultimately fund the project, the intent and effect of this Resolution is to address the proposed project itself, and does not express support for the Settlement Agreement, the Water Purchase Agreement, or other financial agreements made between California American Water, the Monterey County Water Resources Agency, and the Marina Coast Water District, now pending review by the California Public Utilities Commission.”

⁴ Settling Parties’ Motion to Approve Settlement (“Motion”), page 2.

These Comments specify the portions of the Settlement that MPWMD opposes, the legal basis of its opposition, and factual issues it contests in accord with Rule 12.2. The Water Management District requests the Commission set a hearing. Rule 12.3 provides, “Parties to the settlement must provide one or more witnesses to testify concerning the contested issues,” and “Contesting parties may present evidence and testimony on the contested issues.”

The Water Management District requests the Commission, in accord with Rule 12.4, reject the Settlement upon the grounds that terms of Settlement are not in the public interest and require revision. Further, the Settlement poses avoidable risks that are not supported by the record. Upon rejection of the Settlement, the Commission should propose alternative terms of Settlement which are acceptable to the Commission and allow the parties to accept those terms as permitted by Rule 12.4.

In presenting these Comments on the proposed Settlement, the Water Management District emphatically expresses its support for the Regional Desalination Project (“Regional Project”).

SUMMARY

The terms of Settlement and its supporting documents are flawed and not in the public interest for the following reasons:

- Lack of Openness – The WPA does not address open meeting rules, public records rules, or ethical conduct rules.
- Lack of Oversight – The Regional Project does not incorporate sufficient opportunity for future Commission review.
- Lack of Fairness – MCWD does not pay for benefits it receives.
- Lack of Fairness – The WPA does not require MCWD to pay a fair share.

- Lack of Fairness – Cal-Am ratepayers do not receive a fair treatment under the Settlement and WPA.
- Lack of Fairness – Monterey Citizens lack substantive or effective representation in the Regional Project.
- Lack of Agency Cooperation – The Water Management District has no representation in the Regional Project.
- Risk and Lack of Certainty – The Settlement and WPA do not adequately manage risk to the Regional Project.

COMMENTS

The terms of the Settlement and the WPA are flawed. Both need revision. The concerns set forth below are supported by the testimony of Darby W. Fuerst, Andrew M. Bell, and David J. Stoldt, and the exhibits and attachments to their testimony.

1.0 Lack of Openness – The WPA Does Not Address Open Meeting Rules, Public Records Rules, or Ethical Conduct Rules. The terms of the Settlement are not in the public interest. Neither the Settlement nor the WPA guarantee decision-making processes shall remain open and public. The Settlement and the WPA fail to address public meeting protocols, public record protocols, or ethics and conflict-of-interest disclosure rules.

- 1.1 The WPA should be revised to require meetings of advisory bodies to comply with the Ralph M. Brown Act (“Brown Act”).⁵ The Brown Act should apply to

⁵ The Ralph M. Brown Act (Gov’t. Code §§ 54950, et seq.) guarantees the public’s right to attend and participate in meetings of decision making bodies.

meetings of the Advisory Committee formed pursuant to the WPA, Section 6.⁶

- 1.2 The WPA should be revised to require all records created or maintained in support of the Regional Project be retained and disclosed in accord with the Public Records Act.⁷
- 1.3 The WPA should be revised to require officials who make substantive decisions related to the Regional Project to comply with the Fair Political Practices Act.⁸

The Settlement and WPA are silent as to each of these open meeting requirements. Failure to address these issues prevents the public from fair access to decisions that directly affect their interests, and expose the Regional Project to litigation.

2.0 Lack of Oversight – The Regional Project Does Not Incorporate Sufficient Opportunity for Future Commission Review. The Settlement and the WPA

⁶ Section 6.3 of the WPA can be amended by adding the following sentence to ensure open meeting requirements are followed: “All meetings of the Advisory Committee shall comply with the Ralph M. Brown Act (Gov’t. Code §§ 54950, et seq.)”

⁷ The California Public Records Act (Gov’t. Code §6250, et seq.) is designed to give the public access to information in possession of public agencies: “public records are open to inspection at all times during the office hours of the . . . agency and every person has a right to inspect any public record, except as . . . provided, [and to receive] an exact copy” of an identifiable record unless impracticable. (§6253).

⁸ The California Political Reform Act of 1974 (Gov’t. Code §§ 81000, et seq.) governs disclosure of political contributions, sets ethics rules for government officials, and imposes strict limits on decisions that affect the official’s financial interests. The Political Reform Act is designed to assure decisions serve all citizens equally, with impartially and without bias.

The following sentence should be added to Section 4.5 of the WPA: “With respect to their performance of duty under this WPA, representatives of the Parties, Project Manager, contractors and service providers shall be considered “public officials” within the meaning of the Political Reform Act of 1974 (“Act”), and its regulations, for purposes of financial disclosure, conflict of interest and other requirements of such Act and regulations, and in accord with a conflicts of interest code that shall be adopted by the Parties in compliance with the Act.”

The following sentence should be added to Section 6.6 of the WPA: “With respect to their performance of duty, all meetings of the Parties to make decisions referenced in this paragraph 6.6 shall comply with the Political Reform Act of 1974, and its regulations.”

contain provisions to minimize or avoid future reasonableness review by the Commission. The Settling Parties' Motion states at page 9,

By approving the Settlement Agreement and WPA, the Commission will adopt the provisions of Section 11.2(d) of the WPA, which declares that all costs of the Parties under the WPA shall be reasonably and prudently incurred and all payments made by CAW under the WPA shall be deemed reasonable and to the extent practicable be included in the cost of the product water.

This provision exempts Regional Project costs and the price of water from future Commission review and may result in Cal-Am ratepayers bearing disproportionate, unfair and unequal costs.

Section 10.1 of the Settlement is entitled "All Agency Costs Reasonable and Prudent." This provision concludes that because MCWD and MCWRA are governmental agencies, due to "the requirements under law" they "incur only reasonable and prudent costs and expenses for purposes related to their governmental duties..." This provision, however, does not guarantee expenditures are properly charged against the Regional Project, and need to be paid by Cal-Am ratepayers.

- 2.1 Section 7.1 c (iv) of the WPA, page 41, authorizes prior CPUC approval of Cal-Am financing in a manner that is against the public interest. This provision eliminates CPUC financial oversight for Regional Project financing, stating,

By CPUC's approval of this Agreement, the making of *any CAW Financing shall be authorized by CPUC and the terms of the same shall be deemed reasonable and prudent* and if for any reason these loans are not recovered in the price of the Product Water, then the principal thereof and interest thereon shall be recoverable in rates. (Emphasis added.)

This provision is based upon Section 10.5 of the Settlement, which states,

The WPA provides that CAW will be obligated to make loans to MCWD and/or MCWRA under the limited circumstances described in the WPA. *By its approval of this Settlement Agreement, the Commission is deemed to have authorized those loans and found them to be reasonable and prudent and further to have found that the method and terms of repayment of those loans as particularly described in the WPA are reasonable and prudent* and, if for any reason, those loans are not recovered in the price of the Product Water, then the principal amount thereof and interest thereon shall be recovered in CAW's rates. (Emphasis added.)

These provisions should be revised to ensure the Commission maintains continuing oversight of Regional Project financing. It is irresponsible to deem terms to be reasonable and prudent before those terms have been drafted or reviewed.

- 2.2 Section 11.2(d) of the WPA, at page 53, authorizes Cal-Am reimbursement of costs incurred by MCWD and MCWRA. This provision is against the public interest as it eliminates CPUC financial oversight of these reimbursement expenses. The WPA provides,

All costs of the Parties pursuant to this Agreement shall be reasonably and prudently incurred. *All payments made by CAW under this Agreement shall be deemed reasonable* and to the extent practicable be included in the cost of the Product Water. (Emphasis added.)

Section 10.1 of the Settlement states,

The Parties agree that, given the status of MCWD and MCWRA as governmental agencies and the requirements under law that they incur only reasonable and prudent costs and expenses for purposes related to their governmental duties and the fact that such costs and expenses are subject to public review and scrutiny, all Regional Desalination Project costs incurred by MCWD and MCWRA in compliance with the terms of the WPA shall be deemed reasonable and prudent and *the Commission, by its approval of this Settlement Agreement, shall be deemed to have agreed that such costs are reasonable and prudent.* (Emphasis added.)

Section 10.2 of the Settlement provides,

By its approval of this Settlement Agreement, the Commission will be deemed to have agreed that (i) *MCWD's and MCWRA's costs included in the cost of Product Water pursuant to the terms of the WPA are reasonable and prudent...* (Emphasis added.)

These provisions of the Settlement and the WPA should be revised to ensure CPUC oversight for all payments made by Cal-Am. Such payments should not by definition be "deemed reasonable."

3.0 Lack of Fairness – MCWD Does Not Pay for Benefits it Receives. The terms of Settlement are not in the public interest. The WPA affords unfair and disparate treatment to Cal-Am ratepayers as compared to MCWD customers because it does not recognize all benefits received by MCWD. MCWD stands to derive an abundance of political influence and inexpensive water from the agreements as drafted, at the expense of the Monterey Peninsula⁹. The Settlement and WPA do not require MCWD to fully or

⁹ The *Monterey County Herald* published an editorial on April 8, 2010 that stated, "the contract between Cal Am and Marina Coast provides for only minimal ongoing input from outside the boundaries of the Marina Coast Water District, and already there is an effort afoot to make it even more minimal." The editorial continued, "The Monterey Peninsula Water Management District (MPWMD)... is a government agency formed to promote conservation on the Peninsula and to regulate Cal Am. Unlike the smaller Marina Coast district, it is governed by a board elected from throughout the Peninsula. ¶ Marina Coast and county officials say they are now hoping to exclude MPWMD from a seat on the advisory committee because the district board declined, by a 4-2 vote, to officially endorse the desalination agreement. While supporting the Regional Project and its goals overall, the board majority was concerned about numerous technical issues and cost Regional Projections that they believe to be artificially low. Some board members felt that officially endorsing the contract would undermine their ability to raise those issues as the agreement moves on to the PUC for approval. ¶ Some accuse the MPWMD of being obstructionist, and there is some truth to that. There is a strong environmentalist bent on its board, just as there is a strong environmentalist bent in this community. Not everyone is convinced that desal is a good idea. But the water district possesses considerable expertise in local water issues and certainly should be entitled to as much of a voice in the process as either Cal Am or Marina Coast. Even so, it and the taxpaying customers it represents could soon be muscled out of even a nonvoting, advisory role. ¶ It shouldn't be that way. The public's role in what has been an almost secret process needs to be expanded rather than diminished." (*Monterey County Herald*, April 8, 2010.)

fairly pay for benefits of the Regional Project that it receives. Examples of MCWD benefits not accounted for in the WPA include the following:

- 3.1 All groundwater wells and facilities are subject to deterioration and require replacement at the end of their useful life. The WPA does not require MCWD to share these replacement costs. MCWD will benefit from the Regional Project by not having to revitalize its wells. MCWD has the guarantee that the wells and facilities upon which it relies will not need to be refurbished or replaced during the 94 year term of the WPA. The Settlement and the WPA do not require MCWD to pay any amount for these tangible benefits, forcing Cal-Am ratepayers to bear a disproportionate, unfair and unequal burden of costs.
- 3.2 Existing groundwater wells upon which MCWD relies may be subject to potential contamination from groundwater plumes in the northern portion of former Fort Ord. Water from the Regional Project could potentially lessen impacts from these contamination issues. MCWD benefits by avoiding the need to remediate or replace some of its existing wells to avoid the potential water quality problems and protect its water supply from potential contamination. Neither the Settlement nor the WPA requires MCWD to pay for this benefit of the Regional Project. Again, this failure causes Cal-Am ratepayers to bear a disproportionate, unfair and unequal burden of costs.
- 3.3 MCWD will benefit from the installation and use of Regional Project groundwater monitoring wells. Neither the Settlement nor the WPA calls for MCWD to pay for a pro-rata share of this benefit from the Regional Project. Without contribution by MCWD, Cal-Am ratepayers must bear the entire burden of these costs. Nonetheless, the Settlement and WPA call for MCWD to be the sole owner of the Regional Project facilities at the end of the term of the agreement.

- 3.4 Even though MCWD derives benefit from the existence of the Regional Plant, which solves MCWD supply issues for a 94-year term, Exhibit F to the WPA provides that MCWD is to pay only \$148.50 per acre-foot for desalinated water until it exercises its right to a permanent water allocation. During this same period, Cal-Am will pay in the range of \$5,000 to \$6,000 for the same water. This is a profoundly unfair and unequal result. The price does not factor in the benefit that MCWD receives by reason of its reimbursement of pre-effective costs as required by the WPA. Reimbursement to MCWD and MCWRA for pre-effective costs shall exceed \$6,564,990, as shown on Exhibit D of the WPA. MCWD's share of the Exhibit D pre-effective date costs is \$5,842,857. To date, MCWD has not provided sufficient detail as to the nature of these costs and expenses. It remains unclear how many of these expenses are related to the Regional Project as presently envisioned, or if any previous costs for MCWD's stand-alone desal plant or other Regional Urban Water Augmentation Project ("RUWAP") costs are included. Without greater detail, it is unclear whether these costs should be paid by CAW ratepayers. The effect of reimbursement is a replenishment of MCWD accounts.

4.0 Lack of Fairness – The WPA Does Not Require MCWD To Pay A Fair Share. The terms of Settlement are not in the public interest. The WPA affords unfair and unequal treatment to Cal-Am ratepayers as compared to MCWD customers because the terms are skewed to the benefit of MCWD.

- 4.1. The term “Fee Limits” is set forth in the WPA at page 10 and states,

“Fees Limit” shall be equal to twenty-two million dollars (\$22,000,000) less the sum of (i) 16.2% of any grant funds obtained by MCWD during the Term of this Agreement which are applied to reduce the MCWD Indebtedness; (ii) all prior payments of MCWD Debt Service Allocation; and (iii) any prior collected Fees that were utilized to pay or reduce either the MCWD Indebtedness or MCWD O&M Costs; provided, however, that the Fees Limit shall never be a negative amount.

This “Cost Cap” provision and others¹⁰ impose an unfair limit on contributions that are to be made by MCWD, effectively transferring the payment burden to Cal-Am ratepayers. No rationale is provided for this Cost Cap. All Cost Cap provisions should be deleted from the WPA.

- 4.2 The WPA does not fairly factor in the amount of water that MCWD can receive from the Regional Project. The Cost Cap referenced in paragraph 4.1, above, means the MCWD obligation to pay shall never exceed approximately five percent (5%) of Regional Project costs. In contrast, MCWD can conceivably take 16.2% of the output water over the 94-year term. The only scenario under which the referenced Cost Cap allocates a fair share of expense to MCWD is if MCWD does not receive any share of its 1,700 acre-feet per year (afa) water entitlement until approximately 68 years. This means MCWD would have to delay its use of water until the year 2078 for the share of cost set forth in the WPA to accurately reflect benefits that MCWD shall receive from the Regional Project. No data support this result. The WPA should be revised to account for this factor.
- 4.3 The WPA does not fairly factor in immediate reimbursement to MCWD of more than \$4 million for its pre-effective date costs. The WPA should be revised to account for all reimbursements that are paid by Cal-Am ratepayers.

¹⁰ By way of example, the term “Fees” is defined to mean “rates, fees or charges collected, up to but not in excess of the Fees Limit”. WPA, page 10.

- 4.4 The WPA does not fairly address MCWD debt or operating costs. MCWD fees only apply to its debt or operating costs. If, for example, MCWD does not serve Fort Ord until after most or all the Regional Project debt is paid off, MCWD is not required to apply its fees against capital costs. Instead, MCWD only offsets its own O&M component. Thus, the WPA does not include any “buy in” of Regional Project capital costs by repaying Cal-Am ratepayers for their payment of debt service in all earlier years. Such a provision should be added to the WPA.
- 4.5 The WPA should ensure equal and fair allocation of costs among both MCWD and Cal-Am ratepayers. This should apply to all new connections which benefit from the Regional Project, irrespective of the system that provides water to that new connection. New connections to the Regional Project though the MCWD should contribute connection fees comparable to those who make new connections to the Cal-Am system.

5.0 Lack of Fairness – Cal-Am Ratepayers Do Not Receive a Fair Treatment Under the Settlement and WPA. The terms of Settlement and the WPA are not in the public interest. The WPA disadvantages Cal-Am ratepayers by reason of unfair and unequal treatment as compared to MCWD.

- 5.1 At the end of the Regional Project life, the share of the Regional Project owned for the benefit of Cal-Am ratepayers should bear a positive correlation to the share of Regional Project costs that CAW ratepayers have paid over the Regional Project life. This should include debt service and operations and maintenance costs. Instead, Paragraph 5 of the WPA, at page 33, provides that MCWD shall be the sole owner of facilities for which it may not have paid any

capital contribution.¹¹ The WPA should be revised to ensure a pro rata ownership (equity) buy in benefits for Cal-Am ratepayers in direct and positive correlation to their contribution of costs. A variety of different ownership models can achieve this end, including one of the following scenarios: (a) post-project ownership by Cal-Am, (b) a buy-sell agreement whereby an organization can receive an ownership interest for the benefit of Cal-Am ratepayers, (c) ownership by a joint-powers agency created for that purpose¹², (d) ownership by an existing public agency responsible to Cal-Am ratepayers such as MPWMD, (e) creation of a trust to receive and hold the ownership interest for the benefit of Cal-Am ratepayers, or (f) MCWD, as trustee, under a trust that adequately protects and preserves the ownership interest for the benefit of Cal-Am ratepayers.

- 5.2 At the end of the Regional Project life, as an alternative to the scenario that a share of the Regional Project should be owned for the benefit of Cal-Am ratepayers in positive correlation to the share of Regional Project costs that those ratepayers have paid over the Regional Project life, the WPA can be amended to

¹¹ Section 5.4 of the WPA, at page 34, provides, “Unless otherwise agreed among the Parties in a written and duly executed amendment to this Agreement, neither CAW’s contractual payments under this Agreement nor any other contribution of funds made by CAW (if any) for improvements, expansion, repair, operation, maintenance, construction or otherwise, shall in any way extend or convey any ownership interest or right to physically control any portion of the Regional Project Facilities that is owned or operated by MCWD or MCWRA or in which either of them has any legally recognizable interest or that is upstream of the CAW Facilities commencing from the CAW Meter at the Delivery Point. *CAW hereby expressly disclaims and irrevocably waives any such claim of ownership in connection with the Regional Project Facilities or any legal right to operate the Regional Project Facilities including by reason of any payment(s) made by CAW, in the past, now or at any time in the future*; provided, however, that notwithstanding such disclaimer and waiver, either MCWD or MCWRA may, in its sole discretion, contract with CAW to manage, operate and/or maintain their respective Regional Project Facilities as a contract service provider.”

¹² On April 21, 2010, the Pacific Grove City Council adopted Resolution 10-029 that states, in Section 4, “The City Council of the City of Pacific Grove supports the creation of a regional governance body to address the diversity of water supply and water management needs in the Monterey Peninsula region as well as in the Salinas Valley.”

include a buy-sell agreement that provides a mechanism to value the forgone ownership interest that shall not be received by the Cal-Am ratepayer. The buy-sell agreement would obligate MCWD to purchase this interest from Cal-Am, and all proceeds would accrue to the benefit of Cal-Am ratepayers.

- 5.3 The Settlement neither adequately nor accurately portrays the annual impact to ratepayers of the project costs shown in Exhibit C of the WPA or Attachments 3 and 4 to the Settlement. To date, Cal-Am ratepayers have received confusing and inconsistent signals as to the costs per acre-foot and impact on rates, prohibiting them from the ability to make an informed judgment on the Settlement and its allocation of cost impacts. The approaches encompassed in the updated cost comparison worksheets provided in Cal-Am, MCWD, and MCWRA's April 15, 2010 Joint Response to DRA Data Request CWP-53 fail to account for the true costs of debt issuance, interest during construction, reserve funds, pre-tax rates of return, and depreciation such that they have understated the estimated cost impact. The Cal-Am responses to DRA Data Requests CWP-57 and CWP-54 provide some additional information, but make assumptions and/or omissions as to render them incomplete.
- 5.4 Language regarding accounting treatment and Cal-Am's financial well-being in Section 5 of the Settlement Agreement represents a significant potential increase to the annual recovery of Regional Project costs from rates. To date, this uncertainty has been neither adequately nor accurately described, prohibiting MPWMD from the ability to make an informed judgment on the Settlement and its allocation of cost impacts.

WPA, Section 6.7(g), demonstrates the inequality of the Settlement. The Parties agree that "All costs of the Parties of conducting and participating in the meetings of the

Community Involvement Forum shall constitute a Regional Desalination Project Related Expense” but incongruously specify “meetings... by the Parties... at the office of the Monterey Peninsula Water Management District *so long as such meeting space is available at no cost* or such other location identified by the Parties in the Monterey Peninsula and available for such use at minimal cost.” It is difficult to imagine how the Parties can steadfastly maintain that their costs to participate in meetings should be recovered as a Project expense, but costs incurred by the Water Management District when it provides the meeting space cannot be shared.¹³

6.0 Lack of Fairness – Monterey Peninsula Citizens Lack Substantive or Effective Representation in the Regional Project. The terms of the Settlement are not in the public interest. The WPA disadvantages citizens of the Monterey Peninsula. They do not have a representational voice in Regional Project management decisions, yet bear all risk and responsibility for the Regional Project. This is unfair and unequal treatment as compared to citizens of MCWD.

- 6.1 MPWMD does not have seat on the Advisory Committee. Section 6 of the WPA, at page 34, could have provided the Water Management District with a seat on the Advisory Committee. It does not. This omission is not in the public interest as the Monterey Peninsula Water Management District is the legislatively-created comprehensive manager of the integrated water resources of

¹³ This unfair result can be eliminated by modifying Section 6.7 (g) of the WPA, as shown in ~~strikeout text~~, to provide, “The meetings of the Community Involvement Forum shall be conducted by the Parties on a rotating basis or with the assistance of a contract facilitator at the office of the Monterey Peninsula Water Management District ~~so long as such meeting space is available at no cost~~ or such other location identified by the Parties in the Monterey Peninsula and available for such use at minimal cost.” This modification is consistent with Section 10.1 of their Settlement that concludes that governmental agencies can “incur only reasonable and prudent costs and expenses for purposes related to their governmental duties...”

the Monterey Peninsula.¹⁴ Section 6.1 of the WPA can be amended to achieve this result by the following amendment: “Within sixty (60) days of the Effective Date, the Parties shall form a four Member committee (the “Advisory Committee”) that will be composed of one Representative from each of the Parties and one representative from the MPWMD.”

- 6.2 The WPA does not afford Monterey Peninsula constituents any decision-making role relating to Regional Project operations over the 94-year life of the Regional Project, including salaries, benefits, replacement equipment. MCWD Directors are not elected by or responsible to Cal-Am ratepayers, or the constituents of the Monterey Peninsula. The MCWD is not subject to initiative, recall or referendum rights of the citizens of the Monterey Peninsula. The WPA should be revised to ensure that elected representation for citizens of the Monterey Peninsula is involved in key decisions that affect costs of the Regional Project passed through to Cal-Am ratepayers.¹⁵
- 6.3 Neither Cal-Am ratepayers nor Monterey Peninsula citizens have any voice in decisions relating to future expansion of the Regional Project. This is an important omission. While the Regional Project provides water to meet the future needs of MCWD, the WPA does not provide any additional water to meet the

¹⁴ The California Legislature created the Water Management District in 1977 and expressly granted it authority to regulate all local water systems, including the Cal-Am system pursuant to the Monterey Peninsula Water Management District Law, Statutes of 1977, Chapter 527, as amended, found at West’s Water Law Appendix, Section 118-1, et seq. Cal-Am is required by law to obtain a permit from the Water Management District to accept water from the Regional Project.

¹⁵ The *Monterey County Herald* published an editorial on April 8, 2010 that stated, “Also off the table is the notion of Cal Am customers having any real say over the production and processing of a vital public resource that they are compelled to purchase. It doesn’t have to be that way.” The Herald editorial added, the “Division of Ratepayer Advocates concluded that the Regional Project as proposed would leave Cal Am customers with ‘no decision-making role.’ ” (*Monterey County Herald*, April 8, 2010.)

future needs of the Monterey Peninsula. The need for new water supply for use, including water demand required for remodels, additions, lots of record and other unmet needs is not addressed. The WPA must be revised to address the future expansion of the Regional Project. The WPA must ensure citizens of the Monterey Peninsula have a direct voice and participatory role in that decision-making process. Without revision, the WPA provides that MCWD, alone, shall decide when, if and how much water shall be made available to meet any water need beyond that required to replace existing sources of supply. Without revision, MCWD decides whether or not lots of record on the Monterey Peninsula shall receive water.

7.0 Lack of Agency Cooperation – The Water Management District Has No Representation in the Regional Project. The terms of the Settlement are not in the public interest. The WPA does not include a participatory role for the Water Management District. This may result in unnecessary costs to Cal-Am ratepayers, and harm to the environment. It is critical that MPWMD participate in operation and management of desalination facility. Water Management District operations are affected in at least four (4) separate ways.

- 7.1 Cal-Am relies upon the Water Management District to implement conservation and rationing activities as needed. Rationing may be required by reason of planned or unplanned interruption of water from Regional Project facilities. As such, MPWMD needs advance warning and cooperation from other Regional Project participants to coordinate the unfortunate impacts that may be caused from any interruptions in supply. Inefficient communication shall complicate response time, and pose additional and unneeded costs to Cal-Am ratepayers.

- 7.2 At times, the Water Management District may use Regional Project product water for groundwater injection through the existing MPWMD Aquifer Storage and Recovery (“ASR”) facility. Operations of Regional Project facilities may affect the suitability of this water for ASR injection. Coordination of Regional Project maintenance and operations is needed to ensure efficient interface with MPWMD ASR facility needs.
- 7.3 At times, when Carmel River water is available under its established water rights, the Water Management District uses water from the Carmel Valley for groundwater injection through the existing MPWMD ASR facility.¹⁶ Operations of Regional Project facilities may affect the amount and timing of Carmel River water available for ASR use. Operation of the Regional Project may affect the availability of Carmel River use, as maintenance and operation of the Regional Project may require Cal-Am to use Carmel River for current system demand, and thus interrupt the supply for ASR injection purposes. A participatory role for the Water Management District will minimize inefficient operation or even disruption of the MPWMD ASR facility.
- 7.4 The Water Management District has ongoing environmental mitigation activities that relate to Cal-Am’s planned and future diversion of water from the Carmel River and Carmel Valley alluvial aquifer. These mitigation efforts are required by law. The intensity of activities will be directly affected by any planned or unplanned interruption of water from the Regional Project. A participatory role for the Water Management District will ensure effective environmental mitigation

¹⁶ MPWMD and Cal-Am also co-own and operate a permit to appropriate water from the Carmel River. This water right (SWRCB Permit 20808A) is used to provide water for the joint Cal-Am-MPWMD ASR project.

efforts, and minimize the potential for adverse environmental effects that may result from Cal-Am's diversion of Carmel River water.

The WPA should be revised to include a participatory role for the Water Management District to address each of the operational concerns noted above. This result would be achieved if Section 6.5 of the WPA, entitled "Operational Period Responsibilities," was revised to state: "The Parties and MPWMD, in consultation with the Advisory Committee, shall...."

8.0 Risk and Lack of Certainty – The Settlement and WPA Do Not Adequately Manage Risk to the Regional Project. The terms of the Settlement, conditions under which the Settlement is proposed, and the lack of data pose undue and unnecessary risks for successful implementation of the Regional Project. Assumptions which underlie the Regional Project are undocumented and unsupported. If questions relating to those assumptions are not resolved, the Settlement and the WPA may later be determined to be inconsistent with applicable law and contrary to the public interest.

Revisions to the Settlement and WPA, and public review of support data, can avoid or minimize these risks, and help assure an apprehensive public that assumptions used are reasonable.

- 8.1 It is uncertain whether groundwater pumping restrictions imposed by the MCWRA shall apply to Product Water or to Brackish Source Water for the Regional Project. The WPA assumes that the calculation that determines the quantity of water required by law to remain in the Salinas Valley can be based upon Product Water from the desalination plant (Section 9.3(c) of the WPA). While this assumption may be reasonable, it is not certain. An alternate contention may be made that the calculation as to the quantity of water needed to remain in the Salinas Valley must be based upon Brackish Source Water pumped

from the Salinas Basin and delivered to the desalination plant. This is a critical assumption, as calculations based upon Brackish Source Water quality determine the increment of water that can be delivered to the Monterey Peninsula. The project proponents can unequivocally resolve this uncertainty by bringing a declaratory relief action to test the validity of the assumptions. This effort need not delay action on the Regional Project.

- 8.2 Effects of the Regional Project on seawater intrusion in the Salinas Groundwater Basin¹⁷ are not fully known or understood. The WPA must better address the scenario whereby the fresh/groundwater ratio changes over time and less saltwater is produced. Neither the Settlement nor the WPA defines the term “basin water”. Lack of a proper definition creates uncertainty and exposes the Regional Project to the risk of litigation. The documents should be revised to define the term “Salinas Basin water” and to better define the method to be used to determine the Total Dissolved Solids (“TDS”) concentration of “Salinas Basin water.”¹⁸
- 8.3 Neither the Settlement nor the WPA provides protocols for testing of the wells proposed for producing desalination plant feed water (termed “Brackish Source Water” in the WPA). These protocols should be defined and should

¹⁷ If the Regional Project improves seawater intruded areas in the Salinas Valley Groundwater Basin, it is unclear how the Regional Project can maintain the 85% seawater and 15% inland groundwater ratio of source water needed for Regional Project feasibility.

¹⁸ Proper definition in this area is important because according to the WPA, the TDS concentration of “Seaside Basin water” determines how much of the extracted water can be transferred to Cal-Am. The values of 500 mg/l and 400 mg/l are used in Exhibit E to the WPA as examples of Salinas Basin water TDS, but these values may not be representative of “freshwater” in the basin. The component of fresh water that is found in “Salinas Basin water,” will significantly affect the amount of extracted and desalted water that can be delivered to Cal-Am.

include a statement of the location of monitoring wells, planned measurements, and the period planned for testing. Lack of test protocol data creates uncertainty because any increase in the percentage of groundwater versus seawater could mean Cal-Am would be unable to receive the full share of 8,800 afa.

- 8.4 The AG Land Trust has filed a Petition/Complaint against the MCWD related to the Regional Project. This lawsuit alleges the analysis of water rights and environmental impacts upon which the project is based are procedurally and substantively flawed. The extent to which the Settling Parties have documentation to refute the allegations of the lawsuit is unknown. Revisions to the Settlement and WPA, and public review of support data, can avoid or minimize the assertions set forth in the lawsuit, and help assure an apprehensive public that assumptions used are reasonable. Water rights assumptions for the project are critical to determining the amount of water that can be delivered to the Monterey Peninsula. This uncertainty can be unequivocally resolved through a declaratory relief action to test the validity of the assumptions. As noted earlier, this effort need not delay action on the Regional Project.

9.0 Incorporation of Concerns Raised by DRA. MPWMD also shares and adopts additional issues of concern as stated by the Division of Ratepayer Advocates (“DRA”). These include the following:

- 9.1 DRA estimates that the Regional Project would result in an increased Cal-Am revenue requirement of \$70 million. This would pose an increase in the range of 163% for Cal-Am rates. This revenue requirement would affect, and call into question, the Cal-Am ratepayer ability to pay.

- 9.2 Analysis of the Cal-Am ratepayer ability to pay has not been adequately factored in forthcoming costs that Cal-Am shall incur for San Clemente Dam activities.
- 9.3 Analysis of the Cal-Am ratepayer ability to pay has not been adequately factored in the forthcoming Cal-Am General Rate Case (“GRC”) to be filed July 2010.
- 9.4 Analysis of the Cal-Am ratepayer ability to pay has not adequately addressed demand elasticity. Regional Project rates may depress customer demand. DRA estimates significant decreases in demand shall dramatically increase effective rates. The issue of rate sensitivity should be carefully analyzed.
- 9.5 Neither the Settlement nor the WPA address cost impacts from debt equivalence issues.
- 9.6 Neither the Settlement nor the WPA includes adequate controls regarding the price of desalinated water.
- 9.7 The Commission should not deem all expenses of MCWRA and MCWD to be reasonable and prudent as required by the WPA. This would include all overhead allocations, and all costs and attorneys’ fees.
- 9.8 The WPA should not reimburse MCWD for its historical costs to develop its own desalination plant.
- 9.9 The public should be given an opportunity to inspect Regional Project supporting cost worksheets, expected financing costs or operations and maintenance costs.
- 9.10 An equity reimbursement formula should be added similar to the Outfall Agreement, to cover costs for future use of the Regional Project infrastructure.

CONCLUSION

Commission Rule 12.1 requires that a settlement be “reasonable in light of the whole record, consistent with law, and in the public interest.” The Settlement Agreement fails to meet these requirements.

In presenting its Comments on the proposed Settlement, the Water Management District reiterates its support for the Regional Project. Still, the proposed Settlement should be revised to ensure all of its terms are in the public interest and are factually supported. While time is of the essence, the regulatory, planning, testing and construction phases will be lengthy. There is ample time for the Regional Project to proceed through these preliminary steps while the Commission devises specific regulatory structures to ensure Cal Am ratepayers are treated fairly, and are ensured of a true participatory role. In its haste for action, the Commission should not abdicate its review authority and project oversight. The Commission should make certain it has regular access to cost and operating data as part of its ongoing regulatory role.

The settlement should also facilitate a greater role for the Water Management District to enable its participation for matters about which it has a statutory and proprietary concern.

Based on the questions, issues and concerns set forth above, and further based on issues of concern stated by the Division of Ratepayer Advocates, the Water Management District requests the Commission hold the hearing set to begin on May 10, 2010 pursuant to Rule 12.3, and that the Parties to the Settlement be directed to provide one or more witnesses to testify concerning these issues. MPWMD intends to present evidence and testimony on the contested issues.

For these reasons, the Water Management District requests that the Commission, in accord with Rule 12.4, reject the Settlement upon the grounds that terms of Settlement

are not in the public interest, and thereupon, the Commission should propose alternative terms of Settlement to address and resolve these issues.

Respectfully submitted,

Dated: April 30, 2010

A handwritten signature in black ink, appearing to read "David C. Laredo", written over a horizontal line.

DAVID C. LAREDO
De LAY & LAREDO
Attorneys for
**MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT**

1 **PROOF OF SERVICE**

2 I, Lisa Andrew, declare as follows:

3 I am employed in the City of Pacific Grove, County of Monterey, California. I am
4 over the age of eighteen years, and not a party to the within entitled cause. I am an employee of
5 De LAY & LAREDO and my business address is 606 Forest Avenue, Pacific Grove, California
93950. On May 3, 2010, I served the within:

6 **COMMENTS ON SETTLEMENT BY**
7 **MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**

8 on the interested parties in this action addressed as follows:

9 *Please see attached Service List*

10 (BY E-MAIL SERVICE) By transmitting such document electronically from
11 De Lay & Laredo, Pacific Grove, California, to the electronic mail addresses listed above.
12 I am readily familiar with the practice of De Lay & Laredo for transmitting documents by
13 electronic mail, said practice being that in the ordinary course of business, such electronic
mail is transmitted immediately after such document has been tendered for filing.

14 I declare that I am employed in the office of a member of the bar of this court at
15 whose direction the service was made.

16 Executed on May 3, 2010, at Pacific Grove, California.

17 
18 _____
19 Lisa Andrew

A.04-09-019 II Service List

1
2
3
4 George Riley
Citizens for Public Water Citizens for Public Water
1198 Castro Road
5 Monterey, CA 93940
georgeriley@hotmail.com
6
7 David C. Laredo
DeLay & Laredo Monterey Peninsula Water
606 Forest Avenue Management District
8 Pacific Grove, CA 93950
dave@laredolaw.net
9
10 Dan L. Carroll
Attorney At Law Monterey County Water
Downey Brand, LLP Resources Agency
11 621 Capitol Mall, 18th Floor
Sacramento, CA 95814
12 dcarroll@downeybrand.com
13 Mark Fogelman
Friedman Demas & Springwater, LLP Marina Coast Water District
14 150 Spear Street, Suite 1600
San Francisco, CA 94105
15 mfogelman@friedumspring.com
16 Sabrina D. Venskus
Venskus & Associates, P.C. Surfrider Foundation
17 21 South California Street, Suite 204
Ventura, CA 93001
18 venskus@lawsv.com
19 Lenard Weiss
Attorney At Law California American
Manatt, Phelps & Phillips, LLP Water Company
20 One Embarcadero Center, 30th Floor
21 San Francisco, CA 94111
lweiss@manatt.com
22
23 Monica L. McCrary
Legal Division DRA
RM. 5134
24 505 Van Ness Avenue
San Francisco, CA 94102
25 mlm@cpuc.ca.gov
26 Patricia Nelson
Public Trust Alliance, Resource Renewal The Public Trust Alliance
27 Building D Fort Mason, Room 290
San Francisco, CA 94123
28 nelsonp34@hotmail.com

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Sabrina V. Teller
Attorney At Law
Remy Thomas Moose & Marley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
steller@rtmmlaw.com

Monterey Regional Water
Pollution Control Agency

Andrew Barnsdale
Energy Division
Area 4-A
505 Van Ness Avenue
San Francisco, CA 94102
bca@cpuc.ca.gov

CPUC

Diana Brooks
Division of Ratepayer Advocates
RM. 4208
505 Van Ness Avenue
San Francisco, CA 94102
dsb@cpuc.ca.gov

CPUC

Max Gromberg
Division of Ratepayer Advocates
RM. 4208
505 Van Ness Avenue
San Francisco, CA 94102
mzx@cpuc.ca.gov

CPUC

Laura L. Krannawitter
Executive Division
RM. 5303
505 Van Ness Avenue
San Francisco, CA 94102
llk@cpuc.ca.gov

CPUC

Angela K. Minkin
Administrative Law Judge Division
RM. 5105
505 Van Ness Avenue
San Francisco, CA 94102
ang@cpuc.ca.gov

CPUC

Jonathan J. Reiger
Legal Division
RM. 5035
505 Van Ness Avenue
San Francisco, CA 94102
jzr@cpuc.ca.gov

CPUC

1 Cynthia J. Truelove CPUC
Policy & Planning Division
2 RM. 5119
505 Van Ness Avenue
3 San Francisco, CA 94102
cjt@cpuc.ca.gov

4 Richard Rauschmeier CPUC
5 Division of Ratepayer Advocates
RM. 3200
6 505 Van Ness Avenue
San Francisco, CA 94102
7 rra@cpuc.ca.gov

8 Steven Kasower
1720 Q Street
9 Sacramento, CA 95814
steve@seacompany.org

10 Tanya A. Gulesserian
11 Attorney At Law
Adams Broadwell Joseph & Cardozo
12 601 Gateway Blouvard, Suite 1000
tgulesserian@adamsbroadwell.com

13 Alan B. Lily
14 Attorney At Law
Bartkiewicz, Kronick & Shanahan
15 1011 22nd Street, Suite 1000
Sacramento, CA 95816
16 abl@bkslawfirm.com

17 Gregory K. Wilkinson Ocean Mist Farming Company
Best Best & Krieger, LLP
18 3750 University Avenue, Suite 400
Riverside, CA 92501
19 Gregory.Wilkinson@bbklaw.com

20 Jason M. Ackerman
Best Best & Krieger, LLP
21 3750 University Avenue, Suite 400
Riverside, CA 92501
22 Jason.Ackerman@bbklaw.com

23 Carrie Gleeson
California American Water
24 1033 B Avenue, Suite 200
Coronado, CA 92118
25 Carrie.gleeson@amwater.com

26 Catherine A. Bowie
Manager External Affairs
27 California American Water
P.O. Box 951
28 Monterey, CA 93942
catherine.bowie@amwater.com

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2
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21
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25
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California American Water

David P. Stephenson
California American Water
4701 Beloit Drive
Sacramento, CA 95838
dstephen@amwater.com

Tim Miller
Attorney At Law
California American Water
1033 B Avenue, Suite 200
Coronado, CA 92118
Tim.miller@amwater.com

Manuel G. Fierro
Citizen for Public Water
461 Line Street
Monterey, CA 93940
Manuelfierro02@yahoo.com

Heidi Quinn
DeLay & Laredo
606 Forest Avenue
Pacific Grove, CA 93950
heidi@laredolaw.net

Kevin M. O'Brien
Attorney At Law
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
kobrien@downeybrand.com

Audra Hartmann
Director, Government & Reg. Affairs
Dynergy, Inc
980 Ninth Street, Suite 21030
Sacramento, CA 95814
Audra.Hartmann@Dynergy.com

Eric Zingas
Environmental Associates/Water
225 Bush Street
San Francisco, CA 94104
ezigas@eassoc.com

Fran Farina
389 Princeton Avenue
Santa Barbara, CA 93111
ffarina@cox.net

1 Derrick N.D. Hansen
Friedman Dumas & Springwater, LLP
2 150 Spear Street, Suite 1600
San Francisco, CA 94105
3 dhansen@friedumspring.com

4 Stefanie A. Elkins
Friedman Dumas & Springwater, LLP
5 150 Spesr Street, Suite 1600
San Francisco, CA 94105
6 selkins@friedumspring.com

7 Lori Ann Dolqueist
Attorney At Law
8 Manatt, Phelps & Phillips, LLP
One Embarcadero Center, 30th Floor
9 San Francisco, CA 94111
ldolqueist@manatt.com

10 Sarah E. Leeper
11 Attorney At Law
Manatt, Phelps & Phillips, LLP
12 One Embarcadero Center, 30th Floor
San Francisco, CA 94111
13 sleeper@manatt.com

14 James Heitzman
Marina Coast Water District
15 11 Reservation Road
Marina, CA 93940
16 jim@mcwd.org

17 Bob Mckenzie
375 Spencer Street, No. 1
18 Monterey, CA 93940
bobmac@qwest.net

19 Curtis V. Weeks
20 Monterey County Water Resources Agency
P.O. Box 930
21 Salinas, CA 93902
weeksc@co.monterey.ca.us

22 Andrew Bell
23 District Engineer
Monterey Peninsula Water Management District
24 P.O. Box 85
Monterey, CA 93942
25 andy@mpwmd.dst.ca.us

26 Darby W. Fuerst
General Manager
27 Monterey Peninsula Water Management District
P.O. Box
28 Monterey, CA 93942
darby@mpwmd.dst.ca.us

MPWMD Service List

(May 3, 2010)

1
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11
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18
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20
21
22
23
24
25
26
27
28

Joyce Ambrosius
NOAA'S National Marine Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404
Joyce.ambrosius@noaa.gov

Lloyd W. Lowrey, Jr.
Christine Kemp
Attorney At Law
Nolan, Hamerly, Etienne & Hoss
P.O. Box 2510; 333 Salinas Street
Salinas, CA 92902
llowrey@nheh.com

Marina Coast Water District

Stephen Collins
Ocean Mist
26153 Legends Court
Salinas, CA 93908
stecllns@aol.com

Stan Williams
Poseidon Water
111 North Market Street, Suite 300
San Jose, CA 95113
swilliams@poseidon1.com

Pajaro/Sunny Mesa Community
Services District

Michael Warburton
Public Trust Alliance
290 Building D, Fort Mason
San Francisco, CA 94123
michael@rri.org

Tyla Montgomery
RBF Consulting
9755 Clairemont Mesa Boulevard, Suite 100
San Diego, CA 92124
tmontgomery@rbf.com

Lyndel Melton
RMC Water & Environment
2001 N. Main Street, Suite 400
Walnut Creek, CA 94596
lmelton@rmcwater.com

Conner Everts
Southern California Watershed Alliance
2515 Wilshire Boulevard
Santa Monica, CA 90403
connere@west.net

1 Joe Geever
2 Southern California Manager
3 Surfrider Foundation
4 8117W. Manchester Avenue #297
5 Playa Del Rey, CA 90293
6 jgeever@surfrider.org

7 Sarah Corbin
8 Central California Regional Manager
9 Surfrider Foundation 809 Browns Valley Road
10 Watsonville, CA 95076
11 scorbin@surfrider.org

12 Daniel Lopez
13 The Monterey County Herald
14 8 Upper Ragsdale Drive
15 Monterey, CA 93940
16 dlopez@montereyhearld.com

17 Ravi Kumra
18 California Public Utilities Commission
19 505 Van Ness Avenue
20 Water & Sewer Advisory, Area 3-C
21 San Francisco, CA 94102-3214
22 rkk@cpuc.ca.gov

23 Nancy Isakson
24 Government Affairs Consultant
25 P.O. Box 804
26 Carmel, CA 93920
27 nisakson@mbay.net

28 Robert Holden
29 Monterey Regional Water Pollution Control Agency
30 5 Harris Court, Bldg.D
31 Monterey, CA 93940
32 bobh@mrwpca.com

33 ALJ Angela K. Minkin
34 California Public Utilities Commission
35 Division Of Administrative Law Judges
36 505 Van Ness Avenue, Room 5105
37 San Francisco, CA 94102-3214
38 ang@cpuc.ca.gov

39 Molly Erickson
40 Law Offices of Michael Stamp
41 479 Pacific Street, Suite One
42 Monterey, CA 93940
43 erickson@stampLaw.us

44 Glen Stransky
45 Hidden Hills Subunit Ratepayer Association
46 92 Saddle Road
47 Carmel Valley, CA 93924
48 glen.stransky@LosLaurelesHOA.com

MPWMD Service List

(May 3, 2010)

1
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19
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21
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23
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25
26
27
28

Robert G. Maclean
California American Water
1033 B Avenue, Suite 200
Coronado, CA 92118
robert.maclean@amwater.com

John Klein
California American Water
P.O. Box 951
Monterey, CA 93942
john.klein@amwater.com