

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



FILED

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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.)	
_____)		

**MONTEREY PENINSULA WATER MANAGEMENT DISTRICT'S RESPONSE
TO JOINT MOTION OF CALIFORNIA-AMERICAN WATER COMPANY,
MARINA COAST WATER DISTRICT AND MONTEREY COUNTY WATER
RESOURCES AGENCY TO STRIKE PORTIONS OF THE TESTIMONY OF
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**

Date: May ____, 2010

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MONTEREY PENINSULA WATER MANAGEMENT DISTRICT**

I. INTRODUCTION

Pursuant to Rule 11.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), the Monterey Peninsula Water Management District (“Water Management District” or “MPWMD”) hereby submits this response to the joint motion of California-American Water Company (“Cal-Am” or “CAW”), Marina Coast Water District (“MCWD”), and Monterey County Water Resources Agency (“MCWRA”) (collectively “Moving Parties”) requesting the Administrative Law Judge to strike portions of the *Direct Testimony of Darby Fuerst and Andrew M. Bell* submitted by the Water Management District (“Testimony of Fuerst and Bell”).

On May 26, 2010, Administrative Law Judge (“ALJ”) Minkin issued an order shortening the time for responses to the joint motion, requiring responses to be filed and served by June 1, 2010. The Water Management District’s response is timely filed.

The Moving Parties’ motion is based on their contentions that portions of the Testimony of Fuerst and Bell are contrary to Rule 12.6¹, are not appropriate, and/or are outside the expertise of the supporting witnesses.

For the reasons stated below, these contentions are not supportable. The ALJ should deny the joint motion in its entirety.

II. THE MOVING PARTIES FAILED TO MEET AND CONFER PRIOR TO FILING THE MOTION

The Moving Parties failed to comply with the Administrative Law Judge’s recommendation to meet and confer with a party prior to filing a motion to compel or limit discovery.²

Contrary to the assertions of the Moving Parties, the Water Management District did not receive an e-mail on May 14, 2010, or any date thereafter, from any of the Moving Parties.

Counsel for the Water Management District did receive a voicemail from Cal-Am on Thursday, May 20, 2010, but the call was placed after the close of business. At 5:07 p.m., counsel for Cal-Am left a voicemail message stating that the call was a follow-up to a previous e-mail dated May 14, 2010 regarding a request to meet and confer. The voicemail message did not indicate that the request to meet and confer was in anticipation

¹ Unless otherwise stated, all further reference to the “Rules” refers to the Rules of Practice and Procedure of the California Public Utilities Commission.

² The Moving Parties raise Rule 11.3 as a potential basis to require the parties to meet and confer prior to the filing of a motion to limit testimony.

of a motion, or that Cal-Am would be filing a motion the next morning. The Moving Parties filed the joint motion the following day, Friday, May 21, 2010, depriving counsel of an opportunity to respond.

The Moving Parties failed to effect proper notice prior to the filing of the joint motion, and on that ground, the motion should be denied in its entirety.

III. THE TESTIMONY OF FUERST AND BELL DOES NOT VIOLATE RULE 12.6

The portions of the Testimony of Fuerst and Bell that the Moving Parties seek to strike does not disclose confidential information. The Moving Parties' joint motion should be denied.

Rule 12.6 provides,

“No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.”

The Testimony of Fuerst and Bell does not contain confidential information, and does not violate Rule 12.6. Contrary to the Moving Parties' assertion, the Testimony of Fuerst and Bell does not violate the provisions of California Evidence Code § 1119, which pertains to mediation or mediation consultations.³ Further, as the Moving Parties admit, state rules of evidence do not apply.⁴

³ Evid. Code § 1119(c) provides, “Except as otherwise provided in this chapter: . . . (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

⁴ Rule 13.6.

The Testimony of Fuerst and Bell, identified as A22⁵, set forth at pages 15-17, does not disclose confidential information. This challenged testimony must be read in the context of the complete answer, A22, which provides,

“Inclusion of a representative from MPWMD on the Advisory Committee was discussed by the parties, i.e., Cal-Am, MCWD, and MCWRA, and MPWMD. In fact, the version of the WPA that was approved by Cal-Am’s parent company, American Water, on March 26, 2010; by the MCWD Board of Directors and the MCWRA Board of Directors on April 5, 2010; and by the Monterey County Board of Supervisors on April 6, 2010, included language in Section 6.1 describing formation of a four-member Advisory Committee composed of one representative from each of the parties and one representative from the Monterey Peninsula Water Management District. In this earlier version, it was noted that MPWMD would function like other members of the Advisory Committee, i.e., provide advice and make recommendations to the parties, but would not be considered a party and would not be a decision maker as described in Section 6.6 of the WPA. This language was removed from the version of the WPA that the parties submitted to the Commission on April 7, 2010; after the MPWMD Board voted not to sign the Settlement Agreement on April 5, 2010.

As noted in the Comments, MPWMD is a special district that was created in 1977 by the California Legislature and ratified by local voters in 1978 (Statutes of 1977, Chapter 527, as amended, found at West’s Water Law Appendix, Section 118-1, et seq.). The Legislature created MPWMD to manage and regulate use, reuse, reclamation, and conservation of water in the Monterey Peninsula area. MPWMD was also created to finance public works water projects and foster the environmental quality on the Monterey Peninsula and Carmel River basin. The District Law directs MPWMD to provide integrated management of all water resources in the Monterey Peninsula area.

In the discussions with the parties regarding MPWMD inclusion on the Advisory Committee, it was acknowledged that MPWMD staff possessed significant experience and expertise in water supply planning, permitting, and development that would benefit the Regional Project. In addition, it was recognized that a direct exchange of information regarding operation

⁵ A22 responds to the following question, labeled Q22: “In Section 6.1 of the MPWMD Comments, it is stated that MPWMD does not have a seat on the Advisory Committee that would be formed pursuant to the WPA and that this omission, given MPWMD’s legislative mandate to provide integrated water resources management in the Monterey Peninsula area, is unfair and not in the public interest. Please explain.” Testimony of Fuerst and Bell, p. 15.

of the Regional Project between MPWMD and the parties would be mutually beneficial. Specifically, advance knowledge of how the Regional Desalination Project would be operated and the monthly quantities of desalinated water that would be available to Cal-Am would aid MPWMD in developing quarterly water supply strategies and budgets for Cal-Am's distribution systems. For example, as a member of the Advisory Committee, MPWMD would receive firsthand information whether or not a "true-up" of MCWD's Agreed Allocation was planned for the upcoming quarter that would reduce the amount of desalinated water that would be available to Cal-Am and necessitate an increase in Cal-Am's production from Carmel River and Seaside Groundwater Basin sources. Similarly, as a member of the Advisory Committee, MPWMD would receive firsthand information on MCWRA's testing and monitoring program to assess the impacts from operation of the brackish source wells on hydrologic conditions in the Salinas Groundwater Basin and compliance with the MCWRA Act. This information would, in turn, be used to confirm the monthly amounts of desalinated water available to Cal-Am and the corresponding amounts of Carmel River and Seaside Groundwater Basin water needed to meet Cal-Am customer demand. Inclusion of MPWMD on the Advisory Committee is consistent with MPWMD's legislative mandate to provide integrated water resources management in the Monterey Peninsula area and is in the public interest."

The first paragraph of the testimony set forth above addresses the role of the Water Management District on the Advisory Committee. This information is not privileged or confidential. The Testimony is based upon discussions and positions of the Moving Parties articulated outside the ADR process.⁶

A close reading of this portion of the Testimony shows that discussion of MPWMD role on the Advisory Committee is reflected in public documents, including the Water Purchase Agreement ("WPA") approved by Cal-Am on March 26, 2010, the MCWD on April 5, 2010, the Monterey County Board of Supervisors on April 6, 2010. Further, as part of the approval process, the status of the MPWMD as a member of the Advisory Committee was also discussed at public meetings. The Moving Parties'

⁶ *Id.*, p. 15.

request to strike the entire first paragraph of A22 should be denied, as the information is not confidential or privileged.

The Moving Parties also request to strike the second paragraph of the A22.⁷ This request should be denied as the statements do not contain confidential or privileged information. This portion of the Testimony of Fuerst and Bell simply contains language regarding the legislative mandates of the Water Management District. General Manager Darby Fuerst and District Engineer Andrew Bell are each competent to provide this Testimony. There is no basis to exclude or strike the Testimony.

The Moving Parties' motion to strike the last paragraph of A22⁸, should also be denied. This portion of the Testimony of Fuerst and Bell is not confidential or privileged. The "discussions" referred to in the Testimony of Fuerst and Bell occurred outside the ADR process.⁹ The positions of the Settling Parties were articulated in open and public meetings. The purpose of the Testimony of Fuerst and Bell is to set forth information regarding the absence of the Water Management District from the Advisory Committee, and provide testimony as to the benefits and importance of such a role. The witnesses are entitled to provide testimony in this regard.

IV. THE TESTIMONY OF FUERST AND BELL IS NOT OUTSIDE THE EXPERTISE OF THE SPONSORING WITNESSES.

The Testimony of Fuerst and Bell is combined as each witness is competent to testify to the whole of the information. There is no Rule that prohibits combined testimony. The Testimony of Fuerst and Bell was combined to accommodate potential

⁷ *Id.*, p. 16.

⁸ *Id.*, pp. 16-17.

⁹ *Id.*, p. 16.

scheduling problems and to ensure adequate opportunity for cross-examination of the witnesses. So long as either witness can sponsor the Testimony, there is no basis to strike it on the grounds that another witness is also able to testify to the same facts.

The joint motion also seeks to strike portions of the Testimony of Fuerst and Bell on the grounds it contains legal argument. The Moving Parties' request mischaracterizes the Testimony. The motion to strike Q13 and A13, Q14 and A14, and Q15 and A15 should be denied.¹⁰ This challenged testimony must be read in the context,

Q13. In Section 1.1 of the MPWMD Comments, it is stated that the WPA should be revised to require that all meetings of advisory bodies comply with the Ralph M. Brown Act ("Brown Act") and, more specifically, that the Brown Act requirements apply to the Advisory Committee formed pursuant to Section 6 of the WPA. Please explain.

A13. The express purpose of the Brown Act (Gov't. Code §§ 54950, et seq.) is to assure local government agencies conduct the public's business openly and publicly. The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Given the far-reaching impacts that construction and operation of the Regional Project will have on the citizens in the greater Monterey Peninsula area, it is important that all meetings of advisory bodies to the Regional Project, including the Advisory Committee formed pursuant to Section 6 of the WPA, comply with the Brown Act. These requirements include proper noticing, open access and participation, and record keeping. By complying with the Brown Act, the agencies and Cal-Am will encourage openness, reduce the possibility of misunderstandings and controversy regarding the project, and promote the public interest.

Q14. In Section 1.2 of the MPWMD Comments, it is stated that the WPA should be revised to require that all records created or maintained in support of the Regional Project should be retained and disclosed in accord with the California Public Records Act. Please explain.

A14. 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. The Act applies to all state and local agencies, including

¹⁰ Testimony of Fuerst and Bell, pp. 7-9.

advisory boards created by the agencies. "Records" include all communications related to public business regardless of physical form or characteristics. Certain records, such as attorney-client discussions and preliminary draft and notes, may be exempt from disclosure. The California Public Records Act is intended to safeguard the accountability of government to the public. In order to verify accountability, individuals must have access to government files. Again, given the significant impacts that construction and operation of the Regional Project will have on the citizens in the greater Monterey Peninsula area, it is important that the Regional Project comply with the California Public Records Act. By complying with the Public Records Act, the agencies and Cal-Am will provide openness, ensure accountability, and promote the public interest.

Q15. In Section 1.3 of the MPWMD Comments, it is stated that the WPA should be revised to require that all officials who make substantive decisions related to the Regional Project comply with the Fair Political Practices Act. Please explain.

A15. The California Political Reform Act of 1974 (Gov't. Code §§ 81000, et seq.) established the Fair Political Practices Commission to promote the integrity of representative state and local government through fair and impartial interpretation and enforcement of political campaign, lobbying, and conflict of interest laws. The Political Reform Act is designed to assure that state and local government serves all citizens equally, without regard to status or wealth. As indicated above, because decisions by local and state government officials regarding the construction and operation of the Regional Project will significantly affect the citizens in the greater Monterey Peninsula area, it is important that these decision-makers comply with the Fair Political Practice Commission regulations. By complying with Fair Political Practice Commission regulations, the agencies and Cal-Am will provide fairness, avoid litigation, and promote the public interest.

Darby Fuerst, as General Manager of the Water Management District, and Andrew Bell, as District Engineer, do not offer testimony as experts. By the nature of their positions, Mr. Fuerst and Mr. Bell each have training and expertise that qualifies them to testify as to the general application and scope of the Brown Act, the Public Records Act, and the Fair Political Practices Act. The Testimony is offered in support of the Comments filed by the Water Management District and is intended to set forth the

potential benefits of the application of such statutes to the Regional Water Supply Project (“Regional Project”). These statements identify the issues, they do not purport to provide technical analysis.

The request of the Moving Parties to strike Questions and Answers 13, 14 and 15 of the Testimony of Fuerst and Bell should be denied.

V. THE TESTIMONY OF FUERST AND BELL IS NOT OUTSIDE THE SCOPE OF THE PROCEEDINGS.

The information the Moving Parties seek to strike is properly within the scope of this phase of the proceeding. The Moving Parties’ request to strike Exhibit AB-4 should be denied.

The Joint Scoping Ruling provides,

“To the extent that information on water rights and jurisdiction can inform our understanding of the proposed Project and alternatives, and how ownership and financing might be implemented, then it is appropriate to consider these issues.”

Exhibit AB-4 of the Testimony of Fuerst and Bell is complaint filed by the AG Land Trust in the Monterey County Superior Court. The Water Management District offers Exhibit AB-4 within the context of the Ruling, as it helps inform the Commission’s understanding of risks that have been raised that may affect the Regional Project and alternatives. The Exhibit is submitted for the fact of its existence, and not for the truth of the content. As the Moving Parties concede, the Water Management District may introduce evidence that an action has been filed. This is precisely why the document has been offered.

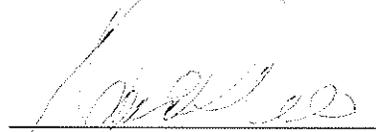
The request of the Moving Parties to strike the Exhibit should be denied.

VI. CONCLUSION

For the reasons set forth above, the Monterey Peninsula Water Management District respectfully requests the Administrative Law Judge deny, in its entirety, the joint motion of the Moving Parties' to strike portions of the Testimony of Fuerst and Bell.

Dated: May 28, 2010

Respectfully submitted,



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

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PROOF OF SERVICE

I, Heidi Quinn, declare as follows:

I am employed in the City of Pacific Grove, County of Monterey, California. I am over the age of eighteen years, and not a party to the within entitled cause. I am an employee of De LAY & LAREDO and my business address is 606 Forest Avenue, Pacific Grove, California 93950. On May 27, 2010, I served the within:

**MONTEREY PENINSULA WATER MANAGEMENT DISTRICT'S RESPONSE TO
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RESOURCES AGENCY TO STRIKE PORTIONS OF THE TESTIMONY OF
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on the interested parties in this action addressed as follows:

Please see attached Service List

(BY E-MAIL SERVICE) By transmitting such document electronically from De Lay & Laredo, Pacific Grove, California, to the electronic mail addresses listed above. I am readily familiar with the practice of De Lay & Laredo for transmitting documents by 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.

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

Executed on May 27, 2010 at Pacific Grove, California.

Heidi A. Quinn
Heidi Quinn

A.04-09-019 II Service List

George Riley
Citizens for Public Water
1198 Castro Road
Monterey, CA 93940
georgeriley@hotmail.com

David C. Laredo
DeLay & Laredo
606 Forest Avenue
Pacific Grove, CA 93950
dave@laredolaw.net

Dan L. Carroll
Attorney At Law
Downey Brand, LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
dcarroll@downeybrand.com

Mark Fogelman
Friedman Demas & Springwater, LLP
150 Spear Street, Suite 1600
San Francisco, CA 94105
mfogelman@friedumspring.com

Sabrina D. Venskus
Venskus & Associates, P.C.
21 South California Street, Suite 204
Ventura, CA 93001
venskus@lawsv.com

Lenard Weiss
Attorney At Law
Manatt, Phelps & Phillips, LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
lweiss@manatt.com

Monica L. McCrary
Legal Division
RM. 5134
505 Van Ness Avenue
San Francisco, CA 94102
mlm@cpuc.ca.gov

Patricia Nelson
Public Trust Alliance, Resource Renewal
Building D Fort Mason, Room 290
San Francisco, CA 94123
nelsonp34@hotmail.com

Citizens for Public Water

Monterey Peninsula Water
Management District

Monterey County Water
Resources Agency

Marina Coast Water District

Surfrider Foundation

California American
Water Company

DRA

The Public Trust Alliance

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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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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
Dynegy, Inc
980 Ninth Street, Suite 21030
Sacramento, CA 95814
Audra.Hartmann@Dynegy.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 28, 2010)

1
2
3
4
5
6
7
8
9
10
11
12
13
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15
16
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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
Southern California Manager
2 Surfrider Foundation
8117W. Manchester Avenue #297
3 Playa Del Rey, CA 90293
jgeever@surfrider.org
4

5 Sarah Corbin
Central California Regional Manager
Surfrider Foundation 809 Browns Valley Road
6 Watsonville, CA 95076
scorbin@surfrider.org
7

8 Daniel Lopez
The Monterey County Herald
8 Upper Ragsdale Drive
9 Monterey, CA 93940
dlopez@montereyhearld.com
10

11 Ravi Kumra
California Public Utilities Commission
505 Van Ness Avenue
12 Water & Sewer Advisory, Area 3-C
San Francisco, CA 94102-3214
13 rkk@cpuc.ca.gov

14 Nancy Isakson
Government Affairs Consultant
15 P.O. Box 804
Carmel, CA 93920
16 nisakson@mbay.net

17 Robert Holden
Monterey Regional Water Pollution Control Agency
18 5 Harris Court, Bldg.D
Monterey, CA 93940
19 bobh@mrwpca.com

20 ALJ Angela K. Minkin
California Public Utilities Commission
21 Division Of Administrative Law Judges
505 Van Ness Avenue, Room 5105
22 San Francisco, CA 94102-3214
ang@cpuc.ca.gov
23

24 Molly Erickson
Law Offices of Michael Stamp
479 Pacific Street, Suite One
25 Monterey, CA 93940
erickson@stamlaw.us
26

27 Glen Stransky
Hidden Hills Subunit Ratepayer Association
92 Saddle Road
28 Carmel Valley, CA 93924
glen.stransky@LosLaurelesHOA.com

MPWMD Service List

(May 28, 2010)

1 Robert G. Maclean
2 California American Water
3 1033 B Avenue, Suite 200
4 Coronado, CA 92118
5 robert.maclean@amwater.com

6 John Klein
7 California American Water
8 P.O. Box 951
9 Monterey, CA 93942
10 john.klein@amwater.com

11 Joyce Steingass
12 CPUC Water Branch
13 Room 4209
14 505 Van Ness Avenue
15 San Francisco, CA 94102
16 jws@cpuc.ca.gov

17 Mike Miller
18 Water and Sewer Advisory Branch
19 Area 3-C
20 505 Van Ness Avenue
21 San Francisco, CA 94102
22 mml@cpuc.ca.gov

23 Nihar Shah
24 CPUC Water Branch
25 Room 4209
26 505 Van Ness Avenue
27 San Francisco, CA 94102
28 nks@cpuc.ca.gov

Peter V. Allen
CPUC Water Branch
Room 5031
505 Van Ness Avenue
San Francisco, CA 94102
pva@cpuc.ca.gov

James M. Reilly
California-American Water
333 Hayes Street, No. 202
San Francisco, CA 94102
James.M.Reilly@amwater.com

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