



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

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In the Matter of the Application of California-American Water Company (U 210 W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.

A.12-04-019

(Filed April 23, 2012)

**MARINA COAST WATER DISTRICT'S  
PREHEARING CONFERENCE STATEMENT**

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Date: June 4, 2012

In accordance with Rule 7.2(a) of the Commission’s Rules of Practice and Procedure, and the “Administrative Law Judge’s Ruling Setting a Prehearing Conference and Inviting Prehearing Conference Statements” (the “PHC Ruling”) issued by Assigned Administrative Law Judge (“ALJ”) Gary Weatherford on May 11, 2012, Marina Coast Water District (“MCWD”) respectfully submits its Prehearing Conference (“PHC”) Statement herein.

The PHC Ruling asks that PHC Statements address the following topics: (1) Issues that should define the scope of the proceeding; (2) The value or not of holding a workshop for the parties; (3) The prospects, if any, for timely and productive settlement discussions, with or without facilitation/mediation; and (4) Comments on the Schedule proposed in the California-American Water Company Application at 26.

MCWD also addresses in this PHC Statement the Ruling issued by ALJ Weatherford on June 1, 2012, purporting to deny MCWD’s pending motion to dismiss the application herein.

**I. Issues that should define the scope of the proceeding**

**A. The June 1, 2012 Dismissal Ruling**

As noted above, on June 1, 2012, ALJ Weatherford issued a Ruling purporting to deny MCWD’s motion to dismiss the instant application (the “Dismissal Ruling”). The Dismissal Ruling is *ultra vires* – beyond the lawful authority possessed by Administrative Law Judges – for two distinct reasons and must be considered a nullity. A decision beyond the lawful authority of a decisionmaker is void. (*See Varian Medical Systems,*

*Inc. v. Delfino* (2005) 35 Cal.4th 180, 196 (“any judgment or order rendered by a court lacking subject matter jurisdiction is ‘void on its face’ [citation]”); *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287-88.) As will be discussed below, the Dismissal Ruling is *ultra vires* because an Assigned ALJ is neither authorized to rule on a motion that involves a final determination of a proceeding nor authorized to change Commission policy. Only the Commission can decide whether to grant a motion that involves the final determination of a proceeding and only the Commission can decide whether to change Commission policy.

First, MCWD’s motion to dismiss is a dispositive motion that seeks a final determination of the proceeding and is addressed to the Commission, not the Assigned ALJ. The Commission’s rules do not authorize an ALJ to make a decision involving the final determination of a proceeding. (Commission Rule 9.1.) Under Rule 9.1, Administrative Law Judges are not authorized to rule on motions that “involve final determination of proceedings.” (*Ibid.*) Only the five Commissioners, acting as the Commission, can determine whether or not a dispositive motion should be granted.

It could be argued that the language of Rule 9.1 is ambiguous, and that a ruling *denying* a dispositive motion does not “involve final determination of proceedings” because the proceeding for which dismissal is sought remains pending. However, that argument is unavailing. Rule 9.1 clearly addresses the nature of the motion, not the nature of the ruling on the motion. Allowing an Administrative Law Judge to deny a dispositive motion would deprive the moving party of a decision on the motion from the one decisionmaker authorized to make the decision. The denial of a dispositive motion is

in essence a determination not to grant the motion, and the decision whether or not to grant a dispositive motion plainly rests exclusively with the Commission. Moreover, to the extent any ambiguity may exist in the language of Rule 9.1, any delegation of the Commission's constitutional and statutory authority is strictly construed and must be clear and unmistakable. (See, e.g., *Louisiana Public Service Com. v. FCC* (1986) 476 U.S. 355, 379; *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, citing *State v. Brotherhood of R. R. Trainmen* (1951) 37 Cal.2d 412, 421-22 (intent to create or transfer powers must be "clear and unmistakable").)

Irrespective of Rule 9.1, it is highly unlikely that the California Constitution and the California Legislature, having vested the five Commissioners with the powers of the Commission, intended to authorize the Commission to delegate the authority to rule on a motion seeking a final determination of a proceeding to a single Commission employee. Certainly, there is nothing in the Constitution or Public Utilities Code that makes such intent clear and unmistakable. Notably, in the past, proposed decisions granting dispositive motions and alternate proposed decisions denying dispositive motions have been determined by Commission vote, and the determination has been a decision of the Commission. (See *Re Pacific Gas and Electric Company* (Cal. P.U.C. 2008) 2008 WL 4948590 ("D.08-11-007"), *Decision Granting Motion to Dismiss of Western Power Trading Forum* at \*1, \*10; *Application of Western Gas Resources-California, Inc., for a Certificate of Public Convenience and Necessity, etc.* (Cal. P.U.C. 1999) 1999 WL 1957792 ("D.99-11-023"), *Opinion Dismissing Without Prejudice Western Gas Resources-California, Inc.'s Application for a CPCN*, at \*1, \*16.)

The second reason why the Dismissal Ruling is void is that the Assigned ALJ may not change Commission policy. (Pub. Util. Code, §1708.) The Commission presently has in place a policy mandating that the Regional Desalination Project (“RDP”) is the Commission-authorized solution to the water supply deficit on the Monterey Peninsula and that the project is to be constructed “without delay.” (Commission Decision (“D.”) 10-12-016, pp. 32, 196.) That policy is established in D.10-12-016, a final, non-appealable Commission decision. All of the projects that may be considered in the instant application are, as an economic and practical matter, mutually exclusive with the RDP within the meaning of *Ashbacker Radio Corp. v. FCC* (1946) 326 U.S. 327, and its progeny. The Commission cannot properly move forward to consider these mutually exclusive proposals without clarifying the status of its current policy approving the RDP. Such clarification must come from the Commission, not an ALJ.

The argument could of course be made that there has been no change in Commission policy because D.10-12-016 will remain in force while the new proposed alternative projects are considered, but that argument would be disingenuous at best. The processing of the instant application makes the command of D.10-12-016 to construct the RDP “without delay” impossible. So long as mutually exclusive alternatives are being considered, the RDP cannot move forward, and thus the processing of this proceeding for months or years will delay and jeopardize, if not destroy entirely, the possibility that the RDP – which MCWD still believes is the only project that has a chance of meeting the State Water Resources Control Board’s (“SWRCB’s”) 2016 Cease-and-Desist Order (“CDO”) deadline – can be timely constructed.

Because the ALJ's denial of MCWD's motion to dismiss is *ultra vires*, the motion remains pending. Therefore, the Commission should clarify the status of the RDP either by granting the motion to dismiss or by declaring a Project Cessation, which would release the parties from their obligations and duties under the RDP Water Purchase Agreement ("WPA"). MCWD has consistently attempted to comply with D.10-12-016 and to perform its obligations under the WPA in good faith, and it is not fair to impose on MCWD a continuing obligation to perform if the Commission truly intends to move forward with a different project. As noted in MCWD's previous pleadings herein, MCWD has an obligation to ensure an adequate water supply for its own customers, and if the Commission is truly going to allow California-American Water Company ("Cal-Am") unilaterally to renounce the Commission-approved RDP, it must in fairness release MCWD from its obligations under the WPA by declaring a Project Cessation, at least as to MCWD, so that MCWD will be free to pursue other water supply projects that may be necessary to provide the 1700 AFY that would have been provided to MCWD, when needed, by the RDP. The Commission should dismiss the instant application as previously requested or declare that an RDP Project Cessation has occurred. That decision must be made by the Commission.

In the alternative, the Commission may wish to defer consideration of MCWD's still-pending motion to dismiss until conclusion of the requested briefing by the parties on legal issues concerning the feasibility of the project proposed in the application. If the Commission were to find after the legal briefing that Cal-Am's proposal is not feasible for one or more legal reasons, then the Commission would have an additional ground

upon which to dismiss the application. Unless the project Cal-Am now proposes is feasible on each and every one of the legal issues as to which the ALJ requested briefing, proceeding to entertain A.12-04-019 will clearly be a “fruitless” effort and a waste of Commission and party resources. (D.99-11-023 at \*15. *See also* D.08-11-004 at \*2, \*9.) However, if the Commission decides at this juncture to adopt as its own decision the *ultra vires* denial of MCWD’s motion to dismiss that was set forth in the Assigned ALJ’s Dismissal Ruling, MCWD is prepared to renew its motion to dismiss upon an expanded record following conclusion of the requested briefing.

**B. Preliminary Statement**

The only reason the Commission-approved RDP is not moving forward right now is that Cal-Am has decided, after giving the Commission its sworn testimony and commitment to the contrary, that it wants to own the entire project.<sup>1</sup>

Cal-Am’s wish is contrary to Commission policy articulated in a final Commission decision (D.10-12-016), to contractual obligations contained in agreements approved in that final decision, to the Monterey County policy prohibiting private ownership of desalination plants embodied in Monterey County Code section 10.72, to the preference of multiple Monterey County stakeholders that the County’s water supply be publicly owned, to the Public Trust Doctrine, to the interests of those who hold water

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<sup>1</sup> As noted in MCWD’s motion to dismiss, MCWD believes that if the Commission unequivocally instructed Cal-Am once again to implement the RDP (as it did in D.10-12-016) and to comply with the WPA, the RDP could and would go forward. Cal-Am would then have to inform American Water Works Corporation executives in New Jersey that despite its hard-fought attempt to gain ownership of the project, the Commission would not permit it. MCWD believes that Cal-Am would then return to its role as a cooperative partner in the project.

rights in the Salinas Valley Groundwater Basin (“SVGB”) (which Cal-Am does not), to the state law prohibition against the exportation of SVGB groundwater outside the basin (Monterey County Water Resources Agency Act, Water Code Appendix, chapter 52 (“Agency Act”), to the requirement of the California Environmental Quality Act, Public Resources Code section 21000, *et seq.* (“CEQA”) that the Commission review the “whole of a project,” and to a plethora of longstanding public and private agreements that would have to be unconstitutionally abrogated *ex post facto* if Cal-Am were to succeed in the project it proposes. The project Cal-Am proposes is likely to result in years, if not decades,<sup>2</sup> of court litigation with no likelihood that the project will ever succeed. The high probability is that the project would fail. Indeed, as demonstrated by MCWD in its Protest herein, even if it could lawfully be constructed, the Monterey Peninsula Water Supply Project (“MPWSP”) that Cal-Am proposes would cost Cal-Am ratepayers hundreds of millions of dollars more than the RDP and, at a minimum, would take several additional years to construct, resulting in a potentially tragic failure to meet the CDO deadline. This might be a good deal for Cal-Am’s New Jersey shareholder, American Water Works Corporation, but not for Cal-Am’s ratepayers and the citizens of Monterey County, whose economic future, health and safety Cal-Am’s proposal puts at risk. In addition, the processing of Cal-Am’s new application (A.12-04-019) will unnecessarily reopen the competition (now closed for some two years) between multiple

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<sup>2</sup> Beyond potential litigation concerning eminent domain and land acquisition, land use, the county ordinance prohibiting private ownership of desalination plants, the Agency Act and CEQA, some parties have suggested that a Cal-Am-owned project drawing groundwater from the SVGB would trigger a basin adjudication lawsuit that could easily last two or three decades or more.

competing and mutually-exclusive project alternatives. Some parties have already suggested that the Commission must consider two new alternatives, a so-called People's Desalination Project and a so-called Deepwater Desalination Project.<sup>3</sup> This would necessitate the Commission's preparation of the mother of all Environmental Impact Reports and the long and vigorously contested comparative hearing that would be required by the *Ashbacker* doctrine. (*Ashbacker Radio Corp. v. FCC, supra*, 326 U.S. 327.)

MCWD asks the Commission to assume a strong and decisive leadership role now. The Commission cannot simply commence a new environmental review and "process" this new application for the next many months or years without first making a decision as to whether it will (1) adhere to the policy it established in D.10-12-016 approving the RDP as the project alternative that best serves the public interest and requiring Cal-Am to implement that project "without delay," or (2) declare a Project Cessation of the RDP and proceed in this application to consider other alternatives in place of the RDP. Only the Commission – and certainly not a regulated utility like Cal-Am – is authorized to change the Commission's policy. (*See* Pub. Util. Code, §1708 ; *see also* Pub. Util. Code, §§1702, 2106-2114.)

On April 30, 2012, MCWD filed its motion to dismiss the application in order to provide the Commission with a vehicle for making that decision. There is strong

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<sup>3</sup> Because these projects propose to rely on direct ocean intake for desalination sourcewater, MCWD believes that community opposition would be strong and that the environmental review process would likely result in a finding that they are not feasible, as was the case with Cal-Am's original Moss Landing desalination project proposal in A.04-09-019.

precedent for the proposition that the Commission may choose not to reexamine its recently-articulated Commission policy and may dismiss an application that is inconsistent with such policy. (*Western Gas Resources-California, Inc.*, D.99-11-023 at \*15 (holding “the effort would be fruitless” if the Commission were to hear an application that did “not comport with the Commission’s policy” and dismissing the application). *See also* D.08-11-004 at \*9 (application that did not meet the criteria of the Commission’s policy was dismissed).)

The Commission – not an ALJ – needs to decide now whether it wishes to adhere to the policy it set forth in D.10-12-016 and proceed with the RDP, or turn its back on that policy and move forward with other alternatives such as the new variant of the rejected North Marina Alternative presented in the instant application. If it chooses the latter course, it should immediately declare an RDP Project Cessation within the meaning of Article 7.4 of the WPA in its decision on the motion to dismiss, enabling MCWD to recover its project-related costs in accordance with the Commission-approved WPA. This would also enable MCWD, having lost the 1700 AFY future water supply conferred upon it by the RDP, to protect its own ratepayers and pursue other water supply projects necessary to meet the needs of MCWD customers. The Commission should not move forward with the instant application without first ending the RDP, and it should do so in a manner that treats MCWD, the one party that has consistently defended and complied with the Commission’s policies, fairly.

### C. Relevant Background

Some fourteen years ago, the California Legislature, mindful of the longstanding and significant environmental degradation of the Carmel River and its steelhead habitat by Cal-Am and the decades of prior failed efforts to bring a lawful replacement water supply to the Monterey Peninsula, tasked this Commission with finding a solution. (*See* SWRCB Order WR 95-10; A.B 1182 (1998 stats., ch. 797).) In 2009, the SWRCB issued a CDO establishing a December 31, 2016 deadline for the replacement water supply, with potentially draconian impacts to the economy and health and safety of the Peninsula and the County if the deadline were not met. (SWRCB Order WR 2009-0060, pp. 57-58.)

From 1998 through 2010, the Commission conducted an array of complex, difficult and challenging proceedings, involving a large number of diverse stakeholders, culminating in its D.10-12-016 (Dec. 2, 2010), in which it approved the RDP, the RDP Settlement Agreement and the RDP WPA, rejected the Moss Landing, North Marina and No Action Alternatives as inferior to the RDP and “infeasible” to meet the CDO deadline, granted Cal-Am a Certificate of Public Convenience and Necessity (“CPCN”) to construct \$106 million of its own RDP-related facilities, and instructed Cal-Am and its RDP project partners to construct and operate the RDP “without delay.” (*See* D.10-12-016, pp. 32, 196.) D.10-12-016 is now a final, non-appealable Commission decision and constitutes the Commission’s existing policy on the Monterey Peninsula water supply issue.

The three RDP project partners are Cal-Am,<sup>4</sup> MCWD and the Monterey County Water Resources Agency (“MCWRA”).

Over the past months, MCWRA – the project partner with the smallest financial stake in the RDP – has repeatedly breached the WPA and impeded the progress of the project. It has done so, among other things, (1) by creating uncertainty as to the legal effect of its approval of the project because one of its Directors, Stephen Collins, is alleged to have engaged in a conflict of interest in violation of Government Code section 1090<sup>5</sup> by recommending that the MCWRA Board of Supervisors approve the project while having an alleged financial interest in such approval; (2) by failing to take the simple step of reapproving the project agreements in order to eliminate the alleged conflict of interest concern, (3) by failing to move forward with project financing and impeding the ability of MCWD to do so, where MCWD, unlike MCWRA, had timely presented a joint RDP financing plan to its Board, had made timely application for low-interest California State Water Resources Control Board State Revolving Fund (“SRF”) financing, and had made large project-related expenditures from its own reserves to defend the RDP and the Commission’s jurisdiction against the Ag Land Trust

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<sup>4</sup> The actual “utility” project partner is not Cal-Am but its ratepayers. Cal-Am has consistently taken the position that it will not risk one dime of the financial assets of its sole shareholder, American Water Works Corporation, on the RDP or any other project. MCWD is informed and believes and thereon states that American Water Works Corporation turned a profit last year of \$2.7 billion.

<sup>5</sup> Mr. Collins was criminally indicted, among other things, for possible violation of section 1090 and will presumably suffer whatever penalty and restitutionary requirements are appropriate. MCWD submits that is no reason for the desperately-needed RDP not to move forward. In the meantime, Mr. Collins has filed suit against the County and County Supervisors alleging defamation and other tortious conduct.

environmental litigation, (4) by failing to pay the invoices of its project manager and permitting consultant that would have facilitated the project moving forward, (5) by seeking to delay the California Coastal Commission's consideration of a Coastal Development Permit that would have authorized the drilling and operation of test wells, and (6) by publicly taking the position that the RDP contract agreements are void.

Cal-Am, at the apparent behest of its New Jersey parent, opportunistically sought to use MCWRA's conduct as a basis for "grabbing" the project (*i.e.*, jettisoning the RDP in favor of a variant of the rejected North Marina Alternative, which would be wholly owned by Cal-Am).

On April 23, 2012, Cal-Am filed the instant application, A.12-04-019. On April 30, 2012, MCWD filed its motion to dismiss A.12-04-019.

On May 11, 2012, Cal-Am filed a motion to deny MCWD party status, and requested that the Assigned ALJ vacate the due date for responding to MCWD's motion to dismiss.

On May 11, 2012, the Assigned ALJ issued the PHC Ruling, setting a PHC for June 6, 2012, inviting the submission of PHC Statements on June 4, 2012, and vacating the due date for responding to MCWD's motion to dismiss until the ALJ determined whether MCWD would be granted party status herein.

On May 25, 2012, MCWD filed its response to Cal-Am's motion to deny MCWD party status. On or about that same date, MCWD and other parties filed Protests to the application.

On June 1, 2012, the Assigned ALJ issued the Dismissal Ruling, granting MCWD party status, while purporting to deny MCWD's dispositive motion to dismiss the application, and requesting briefing of certain legal issues.

**D. Some of the issues that should define the scope of this proceeding.**

1. Whether the application should be dismissed because the Commission chooses not to reexamine recently-articulated Commission policy.<sup>6</sup>
2. Whether the application should be dismissed because the MPWSP proposed by Cal-Am is not feasible.
3. If the application is not dismissed, whether an RDP Project Cessation within the meaning of Article 7.4 of the WPA has occurred.
4. Whether the MPWSP proposed by Cal-Am is feasible.
5. Whether the MPWSP proposed by Cal-Am is contrary to Commission policy articulated in D.10-12-016.

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<sup>6</sup> If the Commission concludes the application should be dismissed, it should find that Cal-Am has failed to demonstrate any serious impediment to the RDP moving forward, that invalidation of the project agreements approved by the Commission is barred by the Validating Act, the Agency Act and the Public Utilities Code statutes of limitations, that the parties should continue to pursue efforts to overturn the Superior Court CEQA decision in *Ag Land Trust v. MCWD*, Monterey Superior Court Case No. M105019, that the parties should perform the project agreements in accordance with D.10-12-016 and the terms of the agreements, and that non-performing party MCWRA should assign its interest in the RDP and the RDP agreements to MCWD or another party able and willing to perform pursuant to Article 18.2 of the WPA, or face Commission legal action pursuant to *Henderson v. Oroville-Wyandotte Irr. Dist.* (1931) 213 Cal. 514, and *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174.

6. Whether the MPWSP proposed by Cal-Am is in violation of contractual obligations contained in agreements approved by the Commission in D.10-12-016.
7. Whether Cal-Am's breach of the RDP project agreements and violation of D.10-12-016, if any, should be punished with fines and penalties, and whether the cost of such fines and penalties should be borne by Cal-Am's shareholders.
8. Whether Cal-Am owns or may obtain a site for a desalination plant for the MPWSP, and where that site is or will be located.
9. Whether the MPWSP proposed by Cal-Am is contrary to the Monterey County policy prohibiting private ownership of desalination plants embodied in Monterey County Code section 10.72.
10. Whether the Commission may lawfully preempt the prohibition on private ownership of desalination plants embodied in Monterey County Code section 10.72 in the absence of a showing of necessity and that there is no alternative project that could achieve the same project purpose without preempting the ordinance.
11. Whether a non-binding Commission Legal Division advisory opinion contained in a letter from the General Counsel of the Commission offering a hypothetical view of the ability of the Commission to preempt

a county ordinance – and not contained in or resulting from an act, order or decision of the Commission – should be accorded any probative value or weight.

12. Whether if the Commission considers Cal-Am’s application to construct the MPWSP, it must conduct a comparative evidentiary hearing pursuant to *Ashbacker Radio Corp. v. FCC* (1946) 326 U.S 327, and its progeny, in which it considers the comparative merits of all competing, mutually exclusive alternative projects.
13. What are all of the competing, mutually exclusive alternative projects that must be considered – both in an environmental review of the application and in the CPCN determination – along with the MPWSP.
14. Whether the MPWSP proposed by Cal-Am is contrary to the Public Trust Doctrine.
15. Whether the MPWSP proposed by Cal-Am is contrary to community values.
16. Whether the MPWSP proposed by Cal-Am is contrary to the interests of those who hold water rights in the Salinas Valley Groundwater Basin (“SVGB”) (which Cal-Am does not).

17. Whether Cal-Am can obtain water rights sufficient to support the operation of the MPWSP, and if so, how, when and at what cost.
18. Whether, and to what extent, the MPWSP proposed by Cal-Am would adversely impact the level of saltwater intrusion in the SVGB.
19. Whether the approval of the MPWSP would instigate or necessitate a lawsuit to adjudicate the SVGB – a lawsuit that could easily take 20 or 30 years to conclude.
20. Whether the MPWSP’s exclusive reliance on slant wells (rather than vertical wells) is feasible and/or prudent, particularly in light of the slant well feasibility testimony of DRA’s experts from the U.S. Bureau of Reclamation in A.04-09-019.
21. Whether the MPWSP proposed by Cal-Am is contrary to the state law prohibition (Monterey County Water Resources Agency Act, Water Code Appendix, Chapter 52) against the exportation of SVGB groundwater from the basin.
22. Whether the MPWSP proposed by Cal-Am is contrary to the requirement of CEQA that the Commission review the “whole of a project.”

23. Whether the Commission's environmental review of the MPWSP proposed by Cal-Am must include a comprehensive review of MRWPCA's proposed Groundwater Replenishment ("GWR") component of the MPWSP.
24. Whether the Commission's environmental review of the MPWSP proposed by Cal-Am must include a comprehensive review of the proposed Aquifer Storage and Recovery ("ASR") component of the MPWSP.
25. Which agency will be the lead agency for purposes of environmental review of the project in accordance with CEQA.
26. Whether, in order to comply with CEQA, the Commission must prepare a new EIR rather than relying on the FEIR prepared in A.04-09-019 and a Supplement thereto.
27. What are the differences in the locations of the facilities for the prior North Marina alternative studied in A.04-09-019 and the MPWSP proposed by Cal-Am here, how will those locational changes for the MPWSP affect threatened species, sensitive habitats, and special areas committed to designated uses, and can any adverse environmental impacts be fully mitigated?

28. Will the Commission permit Cal-Am to access the project's wells through environmentally sensitive habitat and marine sanctuaries as proposed?
29. Will the California Coastal Commission permit Cal-Am to access the project's wells through environmentally sensitive habitat and marine sanctuaries as proposed?
30. Whether the proposed MPWSP will have significant, unavoidable and unmitigable impacts to the 11 special-status plant species identified within the Regional Desalination Project site during focused botanical surveys in 2009, 2010, 2011, including the Monterey Spineflower, the Sand Gilia, and the Coast Wallflower.
31. Whether the proposed MPWSP will have significant, unavoidable and unmitigable impacts to the 15 special-status terrestrial wildlife species known or with the potential to occur within the project site, including the California horned lark, Smith's blue butterfly, and the tiger salamander.
32. Whether the MPWSP can obtain a Coastal Development Permit from the California Coastal Commission for slant wells that will be located in sensitive habitat, will potentially impact threatened species, and are located within the 50-year erosion zone.

33. Whether the MPWSP can obtain a Coastal Development Permit from the California Coastal Commission for a desalination treatment plant that may be visible from Highway 1 and Del Monte Boulevard.
34. Whether the MPWSP can obtain appropriate permits from the City of Marina for production facilities that are proposed to be located in city areas with land use designations of open space and habitat preserve.
35. Whether the public agency participants in this proceeding may lawfully take positions favoring the MPWSP, MRWPCA's proposed GWR component of the MPWSP, the People's Desalination Project, the Deepwater Desalination Project, or any other project, or enter into a settlement of this proceeding, without relying on a certified Final EIR.
36. Are the environmental impacts of the MPWSP properly considered relevant factors in connection with the Commission's CPCN determination, and if so, how do they impact the Commission's CPCN public interest determination and how will they be considered in making that determination?
37. How will the MPWSP proposed by Cal-Am impact climate change?
38. Whether the MPWSP proposed by Cal-Am will adversely impact and/or impair the rights and obligations of the parties to MCWD's 1996 Annexation Agreement and Groundwater Mitigation Framework

between MCWD, MCWRA, RMC Lonestar (the predecessor-in-interest to CEMEX), the J.G, Armstrong Family and the City of Marina.

39. Whether the MPWSP proposed by Cal-Am will adversely impact and/or impair the rights and obligations of the parties to MCWD's Three-Way Memorandum of Understanding with MRWPCA and MCWRA.

40. Whether the MPWSP proposed by Cal-Am will adversely impact and/or impair the rights and obligations of the parties to MCWD's Outfall Agreement with MRWPCA.

41. Whether enabling the MPWSP proposed by Cal-Am to utilize the MRWPCA Outfall for brine disposal will necessitate an expansion of the Outfall and if so, how much will such expansion cost, how long will it take, and how will it affect other users of the Outfall?

42. Whether the MPWSP proposed by Cal-Am will adversely impact and/or impair the rights and obligations of the parties to other water supply agreements previously entered into by public agencies in Monterey County.

43. Whether a private company such as Cal-Am qualifies for California State Water Resources Control Board State Revolving Fund ("SRF") financing under current standards and requirements.

44. If California State Water Resources Control Board SRF financing is not available to Cal-Am, how will the project (including the ASR and GWR components) be financed, and on what terms.
45. Whether using an apples-to-apples comparison the MPWSP proposed by Cal-Am (including the proposed ASR component of the MPWSP and with and without MRWPCA's proposed GWR component of the MPWSP) will cost more than the RDP and/or other proposed project alternatives, and if so, how much more.
46. Whether the MPWSP will be unable to meet the SWRCB's CDO deadline, and if so, how much time beyond the deadline will be required to put the MPWSP into operation.
47. Whether if the MPWSP is certificated by the Commission, and Cal-Am fails to put the MPWSP into operation in time to meet the SWRCB's CDO deadline, Cal-Am's shareholders should be required to pay any fines and penalties incurred due to the failure to meet the deadline.
48. Whether if the MPWSP is certificated by the Commission, and Cal-Am fails to put the MPWSP into operation in time to meet the SWRCB's CDO deadline, Cal-Am's shareholders should be required to compensate Monterey County residents for the economic harms they suffer.

49. Whether and to what extent Cal-Am should be permitted to put the costs of the MPWSP into its rate base.
50. Whether and to what extent Cal-Am should be permitted to earn a return on equity for its MPWSP assets.
51. If the MPWSP is not certificated or constructed, whether Cal-Am should be permitted to recover from ratepayers its costs of this proceeding.
52. Whether Cal-Am should be required to reimburse any public agencies participating in this proceeding the costs of their participation, and, if so, whether that reimbursement cost should be borne by ratepayers or shareholders.
53. Whether MRWPCA's proposed GWR component of the MPWSP is feasible.
54. Whether MRWPCA's proposed GWR component of the MPWSP can be financed without the participation and financial support of districts and municipalities within the MRWPCA service area that choose not to support the GWR component and will not benefit from the project.
55. Whether the financing of MRWPCA's proposed GWR component of the MPWSP will be in compliance with Proposition 218.

56. Whether MRWPCA's proposed GWR component of the MPWSP can be financed and if so, how.
57. Whether MRWPCA possesses sufficient recycled water rights to operate the GWR component of the MPWSP, or if not, how can MRWPCA obtain such rights and at what cost and in what time frame.
58. Whether the GWR Memorandum of Understanding between Cal-Am and MRWPCA requires Cal-Am to utilize the GWR component in the MPWSP, and if not, whether Cal-Am actually intends to utilize the GWR component in the project.
59. Will Cal-Am ratepayers be required to reimburse MRWPCA the costs of developing the GWR component of the MPWSP if Cal-Am elects not to utilize that component in the MPWSP.
60. What will be the litigation and land acquisition costs of the MPWSP and how long will it take Cal-Am to resolve litigation and land acquisition issues in a manner that will permit the financing, construction and operation of the MPWSP.
61. Will the Commission place a cap on the litigation and land acquisition costs that Cal-Am may expend on the project.

62. Will the Commission place a cap on the total cost that Cal-Am may expend on the project.
63. What is the back-up plan if Cal-Am's litigation and land acquisition efforts are unsuccessful, or if other significant project impediments arise, rendering the MPWSP infeasible.
64. Whether the ASR component of the MPWSP will be capable of harvesting water each and every year of the project's operation, and how the ASR component will affect project cost.
65. What will be the impact on the Seaside Aquifer if both GWR and ASR as proposed for the MPWSP were implemented simultaneously.
66. As a practical matter, what degree of control of the MPWSP (and hence the Monterey Peninsula's water supply) would be held or exercised by American Water Works Corporation, a company that is not regulated by the Commission, or by other unregulated affiliates of Cal-Am.
67. What vendors, suppliers and contractors affiliated with Cal-Am and/or American Water Works Corporation will transact business with or related to the MPWSP and how will such affiliate transactions be monitored by the Commission.

68. What companies and/or entities will staff and operate the MPWSP desalination plant.

69. Whether it serves the public interest for regional resources that may be used ultimately to serve a broad area of northern Monterey County to be controlled by a private corporation and used to serve only a part of the region.

## **II. The value or not of holding a workshop for the parties**

MCWD takes no position on the value of a workshop, except to observe that it will be difficult to separate many of the technical issues from the legal and regulatory issues in this proceeding. MCWD believes that it might be beneficial to put off the schedule for any workshops until after the legal briefing requested by ALJ Weatherford in the Dismissal Ruling is completed. It is likely that those legal briefs will demonstrate that the MPWSP is legally infeasible, rendering further proceedings unnecessary.

## **III. The prospects, if any, for timely and productive settlement discussions, with or without facilitation/mediation**

MCWD devoted thousands of person-hours to settlement discussions, with and without facilitated mediation, in A.04-09-019, resulting in the Settlement Agreement that was approved by the Commission in its final decision in D.10-12-016. Rather than enforcing the Settlement Agreement and D.10-12-016, the Commission has so far allowed Cal-Am to breach the Settlement Agreement and to violate its obligations under D.10-12-016 with impunity. MCWD is therefore skeptical of the prospects for timely

and productive settlement discussions, with or without facilitation/mediation. MCWD believes that the parties will be better able to address the need for and means of negotiations, if any, after the Commission decides whether the proposed project is legally feasible. MCWD has concerns about whether a public agency may lawfully enter into a settlement agreement without relying on a certified Final EIR.

#### **IV. Comments on the Schedule proposed in the California-American Water Company Application at 26**

MCWD believes that the schedule proposed by Cal-Am is extremely unrealistic and can only be met if the Commission dispenses with any deliberative process and rubber-stamps the application. MCWD believes that the environmental review necessitated by this application would require at least 18 months to two years, and the conduct of a thorough examination and fair hearing of the CPCN issues, including a comparative evidentiary hearing of the relative merits of all competing alternatives, would take at least two to three years. A swift Commission decision on the feasibility of the proposed project following the briefing of legal issues requested by ALJ Weatherford would permit a more precise and useful evaluation of future scheduling requirements.

#### **V. Conclusion**

For all of the reasons stated, and on the grounds of conflict with existing Commission policy, the absence of any clearly-articulated justification for a change in Commission policy, and the fact that the project proposed by Cal-Am is infeasible as a matter of law and fact, MCWD urges the Commission to (1) consider and decide

MCWD's motion to dismiss the application, and (2) either grant the motion to dismiss or declare a Project Cessation of the RDP, at least as to MCWD, allowing MCWD to move forward with efforts to secure the water supply it will need for its own customers in the absence of the RDP. In the alternative, MCWD is prepared to renew its motion to dismiss following the Commission's prompt decision as to the legal feasibility of the MPWSP after the initial legal briefing requested by the Assigned ALJ.

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Respectfully submitted,

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