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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

City of Marina, et al.

Plaintiff(s)/Petitioner(s)

vs.

California Coastal Commission,

Defendant(s)/Respondent(s)

Case No.: 22CV004063

FINAL DECISION

Introduction:

The instant action is one in a series of challenges filed by the City of Marina ("City") and others to the proposed desalination plant of Real Party in Interest California-American Water Company ("Cal-Am") in Marina.[1] The project has a lengthy history, described by the Commission in detail. (See, e.g., Administrative Record ("AR") 2-4; 49-52.)

A glossary of terms, entities and abbreviations is attached as Appendix B to this Decision.

Cal-Am is a private, investor-owned company that supplies water for areas on and near the Monterey Peninsula, including the Cities of Monterey, Seaside, Sand City, Carmel-by-the-Sea, and Del Rey Oaks and nearby portions of Monterey County. (AR 48.)

[1] The other Petitioners in this case include: Monterey Peninsula Water Management District ("MPWMD"), Marina Coast Water District ("MCWD"), and Marina Coast Water District Groundwater Sustainability Agency ("MCWDGSA"). The Respondent in this matter is the California Coastal Commission ("Commission"). Petitioners MPMWD, MCWD and MCWDGSA filed their briefing jointly and unless specifically referenced individually will be referred to collectively as "Marina Water" for ease of reference (e.g., "Marina Water OB" for their opening brief). Petitioner City filed its briefing separately and will be referred to as "City," although it has joined in the arguments made by the Marina Water Petitioners. Collective references to all Petitioners will be to "Petitioners." References to "Respondents" collectively refer to the Commission and Cal-Am, who have filed their briefing jointly. The desalination plant project ("Project") is part of a larger Monterey Peninsula Water Supply Project ("MPWSP") directed at addressing longstanding water supply constraints in the region and provide an alternative water supply for Cal-Am to rely upon in lieu of its over withdrawal of water from the Carmel River, which the State Water Resources Control Board ("SWRCB") ordered to be stopped by December 2021. Other components of the MPWSP include a Pure Water recycling project and an aquifer storage and recovery ("ASR") project. (AR 2) Additional description of the MPWSP is at found in the administrative record at AR 41 and AR 50.

The desalination facility components lie within several local jurisdictions both within and outside of the coastal zone, including coastal zone areas within the Commission's retained jurisdiction and the certified Local Coastal Plan ("LCP") jurisdictions of Monterey County and the cities of Seaside and Marina. The approval of numerous agencies is required for the Project. Under the California Coastal Act, Public Resources Code sections 30000 et seq., such a development requires a Coastal Development Permit ("CDP"). (Pub. Res. C. § 30600(a).)

One of the many agencies whose approval is required is the Commission, for matters within its coastal zone jurisdiction.[2] Another agency whose approval is necessary for the Project is the California Public Utilities Commission ("CPUC"), which regulates the rates which Cal-Am may charge its customers. (AR 48.) Pursuant to provisions of the California Environmental Quality Act ("CEQA"), Public Resources Code sections 21000 et seq., the CPUC is the 'lead agency' for approval of the Project. The CPUC certified a FEIR/FEIS[3] for the facility in September 2018 and gave its approval to a CPCN for the Project. (AR 50.)[4] There was, at the time of the events here in question, at least one additional proceeding pending before the CPUC regarding projected water supply and demand.[5]

The proposed desalination facility involves wellheads installed on coastal land with source water pipes extending seaward, and a brine outfall which is also located on the coast and

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[2] See AR 3 (stating "[t]he proposed Project has a controversial history involving multiple agency reviews, spawning at least 10 lawsuits, including several against the California Public Utilities Commission .... The Commission is not the first agency to review whether the Project should be constructed, nor will it have the final say on the issue, as several other agencies are concurrently and independently reviewing the Project, including the CPUC and the State Water Resources Control Board. Some issues within the Commission's jurisdiction overlap with issues under consideration by other agencies, but the Commission's determination on those overlapping issues does not bind the other agencies (and vice-versa)."); see also, AR 12-13; AR 56-57; AR 10329.)

[3] "FEIR" is an abbreviation for a Final Environmental Impact Report. "FEIS" is a Final Environmental Impact Statement. FEIR is the title for a CEQA environmental study document, and FEIS is the title given the environmental study document under The National Environmental Policy Act. (AR 50.) The terms as used in this proceeding refer to the same document prepared by the CPUC and the Monterey Bay National Marine Sanctuary ("MBNMS") in connection with the CPUC's Certificate of Public Convenience and Necessity ("CPCN") proceeding and have been used more or less synonymously. (See AR 41.)

[4] Petitioners were parties to the CPUC proceeding. The CPUC determination was challenged by the City and MCWD unsuccessfully. (See *Marina Coast Water District v. County of Monterey* (2023) 96 Cal.App.5th 46, 59 (the Sixth District Court of Appeal's decision in that case sets forth the contentious history surrounding the desalination project.))

[5] CPUC proceeding A.21-11-024. (See AR 13, 48, 53-54.) The Commission noted many times that the CPUC will determine if there is a need for the desalination facility based on longer term water supply and demand estimates.

that will necessitate modification as it is an existing treated wastewater outfall owned and operated by another entity, Monterey One Water ("M1W").[6]

As noted, Project components lie within several jurisdictions both within and outside the coastal zone. (AR 52.) The well field at the former CEMEX sand mining site, portions of several water transmission pipelines and portions of an existing wastewater outfall that would be modified to handle brine effluent from the desalination process, lie within the jurisdiction of the City and its LCP[7], and other portions within the original jurisdiction of the Respondent Commission and the certified LCP jurisdictions of the City of Seaside and County of Monterey. Consequently, coastal development permits for the facility were required from each. The CDP application for the portions not within City's LCP jurisdiction was submitted to the Commission via a consolidated application. (AR 52, 57.)

The instant challenges arise from CDPs granted by the Respondent Commission, one of which was granted within the Commission's appellate jurisdiction (pursuant to Pub. Res. C. section 30603, and on appeal before the Commission from the City's denial of a CDP for the facility under its LCP), and the other granted within the original jurisdiction of the Commission.

The FEIR/FEIS of lead agency CPUC found that a 6.4 million gallon per day ("mgd") facility was environmentally preferable to a 4.8 mgd, based upon information before the CPUC at the time. In its 2018 decision, the CPUC approved the Project only as a 6.4 mgd facility, downsized from Cal-Am's originally proposed 9.6 mgd facility. (AR 50.)[8]

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[6] M1W, formerly known as the Monterey Regional Water Pollution Control Agency (AR 43), is a regional, public agency primarily involved with collection, conveyance and treatment of wastewater within its service area, which includes much of the region between Moss Landing to the north, Pacific Grove to the west, and Salinas to the east. The Commission stated that for purposes of its findings for the instant CDPs, one of M1W's important roles is its management of the Pure Water Project (discussed further below), which provides the foundation for the Pure Water Expansion which the Commission has identified as a near-term feasible alternative to Cal-Am's proposed project. (AR 48.)

[7] City's LCP was certified by the Commission pursuant to PRC 30510 et seq. and was thus delegated authority over coastal development within its jurisdiction, although its decisions are subject to appeals to the Commission. (Public Resources Code § 30519.) City's LCP consists of a Local Coastal Land Use Plan ("LCLUP") and a Local Coastal Program Implementation Plan ("LCPIP"). (AR 52.)

[8] The CPUC also imposed upon Cal-Am a requirement that it purchase water from the Pure Water Project, a water recycling and aquifer recovery and storage project being developed by two public water agencies, the Monterey Peninsula Regional Water District and M1W. The Pure Water Project was operating by the time of the Commission's approvals here and was providing approximately 3,500 acre-feet per year ("afy") to be used by Cal-Am or stored in the Seaside Basin aquifer for future use. The Pure Water Project also serves as the base project for the Pure Water *Expansion* Project, which was then under consideration by the CPUC as an additional water source for Cal-Am to use. (AR 50.) The Pure Water Expansion Project -- specifically, its then-unknown future supply capacity -- is the source of some of the contentions in this proceeding.

Cal-Am subsequently applied to the City for a CDP for those portions of the Project within the City's LCP jurisdiction. City denied the LCP.

Cal-Am also applied to the Commission initially for a CDP for a 6.4 mgd facility. This request was the subject of two prior scheduled hearings before the Commission, in 2019 and 2020. Based upon information presented to the Commission at the time, in 2020 Commission Staff recommended in their report[9] denying the CDP(s), because Staff had identified the Pure Water *Expansion* Project as a feasible alternative to the desalination Project. Real Party Cal-Am withdrew its CDP application following these recommendations. (AR 3.)

In November 2020, however, after City's LCP denial, Cal-Am revised and resubmitted its CDP application to the Commission that included both an appeal of the City's LCP denial and sought approval of the other components within the Commission's original jurisdiction.[10] Over the next two years, the Commission issued Notices of Incomplete Application seeking additional information about the Project in order for the application to be deemed completed. (See generally, AR 2952-6315.) The 2020 CDP application was eventually deemed complete on September 1, 2022. (AR 6316.)

On October 5, 2022, approximately one month prior to the Commission's hearing on the CDPs and issuance of the Staff Report, Cal-Am, by letter, proposed to downsize the facility in

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[9] The Commission is exempted from the requirement of preparing an EIR, pursuant to Pub. Res. C. section 21080.5 and *Ross v. Cal. Coastal Com.* (2011) 199 Cal.App.4th 900, 930-933, because its environmental program was certified by the State Secretary of Natural Resources and the Commission's environmental document "functions as the equivalent" of documents CEQA would otherwise require. However, the exemption set forth in section 21080.5 is not a blanket exemption from CEQA, and a certified regulatory program remains subject to the provisions of CEQA outside the exemption, including CEQA's broad policy goals and substantive standards. (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (2d ed Cal CEB 2024), § 21.11; see also, *City of Arcadia v. State Water Resources Control Bd.* (2005) 135 Cal.App.4th 1392, 1421-1422 (citing the same).) This includes the duties to identify a project's adverse environmental effects, to mitigate those effects through adoption of feasible alternatives or mitigation measures, and to justify its action based on specific economic social, or other conditions. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.App.4th 1215, 1229-1230.) These substantive requirements for an environmental review and documentation by a responsible agency under CEQA also apparently apply to the Commission in its role as a responsible agency.

[10] The revised application also proposed extending the saltwater intakes for the plant 1,000 feet seaward. The source of the water for the desalination intakes and the potential effects of the seawater intake draws on other water sources is a hotly contested issue and pending before this Court in *City of Marina v. RMC Lonestar et al.* 20CV001387, which the Commission recognized (AR 7, 13, 55-56, 84, 88). In that action, this Court referred questions regarding same to the State Water Resources Control Board in October 2021 and has been advised that a final referee's report will be forthcoming shortly. That case will be tried in November 2025. Conclusion of that action with a specified outcome is also one of the many conditions imposed as a Special Condition before the instant CDPs will be issued. AR 13, Special Condition 1.)

which only a 4.8 mgd would be initially approved ("Phase 1")[11] with a potential second phase to a full-scale 6.4 mgd operation ("Phase 2"). (AR 171-172.) Phase 2 would not be approved unless and until Phase 1 had operated for a period of time with data collected from mandated monitoring of various environmental effects during Phase 1 and a further CDP application to the Commission. (AR 14, 171-172.)

It is noted that the November 2020 CDP application (which was before the Commission in 2022), presented additional new information which was evaluated by the Commission. This included new predictions regarding sea rise and erosion, and regarding both near-term and long-term water supply and demand.

The Commission Staff's 157-page 2022 Report (AR 32154-32310) evaluated the Project's potential impacts to Coastal Resources and proposed imposing 20 Special Conditions to minimize impacts on coastal resources. (AR 12-40.) Staff concluded that the Project would be inconsistent with the Marina LCP provisions prohibiting certain development in Environmentally Sensitive Habitat Areas ("ESHA") but explained that, with appropriate findings, the Commission could, in its discretion, approve the Project nonetheless pursuant to Public Resources Code section 30260. The Staff Report recommended finding that the requirements for an exception under Section 30260 were met and approving the Project.

The Staff Report was posted and circulated on November 4, 2022. It generated a significant public response. On November 14, 2022, Commission Staff released a 32-page addendum which included additional analysis, modified certain findings and Special Conditions, and responded to public comments received (AR 38385-38616) at the hearing which followed. Notice of the hearing and other documents were provided in English and Spanish by the Commission, and Cal-Am provided Spanish translation and interpretation available as well to anyone attending remotely by Zoom. (AR 40364-40367, 32459-32460, 32461-32466, 112.)

After a lengthy hearing which commenced at 8:30 a.m. and concluded over thirteen hours later at 10:09 p.m. (AR 40822, 40894) on November 17, 2022, the Commission heard from Cal-Am, Petitioners' representatives, other agencies and organizations and numerous individuals who commented in-person or remotely (AR 40745-40815). Ultimately, because of time constraints, the Commission asked for a show of hands for and against the Project (AR 41205-41206), and after three hours of deliberation (AR 41218, 41394), Commission approved both CDPs. It imposed, with some modification, the numerous conditions recommended by the Staff Report that would need to be fulfilled before the CDPs would actually issue. (AR 41390-41394.)

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[11] Additional changes in the downsized proposal from Cal-Am included fewer well pads and wells, shorter access road, a smaller footprint for the facility, and reduced pumping during the first phase with hydrogeologic monitoring in the first phase. (AR 42.)

The 2020 CDP application, appeal and approval did not include modifications to the existing outfall then currently owned and operated by M1W under an existing CDP.[12] However, one of the numerous conditions imposed by the Commission prior to CDP issuance is an application for and approval of modification of the outfall necessary for the desalination project.

This action was filed on December 29, 2022 by City, MPWMD[13], MCWD[14], and MCWDGSA,[15] naming the Commission as Respondent and Cal-Am as Real Party in Interest. The Petition initially involved four causes of action: (1) Violation of the California Coastal Act and Public Trust Doctrine; (2) Violation of CEQA; (3) Fair Hearing Violation/ Violation of Due Process; and (4) Declaratory Relief Under the Coastal Act and CEQA for Pattern and Practice: Failure to Provide a Reasonable Public Review Period or Respond to Comments for Staff Reports that Function as EIR-Equivalent Documents.

On April 24, 2024 this Court ruled, on a Motion for Summary Adjudication of the Fourth Cause of Action for Fair Hearing Violation/Violation of Due Process, that the Commission was not obligated to follow and did not violate the notice timeline to distribute Staff Reports or written comment provisions of Public Resources Code section 21091 (a) and (d).

Accordingly, the remaining three causes of action for trial, and addressed in this ruling, are: (1) Violation of the California Coastal Act and Public Trust Doctrine; (2) Violation of CEQA; and (3) Fair Hearing Violation/ Violation of Due Process. The parties' briefing does not address the challenges by causes of action, but by issues, which rely significantly upon facts common to each of the remaining causes of action. The relief sought is administrative mandamus under CCP 1094.5 and injunctive relief.

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[12] The outfall was also constructed by the MPWPCA, now known as M1W. (AR 51.)

[13] Petitioner MPWMD is a special water management district created by the legislature in 1977 and approved by the voters in 1978 to manage the Monterey Peninsula's water resources. (AR 8398, 40709; see also, *Monterey Peninsula Water Management Dist. v. Public Utilities Comm.* (2016) 62 Cal.4th 693, 695.) One of its important functions is to assist Cal-Am in developing a legal water supply. (AR 48.)

[14] Petitioner MCWD is a municipal water district that provides water service to over 37,000 residential and commercial customers in the Cities of Marina, Seaside, Del Rey Oaks, and Monterey, and throughout the former Fort Ord Army Base and East Garrison communities. (AR 37695, 40681, 12555, 12827.)

[15] Petitioner MCWDGSA is a groundwater sustainability agency charged with implementing the Sustainable Groundwater Management Act ("SGMA") within a portion of the Monterey Subbasin. (Water Code §§ 10720, 10721, subd. (j).) However, the County of Monterey is the GSA for the CEMEX area where the Project wellsite is to be located. (*Marina Coast Water District v. County of Monterey* (2023) 97 Cal.App.5th 17.)

Discussion and Ruling

I. Appellate jurisdiction.

Standard of Review

The Court reviews appellate jurisdiction of the Commission as a question of law. When jurisdictional issues involve the interpretation of the Coastal Act, specifically, an issue of whether the Commission acted in excess of the authority conferred upon it by statute, the issue is a question of law reviewed by the Court de novo; the Court does not defer to the agency's determination when deciding whether an agency's action was within the scope of the authority delegated to it by the Legislature. (*Burke v. Cal. Coastal Comm.* (2008) 168 Cal.App.4th 1098, 1106.)

Petitioners' contention that the Commission lacked appellate jurisdiction for its action.

Petitioners MPWMD, MCWD and MCWDGSA, and the City (incorporated by reference), contend that the Commission exceeded its appellate jurisdiction[16] by granting Cal-Am's appeal and approving the Project based upon California Public Resource Code ("PRC") section 30260, the "Industrial Override" section of the Coastal Act. PRC section 30260, as discussed in further detail below, allows for construction of coastal-dependent industrial facilities, in the discretion of the Commission if it finds that certain specified criteria are met, even though the facility might not be consistent with other policies of the Coastal Act, PRC sections 30000 et seq.

Statutory provisions relevant to the appellate jurisdictional challenge.

What can be appealed to the Commission. PRC section 30603, subd. (a) provides that an appeal may be taken from action of a local government on a coastal development permit application for only certain types of developments. One such type of development for which an appeal is permitted is "[a]ny development which constitutes a major public works project ...." (PRC §30603(a)(5).)

PRC section 30603, subd. (b)(2) goes on to state that "[t]he grounds for an appeal pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division."

[16] Many of the arguments Petitioner MCWD makes here are the same as those unsuccessfully advanced by it in the earlier litigation over the test slant well project for this desalination plant in *Marina Coast Water District v. California Coastal Commission*, Santa Cruz County Super. Case No. CV180839.

The Commission's powers on appeal. At the time of the Commission's decision[17], PRC section 30260, the "Industrial Override" provision in the Coastal Act, provided as follows:

> "**30260. Location or expansion.** Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261[18] and 30262[19] if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible."

Petitioners' appellate jurisdiction argument is essentially three-pronged: (1) that under PRC section 30603(b)(2) the Commission has very limited jurisdiction for this appeal and lacked the power to apply section 30260 on appeal; (2) that there was insufficient factual basis in the record for the Commission to make the findings justifying an industrial override under section 30260; and (3) that the only way for Cal-Am to have proceeded before the City here was to apply for a modification of its LCP pursuant to PRC section 30515.[20] None of these contentions survives analysis.

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[17] The section was subsequently revised in 2023.

[18] Section 30261, not in issue here, provides: "Tanker facilities; use and design" states that "Multicompany use of existing and new tanker facilities shall be encouraged to the maximum extent feasible and legally permissible, except where to do so would result in increased tanker operations and associated onshore development incompatible with the land use and environmental goals for the area. New tanker terminals outside of existing terminal areas shall be situated as to avoid risk to environmentally sensitive areas and shall use a monobuoy system, unless an alternate type of system can be shown to be environmentally preferable for a specific site. Tanker facilities shall be designed to (1) minimize the total volume of oil spilled, (2) minimize the risk of collision from movement of other vessels, (3) have ready access to the most effective feasible containment and recovery equipment for oilspills, and (4) have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required."

[19] Section 30262, also not in issue here, provides: "Oil and gas development," provides, in relevant part, that "(a) New or expanded oil and gas development shall not be considered a coastal-dependent industrial facility for the purposes of Section 30260 and may be permitted only if found to be consistent with all applicable provisions of this division and if all of the following conditions are met: [sets forth conditions]."

[20] PRC Section 30515 allows "[a]ny person authorized to undertake a public works project…may request any local government to amend its certified local coastal program, if the purposes of the proposed amendment is to meet public needs of an area greater than that included within such certified local coastal program that had not been anticipated by the person making the request that the time the local coastal program was before the commission for certification."

a.) Existence of jurisdiction: The Commission properly found the issue of conformity of the Project with the City's LCP raised a substantial issue within its appellate jurisdiction.

There is no serious dispute that the Project is the type of development for which an appeal is permitted as a " ...development which constitutes a major public works project ... ." (PRC §30603(a)(5).)

As noted above, PRC section 30603 (b)(2) states that "[t]he grounds for an appeal pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division."

Cal-Am asserted before the Commission that the proposed Project is in conformity with City's LCP, notwithstanding City's position to the contrary. Coastal Act, PRC Section 30625, requires the Commission to hear an appeal unless it determines that no substantial issue is raised by the appeal. (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 848.) Title 14 of the California Code of Regulations ("14 CCR") section 13115 defines a substantial issue as one that presents a significant question as to conformity with the certified local coastal program. (*Hines, supra,* 186 Cal.App.4th at p.848.) A court reviewing the Commission's determination whether a substantial issue is raised grants broad deference to the Commission's interpretation of the local program. (*Ibid.*) The Commission here weighed and considered the requisite factors for making a determination whether a substantial issue was raised by the appeal (AR 6337-6346: see also 14 CCR § 13115, subd. (c).), and found that the appeal raised a substantial issue regarding conformity with the LCP and with Coastal Act public access. Petitioners have not shown it abused its discretion in doing so.

b.) The Commission properly found that City's LCP included PRC section 30260.

Petitioners contend that Pub Res C section 30603(b)(2) does not contemplate an appeal on grounds that the development conforms to the City's certified LCP by virtue of a PRC section 30260 "industrial override" because the City's LCP does not contain such a corresponding provision mirroring the language of section 30260. They are incorrect.

First, the LCP contains express references that *it is consistent with* section 30260. (AR 8964, 8968). Specifically, under the LCP's "Land Use Description by Planning Area," for the "North of Reservation Road Planning Area" (where the proposed Project will be situated), the LCP states:

> "The Coastal Conservation and Development Designation for this area is consistent with Coastal Act policies: ... 30260 (Coastal-Dependent Industries)."

(AR 8964.) This same subsection of the LCP further states that:

"Priority for public acquisition along the continuation of the existing land use and future Coastal Conservation and Development land use designation are consistent with Coastal Act policies: … 30260 (Coastal-Dependent Industries)."

(AR 8968.)

Section 30260 only deals with permitting coastal-dependent industrial facilities, including those which "… cannot feasibly be accommodated consistent with other policies of this division, …." Petitioners have provided no rational explanation how the City's LCP could be consistent with, and explicitly reference, section 30260 and at the same time preclude application of Section 30260 under the LCP.

Second, at oral argument, Petitioners suggested that the City's LCP indicates that it is consistent with only the first portion of Section 30260 that "coastal-dependent industrial facilities" should be encouraged to locate or expand and be permitted long term growth within existing sites; but that the City's LCP did not explicitly adopt the industrial override portion of Section 30260. There is no indication in the LCP, however, that this was the City's intent when it referenced Section 30260 in the LCP.

The *current* version of Section 30260 contains two subsections, (a) and (b), where subsection (a) contains the provision encouraging coastal dependent industrial facilities to locate or expand on existing sites; and subsection (b) contains the industrial override provision. However, at the time the LCP was adopted in 1982, Section 30260 contained no subsections. Subsections (a) and (b) were added when the statute was amended in 2023. Therefore, the Court is not persuaded that the City only intended to acknowledge consistency with a portion of Section 30260 and not the statute in its entirety, including the industrial override provision.

Furthermore, when the Project was before the City, the City Planning Department specifically found that the City had authority to approve the development pursuant to section 30260. (AR 800. City Planning Department Finding 5-1 (stating "the Planning Commission makes the finding that Section 30260 will be applied so that it can make a full assessment of the Project and whether application of this section should authorize approval of the Project. Since the City has a certified LCP, it has full authority to make the determination of whether the Project should be authorized pursuant to Section 30260."))[21]

At oral argument, Petitioners argued that the City Planning Commission did not decide whether or not the 30260 override was applicable to the City's LCP. This appears, however, to

[21] Oddly, the City concluded that the Project did not meet the criteria of Section 30260 because the Project was not a coastal-dependent industrial facility. (AR 802). Petitioners did not appear to pursue this bizarre proposition in briefing or at oral argument. While it does not appear the LCP or the Coastal Act defines what constitutes a "coastal-dependent industrial facility," PRC section 30101 broadly defines a coastal-dependent development or use as any development or use which requires a site on or adjacent to, the sea to be able to function at all. Similarly, Section 30101.3 of the Coastal Act defines "Coastal-related development" as "any use that is dependent on a coastal-dependent development or use."

contradict the Planning Commission's plain finding that "[s]ince the City has a certified LCP, it has full authority to make the determination of whether the Project should be authorized pursuant to Section 30260." (AR 800.) Petitioners have not explained or provided a rationale for why the section would no longer apply to the City.

Third, LCLUP Policy 41 under the City's LCP is to "give priority to coastal-dependent development on or near the shoreline." (AR 59). This policy aligns with the clear language of Section 30260 which states "[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division...[and] where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless permitted in accordance with this section...if all of the following conditions are met...."

Petitioners have argued that Policy 41 only applies to "coastal-dependent development" and does not refer to a Section 30260 "coastal dependent *industrial* facility." Petitioners, however, provide no support for this contention.

In addition, as recognized by the Commission, under the LCP, the Project components are designated as "Coastal Conservation and Development" which prioritizes coastal-dependent industrial uses. (AR 158.) Similarly, other provisions of the LCP contemplate and favor coastal dependent development. (See for example, *LCLUP Geotechnical Policies, Policy 1 (first bullet)*(stating "[s]tructural development shall not be allowed on the ocean-side of the dunes, in the area subject to wave erosion in the next 50 years, or in the tsunami run-up zone. The only exception to this would be essential support facilities to a coastally dependent industry...."); *LCLUP Coastal Conservation and Development Uses, Policy 2 (first bullet)* (stating "Coastal Conservation and Development uses shall be allowed on the west side of Dunes Drive. These activities shall include, but not be limited to, marine agriculture (Mariculture); off-shore and surf-zone sand mining, and other commercial activities dependent for economic survival on proximity to the ocean, salt water or other elements only available in this particular environment. Coastal dependent development in this area will be allowed in already disturbed areas...."); *LCLUP* at p. 41 (describing uses allowed in areas designated as Coastal Conservation and Development as uses that are "dependent upon salt water, the unique coastal-marine environment found in Marina, and/or on resources present only in this portion of Marina's Coastal Zone.").) (AR 158-159.)

Finally, the Commission has interpreted the City's LCP as incorporating section 30260 (AR 9, 143.) The Commission also concluded that the Project is a "coastal dependent industrial facility." (AR 9, 80, 159.) "Under the Coastal Act's legislative scheme, ...the LCP and development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law but embody state policy. The Coastal Commission's primary policy is the implementation of the Coastal Act. It is designated the state coastal zone planning and management agency for any and all purposes. ([PRC] §30330) Local government prepares the LCP. ([PRC] §30500, subd. (a).) But the LCP must be submitted for the Coastal Commission's

approval. ([PRC] § 30512, subd. (a).) The Coastal Commission may certify the LCP only if it meets the requirements of and is in conformity with the policies of the Coastal Act. ([PRC] §30512, subd. (c).)". (*Charles A. Pratt Const. Co. v. California Coastal Com.* (2008) 162 Cal. App. 4th 1068, 1075.)

The Court grants broad deference to the Commission's interpretation of an LCP and will not depart from the Commission's interpretation of an LCP unless it is clearly erroneous. (*Hines, supra,* 186 Cal.App.4th at p. 849.)

It thus clearly appears to the Court that the City's LCP incorporates PRC section 30260. Petitioners' claims that the only recourse available here to obtain approval was for Cal-Am to seek modification of the LCP under section 30515 is contrary to the City's LCP and not meritorious. A request to amend the LCP in order to proceed with the instant Project was unnecessary, since, under the existing LCP, there was ability to pursue Project approval pursuant to PRC section 30260.[22]

Consequently, Cal-Am's appeal of the LCP permit denial on grounds the Project was consistent with the standards set forth in the certified LCP – which included PRC section 30260 – was certainly sufficient to place the issue of PRC 30260 applicability before the Commission on appeal.[23]

c.) Finding inconsistency with the LCP did not deprive the Commission of jurisdiction; such a finding is simply a threshold for applicability of the PRC section 30260 "Industrial Override."

Petitioners also argue that the Commission found the Project inconsistent with the habitat protection policies of the City's LCP, citing AR 80, and that therefore it could not exercise appellate jurisdiction because PRC section 30603 subd. (b)(2) limits appellate grounds to an

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[22] Petitioners' reliance on the decision in *City of Malibu v. California Coastal Com.* (2012) 206 Cal.App.4th (*Malibu*) for a contrary conclusion is misplaced, since that decision is distinguishable. The issue in *Malibu* was whether the Coastal Commission had acted in excess of its jurisdiction when it approved *amendments to a city's certified LCP.* (*Id* at p. 552.) The appellate court determined that under section 30515, the Coastal Commission may override a city's decision not to amend its LCP only where the amendment is sought for "the development of a public works project or energy facility that would meet the public needs of an area greater than that encompassed in the local coastal program that were not anticipated when the LCP was certified." (*Malibu, supra*, 206 Cal.App.4th at p. 564.) Since an LCP amendment is not at issue in this case, the decision in *Malibu* is inapplicable: the instant case does not involve "...*changes to* a local government's land use policies and standards", but the interpretation and application of those standards. (*id.* at p. 556 (emphasis added).)

[23] At the other extreme, the Commission has taken the position that since an appeal from denial of a local CDP is reviewed *de novo* by the Commission pursuant to PRC section 30621, so long as an appeal contains an allegation that the Project is consistent with the certified local coastal plan, *any* grounds may be considered by the Commission on appeal from action on an LCP permit. The Court believes this misconstrues the meaning and scope of a '*de novo*' review and would nullify the jurisdiction-limiting language of section 30603(b)(2). In any event, it is not necessary to go so far in finding appellate jurisdiction present here.

allegation that the project conforms to the certified LCP policies. It is true the Commission found the Project inconsistent with the LCP habitat protection policies of the LCP. And it is also true that the Commission found the Project as proposed did not conform to the Coastal Act's ESHA policies, either. But that is not everything the Commission stated on this topic. The paragraph which followed states:

> "However, because the Project is considered a coastal-dependent industrial facility, the Commission has the discretion to apply the three tests of Coastal Act [PRC] section 30260 and approve the Project notwithstanding its inconsistencies with Coastal Act and LCP provisions."

(AR 80).

Likewise, as noted by the Commission again in its discussion and findings regarding the Industrial Override provisions of PRC 30260,

> "**Analysis** As evaluated in Section IV.E, the Commission finds that the Project is fundamentally inconsistent with (i.e., is inconsistent and could not be brought into consistency through mitigation measures) Coastal Act and/or LCP policies regarding environmentally sensitive habitat areas. Nonetheless, Coastal Act section 30260 allows the Commission to approve a coastal-dependent industrial facility that is otherwise inconsistent with one or more policies of the Coastal Act's Chapter 3."

(AR 159).

This interpretation by the Commission is entitled to deference, *Hines*, *supra*, but even standing by itself the plain language of the statute vests discretionary authority in the Commission to apply section 30260. (See also, *Gualala Festivals Committee v. Cal. Coastal Com.* (2010) 183 Cal.App.4th 60, 66 (noting that the Commission is owed deference in its interpretation of Coastal Act); *Alberstone v. Cal. Coastal Com.* (2008) 169 Cal.App.4th 859, 863-864 (stating that the Commission is owed "broad deference" in its interpretation of a document it has prepared.))

As noted above, the City deemed its LCP here to be consistent with PRC section 30260, and the Planning Commission analyzed whether the present Project complied with Section 30260. The clear language of PRC 30260 is to allow development of coastal-dependent industrial facilities which would *otherwise* be inconsistent with other policies of the Coastal Act. By virtue of PRC section 30260, a Project of this nature can be approved consistent with the Coastal Act even though it is not consistent with other policies of the Coastal Act. Petitioners' argument - that if a coastal-dependent industrial facility is inconsistent with any provision of an LCP, the latter provision trumps section 30260 – would render section 30260 meaningless. Any interpretation of a statute that would lead to absurd results is to be avoided. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.)

The Coastal Commission's interpretation of the City's LCP is consistent with the Commission's obligation to ensure that "... the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794.)

Finally, with respect to Petitioner City's claim of failure to comply with public coastal access mandates of PRC section 30310 et seq., (City OB at pp. 44-45), the Commission did also find compliance with the public access policies set forth in the Coastal Act and discussed them at AR 136-140. In accordance with Public Resources Code section 30604(c), the Commission found "that the development as conditioned will be in conformity with the Certified Local Coastal Plan and the public access and recreation policies of Chapter 3 of the Coastal Act." (AR 11) The Commission's analysis evaluated the effects of the Project on public access during construction as well during Project operations. (AR 136-140.) It noted that "... Cal-Am has offered to provide $3 million to fund public access amenities, as described ... above and as addressed by **Special Condition 17**", and found that those amenities "...are expected to enhance public access in the area." (AR 139)

Special Condition 17 (at AR 37-38) mandates Community Engagement and Public Access Plans prior to issuance of the CDP and imposes among other requirements the $3 million funding "...for improving public access, public facilities, recreational opportunities, and restoration within the City of Marina ...." The Commission concluded that the Project would have temporary adverse impacts to public access and recreation during construction as well as some modest long-term loss but that the Project was likely to reduce nearby access limitations in a manner consistent with the public access and recreation provisions of the Coastal Act and LCP. (AR 139-140.) Petitioner has failed to show that this finding, discussed further under the environmental justice category below, was unsupported by substantial evidence.

For the foregoing reasons, the Court finds that the Commission did not lack appellate jurisdiction in considering Cal-Am's appeal from the City's denial of its application for a coastal development permit.

d.) Exhaustion of Administrative Remedies as to Petitioners' PRC 30260 challenge.

The Commission and Cal-Am argue that Petitioners failed to exhaust their administrative remedies on whether a Section 30260 "industrial override" may be granted on a CDP on appeal. (Opp. at 33:6-7.) (*See Walter H. Leimert Co. v. Calif. Coastal Com.* (1983) 149 Cal.App.3d 222, 232 (recognizing that the doctrine of administrative exhaustion applies to review of coastal commission actions).)

In response, Petitioners emphasize that they raised these arguments before the Commission in letters to the Commission and, therefore, exhausted their administrative remedies. (Marina Water Reply at 13:23-25, citing to AR 1897-1900; 6645-6646; 53193-53195; 33729 (fn. 4 incorporating prior comments).)

The Administrative Record reflects that this issue was raised before the Commission prior to the close of the public hearing. (AR 1897-1900; 6645-6646; 53193-53195; 33729 (fn. 4 incorporating prior comments).)

Petitioners have shown that they exhausted their administrative remedies on this point.

e.) The Commission Has Power to Impose Conditions on Appeal.

Petitioners have argued in various ways that the Commission lacked the power to impose conditions on appeal. That position is clearly incorrect. As noted by the court in *Lindstrom v. Calif. Coastal Com.* (2019) 40 Cal.App.5th 73, 100-101, "... the Coastal Act provides that '[a]ny permit that is issued or any development or action *approved on appeal*, pursuant to this chapter, shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division.' (Pub. R. Code § 30607, italics added.)" Petitioners have presented no authority to the effect that such statutory power is denied where the Commission imposes conditions when reversing a local authority's decision to deny a permit.

f.) Substantial evidence supports the Commission's finding that the Project qualified for the industrial override provisions of section 30260.

Petitioners' contentions.

Petitioners contend that the Commission prejudicially abused its discretion under the Coastal Act in finding that alternative locations are infeasible or more environmentally damaging, because the Commission, Petitioners assert, "fail[ed] to independently assess all the information in the record and impermissibly deferr[ed] the actual feasibility of alternatives to a future decision by the CPUC." (Marina Water OB at 40:17-19.) They further claim that there was no substantial evidence to support the Commission's findings that the Pure Water Monterey Project was not a feasible long-term water supply.

Petitioners have made a variety of arguments regarding the Commission's findings under PRC section 30260. The arguments, inadvertently or otherwise, wander between and conflate the statutory requirements of PRC section 30260 and CEQA. They also misstate the requirements of a responsible agency under CEQA.

Petitioners argue "the Commission prejudicially abused its discretion in approving the CDPs under section 30260 because the Staff Report and the Commission's Findings do not comply with the Coastal Act and CEQA." (Marina Water OB[24] 40:8-10.) They also argue that the "...Commission prejudicially abused its discretion under the Coastal Act and CEQA in

[24] Monterey Peninsula Water Management District's, Marina Coast Water District's and Marina Coast Water District Groundwater Sustainability Agency's Joint Opening Brief ("Marina Water OB").

finding that Cal-Am's modified Project alternative met each of Section 30260's rigorous criteria." (*Id.* at 40:11-12).

For starters, PRC section 30260 is a Coastal Act provision (PRC 30000 et seq.), not a CEQA provision (PRC 21000 et seq.).

Petitioners have pointed to no evidence in the record regarding alternative locations, but rather cross over into an argument that there was 'significant new information' in the record regarding feasible alternatives to the Project – not locations for it – since " ... significant new information that was not available to the CPUC demonstrated that the PWM Expansion – which the CPUC previously found to be infeasible – would, in fact, be a feasible alternative because it would reduce, if not eliminate, most of the MPWSP's significant effects." (Marina Water OB 41:16-19, citing AR 143, 144, 145-147, 150.). This half-complete statement of the Commission's findings is highly misleading. The Commission did find, after extensive discussion, that the PWM Expansion was a feasible for *near-term* water supply *but not for long-term* use, particularly in the absence of any actual track record of any actual production output by PWM:

> "The alternatives analysis in Section IV.O of these Findings describes a feasible and less environmentally damaging alternative to the Project that will provide the needed water supply in the near term. However, as described in the Commission's alternative analysis, the Pure Water Expansion Project is likely not adequate to meet supply needs in the longer term. Although there is uncertainty about when water from Cal-Am's Project would be needed and how much would be needed, it is reasonable to expect a need beyond what the Pure Water Expansion would provide at some point within the next twenty years approximately. The uncertainties about when and how much water is needed are addressed through **Special Condition 1**, which acknowledges that the CPUC, which is conducting a proceeding addressing the need for the Project and longer-term supply and demand estimates (through 2050), will be making the necessary determination in the near future. Thus, the Commission finds the proposed Cal-Am project meets the first test of Section 30260."

(AR 162.)

The duties of the Commission as a responsible agency *under CEQA* regarding new information about the downsizing of the Project are discussed separately below.

Petitioners also argue that the existence of an ongoing, not-then-concluded CPUC proceeding was significant new evidence requiring an expansion of the Staff Report "...to serve as the functional equivalent of a supplemental or subsequent EIR in its assessment of Project alternatives under CEQA." (Marina Water OB at 40:25-26.) First, the CEQA-equivalent duty of the Commission as a responsible agency was to evaluate the continued value of the FEIR as an informational document in light of new information, and then it was only required to issue a

supplemental EIR (or functional equivalent) in the event it determined the new information disclosed a significant adverse environmental impact; deference is given to the Commission's determination – whether explicit or implicit – in this regard. (*California Coastkeeper Alliance et al. v. State Lands Commission* (2021), 64 Cal.App.5th 36, 58-59; see also, *Marina Coast Water Dist., supra*, 96 Cal.App.5th at 66-67.)

Secondly, the Commission did in fact consider the then-pending CPUC proceeding (AR 3, 54-55), but of course since it was pending the outcome of that proceeding could not be known. So, the Commission imposed as Special Condition 1. The conclusion of the CPUC proceeding with a determination that there is a projected demand for additional water supply beyond the Pure Water project's ability to supply. (AR 13). These points are further discussed below in this ruling.

Commission's findings for application of PRC 30260.

In a nutshell, the Commission found that all three criteria for application of PRC section 30260 were met and in its discretion found the industrial override provision appropriate for the 4.8 mgd project permit it approved. In so doing, it also considered PRC section 30233 and found that although Pure Water Monterey Expansion Project was a feasible alternative for near-term water supply, it was likely not a sufficient source – i.e., not a feasible alternative to the Project – for needed long-term water supply.

Standard of Review.

The Commission's findings under the Coastal Act are reviewed for substantial evidence, and the Commission's decision may be reversed only if, based on the evidence before the agency, no reasonable person could reach the conclusion reached by the agency. (*La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814.)

The Commission's decision to apply the 'Industrial Override' provision of PRC section 30260 is supported by substantial evidence.

The Commission staff report engaged in a lengthy analysis and discussion of the Project and its background (AR 41-51), and environmental considerations, including alternatives and their feasibility (AR 59-157), much of which provided the factual basis for its ensuing discussion and findings applying PRC section 30260.

(i) Commission's Finding as to PRC Section 30260, Criterion No. 1: Alternative Locations are Infeasible or More Environmentally Damaging

In its determination that the first criterion under Section 30260 was met here, the Commission's Findings and Discussion (AR 161-162) and alternative location analysis noted:

"**Test 1- Alternative Locations are Infeasible or more environmentally damaging and Development is Limited to Already-Disturbed Areas**: The first test of Coastal Act Section 30260 allows the Commission to approve a project that is otherwise consistent with Coastal Act policies, or in this case, if it is additionally inconsistent with LCP policies, if it finds that 'alternative locations are infeasible or more environmental damaging.' As noted above, the Commission is also considering this question in the context of Coastal Act Section 30233's provision allowing fill in coastal waters only 'where there is no feasible less environmentally damaging alternative.'[25]

As part of the proposed Project's CEQA review, the FEIR/FEIS evaluated alternative locations to the proposed Project. For instance, the FEIR/FEIS analyzed two alternative locations for the slant wells, which involved the construction of intake systems at a site on Potrero Road and a site at Moss Landing. The FEIR/FEIS concluded that siting intake systems at either Potrero Road or at the Moss Landing site would not 'offer an overall environmental advantage over the proposed project,' and would increase impacts compared to the CEMEX site. As such, the FEIR/FEIS identified that proposed Project, with slant wells located at the CEMEX site, as the environmentally superior alternative. The FEIR/FEIS concluded that the Project's proposed location offers environmental advantages to alternative sites, such as use of an existing outfall, no construction on the seafloor, avoiding impingement and entrainment of an open water intake, and less than significant impacts to groundwater resources. These findings and conclusions were incorporated into the CPUC's final decision regarding the proposed Project."

This evidence and discussion would have been sufficient to address the 'alternative location' criterion of section 30260, and Petitioners have not shown otherwise. The Commission, however, went even further in discussing the criteria under PRC 30233, in the course of its discussion of PRC section 30260. That is discussed further below.

The first requirement of PRC section 30260 is that "alternative *locations* are infeasible or more environmentally damaging." (emphasis added.) The plain language of the statute addresses alternative locations only; not less damaging feasible alternatives to a project generally.[26] The

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[25] It is questionable, in light of the power to override via section 30260, whether it was necessary that the Commission consider section 30233, but since the power to override is discretionary, it appears it was entirely within the Commission's discretion to consider it.

[26] PRC section 30233, which the Commission considered and which the Court will address separately, does state that "the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following: (a) … coastal-dependent industrial facilities … ."" This section is discussed separately below.

third criterion of PRC section 30260 requires that adverse environmental effects be mitigated to the maximum extent feasible, which is discussed below.

Petitioners misstate the language of PRC section 30260 as referring to feasible *alternatives to the Project* rather than infeasible or more environmentally damaging *alternative locations:* "30260(b)(1)[industrial facilities inconsistent with Coastal Act policies prohibited where feasible, less environmentally damaging alternatives exist] ... ." (Marina Water OB 41:8-10). Subsection (b)(1) did not exist in the version of the statute effective at the time of the Commission's decision here, but in any event neither the text of the statute then effective or in its later form (Amended by Stats. 2023, c.292 (S.B. 704), section 2, eff. Jan.1, 2024) broaden the language of alternatives to be considered under PRC section 30260 beyond that of alternative *locations.*

Next, Petitioners have argued that the Commission "... prejudicially abused its discretion under the Coastal Act in finding that 'alternative locations are infeasible or more environmentally damaging' by .. impermissibly deferring the actual feasibility of alternatives to the CPUC." (Marina Water OB 40:16-19).

The Commission did not defer the finding that alternative locations are infeasible or more environmentally damaging to the CPUC. The FEIR of the CPUC, acting as lead agency, already made that determination. (See, e.g., AR 161-162):

> "As part of the proposed Project's CEQA review, the FEIR/FEIS evaluated alternative locations to the proposed Project. For instance, the FEIR/FEIS analyzed two alternative locations for the slant wells, which involved the construction of intake systems at a site on Potrero Road and a site at Moss Landing. The FEIR/FEIS concluded that siting intake systems at either Potrero Road or at the Moss Landing site would not 'offer an overall environmental advantage over the proposed project,' and would increase impacts compared to the CEMEX site. As such, the FEIR/FEIS identified that proposed Project, with slant wells located at the CEMEX site, as the environmentally superior alternative. The FEIR/FEIS concluded that the Project's proposed location offers environmental advantages to alternative sites, such as use of an existing outfall, no construction on the seafloor, avoiding impingement and entrainment of an open water intake, and less than significant impacts to groundwater resources. These findings and conclusions were incorporated into the CPUC's final decision regarding the proposed Project."

(AR 161-162.)

Even under CEQA – which PRC section 30260 is not – the Commission, acting in its role as a responsible agency, was not required to revisit this in the absence of new information about alternative locations. (*California Coastkeeper, supra*, 64 Cal.App.5th at 56-59.)

(ii.) Commission's Finding as to PRC Section 30260 Criterion No. 2: to disallow the project would adversely affect the public welfare.

With regard to the second criterion for an industrial override, Petitioners' argument again largely relies on the 2019 and 2020 Staff Reports which concluded that denying the Project would benefit the public welfare.

However, in 2022 the Commission, after a lengthy analysis of alternatives (AR 143-157) discussion and its finding that to disallow the project would adversely affect the public welfare is found at AR 162-163:

"Test 2 – To not permit the development would adversely affect public welfare:

> "Section 30260's second test provides that coastal-dependent industrial development may be permitted if to do otherwise (i.e., to deny the proposal) would adversely affect the public welfare. The Findings herein evaluate several benefits and concerns regarding the proposed Project's effects as related to public welfare.
>
> The Commission acknowledges the need for Cal-Am to obtain a new water supply and the importance of long-term planning in light of the decades-long water supply crisis affecting the Monterey Peninsula region....Without a reliable water supply, part of the region has been under a moratorium on new water connections since 2010, making it difficult to plan adequately for housing and other community needs. The Pure Water and Pure Water Expansion projects will help to address water supply demand in the short term, but additional supplies will be needed to address the long-term demand.
>
> Cal-Am's proposed Project also includes several components meant in part to address public welfare concerns. First, Cal-Am selected a site where it could obtain a source water using subsurface intakes, which is the state's preferred method for seawater desalination facilities, due to their limited or non-existent adverse effects on marine life. It also selected a site that, at that time, was already being used by a coastal-dependent industrial facility – the CEMEX sand mining operation – rather than a completely undeveloped coastal location where it may have caused additional adverse effects. Although CEMEX has recently ceased operations and the site will be largely set aside for habitat restoration, public access, and coastal educational opportunities (subject to Cal-Am's existing easement rights on a portion of that property), the Project, as conditioned, will be constructed and operated in a manner that minimizes impacts to surrounding coastal resources and uses. Additionally, Cal-Am proposed to implement the Project in two phases, in part, to address concerns raised by the public about potential impacts to groundwater and wetland resources. Monitoring during the first phase will demonstrate whether the Project is resulting in adverse effects to local groundwater supplies and nearby wetlands and will inform the decision

about whether and how to proceed with the full-scale facility. This approach is more protective of coastal resources and the public welfare than the originally proposed full scale facility. Finally, Cal-Am has proposed a series of measures designed to benefit the underserved communities that would be disproportionately burdened by the Project, including programs designed to minimize additional costs to low-income ratepayers and a package of benefits for the residents of Marina. These benefits include increased groundwater monitoring, property tax revenues, funding for improved public access, public facilities and recreational opportunities and restoration for the City. These benefits were largely rejected by the City and thus, environmental justice issues remain unresolved."[27]

"The Commission concludes that the desalination Project is necessary to meet longer term supply and demand needs, both to secure a reliable source of water and to help the region undertake long-term planning that is dependent on water supply needs. Thus, a denial of the Project would adversely affect the public welfare. Further, Cal-Am has incorporated several project elements designed to minimize impacts to the public. The Commission also recognizes that despite the benefits of the Project to the region, certain communities face disproportionate burdens from the Project. Cal-Am's proposed measures to offset costs to low-income ratepayers and community benefits for the City of Marina provide some measures to address impacts, but environmental justice issues related to the Project are not fully resolved."

The Commission's finding and analysis above includes substantial evidence to support the Commission's findings that to deny the Project would adversely affect public welfare. Petitioners have not met their burden to show otherwise.

(iii.) Commission's Finding as to Criterion 3 of section 30260: Adverse environmental effects are mitigated to the maximum extent feasible.

The Commission's discussion of the third criterion includes the following statement:

"**Test 3 – Adverse environmental effects are mitigated to the maximum extent feasible:** ... As noted in the Findings above, the Commission is imposing an array of Special Conditions requiring that Cal-Am implement substantial mitigation measures to address a range of expected or potential impacts to coastal resources to comprehensive design changes and monitoring to ensure groundwater resources are protected. In addition, the CPUC has imposed a Mitigation Monitoring and Reporting Program ("MMRP") as art of its process in

[27] Consideration by the Commission of environmental justice issues, under PRC section 30604(h), appears to be optional in view of the permissive language of the statute ("When acting on a coastal development permit, the ... commission on appeal, may consider environmental justice ....") Nonetheless, they were considered by the Commission at length, AR 104-120, and are discussed further below.

certifying the FEIR/FEIS, which includes a number of mitigation measures designed to avoid or reduce potential environmental impacts. The CPUC's MMRP, combined with the Special Conditions and Cal-Am's proposed ratepayer programs, will ensure that any adverse environmental effects to coastal resources are mitigated to the maximum extent feasible. With the above-referenced Special Conditions, the Commission therefore finds that Cal-Am's Project meets the third test of Section 30260." (AR 163-164)

The referenced mitigation measures, which are lengthy, are discussed below in relation to Petitioners' multiple contentions, and will not be set forth *in haec verba* here. They include those synopsized by the Commission at AR 162-163 as: site location so as to use "subsurface seawater intakes, the state's preferred method for seawater desalination facilities, due to their limited or non-existent adverse effects on marine life" (AR 162); selection of an existing site which had been used for a coastal-dependent industrial facility, the CEMEX sand mining operation - a large portion of which will be set aside for habitat restoration and public access and education (AR163); two-phased Project implementation which provides for monitoring potential groundwater and wetland resource impacts during the first phase and which will guide determination of whether and under what conditions the second phase will be permitted and thus be more protective of coastal resources and public welfare than the originally proposed full-scale Project (AR163); and a series of measures proposed by Cal-Am to benefit underserved communities that would be disproportionately burdened by the Project (described at AR 163).

The mitigation measures are set out in much greater detail in the Special Conditions imposed on the CDP (AR 12-41), and include not only permits from the multiple other agencies involved, including the CEQA lead agency CPUC (which has imposed its own series of conditions); a determination of whether Cal-Am has water rights to source the Project (the subject of another action pending before this Court in *City of Marina v. RMC Lonestar et al.*, Monterey Superior Court case 20CV001387 and referral to the State Water Resources Control Board); mandatory monitoring and reporting of wetland and groundwater conditions for significant adverse effects for a period of at least two (2) years; requirements for construction practices; a spill prevention and response plan; closures of construction for species protection; pre-construction biological surveys and monitoring during construction; submission of baseline survey reports (of all habitats and vegetation) at least 90 days prior to construction and post-construction reports with specified detailed content); dune habitat and open space protection; habitat monitoring and mitigation plan with compensatory mitigation options, mandatory monitoring and mitigation; a requirement that slant wells extend at least 1,000 feet seaward of the proposed wellhead locations, so as to extract seawater as far seaward as possible and without penetrating the 400-foot aquifer (part of the Salinas Groundwater sub-basin), a major groundwater supply source for areas not supplied by Cal-Am and the effects of the proposed Project upon which are a central source of dispute in case 20CV001387; submission by Cal-Am to the Commission for review and approval prior to CDP issuance a groundwater monitoring plan designed to ensure that pumping for the Project does not adversely affect the aquifers which are a source of drinking water for the City of Marina and MCWD; a wetlands and vernal pond adaptive management program; prohibition of any shoreline protective device; low-income

ratepayer relief to Cal-Am customers; community engagement and public access plans; cultural resource monitoring during construction; energy minimization and greenhouse gas reduction; and a visual resource plan to be submitted to and approved by the Executive Director of the Commission.

The Commission also limited the CDP to a period of 25 years, acknowledging the impossibility of mathematical precision in estimating future supply and demand needs and the extent and timing of any facility component relocation due to erosion. Phase 2 will require a separate coastal development permit application. Modifications to the existing Monterey One Water M1W outfall to accommodate discharges from the desalination operations of the Project will also likewise require a separate permit prior to issuance of the instant CDP.

Petitioners have not met their burden to show that the Commission abused its discretion in adopting appropriate mitigation measures and finding that adverse environmental effects were mitigated to the maximum extent feasible.

(iv) Adequacy of Commission's Discussion and Analysis of Feasible Alternatives to the Project. (PRC 30233.)

Separate from the 'alternate location' criterion of PRC section 30260, is a related issue of whether the Commission adequately considered feasible *alternatives to the Project* which were less adversely impactful to the environment.

Although PRC section 30260 does not include a requirement that there be no feasible alternatives to the project, PRC section 30233 does. It provides, in pertinent part, as follows:

> "(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects..."

In the course of its discussion of the first criterion of PRC section 30260, above, the Commission also addressed PRC section 30233:

> "For this first test of Section 30260, the Commission is also incorporating the alternatives analysis required pursuant to Coastal Act Section 30233 – that there be no feasible, less environmentally damaging alternative to the project." (AR 161).

The only alternative to the Project argued by Petitioners MPWMD, MCWDGSA and MCWD is their much-repeated assertion that the Pure Water Expansion project was a feasible alternative and that the Commission incorrectly determined otherwise. Petitioners' contention sidesteps the question of whether their proposed *alternative* --- the Pure Water Expansion -- was adequately analyzed and discussed based upon evidence before the Commission in 2022.

The Commission, following Staff's guidance, found at the 2022 hearing under review here that:

> "...***there is no current alternative that can provide a reliable supply of water in the longer-term***. Although the Pure Water Expansion is expected to meet demand in the near term, based on updated supply and demand estimates, the Pure Water Expansion project alone is likely inadequate to meet demand over the next twenty years. For that reason, denial of the Project would adversely affect the public welfare. Staff's recommended Findings recognize the need for long-term planning to address the region's critical water supply constraints and has condition[ed] this approval in ways that allows the Commission to evaluate any changed circumstances in the future (including any feasible alternatives that may emerge in the future) if the Project's construction timeline becomes too remote. Finally, through the imposition of a number of conditions, staff believes the Project's impacts have been mitigated to the maximum extent feasible."

(AR 9, emphasis added.) The Commission's full analysis, "Assessment of Alternatives," is on pages 143-157 of the Final Decision.

Events prior to the Commission's 2022 CDP hearing

2018 CPUC finding. The CPUC previously analyzed water supply and demand and in 2018 concluded that the ability of the Pure Water Monterey Expansion project (also referred to as PWE) to meet supply and demand was speculative and insufficient. (AR 9430, 10034, 145, 152). As Respondents note, Martina and MCWD unsuccessfully sought writs of review from the California Supreme Court. (*Marina Coast Water Dist., supra*, 96 Cal.App.5th at p.59).

2020 Commission Staff report. After the CPUC finding, a Coastal Commission staff report, in connection with prior CDP applications by Cal-Am for the Project, concluded on the basis of evidence not available to the CPUC that the PWE would be sufficient to meet supply and demand as an alternative to the Cal-Am project. (AR 143-144, 145-146).

Petitioners, referring to Commission Staff Reports from 2019 and 2020, argue repeatedly that the Commission's Staff previously found, twice, that the PWM Expansion Project was feasible and a less environmentally damaging alternative to the Project. Their argument, however, does not recognize evidence accumulated *after* those reports and considered by the Commission, and which supports the Commission's findings that the PWM expansion project is not sufficient as a longer-term source of supply.[28]

[28] Petitioners go on to contend that the Commission "recognized that significant new information that was not available to the CPUC demonstrated that PWM Expansion – which the CPUC previously found to be infeasible – would, in fact, be a feasible alternative because it would reduce, if not eliminate, most of the MPWSP's significant effects." (Marina Water OB at 41:16-19). This half-statement mischaracterizes the Commission's findings and discussions. The Commission found the PWE Expansion was a feasible near-term alternative, but *not* feasible for longer term water supply.

Substantial evidence before the Commission in 2022 that PWE was not a feasible alternative to supply long-term water demand

The Commission noted and discussed that the time of the 2022 CDP application by Cal-Am, Proceeding A-21-11-024 was pending before the CPUC. In that proceeding, the parties were presenting long-term supply and demand estimates as part of the second phase of that proceeding in which need for the desalination facility would be determined. (AR 146) As explained further below, the Commissions of the CDP approvals is conditioned upon the outcome of that proceeding.

The record here shows that the Commission did disclose, understand and considered the proposed alternative of the Pure Water Expansion, discussed it at length, and noted that parties to the CPUC proceeding "... have submitted widely varying projections through 2050 based on significantly different assumptions about expected growth rates, the number of new residents to expect, the potential for drought to affect existing supplies and others. Certain parties argue that there is no need for Cal-Am's Project by 2050 while Cal-Am argues that the Project is needed as soon as 2025. Other estimates project a need for additional water supply beyond the Pure Water Expansion sometime between 2025 and 2050. ..." (AR 152).[29]

Among the new evidence before the Commission in 2022 was a Report from the " ... California Public Advocates Office ("Cal Advocates"), which is the independent entity within the CPUC that represents and advocates on behalf of the interests of customers, [which] determined that there would a demand for additional supply by 2040." (AR 152, citing Report and Recommendations of Office of Public Advocates in Phase 2, CPUC No. A-21-11-024, dated August 19, 2022.)

Petitioners dispute the credibility of the 2022 water supply and demand projections from the Public Advocates' Office. The Commission reviewed this data, compared it to other supply and demand projections, discussed them at length, found it credible and reasonable, and based

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[29] Petitioners Marina Water parties have argued that the Commission failed to address 'significant new information in the record regarding feasible alternatives that could reduce most if not all of the Project's environmental impacts,' referring to the ongoing and not-then-concluded CPUC proceeding (MPWMD/MCWD OB 40:16-24, citing AR3.) which is the subject of Special Condition 1. Petitioners' citation is only to the introductory summary of the Commission's findings, however. The ongoing CPUC proceeding – and Special Condition 1 which the Commission imposed, conditioning its approval on Cal-Am presenting proof of approval from the CPUC, along with proof of approval from multiple other local, state and federal agencies (AR 12-13), is discussed at length in the administrative record (See e.g., AR 43, 46, 54-55, 57).

upon it found that the PWE expansion urged by Petitioners would likely not meet long-term water needs. (AR 152-155.)[30]

It is for the Commission to weigh the preponderance of conflicting evidence, and the court may reverse its decision only if, based upon the evidence before it, a reasonable person could not have reached the conclusion reached by it. (*Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 226-227.)

Petitioners also omit reference to other additional evidence on supply and demand, subsequent to the 2019 and 2020 Staff Reports, which was before the Commission when the instant CDP was approved in November 2022, and which the Commission discussed in its analysis: a 2022 NOAA study showing three intervening years of drought, the worst in recorded California history (AR 155; see also the hearing transcript at AR 40835); the lack of any *actual* production data, as of the hearing, for the PWM Expansion Project which Petitioners contend is a feasible alternative that will provide all needed water supply (AR 155); and the additional need, beyond that mentioned in the Public Advocate's Office analysis, for another 1,000 afy of water to protect the Seaside Water Basin from seawater intrusion set forth in a 2022 study (AR 155-156; see also AR 61763, a letter from the Seaside Basin Watermaster to the Commission).[31]

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[30] Although the estimates of future demand and supply from the Public Advocates Office and Cal-Am do not match, the Public Advocate's Office nonetheless projected sufficient supply to meet demand *only until* the year 2040, at which time it estimates that demand will *exceed* supply. The term of the instant CDP does not expire until 2050 (AR 16), ten years after demand begins to exceed supply. Furthermore, Comm. Staff was careful to note that " 'forecasting future demand and supply is not an exact science,' and 'estimating future water demand necessarily entails the use of assumptions about demand factors that cannot be predicted with absolute certainty.'"(AR 155.) Commission staff went on to note that the Public Advocate's Office estimates of future supply, which were approximately 1,000 afy higher than those of Cal-Am, "assumes that the Pure Water Expansion will supply its full production of 2,250 afy. … Even with the thoroughness of the California Public Advocate's analysis, any additional water supply beyond the Pure Water Expansion may occur earlier or later, than 2040." (AR 155)

[31] As Respondents' counsel pointed out at oral argument in response to Petitioner MCWD's claim that the Seaside Water Basin needs were not discussed at the Commission hearing, the Seaside Watermaster actually appeared and spoke before the Commission at the 2022 hearing, stating that the MIW project would *not* be sufficient to meet the Seaside Ground Water Basin needs, AR 41065-41066: ("My name is Paul Bruno; I'm the chair of the Seaside Groundwater Basin Watermaster. Since 2006, we have been tasked by the court to protect the basin. … Please direct your attention to our 2-page letter and 19-page report; … We ask that you take notice of our 2022 modeling updates. Our hydrologist spent nearly a year and tens of thousands of dollars updating the original 2013 studies. Under the best case scenario, we will need to inject 1,000 acre-feet of water into the basin every year to replenishment [sic]. Under the conservative scenario, that amount increases to 3,600 acre-feet every year. The report says, quote, unless replenishment water in these quantities is added annually, the Seaside Basin will be at risk of seawater intrusion. And that risk will increase each year the groundwater levels continue to fall and remain below sea level. Implementation of the Pure Water Monterey expansion project does not accomplish this and an additional source of replenishment water will be needed. The only potential source of replenishment water will be from desalinization, end quote."). The Seaside Ground Water Basin needs are also well-known to Petitioner MCWD. See *Marina Coast Water District, supra,* (2023), 96 Cal.App.5th at 81-82.)

Although Petitioners contend the Seaside Water Basin evidence was not specifically discussed in the 2022 Staff Report or Addendum and thus was a prohibited post-hoc rationalization, it is clear that the Staff Report and Addendum discussed the other subsequently accrued evidence and recommended finding that the PWM Expansion would not meet long-term water supply needs, and thus this evidence was not invoked 'after the fact' to support a conclusion the Commission would not have reached anyway based on the other evidence. The Seaside Water Basin evidence nonetheless is uncontradicted evidence which clearly supports the Commission's findings and underscores the absence of prejudicial error in the Commission's ultimate action of approval.

When the substantial evidence standard applies to a court's review of a CEQA issue, the challenger must describe the evidence favorable to the agency and show why it does not support the agency's decision. A failure to do so is fatal to the challenge. (See e.g., *County of Butte v. Dept. of Water Resources* (2023) 90 Cal.App.5th 147, 166; *Save the El Dorado Canal v. El Dorado Irrig. Dist.* (2022) 75 Cal.App.5th 239, 263; *King & Gardiner Farms LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 850.) It is insufficient for the challenger to refer only to the evidence that supports its position. (*Tiburon Open Space Comm. v. County of Marina* (2022) 78 Cal.App.5th 700, 780-781; *California Native Plant Soc'y v. City of Rancho Cordova* (2009) Cal.App.4th 603, 626.)

The Commission analyzed the feasibility of the Project in evaluating the proffered outcomes for the Pure Water Expansion.[32] It stated, in discussing the feasibility of the PWM Expansion:

> "The alternatives analysis in Section IV.O of these Findings describes a feasible and less environmentally damaging alternative to the Project that will provide the needed water supply in the near term. However, as described in the Commission's alternative analysis, the Pure Water Expansion Project is likely not adequate to meet supply needs in the longer term. Although there is uncertainty about when water from Cal-Am's Project would be needed and how much would be needed, it is reasonable to expect a need beyond what the Pure Water Expansion would provide at some point within the next twenty years approximately. The uncertainties about when and how much water is needed are addressed through **Special Condition 1**, which acknowledges that the CPUC, which is conducting a proceeding addressing the need for the Project and longer term supply and demand estimates (through 2050), will be making the necessary determination in the near future. Thus, the Commission finds the proposed Cal-Am project meets the first test of Section 30260."

(AR 162).

[32] It is noted that the Coastal Act defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." (PRC § 30108.)

The Commission found that the Pure Water Expansion project:

"...has fewer environment impacts than Cal-Am's project and would likely be available much sooner...[it] is a preferred alternative to meet water supply needs in the near term, but it is not likely adequate to meet water supply needs in the longer term (i.e., within the next approximately 20 years). Cal-Am's Project would have greater adverse environmental impacts but may be needed for longer-terms water supply needs. Commission staff concludes that an additional source of water beyond the Pure Water Expansion is likely to be needed to meet demand over a longer-term period – i.e., with demand occurring at some point within the next 20 years. The approximate timing of when an additional source water supply beyond the PWM Expansion project will be decided by the CPUC. As noted in Special Condition 1, the Commission's approval of Cal-Am's Project is contingent upon, among other things, this CPUC determination."

(AR 144)

The Commission concluded that:

"...additional water supply beyond the Pure Water Expansion is likely necessary at some point within the next twenty years. Thus, the addition of the Pure Water Expansion project alone is not sufficient to address longer term supply and demand. Likewise, the 'no action' alternative is not feasible for longer term water supply planning."

(AR 157)

The Commission imposed Special Condition 1, which provides that the Commission's CDP approval of the Project is contingent upon, among other things, completion of the CPUC proceeding " ... with a CPUC determination that there is a projected demand for additional water supply beyond the Pure Water Project Expansion ... by or before 2050 and a showing that Cal-Am has authorization to proceed with the Project." (AR 13)

The Commission emphasized that its CDP approval was subject to **Special Condition 1,** which requires, prior to issuance, "...completion of the CPUC's pending proceeding (A.21-11-024) of water supply and demand estimates for the Monterey Peninsula Water Supply Project (MPWSP) ***with a determination that there is projected demand for additional water supply*** beyond the Pure Water Project Expansion (i.e., the project would increase the capacity of the previously CPUC-approved Pure Water project from 3,500 AFY to 5,750 AFY) by or before 2050 and a showing that Cal-Am has authorization from the CPUC to proceed with the Project." (AR 13 (emphasis added).)

Petitioners allege that the Commission did not complete a thorough analysis of the water estimates but merely made estimates based on testimony by one party to the CPUC proceeding. The record shows otherwise. The Commission's Final Decision acknowledges that "[a]lthough there is uncertainty about when water from Cal-Am's project would be needed and how much would be needed, it is reasonable to expect a need beyond what the Pure Water Expansion would provide at some point within the next twenty years approximately. The uncertainties about when and how much water is needed are addressed through Special Condition 1, which acknowledges that the CPUC, which is conducting a proceeding addressing the need for the Project and longer-term supply and demand estimates (through 2050), will be making the necessary determination in the near future." (AR 162.)

The Commission's findings in this respect are supported by substantial evidence. Furthermore, Petitioners have not shown it was improper to impose Special Condition 1. The Commission recognized the uncertainty in the supply/demand estimates and will rely upon the CPUC's final determination for issuance. (See *Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 326-327 (stating "[b]ecause the administrative agency has technical expertise to aid it arriving at its decision, we should not interfere with the discretionary judgments made by the agency"); *Marina Coast Water Dist., supra*, 6 Cal.App.5th at p.79 (appropriate for an agency to recognize the limits of its power in assessing whether alternatives are feasible); see also, *Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315 (finding that in a land use case, "courts should let administrative boards and officers work out their problems with as little judicial interference as possible....Such boards are vested with a high discretion and its abuse must appear very clear before the courts will interfere").)[33]

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[33] *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 (*Vineyard*) discussed "what levels of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan." Vineyard, 40 Cal.4th at p. 428. The bottom line of that holding is that the informational demands of CEQA are met so long as: (1) no solution of the problem of water supply is assumed; (2) the analysis cannot be limited to the water supply for the first few years; (3) "Third, future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ("paper water") are insufficient bases for decisionmaking under CEQA." 40 Cal.4th at p. 432 (citations omitted); and (4) "Finally, where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies. [Citation omitted] The law's informational demands may not be met, in this context, simply by providing that future development will not proceed if the anticipated future water supply fails to materialize. But when an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing the development if the intended sources fail to materialize may play a role in the impact analysis." (*Ibid.* Citation omitted.) Although *Vineyard* involved a question under CEQA of whether there would be an adequate future water supply as a result of the project, the principles logically apply in the reverse situation where the purpose of the project is to meet long term water needs: here, to uphold the Commission's analysis and determinations about the uncertain adequacy of an alternative future water supply (i.e., PWM Expansion) which justifies the desalination plant here. The record here is clear that all requirements were met.

Moreover, the Commission's jurisdiction on permits, whether on appeal or issued directly by the Commission, "shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of [the Coastal Act.]" (PRC § 30607; see also, *Ocean Harbor, supra*, 164 Cal.App.4th at p. 242 (observing that the Commission has "broad discretion" to impose conditions in granting the permit.)) One of the challenges of this case is its complexity and the numerous permits and approvals required from different agencies.

Petitioners have failed to show the Commission abused its discretion.[34] (See *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 596 (noting "[i]n determining whether substantial evidence supports a finding, the court may not reconsider or reevaluate the evidence presented to the administrative agency. [Citation.] All conflicts and any reasonable doubts must be resolved in favor of the agency's findings and decision."))

Finally, Petitioners argue that the Commission arbitrarily approved the modified 4.8 mgd alternative without first addressing the potential growth inducing impacts that could result from the smaller facility's excess water production. Respondents argue that Petitioners failed to exhaust administrative remedies on this issue. (Respondent's Brief at pp. 84-85.) The court finds that the Petitioners' only reference to growth inducing impacts prior to the Commission's review was contained in a letter submitted the day before the November 2022 hearing. (SAR 64015-65016.) Respondents thus contend that the Petitioners, as a result, "did not give the Commission an opportunity to evaluate that issue," and therefore, these arguments are barred. (Respondent's Brief at pp. 84-85; see also, *Greene v. Cal. Coastal Com.* (2019) 40 Cal.App.5th 1227, 1238.)

The Commission, as a responsible agency under CEQA, was entitled to rely on the CPUC's growth inducing impact findings. (*Id.* at 85-87; CEQA Guidelines, § 15096(a); *Marina Coast Water Dist. v. County of Monterey* (2023) 96 Cal.App.5th 46, 66-67; AR 53.) The CPUC's FEIR/ FEIS analyzed these potential growth inducing impacts and found that the Project, along with the PWM Expansion, would result in significant and unavoidable cumulative growth-inducing impacts. (AR 10224, 12152-12160, 12092-12094.) The Commission was not required to reassess these growth inducing impacts. (CEQA Guidelines, § 15096 (g)(1); *Sierra Club v. Cal. Coastal Com.* (2005) 35 Cal.4th 839, 859; AR 53.) In addition, the long term water supply estimates the Commission relied upon appear to be less than what the FEIR/ FEIS

[34] It is noted that the Marina Water Petitioners also argue that the Commission was obligated to independently evaluate the alternatives *before* Project approval and failed to do so because it conditioned the CDP upon completion of a concurrently pending proceeding before the CPUC. (Marina Water Brief at 43, citing AR 162; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1460 (noting that agencies "must independently participate, review, analyze and discuss the alternatives in good faith"); *Friends, Artists & Neighbors of Elkhorn Slough v. Cal. Coastal Com.* (2021) 72 Cal.App.5th 666 (holding that where staff prepared a report after the Commission approved a CDP the Commission violated CEQA and its own regulatory program).) The record clearly demonstrates the Commission met its obligation here. Imposing the additional requirement (Special Condition 1) of a determination of water supply demand from CPUC – the lead agency under CEQA for this project – in its concurrently pending proceeding does not detract from the Commission's action.] "It is appropriate for both lead agencies and, as here, responsible agencies to consider the limits of their power in assessing whether alternatives are feasible." *Marina Coast Water District, supra*, 96 Cal.App.5th at p. 79.)

assumed—in other words, the water supply and associated growth impacts would be well within the impacts considered by the CPUC. (AR 41, 154, 10232; *Citizens' Committee to Complete the Refuge v. City of Newark* (2012) 74 Cal.App.5th 460, 471.) The FEIR/ FEIS already considered the cumulative growth inducing impacts would be significant and unavoidable. (AR 12093-12094.) Petitioners do not cite to any supporting evidence of a substantial increase in the growth inducing impact and it does not appear that there was a significant impact to disclose.

To the extent Petitioners suggest that the Commission's analysis and discussion of alternatives and feasibility of alternatives to the Project was inadequate under Public Resources Code section 30233, or that there is no substantial evidence to support the Commission's finding that there was no feasible alternative, they have failed to show same. When the alternatives have been set forth in a manner specific enough to permit informed participation, "'an EIR does not become vulnerable because it fails to consider in detail each and every conceivable variation of the alternatives stated'". (*Laurel Heights Improvement Assn. v. Regents of University of California* (*"Laurel Heights 1"*) (1988) 47 Cal.3d 278, 406-407. (citations omitted.)

II. Petitioners have not shown violation of Coastal Act Regulation 14 CCR section 13053.4(a) [because outfall modifications were not part of the instant CDP applications] or section 13052 [because CDP approval proceeded before all other agency approvals occurred].

The 'outfall' is an existing wastewater discharge facility owned and operated by the public agency M1W. (AR 45). Cal-Am plans to use the outfall to discharge brine effluent from the desalination facility process. To do so, modifications to the outfall, such as the installation of a liner and replacement clamps, will be necessary to counteract the corrosive effects of the brine discharge (AR 45-46; see also, CPUC's 2018 Final EIR/ EIS Report Mitigation Measure 4.13-5b (requiring the installation of a protective liner system in the land segment of the outfall "[p]rior to operation of the [Project], and as part of an agreement with MRWCPA[35] to use the outfall for brine discharge, Cal-Am shall line the land segment of the outfall with a protective liner system.") (AR 11349 and 11351-11352) and CPUC's Errata to March 2019 Final EIR/EIS (stating "[s]ince lining the land segment of the outfall would maintain the resiliency of the outfall, Cal-Am will need to include the land segment outfall lining and associated activities in a CDP application." (AR 9682)). This will involve the use of construction equipment and temporary closure of some beach access (*Ibid.*).

14, CCR section 13053.4, subdivision (a) concerns CDPs issued by the Commission and requires, under certain circumstances, a single permit application as further discussed below. Petitioners contend that the Commission violated section 13053.4 by not requiring Cal-Am to include in its application for a CDP, or seek via an amendment to the existing CDP, a request to

[35] MRWPCA is the Monterey Regional Water Pollution Control Agency.

modify "M1W's existing CDP for the outfall at the time of Cal-Am's CDP applications here. 14 CCR section 3053.4, subdivision (a) provides in pertinent part as follows:

"(a) To the maximum extent *feasible*, functionally related developments *to be performed by the same applicant* shall be the subject of a single permit application." (emphasis added.)

There is an existing CDP previously issued to M1W for the outfall in its existing state. (AR 3, 45.) When granting the CDP at issue here, Respondent Commission noted that M1W is the current holder of the outfall CDP and as such M1W would need to obtain a permit authorization for construction of modifications to it. Application for and approval of that CDP modification was imposed as a condition of the instant Cal-Am CDP permit. (See AR 12, Special Condition No. 1 [stating "Coastal Commission permit authorization for construction of modifications to the existing M1W ocean outfall to accommodate discharges from the desalination operations."]

Petitioners argue that this Special Condition is inadequate and Cal-Am that should have been required to submit a single CDP for the Project which included the proposed modifications to the outfall liner.

The history of the prior construction, continued ownership, and current operation of the outfall, as well as the uncertainty of what actual changes would be made to the outfall, by whom, and whether its current owner would even seek to relocate the outfall, show that the Commission's decision to impose a Special Condition of Approval rather than require concurrent CDP application by Cal-Am for the outfall modifications – whatever they might be and wherever they might ultimately take place – was pragmatic, rationally based, and reached only after lengthy exchanges and deliberation.

History of the outfall modification assessment before November 2022.

When Cal-Am submitted its amended CDP application for the Project in the fall of 2020, it recognized that the CPUC's Final EIR/EIS required it to retrofit the M1W outfall pipeline. (AR 2411, 2414.) Cal-Am noted in its application, however, that the outfall would be separate from its CDP application to the Commission. (AR 2411 and 2414 (stating "...the M1W outfall work is separate from this application. Cal-Am is currently working with M1W to evaluate how best to implement the outfall work and whether potential alternatives...would minimize potential ESHA impacts within the Coastal Zone to the maximum extent feasible" and noting "[a]ny necessary authorization for work on the M1W outfall pipeline would be sought via a separate CDP application."))

Shortly after Cal-Am submitted its consolidated CDP Application, the Commission, on or about December 3, 2020, issued a Notice of Incomplete CDP Application. (AR 2952). The Commission sought, *inter alia*, additional information concerning the outfall liner; specifically, the planned design, adverse impacts, mitigation measures, evidence of M1W's preliminary concurrence with the proposed design method, and identification of additional discretionary

permits that would be required for the modifications. (*Ibid.*) In response, Cal-Am reiterated its position that the outfall lining would not be part of the CDP application but would be addressed through a separate CDP application by M1W. (AR2964). Cal-Am further disclosed that it was working with its technical experts and M1W to evaluate the possible outfall lining work. (*Ibid.*)

The Commission responded on or about April 2, 2021, pointing out:

> "..one of the mitigation measures in the project's FEIR required that Cal-Am include the needed outfall liner as part of its CDP application. The liner is also functionally related to the development Cal-Am is proposing as part of its CDP application. Without more information about the design and foreseeable impacts of the liner work, it is difficult for the Commission to analyze the effects of the whole of Cal-Am's project. The liner will also require approval from M1W and, depending in part on its final design, may also require a discretionary permit from one or more cities or counties. We understand that to date, none of those agencies have given even a preliminary approval for the liner work. Without at least preliminary approval of the liner work by M1W and any local government with discretionary permitting authority, it is premature for the Commission to complete the application and proceed, as the overall project is contingent on the ability of Cal-Am to have the liner installed....we reiterate our request for the information [previously requested including] documentation of any agreement between Cal-Am and M1W that describes what would be included in a CDP application from M1W, including an agreed-upon design for the proposed liner, along with a description of activities needed to install the liner. This description should also identify which jurisdictions would be involved in reviewing the CDP application—i.e., the County, City of Marina, and/or the Coastal Commission. Please also identify this M1W CDP application, and any other required permits, as part of an update to the application's Appendix B, which describes the various permits needed. If M1W has not yet agreed to a design or committed to apply for the CDP, please provide this information as part of Cal-Am's application."

(AR 3077-3078.)

The Commission also stated its conclusion that the outfall liner was "functionally related to the development Cal-Am is proposing as part of its CDP application." (AR 3078).

On May 19, 2021, Cal-Am responded by reiterating its position that the outfall lining work was not functionally related to the Project components in Cal-Am's CDP application and would require a separate CDP application from M1W. (AR3088). Cal-Am stated:

> "...Cal-Am does not own the outfall and cannot control the application process for a CDP for the outfall diffuser work. Absent a property interest in the outfall, Cal-Am cannot add the outfall diffusers to its CDP application. (See Pub. Resources

Code, § 30601.5 [application must demonstrate proof of property interest]; see also 14 Cal. Code Regs., § 13053.5, subd. (b) [same].)

"As we have previously explained, the Commission can condition Cal-Am's CDP on M1W obtaining a CDP for any modifications to the outfall or Cal-Am performing other measures specified in Mitigation Measure 4.3-5 to ensure that the Project complies with the Ocean Plan's water quality objectives."

(AR 3084.)

Cal-Am also asserted its position that the modifications were not functionally related to other Project components and restated its proposed special condition which it contended would ensure the necessary work would be completed through either a new CDP or amended CDP by M1W. (*Ibid.*) According to Cal-Am, their proposal met the FEIR/FEIS Mitigation Measure 4.3-5. (*Ibid.*) Cal-Am also indicated that it continued to work with M1W and experts on the outfall lining work design and provided a copy of the 95% design drawing that had been reviewed and discussed with M1W staff. (AR 3084-3087, 2096-3129.)

On June 11, 2021, Respondent MCWD objected to Cal-Am's responses and asked the Commission to continue to deem Cal-Am's CDP application as incomplete because Cal-Am had failed to provide the requested information and incorrectly suggested that the Commission could defer its analysis of the Project's impacts by including Special Conditions. (AR 4190). MCWD emphasized that Cal-Am provided no support for its contention that M1W would submit a CDP application for the modifications for the Project. (AR 4191). MCWD also argued that the CPUC's EIR and Cal-Am's amended application expressly acknowledged that the modifications to the liner were part of the Project. (AR 4191).

Similarly, on June 14, 2021, the City objected to Cal-Am's responses and argued that the modifications are "functionally related" to the Project and must be included in Cal-Am's application. (AR 4208-4209). The City also outlined its position that the outfall liner was functionally related to the Project, and why the authorities cited by Cal-Am in support of its position were incorrect because the outfall diffuser and liner are "operationally interdependent" and "interrelated" with other aspects of the Project. (AR 4209-4210). The City contended that the FEIR/ FEIS required Cal-Am, not M1W, to line the land segment of the outfall with a protective liner. (AR 4210, citing FEIR/FEIS at 4.13-29.)

On June 16, 2021, M1W provided the Commission with its "draft" comments to Cal-Am's letter to the Commission dated May 19, 2021. From M1W's then perspective, "[a]lthough M1W owns the outfall, M1W does not have a need to modify the outfall diffusers, nor the pipeline, unless requested (and paid) to do so by Cal-Am, or another entity." (AR 4240). M1W further explained:

"[t]he design for the outfall and its diffusers had progressed to 95% design as of May 31, 2019. The next step for implementation would be to submit permit

applications, including a Report of Waste Discharge to the RWQCB, a CDP application to the Coastal Commission, a request to modify the California State Lands Commission lease, and a request for authorization and permit from the office of National Marine Sanctuaries (ONMS)/Monterey Bay NMS...M1W agreed to assist Cal-Am by reviewing and submitting application material prepared by Cal-Am to the relevant agencies; however, Cal-Am directed M1W to cease all consultant work on permitting and design efforts on November 7, 2019....The ability of the Coastal Commission to consider and approve the outfall modifications in a future consideration rather than together with the current [Project] application is not within M1W's purview."

(*Ibid.*) M1W further explained that the outfall lining is not required without a seawater desalination plant in operation. (*Ibid.*) According to M1W, at that time:

"M1W could enter into a long-term lease with Cal-Am to enable the inclusion of the outfall modification in an application to the Coastal Commission. M1W also agreed to submit a permit application, if drafted by Cal-Am, for the outfall modifications. In addition, there is a precedent for this arrangement; namely, a lease is in effect currently for Cal-Am to discharge water from its test slant well."

(AR 4241.)

Two days later, on June 18, 2021, the Commission renewed its request to Cal-Am for additional information concerning the activities and approvals needed to install the outfall modifications. (AR 4242.) The Commission acknowledged receipt of engineering drawings for a proposed outfall liner design, but noted that Cal-Am still needed to clarify:

"...whether M1W has approved that design or has agreed to apply for any necessary Coastal Act authorization, such as a CDP, concurrent with review of Cal-Am's CDP. We understand that the FEIR for Cal-Am's project included a mitigation measure requiring Cal-Am to include the needed outfall liner as part of its CDP application. As described above for the diffuser issue, the liner is clearly functionally related to Cal-Am's proposed project –i.e., but for Cal-Am's project, the liner would not be needed, and Cal-Am's project cannot operate without the liner.... the Commission will need to evaluate the liner and its method of installation as part of its review of Cal-Am's proposal. Any liner-related work within the Commission's jurisdiction needs to be described now and analyzed concurrently with the overall project....We do not believe it would serve the public or the Commission to have the Commission accept and analyze separate applications, on different timeframes, for various parts of one overall project....Without [the necessary] agencies having given even a preliminary approval for the liner work—work that is integral to the rest of Cal-Am's proposed project development—it is premature for the Commission to complete the

application and proceed....We reiterate our earlier request [for]...documentation of M1W's concurrence with this or another proposed liner design ... documentation of M1W's agreement to submit any CDP application ... and the proposed timing .... If M1W has not agreed to submit a CDP application for the outfall liner, please include an M1W-approved liner design as part of your application or propose other feasible pathways to address this issue."

(AR 4244.)

On January 11, 2022, Cal-Am responded and reasserted its position that the outfall improvements are not functionally related to the Project under the Coastal Act. Cal-Am argued that the Coastal Act regulations provided that, "[t]o the maximum extent feasible, functionally related developments to be performed by the same applicant shall be the subject of a single permit application." (AR 4251 (citing 14 Cal. Code Regs. § 13053.4.)) According to Cal-Am the outfall improvements were not functionally related development because Cal-Am did not own the outfall, did not control the CDP application process for the outfall improvements, and could not itself perform the outfall improvements. (AR 4252). Cal-Am also asserted that "the EIR/EIS fully analyzed the proposed outfall improvements and their secondary environmental impacts. Therefore, the Commission Staff has the information it needs to assess potential impacts to coastal resources as a result of the outfall improvements and should deem Cal-Am's application complete." (AR 4253.) Cal-Am also provided the Commission with an update on the latest outfall liner plans. (AR 4251-4153.)[36]

On February 4, 2022, the City objected to Cal-Am's latest submission and position that the outfall liner and diffusers were not functionally related to the Project. (AR 4837-4840 (citing a prior Staff Report for a different Application No. 5-01-184 where the Commission previously concluded on a different project that development is not functionally related when two development components and each functions independently without the completion of the other); and Public Resources Code § 30601.5 (providing that an applicant who can demonstrate a legal right, interest or other entitlement to use a property is not required to join as a co-applicant the holder or owner of any superior interest in the property)). On February 7, 2022, MCWD also submitted its objection to Cal-Am's latest letter and argued that Cal-Am's proposed special condition was inadequate because the outfall modifications are part of the Project and must be included in the environmental review. (AR 4869-4872, citing CEQA Guideline § 15265 and 14 CCR § 13053.4).

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[36] It is noted that the record demonstrates that as of January 31, 2022, Paul A. Sciuto of M1W recommended to M1W's Board of Directors not to proceed with Cal-Am's proposal for a joint outfall project until after an Amended and Restated Water Purchase Agreement for the Expanded Pure Water Monterey Project. (AR 38434.) In doing so, Mr. Sciuto outlined the history with Cal-Am to install an outfall liner, the recent proposals by and discussions with Cal-Am and emphasized that the Recycled Water committed to recommend to the Board that "M1W staff not move ahead with the next steps to implement a joint outfall project until after execution of the Amended and Restated Water Purchase Agreement for Expanded PWM Project." (AR 38434-38436.)

On February 8, 2022, the Commission responded to Cal-Am's January 2022 letter again requesting additional details concerning the proposed outfall liner and reiterating, to the extent that Cal-Am contended that the modifications are not functionally related the Project, that "the modifications [to the outfall] are needed only to accommodate Cal-Am's effluent within the M1W outfall system." (AR 4878.) The Commission informed Cal-Am that it understood that M1W had not yet agreed to the modifications and conditioned its agreement upon certain conditions, including the CPUC approval of the Water Purchase Agreement. (AR 4879). The Commission, again emphasized that "[w]e do not believe that separating the review of the applications for various parts of one overall project serves the public or the ability to analyze the overall project for the Coastal Act and LCP consistency." (*Ibid.*) The Commission then specially asked Cal-Am to provide: (1) M1W-approved outfall modifications as part of Cal-Am's project description, including the expected installation methods and known potential effects on coastal resources; (2) in the alternative, provide documentation of M1W's agreement to submit any CDP application needed for the Cal-Am outfall modifications and the proposed timing for this submittal that would allow the Commission to concurrently review it with Cal-Am's application; and (3) information demonstrating a path forward to obtaining agreement on a design for, and agency authorization of, the proposed liner for the landward portion of the outfall. (*Id.*)

Changes in circumstances approaching the November 2022 CDP hearing.

On August 5, 2022, Cal-Am responded to the Commission, again restating its position that it was not necessary to link process for the Project's CDP application to M1W's outfall modifications, and also providing an update on the progress made on the outfall liner. (AR 4885) Specifically, Cal-Am explained:

> "M1W and Cal-Am have agreed that installation of a protective slip liner within the existing outfall as designed by Brown & Caldwell and studied in the Project's Final Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") is the preferred option, and that the design for that work is currently about 95% complete....Given the advanced stage of that design work, there is sufficient information in the Commission's record for Commission Staff to evaluate the installation of the slip liner and other proposed outfall modifications analyzed in the Final EIR/EIS for consistency with the Coastal Act. Moreover, ***M1W staff has indicated that if approved by the M1W Board, M1W would apply to the Commission for an amendment to M1W's existing CDP for the outfall to authorize the slip lining work on the outfall.*** (See Exhibit T, attached hereto, Section B below.)"

(AR 4885) (emphasis added.)

Cal-Am then proceeded to describe the potential environmental impacts relying on the analysis in the FEIR/FEIS, the 95% design by Brown & Caldwell (May 2019), and a preliminary

report prepared by AECOM assessing the potential net worst-case impact to ESHA and/or dune habitat as a result of the outfall modifications (based on the design level drawings prepared by Brown & Caldwell). (AR 4885-4888; 4896; 4945-4952.) Notably, among Cal-Am's submissions was email correspondence from Paul Sciuto of M1W to the Commission dated August 4, 2022 where M1W indicates its intention to apply for a modification of the existing CDP once the details of an agreement with Cal-Am are approved. (AR 4896). Specifically, Mr. Sciuto noted that:

> "The M1W Board approved working on an agreement framework for a combined Outfall Protection and relocation project in January 2022. The M1W Board need [*sic*] consider and agree to move forward with the Outfall corrosion protection project only, as described above. If this were to be approved by the Board, M1W would apply to the Coastal Commission for an amendment to the Outfall's Coastal Development Permit to authorize the proposed work."

(*Ibid.*)

On September 1, 2022, the Commission, noting that its February 2022 letter sought information on two items before the Project's CDP application would be considered complete, including "a design agreed upon by Cal-Am and [M1W] for the liner needed for Cal-Am to discharge its effluent through the M1 outfall; and...information demonstrating a 'path forward' for Cal-Am to obtain M1W's final approval for installing the agreed-upon outfall liner design." (AR 6315), stated:

> "1) **Outfall Liner**: Cal-Am provided documentation from M1W showing that the two parties have agreed on a 95% design of a proposed outfall liner.
>
> 2) **"Path forward"**: We also received from M1W a list of other project components that it would need to allow Cal-Am's use of the outfall (see July 15, 2022 Draft Term Sheet for Improvements to Monterey One Water Outfall Facilities). Based on information that Cal-Am has provided to us, project components needed for Cal-Am's use of the outfall include modifications to offshore outfall diffusers, WEKO seal clamps, and the outfall endgate (descriptions of which Cal-Am has already provided), and installation of a brine mixing facility that would be located outside the coastal zone. It is our understanding that there are multiple ways Cal-Am and M1W could approach an outfall liner project (i.e., as a standalone project or as part of M1W's separately planned outfall relocation project). Regardless, the components of the outfall liner project relevant for the Commission's review of Cal Am's overall desalination project would not change and sufficient information on these components has been provided by Cal-Am to demonstrate a path forward."

(AR 6315). The Commission continued:

> "We note that Cal-Am's proposed project will require other approvals, including from the [CPUC] and M1W, and we understand that Cal-Am wishes to proceed with the Coastal Commission's review of this application before Cal-Am obtains all other required approvals. Under 14 Cal. Code Regs. § 13052, unless waived by the Executive Director, 'a permit application shall not be accepted for filing by the Executive Director unless all such governmental agencies have granted at a minimum their preliminary approvals for said development, except as provided in section 13053.' ***Pursuant to Section 13053, the Executive Director has waived the requirement in Section 13502 for this application. Based on the above, and on the information Cal-Am has previously submitted, the application is deemed complete.***"

(AR 6316)(emphasis added.)

When the Commission considered the Project's CDP in November 2022, it specifically recognized that Cal-Am did not include the outfall modification work in its CDP application as Cal-Am did not own the ocean outfall or hold the existing outfall CDP. (AR 45). The Commission noted that Cal-Am was relying on an agreement it was developing with M1W to identify which entity would fund the work, apply for needed permits, and install the liner. (*Id.*) The Commission also acknowledged that Cal-Am previously reached an agreement with M1W, which had since expired, on a 95% design for the proposed liner, which was similar to the version evaluated by the CPUC in the FEIR/FEIS and would have similar impacts, (*Id.*) and that:

> "M1W is now considering whether to implement this design or an alternative approach that would combine the liner installation work for the desalination facility with an outfall relocation/rehabilitation project that M1W had planned previously to undertake as a separate and independent project. If the outfall liner work and relocation project proceeds as a combined project, it could involve more extensive repair or replacement of most of the outfall located on the uplands portion of the coastal zone as a result of the outfall relocation component. This combined project has not yet been designed or gone through environmental review or permitting and will require M1W and Cal-Am to develop an agreement on how to implement the project. That combined outfall liner work and relocation project will likely require an amendment to the CDP that M1W received from the Commission for initial construction and operation of the outfall."

(AR 45-46.)

The Commission's November 2022 CDP approval.

The Commission, when assessing the possible feasible and less environmentally damaging alternatives to the Project, further recognized that installation of the outfall liner would not only likely require a modification to the existing CDP for the outfall, but that M1W was

considering including the liner not as a "stand-alone" modification to accommodate the Project's discharge, but as part of a more comprehensive and long planned relocation and rehabilitation project by M1W that would upgrade a substantial portion of the overall outfall. (AR 148). The Commission noted that M1W had not yet conducted CEQA review for either option for installing the liner, and therefore it could be "up to several years before a final approach is decided upon and the necessary environmental review and permitting is implemented and completed." (*Ibid.*)

In its decision, the Commission determined, based on Cal-Am's and M1W's representations to it, that M1W would apply for a modification to the existing CDP for the outfall, as the current holder of the CDP and owner of the outfall. (AR 45-46, 56, 79, 130, 148.) At the time of the Commission's decision, it was unclear whether the outfall liner work would be combined with M1W's relocation project which could involve more extensive repair and replacement of the outfall. (AR 46). Under either circumstance, the Commission concluded that an amendment to the CDP that M1W received from the Commission for initial construction and operation of the outfall would be required. (AR 46). The Commission addressed the issue by requiring Cal-Am, prior to issuance of the Project's CDP, to provide documentation that the outfall liner needed has received all necessary approvals for use of the M1W outfall, but that if Cal-Am and M1W did not agree on pursuing the outfall liner and relocation project as a combined project, the two projects would proceed separately and likely require separate CDPs. (*Ibid.*)

Petitioners have not shown that 14 CCR § 13052 was violated.

Petitioners have not shown Commission abused its discretion in allowing the Project application to proceed prior to other agency approvals. Petitioners contend that the Commission violated 14 CCR section 3052 (generally requiring any approval from all other governmental agencies be granted before a CDP application may be accepted for filing – except as provided in 14 CCR section 13053) by accepting the Project application before other governmental agencies first approved the outfall modifications, but Petitioners omit reference to the Commission Executive Director's power to waive this requirement under 14 CCR section 13053 – which he did in this instance and explained why.

As noted above, in its letter of September 1, 2022 to Cal-Am (AR 6315-6316) deeming Cal-Am's CDP application complete for the Project, the Commission noted that it had earlier required Cal-Am to provide two additional items. Cal-Am subsequently provided information satisfactory to the Commission to meet these requirements, as outlined in the September 1, 2022 letter, and which included three additional outfall-related components (one of which would be outside the coastal zone) other than the liner. (*Ibid.*)

The Commission acknowledged at that stage it was still uncertain whether the outfall modifications would be addressed as a standalone project or as part of an M1W project to relocate the outfall, but that Cal-Am had provided the Commission sufficient detail about Cal-Am's outfall components – which would not change – to deem the application sufficiently

completed to proceed to consider the CDP application. The Commission noted (as it did many, many times throughout the record here) that the Project would require other agency approvals, including from the CPUC and M1W, and that the Executive Director, exercising the authority given under 14 CCR section 13053, in his discretion waived the submission requirements under 14 CCR section 13502 (requiring preliminary approval from all government agencies to be deemed a complete application for a coastal development permit). (AR 6316.)[37]

The Commission's November 2022 approval did not violate 14 CCR section 13053.4.

As noted above at the beginning of this section, Petitioners also contend that the Commission should have addressed the outfall modifications and any environmental impacts from the modifications as part of the current CDP, pursuant to Coastal Act Regulation 13053.4(a).

Respondents state that the language of that regulation provides that the Commission was not required, under the circumstances presented here, to consider the outfall modifications as part of the CDP, and that it properly imposed a condition that M1W apply for modification of its CDP for the outfall in a separate application to the Commission. Respondents further argue that the Commission nonetheless did adequately analyze and address the outfall modifications in its Findings and Declarations, Section K. (AR 126-131).

Coastal Regulation 13053.4(a) does not unconditionally require a single application for all functionally related developments. The Regulation only says that: "[t]o the maximum extent *feasible*," "functionally related developments *to be performed by the same applicant* shall be the subject of a single permit application." (emphasis added).

That code section only requires a single application for a project (i) by the same applicant and (ii) when feasible. The Court is required to defer to the Commission's interpretation of its own regulations. (*Ross*, *supra*, 199 Cal.App.4th at 938.)

Petitioners have failed to show that Respondent Commission abused its discretion under the Coastal Act by finding the outfall CDP modifications should be the subject of a separate application. Furthermore, the court notes that in imposing the outfall CDP modification as a condition of the current CDP, the Commission provided the environmental safety net that such permission must be obtained *before* the instant CDP will issue. (AR 15).

There was substantial evidence – uncontroverted -- before the Commission that M1W was the appropriate, indeed the only, entity qualified to apply for the outfall modification CDP at the time of the instant CDP hearing in November 2022. The Commission was on the basis of that evidence entirely justified in finding that the applicant for the Project's CDP -- i.e., Cal-Am --

[37] Notwithstanding this waiver, the Commission also evaluated the impacts that the outfall modifications may have to ESHA and reviewed feasible mitigation and alternatives. (AR 130, 145-148, and 38412.) The Commission found that the Project was inconsistent with the Coastal Act and LCP provisions, but nevertheless found it met the three part test of Coastal Act Section 30260 and approved the CDP with conditions prior to issuance. (AR 80, 158-164). The FEIR/FEIS of the lead agency CPUC also addressed outfall impacts.

was not the 'same' applicant which would file the outfall CDP modification. (AR 56, 79, 130, 38411)

Likewise, and for the same reasons, the Commission's conclusion that it was not feasible to consider the outfall modifications for which M1W holds the existing permit and right to seek modification and as to which Cal-Am then had no property right or interest, is well-supported by the record.

Petitioners' arguments based upon PRC section 30601.5 do not compel a contrary conclusion. As noted by Respondents, although PRC section 30601.5 allows an application for a CDP by one who is not the *owner*, the statute qualifies this statement by limiting the application to one who *can demonstrate* a legal right, interest or other entitlement to use the property for the proposed development.[38] There is substantial evidence in the record to support the Commission's finding (AR 38411) that Cal-Am did not possess such an interest at the time of the CDP application for the Project. Any prior agreement between Cal-Am and M1W had since expired and the parties were, at the time of the Commission's review, still considering and negotiating the terms of the reimbursement, joint funding, and agreements related to the outfall liner. (AR 45, 40679.)

In short, at the time of the Commission's review, Cal-Am had no property right in the outfall: M1W operates it, owns it and holds the current CDP for it. (See AR 130 (Commission's stated findings that the CDP for the outfall was issued to M1W which operates it); 4954-4962 (the CDP for the outfall issued to M1W); 3086 (letter from Cal-Am to Commission stating that M1W is the owner and operator of the outfall); see also, Marina Water Opening Brief at 60:20-21 (referring to the outfall as "owned and operated by M1W").)

In approving the CDPs for the Project, the Commission decided to condition issuance of the CDP on the Commission's "permit authorization for construction of modifications to the existing M1W ocean outfall to accommodate discharges from desalination operations." (Special Condition 1.

(AR 12, 6316.)

Thus, the evidence of the circumstances related to the outfall liner, including M1W's ownership of the outfall and existing outfall CDP as well as the status of a finalized agreement

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[38] PRC section 30601.5 provides:

"Where the applicant for a coastal development permit is not the owner of a fee interest in the property on which a proposed development is to be located, but can demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, the commission shall not require the holder or owner of any superior interest in the property to join the applicant as coapplicant. All holders or owners of any other interests of record in the affected property shall be notified in writing of the permit application and invited to join as coapplicant. In addition, prior to the issuance of a coastal development permit, the applicant shall demonstrate the authority to comply with all of the conditions of approval."

between M1W and Cal-Am (in progress), supports the Commission's decision in its discretion not to require Cal-Am to include the outfall liner in its CDP application, nor to require that Cal-Am simultaneously apply for a modification to the outfall CDP. There is likewise substantial evidence to support, and Petitioners have failed to show otherwise, the Commission's decision to instead condition issuance of the CDP on further Commission approval for the construction modifications to the existing M1W outfall to accommodate discharges from desalination operations. (See, *California Native Plant Society, supra,* 177 Cal.App.4th at 957, pp. 984-985 (recognizing greater deference is granted to an agency's substantive factual conclusions, which flows from the fact that the agency has the discretion to resolve factual issues and make policy decisions).) Petitioners have shown no error in the Commission's decision on this point.

III. Piecemealing claims.

Piecemealing is a CEQA issue. In the CEQA context, it refers to approving only portions of a project at a time, so as to sidestep analysis of the cumulative effects of an entire project. "Whether a project has received improper piecemeal review is a question of law" that courts review independently. (*Paulek v. California Department of Water Resources* (2014) 213 Cal.App.4th 35, 36.)

CEQA law regarding 'piecemealing'

In *Laurel Heights I, supra,* 47 Cal.3d at p. 376, 396, our state Supreme Court stated:

> "We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. ... [para.] This standard is consistent with the principle that 'environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.' [citation omitted.] The standard gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful. Under this standard, the facts of each case will determine whether and to what extent an EIR must analyze future expansion or other action."

In reviewing the Commission's actions under challenge here, the context in which those actions were taken is significant. The CPUC was the lead agency under CEQA and had already certified the FEIR/FEIS for the Project as a 6.4 mgd facility. The Commission was a responsible agency under CEQA. Approval of CDP for the desalination facility was just one portion of several subsequent agency approvals necessary for the project to proceed. (See, e.g., AR 10329, 12-13.) The respective roles of the approving agencies govern the extent of their responsibilities under CEQA.

The Commission's role here as a responsible agency under CEQA, after approval of the Project by the CPUC as lead agency.

The respective roles of lead and responsible agencies regarding environmental review after an EIR has been approved by the lead agency are summarized in *California Coastkeeper, supra*, 64 Cal.App.5th 36, applying the principles set forth by the California Supreme Court in *Friends of the San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937 ("*San Mateo Gardens*").[39]:

Pursuant to the Commission's regulatory program for CDPs certified by the Secretary of Natural Resources in 1977, Guidelines section 15251(c) and *Ross, supra*, 199 Cal.App.4th 935, the Commission's procedures for public review and comment, and staff reports analyzing a proposed coastal development, function as the equivalent of CEQA review. (*Ross, supra*, 199 Cal.App.4th at 930-933. The Commission staff reports are the functional equivalent and in lieu of an EIR. (Pub. Res. C. § 21080.5(a); *Ross, supra*, 199 Cal.App.4th at 930-933; see also, *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229-1230 [Secretary's certification of state agency programs allow the programs to function as the equivalent of CEQA and its EIR requirements.])

Under CEQA Guidelines section 15162(a), once an EIR has been certified for a project, generally no subsequent or supplemental EIR is required of the lead agency (or any responsible agency, if the lead agency has previously completed its approval, Guidelines section 15162) unless the agency determines on the basis of substantial evidence, in light of the whole record, that substantial changes will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.[40] The substantial evidence test referred to in the Guidelines does

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[39] A "lead agency" under CEQA means the public agency which has the "principal responsibility for carrying out or approving a project." (14 CCR § 15367; PRC § 21067; *California Coastkeeper, supra*, 64 Cal.App.5th at p. 54.) CEQA requires a lead agency to prepare an EIR before approving a project which may have a significant effect on the environment. (*Ibid.*) The lead agency determines whether an EIR rather than a negative declaration is required before approving the project. (*Ibid.*) A "responsible agency means "a public agency which proposes to carry out or approve a project for which a lead agency is preparing or has prepared a negative declaration." (*Id.* at 55.) For purposes of CEQA, a "'responsible agency' includes all public agencies other than the lead agency which have some discretionary for carrying out or approving the project." (*Id.* at 55-56; 14 CCR § 15381; PRC § 21069.)

[40] Title 14 of the California Code of Regulations section 15162 provides:

> (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in light of the whole record, one or more of the following:
>
> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

not refer to substantial evidence that the project as modified will necessarily have significant environmental effects. It instead refers to substantial evidence that the project *as modified* will involve substantial changes that require major revisions of the previous EIR due to the presence of new or significantly more severe environmental effects. (*California Coastkeeper*, *supra*, 64 Cal.App.5th at 56-57.)[41]

The purpose behind requiring a subsequent or supplemental EIR in such circumstances is to explore environmental impacts not considered in the original environmental document, not to revisit environmental concerns laid to rest in the original analysis. Only changed circumstances

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(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known or could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examine will be substantially more severe than shown on the previous EIR;

(C) Mitigation measures or alternatives previously not found to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative.

(b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subdivision (a). Otherwise, the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation.

(c) Once a project has been approved, the lead agency's role in the project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.

(d) A subsequent EIR or subsequent negative declaration shall be given the same notice and public review as required under Section 15087 or Section 15072. A subsequent EIR or negative declaration shall state where the previous document is available and can be reviewed.

[41] A subsequent or supplemental EIR may also be required where mitigation measures or alternatives previously found not feasible would in fact be feasible and would substantially *reduce* one or more significant effects of the project, but the proponent *declines to adopt the mitigation measure* or alternative. (Guidelines, PRC section 15162(a)(3)(C).) That is not the case here.

are at issue. The question before the agency is whether circumstances have changed enough to justify repeating a substantial portion of the process. (*Id.* p. 58.)

Consequently, under CEQA when there is a change in plans, circumstances or available information after a project has received initial approval, the agency's environmental review obligations turn on the value of the new information to the still pending decision making process. If the original environmental document retains some informational value despite the proposed changes, then the agency proceeds to decide whether the project changes will require major revisions to the original environmental document due to the involvement of new, previously unconsidered significant environmental effects. Whether the original environmental document remains relevant despite changed plans or circumstances is a predominantly factual question, for the agency to answer in the first instance, drawing on its particular expertise.

A court's task on review is to decide whether the agency's determination is supported by substantial evidence – not to weigh conflicting evidence and decide who has the better argument. (*Id.* at 58-59.) As *California Coastkeeper* further noted, 64 Cal.App.5th at 59, the California high Court in *San Mateo Gardens,* 1 Cal.5th at p. 953 pointed out, " … occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare, and rightly so; 'a court should tread with extraordinary care' before reversing an agency's determination, whether implicit or explicit, that its initial document retains some relevance to the decision making process."

Unless a subsequent EIR is required (i.e., because under Guidelines 15162 major revisions to the EIR are required and the EIR cannot be made adequate by minor additions or

changes), a responsible agency does not assume the role of a lead agency. (14 CCR §§ 15052 [42] and 15163 [43]; *California Coastkeeper*, supra, 64 Cal.App.5th at 59-63.)

The parties' piecemealing arguments

Petitioners' CEQA piecemealing argument appears to be directed toward three specific areas: (1) phasing of the Project into Phase 1 and Phase 2, with present approval by the

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[42] Title 14 of the California Code of Regulations, section 15052, "Shift in Lead Agency Designation" provides:

(a) Where a responsible agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate lead agency, the responsible agency shall assume the role of the lead agency when any of the following conditions occur:

(1) The lead agency did not prepare any environmental documents for the project, and the statute of limitations has expired for a challenge to the action of the appropriate lead agency.

(2) The lead agency prepared environmental documents for the project, but the following conditions occur:

(A) A subsequent EIR is required pursuant to Section 15162,

(B) The lead agency has granted a final approval for the project, and

(C) The statute of limitations for challenging the lead agency's action under CEQA has expired.

(b) When a responsible agency assumes the duties of a lead agency under this section, the time limits applicable to a lead agency shall apply to the actions of the agency assuming the lead agency duties.

[43] Title 14 of the California Code of Regulations, section 15163, "Supplement to an EIR" states:

(a) The lead or responsible agency may choose to prepare a supplement to an EIR rather than a subsequent EIR if:

(1) Any of the conditions described in Section 15162 would require the preparation of a subsequent EIR, and

(2) Only minor additions or changes would be necessary to make the previous EIR adequately supply to the project in the changed situation.

(b) The supplement to the EIR need contain only the information necessary to make the previous EIR adequate for the project as revised.

(c) A supplement to an EIR shall be given the same kind of notice and public review as is given to a draft EIR under Section 15087.

(d) A supplement to an EIR may be circulated by itself without recirculating the previous draft or final EIR.

(e) When the agency decides whether to approve the project, the decision-making body shall consider the previous EIR as revised by the supplemental EIR. A finding under Section 15091 shall be made for each significant effect shown in the previous EIR as revised.

Commission only given to Phase 1 (any approval of Phase 2 will require a subsequent application for CDP amendment and further environmental review, accompanied by data accumulated during mandatory monitoring in Phase 1[44]); (2) approval of modifications to the existing outfall, then owned and operated by M1W under an existing CDP, to accommodate brine effluent from the Project, to be the subject of a separate application and review before the instant CDP will issue; and (3) possible future relocation of the slant well network in the event of future erosion, rising sea level from climate change, or other forces of nature (such as dune recession) forcing removal, rehabilitation or outright removal of the slant wells.[45]

Respondents address these piecemealing contentions as follows:

(1) As to phased approval:

(i) the environmental analysis of the full-scale 6.4 mgd project (i.e., the total combined output of Phases 1 and 2, should Phase 2 be approved later by the Commission) was already evaluated in the 2018 FEIR/FEIS certified by the lead agency CPUC, and thus further analysis by the Commission as a responsible agency thereafter was not required;

(ii) that nonetheless the Commission thoroughly evaluated the subsequently accumulated (after the FEIR) information before it in November 2022, and analyzed and mitigated the full 6.4 mgd project in the course of approving the slant well network for an environmentally preferable initial 4.8 mgd project phase;

(iii) that Commission's action in currently approving only a downsized preliminary Phase 1 of the project subject to numerous conditions (including a determination by the CPUC in its *pending proceeding* that there *will* be a demand exceeding the Pure Water Project Expansion supply capacity - see Special Condition 1 (AR13)) which must be met before the current Phase 1 CDP will be issued, was appropriate, and that Petitioners have cited no authority in support of the proposition that the Commission as a responsible agency cannot approve a phased version of a project already approved by a lead agency; and

(iv) that conditioning any further approval for the 6.4 mgd Phase 2 project upon future CDP application by Cal-Am for modification of the instant CDP, which will require Cal-Am to provide actual monitoring data of environmental effects collected during the smaller-scale pumping under Phase 1, only operated to *reduce* environmental impacts during the Phase 1 period and provide less speculative, empirical, data to evaluate whether Phase 2 will be allowed to proceed under a modified CDP.

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[44] This portion of the challenge is not labeled only as piecemealing; City also describes it as 'segmenting.'

[45] Petitioners also argue that by approving only a first, 4.8 mgd, phase of the Project, the Commission collaterally attacked the CPUC approval of the full-scale 6.4 mgd project, in violation of Public Utilities Code section 1709. This contention is addressed separately, below.

(2) As to the outfall:

(i) the outfall modifications were already analyzed and addressed in the CPUC FEIR/FEIS;

(ii) even if further environmental review of the outfall modifications had not already been addressed in the Final EIR/EIS, environmental review of the outfall at the time of the instant CDP application would have been accepted under CEQA case law from a piecemealing challenge;

(iii) in any event the outfall modifications were adequately analyzed and addressed in the Commission's Staff Report at AR 129-131;[46] and

(3) Any potential slant well relocation was adequately addressed by the Commission and properly determined to be too speculative to require further analysis at the time of the 2022 hearing.

Discussion.

There does not appear to be disagreement among the parties that future expansion of the Project from 4.8 mgd Phase 1 approved by the Commission to full-scale 6.4 mgd previously approved by the CPUC and addressed in the latter's FEIR/FEIS is a reasonably foreseeable consequence and would, if approved, likely change the scope of Phase 1 and its environmental effects. In fact, the Commission actually discussed the lessened effects of Phase 1 in a thorough analysis comparing it to the full-scale operation approved by the CPUC.

However, that does not end the analysis. As noted above, under the principles set forth in *Laurel Heights I* and those set forth in *San Mateo Gardens* and summarized in *California Coastkeeper*, the Commission's review as a subsequent responsible agency was not required to start from ground zero.

Adequacy of analysis of future potential environmental impacts when required

General Principles --- What level of discussion is required for reasonably foreseeable future uses and impacts?

The court notes the language of our California State Supreme Court in *Laurel Heights I,* that an EIR must refer in at least general terms – address at least the general effects -- of reasonably foreseeable future uses and the currently anticipated measures for mitigating those effects. (47 Cal.3d at 398.) The Court in *Laurel Heights I* also stated that under this standard, the facts of each case will determine whether ***and to what extent*** an EIR must analyze future expansion or other action. (*Id.*at 396)(emphasis added.)

[46] It appears the analysis actually started at AR 126.

" 'Although admittedly contingent on the happening of certain occurrences, the pipeline [in *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397] was, nevertheless, part of the [overall] plan for the project and could have been discussed in the EIR in at least general terms.' [citation omitted.] The same principle applies here [in *Laurel Heights I*]. UCSF should have discussed in the EIR at least the general effects of the reasonably foreseeable future uses of the Laurel Heights facility, the environmental effects of those uses, and the currently anticipated measures for mitigating those effects. [Para.] We do not require prophecy. The Regents are not required by our decision to commit themselves to a particular use or to predict precisely what the environmental effects, if any, of future activity will be.... A detailed environmental analysis of every precise use that may conceivably occur is not necessary at this stage.... While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (*Laurel Heights I*, supra, 47 Cal.3d at pp. 398-399.)

In the instant action, Petitioners have failed to show that the Commission acted improperly in its role as a subsequent, responsible agency (i) addressing the Project components within its jurisdiction, (ii) assessing information accumulated after the lead agency (CPUC's) FEIR/FEIS was certified, (iii) recognizing in its discretion and upon substantial evidence the continued value of the FEIR/FEIS as an informational document notwithstanding the subsequent information, and (iv) in imposing mitigation measures designed to monitor effect of the Project at a 4.8 mgd level of production as well as conditioning its approval upon a determination by the CPUC of sufficient supply and demand in a then-pending proceeding before the CPUC.

The Court addresses each claimed 'piecemealing' challenge as follows:

a. The Commission's phasing of approval the Project so as to limit CDP approval presently to only 4.8 mgd did not violate CEQA by impermissibly piecemealing assessment of environmental impacts.

Petitioners contend that in granting a CDP permit only for a 4.8 mgd facility and requiring a future application to modify the CDP to allow a 6.8 mgd facility, the Commission impermissibly piecemealed the approval by deferring consideration of impacts of a 6.4 mgd facility.

Respondents argue that the CPUC-certified FEIR/FEIS previously analyzed and addressed the 6.4 mgd full-scale Project; and that nonetheless, the Commission did in fact analyze the impacts of the reasonably foreseeable second phase of the Project and 'fully evaluated those issues associated with the full scale of the 6.4 mgd Project in its review' (Respondent's Brief at 37:3-10 (citing AR 43 [comparing full scale facility to phased approach which will require future demonstration of need before Phase 2 would proceed], AR 68 [finding that compared to full-scale operation, phased project would reduce impacts from wellpads and access road], AR 72-73 [concluding that compared to full scale operation, phased project would

reduce pipeline construction staging], AR 78 [ESHA][47], AR88 [discussing uncertainty about effects on groundwater pumping and consequent rationale for imposing Special Conditions to minimize and monitor pumping effects on same], AR 126-127 [addressing marine resources/coastal waters; first phase would result in reduction of effluent volume by about one-third compared to full-scale operation] and AR138-139 [noting public access would be less impacted by construction during phased project; area impacted is a relatively small portion of the CEMEX site, and significant beach access would still exist].)

In other words, the Commission actually and necessarily *did* evaluate the full-scale project effects as part of the process of comparing and evaluating the lessened, mitigated effects of a 4.8 mgd desalination operation. This appears to be a well-taken, logical and common-sense position.

As Respondents point out, Petitioners cite no authority that prohibits the Commission, as a responsible agency, under CEQA from approving a phased version of a project approved by the lead agency – here, the CPUC. However, the issue raised is whether by doing so, the Commission impermissibly deferred consideration of future environmental impacts. The Court concludes that it did not.

The CPUC, in the FEIR/FEIS, had already extensively studied future environmental impacts based upon the information before it.

The 2018 CPUC FEIR/FEIS analyzed supply and demand and concluded that the Pure Water Expansion[48] project was not a feasible alternative to construction of a 6.4 mgd desal plant, based on the information then before it. Although the CPUC in its lead agency role and in the FEIR/FEIS had determined that a 6.4 mgd facility would be environmentally preferable to a 4.8 mgd operation, by November 2022 when the current CDP was approved three years had elapsed and new studies and data accrued in the interim. (AR 51.) Cal-Am's 2022 proposal also was for a 4.8 mgd project with a smaller footprint (fewer wellpads) than that which the CPUC had considered in finding the 6.4 mgd project environmentally preferable. (AR 2-3.) There remained at the time of the 2022 Commission CDP hearing a major area of uncertainty as to what supply and demand would be more than 25 years out from that hearing.

As noted by the Commission, widely varying projections had been submitted on the topic of supply and demand. Three years of severe drought had occurred in the interim. There was some evidence that the MPWSP PWE, which as yet had no *actual* production output figures,

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[47] It is noted that this portion of the AR only concludes that the mitigation measures and Special Conditions imposed would ensure the impacts to ESHA are "avoided, minimized, and mitigated to the maximum extent feasible" while also recognizing that the Project is inconsistent with the Coastal Act and LCP and would only be approved if it meets the requirements for an industrial facility override under PRC section 30260. (AR 78.)

[48] The Pure Water Expansion Project is part of a water recycling and aquifer storage and recovery project operated by MIW (Monterey One Water) and funded by MIW, Cal-Am, and MPWMD. (AR 145.)

would be able to meet current demand and supply. The Commission concluded that although it was likely that the MPWSP would be able to supply sufficient water in the near term, it would not likely be able to do so in the longer term. (AR 156 (stating "As discussed above, the Pure Water Expansion project is an important, but not sufficient, alternative to meet these objectives over the next 20 years approximately, based on the new data presented in the current CPUC proceeding.")) The administrative record shows that the Commission devoted considerable time and analysis to this subject. (AR 143-157; AR 210 et seq. [Public Advocates Office at the California State Utilities Commission - Report and Recommendations]; the record is saturated with other references tied to supply and demand, including Special Conditions tied to supply and demand – e.g., AR 3- 5, 13, 41, 42-43, 50-55, 57.)

The Commission's conclusion was that, although the Cal-Am's Project would have greater adverse environmental impacts than the PWE, it nonetheless may be needed for longer term water supply needs (a determination ultimately to be made by the CPUC, per Special Condition 1). (AR 3, 9.) This conclusion has not been shown to be unsupported by substantial evidence following an adequate investigation and analysis, or to be not rationally based upon the evidence before it. While courts review the "whole" administrative record and consider all relevant evidence, including that which detracts from the decision, "that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission....it is for the Commission to weigh the preponderance of conflicting evidence, and [courts] may reverse its decision only, if based upon the evidence before it, a reasonable person could not have reached the conclusion reached by it." (*Kirkorowicz v. Cal. Coastal Com.* (2000) 83 Cal.App.4th 980, 986 (citing *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503; *Sierra Club, supra,* 12 Cal.App.4th at p. 610.))

Rather than speculate as to the conditions of supply and demand in the distant future, the Commission limited the term of the CDP to 25 years (Special Condition No. 6, AR 16) and scope of approval to 4.8 mgd (Special Condition No. 2, AR 14). What this actually in effect did, among other things, was to reduce the amount of pumping at the commencement of the Project, and to require monitoring of groundwater and vernal pond/wetland (Special Condition Nos. 2, 10, 12, 13, AR 14, 23, 29-34) impacts, as well as impose a minimum two (2) year period following full operation of Phase 1 before expansion to 6.4 in a second phase could be sought (Special Condition No. 2, AR14). It also required that any expansion of the operation to 6.4 mgd be by application to the Commission to modify the CDP, accompanied by all monitoring reports (Special Condition No. 2, AR 14). The CDP approval of Phase 1 further provided that no later than two (2) years prior to expiration of the current CDP Cal-Am must submit an application to remove, relocate or rehabilitate Project elements or to extend the term of the permit, accompanied by detailed past monitoring and future projection data.[49] The application must also

[49] Specific data must be submitted in connection with the application, including at a minimum the most recent sea level rise projections for the location, most recent coastal erosion rates for the location, location of then-current site features including mean high tide line, foredunes, existing habitat types, and presence of any known or potential

include and address any changed circumstances and unanticipated impacts that have occurred or are reasonably expected to occur during the *next* 25-year period (Special Condition No. 6, AR 16-17.)

As summarized by the Commission: "Construction of the full-scale of the Project at 6.4 mgd per year would occur in a second phase only if Cal-Am can demonstrate a need for the additional water supply and demonstrate that the first phase has been operating in a manner that is protective of local groundwater supplies and nearby wetlands." (AR 2).

This cautious approach taken by the Commission must be measured by the CEQA requirement that the EIR [here, the staff report] describe at least in "general terms" the future uses and impacts, tempered by the notion that "prophecy is not required." (*Laurel Heights 1, supra*, 47 Cal.3d at p. 398.) The Commission's phased approach to approval is rational: future information obtained empirically through monitoring and later scientific data would provide meaningful historical information about environmental impacts to guide what course the Project could feasibly take in the future with minimal adverse environmental consequences.

The evil which true piecemealing presents – that of separately considering only environmental impacts of discrete parts rather than of an entire project as a whole, when cumulatively the impacts may be disastrous – is not present under the facts here presented. The impacts of an entire full-scale 6.4 mgd project *were* previously disclosed, analyzed and mitigated by the *lead* CEQA agency CPUC in its Final EIR/EIS. The Commission, in its role as a *responsible* agency, reviewed additional information which was not available at the time of the CPUC Final EIR/ EIS, and recognized the value of the Final EIR as an informational document, and approved only a *smaller*-scale facility of 4.8 mgd based upon the additional information of a smaller proposed project (fewer well pads, smaller output per day).

Accordingly, the Court finds that Petitioners have not shown that the Commission violated the proscription against piecemealing in approving the downsized Phase I project.

b. CEQA issues regarding claims of 'piecemealing' the outfall by requiring the outfall modifications to be addressed in a separate CDP application rather than as part of the current CDP application by Cal-Am.

As noted above, the 'outfall' is an existing wastewater discharge facility owned and operated by M1W and used to discharge treated wastewater from M1W's regional wastewater treatment facility to about 11,000 feet offshore in Monterey Bay (AR 126). Cal-Am plans to use the outfall to discharge effluent from the desalination facility. To do so, modifications to the outfall, such as the installation of a liner and replacement clamps will be necessary to counteract

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species using the site's habitat types. Failure to obtain a new or amended CDP authorizing removal or an additional term for the project is itself a violation of the CDP. Special Condition 6 (AR 17).

the corrosive effects of the brine discharge. (AR 128-129.) This will involve the use of construction equipment and temporary closure of some beach access (AR 129.)

The Commission noted that M1W is the current holder of the CDP previously issued for the outfall and as such would need to apply for a modification of that permit in order that the modifications of the outfall. The Commission imposed as a condition of the instant Cal-Am CDP permit a requirement of "Coastal Commission permit authorization for construction of modifications to the existing M1W ocean outfall to accommodate discharges from the desalination operations." (AR 12)[50]

Petitioners' CEQA piecemealing contentions regarding the outfall.

Petitioners contend that Commission should have addressed the outfall modifications and any environmental impacts from the modifications as part of the current CDP. Respondents contend that review of the outfall was within two exceptions to the general prohibition against deferred consideration or piecemealing; and that since in any event the outfall modifications were already examined and addressed in the CPUC Final EIR/EIS, and no changes to those modifications had subsequently been proposed, therefore no further evaluation by the Commission as a responsible agency was required under CEQA.

The Court concludes that (a) contrary to Respondent's' argument, no piecemealing exception applies on grounds that the Project is functionally independent of the outfall modification: the Project cannot be operated independently of outfall liner installation, either under the Commission findings (AR 79, 130) or under the FEIR/FEIS, which imposed same as a mitigation measure 4.13-5b, (AR 79, 11351, 11355-11358); but (b) the outfall had already been analyzed in the CPUC's lead agency FEIR/FEIS and Petitioners have not shown that further analysis by the Commission as a responsible agency was required; and (c) further analysis by the Commission of the outfall modifications *does* fall within an exception which applies where two projects have separate proponents, as summarized in *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223, ("*Banning Ranch*"), discussed below.

Respondents' contentions regarding the outfall under CEQA piecemealing constraints

Respondents assert that the outfall *modifications* are not functionally related to the Project because the Project can function without the outfall modifications and thus can be approved independently without violating the prohibition against piecemealing. (Respondent's Brief at 39:3-13, citing *Banning Ranch, supra*, 211 Cal.App.4th 1209, 1223 and referring to AR 45, 130.) The Court does not agree. The Court's review of the record, at AR 129, indicates exactly the opposite – "M1W has already determined that the outfall must be modified in several specific ways to accommodate the relatively corrosive effluent from Cal-Am's facility. Along

[50] Commission also noted that the Central Coast Regional Water Quality Control Board ("CCRWQCB") also will require that M1W apply to CCRWQCB for approval (AR127), and such approval by that agency is also imposed as a condition for the instant CDP. Special Condition 1, AR12.

with requiring that a liner be installed along the upland portions of the outfall, M1W expects that new corrosion-resistant clamps will need to be installed."

Respondents also contend that, in fact, modifications were just one option given to Cal-Am. (Respondent's Brief at 39:8-9, citing AR 10558-10560, 129). This argument does not 'hold water,' either – there is no substantial evidence supporting such a conclusion. It is true that portions of the record (AR 128-129) state that the CPUC in the FEIR/FEIS found there are options, though the use of a diffuser modification would be most effective; it is also true that the FEIR/FEIS (AR 10558-10560) does in fact list options, although it lists the option of operational (as opposed to the physical) modification as less likely to be actually employed. However, even assuming it is true that optional ways to meet the effluent content discharge standards were permitted in the approval, the cited portion of the record does not state the *necessary liner modification* is optional.

Respondents contend that the outfall modification impacts have already been studied at length in the FEIR/FEIS and no changes to those modifications had been proposed as of the 2022 Commission decision. (Respondent's Brief at 37:25-26). The Court agrees. Factual support in the record for the CPUC's analysis and discussion of outfall modifications in the FEIR/FEIS is at AR 10293-10295, 10314,10329, 10556-10565, 11348-11358. Specifically, the FEIR/FEIS addresses the liner installation in connection with FEIR/FEIS Mitigation Measure 4.13-5b[51] at AR 11351, 11355-11358.

Relatedly, Respondents contend that the Commission nonetheless fully evaluated the outfall modifications analyzed in the CPUC's FEIR/FEIS (Respondent's Brief at 37:27-38:2.)

This, too, is borne out by the record. The Commission staff report and findings review and recognize the continued value of the FEIR/FEIS of the lead agency as an informational document, fulfilling the Commission's role as a responsible agency. (*Cal. Coastkeeper, supra*, 64 Cal.App.5th at 54.)

Respondents further contend that under existing CEQA case law, the Staff Report did not engage in prohibited piecemealing because the Cal-Am CDP and the future application for modification of the existing outfall permit by M1W have two separate proponents.

Language in case summaries set forth in *Banning Ranch, supra,* 211 Cal.App.4th at p. 1223 indicates CEQA case law recognizes such does not constitute improper piecemealing. (stating "[o]n the other hand, two projects may properly undergo separate environmental review (i.e., no piecemealing) when the projects have separate proponents, serve different purposes, or

[51] Mitigation Measure 4.13-5b requires installation of the liner prior to Cal-Am commencing its facility operations. (AR 79.)

can be implemented independently)[52]; AR 4896 is a communication from M1W – separate proponent of the outfall modification project - indicating its intention to apply for a modification of the existing CDP once the details of an agreement with Cal-Am are approved.

As noted above in connection with the discussion of Coastal Act Regulation 13053.4(a), there is substantial evidence in the record to support the Commission's finding (AR 38411) that Cal-Am did not possess a property interest in the outfall at the time of the CDP application. (AR 130, 3086, and 4954-4962.) M1W owns the outfall and holds the current CDP for it. The Commission at AR 79 and again at AR 130 addressed the necessity for M1W to apply for a modification of the existing CDP as current holder of the CDP for the outfall. (See AR 130 (referring to M1W as the entity which "operates the outfall"); AR 4954-4962 (existing outfall CDP); and AR 4896 (expressing M1W's indication that it will apply to modify same if approved by their Board); AR 3086 (stating in a letter from Cal-Am to the Commission that M1W is the owner and operator of the outfall; see also, (Petitioners MPWMD/MCWD's Opening Brief 60:20-21 (referring to it as "owned and operated by M1W.”))

Applied to the circumstances here as outlined above, substantial evidence supports the Commission's decision that the outfall modifications did not need to be part of Cal-Am's CDP. M1W is to be the proponent of any outfall CDP modifications. The Commission further imposed Special Condition No. 1 - Cal-Am must submit proof of a CDP permit or CDP modification for the outfall before the CDP will issue. (AR 12). As previously noted, the Central Coast Regional Water Quality Control Board also requires that M1W apply for modification of that agency's permit before the outfall modifications for brine discharge can be approved (AR 127), and that approval in turn is included in Special Condition No. 1. (AR 12.)

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[52] *Banning Ranch*, supra, 211 Cal.App.4th at 1223-1224 (citing *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99 (refinery upgrade and construction of pipeline exporting excess hydrogen from upgraded refinery were "independently justified separate projects with different project proponents"); *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 237 (water transfer had "significant independent or local utility" from broader water supply agreement and would be implemented with or without it); *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 699 (two water rights assignments to city were "approved by different independent agencies" and "could be implemented independently of each other"); *Plan for Arcadia, Inc. v. Arcadia City Council* (1974) 42 Cal.App.3d 712, 726 (shopping center EIR could exclude road work the city had "long before" decided would be needed due to new freeway); but see, *Tuolome County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1227-1228 (home improvement center EIR must include road realignment called for in general plan for 20 years, but also criticizing *West Side Irrigation*, "the possibility that two acts could be taken independently of each other is not as important as whether they actually will be implemented independently of each other".)

c. Petitioners' third area of claimed piecemealing: assessment of relocation of slant wells in the future from erosion and sea level rise

Piecemealing under CEQA.

Essentially, Petitioners argue that the slant wells will have to be relocated in 25 years because of forces of nature, and that the Commission failed to analyze the future impacts.

Respondents argue: (i) that the Commission reviewed and studied this issue at length, and concluded that there was minimal risk to the slant wells during the 25 year CDP permit term; (ii) that the Commission analyzed and found that beyond that 25 year period such impacts are speculative (and thus further analysis is not presently required under CEQA Guidelines and case law because of uncertainty of erosion, climate change effects and dune recession); and (iii) Special Condition No. 6 not only limits the term of CDP to 25 years and imposes an obligation on Cal-Am, no later than two (2) years prior to expiration of the CDP, to apply for removal, relocation or rehab project elements and to restore areas which will no longer be used, but also specifies contents of any such application to include, *inter alia*, current information regarding sea level rise and erosion. Also, as a hedge against sooner destruction or impairment of the wells, Cal-Am is already required by FEIR/FEIS Mitigation Measure 4.2-10 to monitor the slant wells and remove them five years *prior to any exposure*. (AR 100-102.)

CDP Special Condition No. 6 states:

"6. **Permit Term**. This coastal development permit authorizes the approved project slant wells and associated components to be installed and remain on the Applicant's property within the CEMEX site for a period of 25 years, or until January 1, 2050, whichever occurs first. After such time, the authorization for the continuation and/or retention of these project elements shall cease, unless an extension of permit term is approved, as set forth below.

> No later than two years prior to the end of this permit term, the Permittee shall apply for a new coastal development permit or amendment to this permit to remove, relocate, or rehabilitate these project elements and to restore all areas of the site that will no longer be used for these project elements, or to modify this term of authorization. This application shall include, at a minimum, the most recent sea level rise projections for the project location, the most recent coastal erosion rates for the location, and the then-current location of site features, including the mean high tide line, foredunes, existing habitat types, and presence of any known or potential sensitive species using the site's habitat types. The application shall also identify and address changed circumstances and/ or unanticipated impacts that have occurred or are reasonably expected to occur during the next 25-year period regarding environmental impacts and coastal

hazards, including but not limited to ongoing seal level rise projections and changed projections of known and potential coastal hazards. It shall also describe any changes to coastal resources including those resulting from public access or modifications to site habitat types. Provided the Permittee submits a complete application by this date, the termination date for this permit shall be automatically extended until the time the Commission acts on the new or amended coastal development permit application.

Failure to obtain a new or amended coastal development permit authorizing removal of and/or an additional term to retain the project elements shall cause this development to be in violation of the terms and conditions of this coastal development permit."

(AR 16-17.)

Respondents' argument is well-presented and persuasive. The Commission extensively reviewed the issues of future erosion, sea level rise (reviewing and including data more recent than that which was in the 2016 study for the FEIR/FEIS), and even went further by addressing the potential impacts of dune recession which were not addressed in the Final EIR (AR 97-103; also note, AR 101, fn. 81). The Commission also further addressed Petitioner's contention in the Addendum to the Commission Staff Report (AR 38411, noted below). The Commission then concluded, based upon constantly shifting sands of available data, that attempting to quantify and predict the timing of the forces of nature on the viability of the wellfield 25 years out was fraught with such uncertainty that it would be an exercise in speculation to attempt to do so presently.

The Commission nonetheless added Special Conditions limiting the term of the permit and noted that, in conjunction with further mitigation measures imposed by the FEIR/FEIS, any earlier threat to the function of the slant wells prior to conclusion of the 25-year term would be detected by mandatory monitoring and would require sooner removal pursuant to a future permit.

The November 14, 2022 Addendum to the Commission Staff Report states:

"**Potential removal or relocation of wells after permit expiration.** Petitioner MCWD also claims that the Commission must review the future impacts of potential removal or relocation of wells after the 25-year term of the permit. It is speculative, however, to evaluate whether Cal-Am must remove the wells or how it would replace or relocate them after this permit expires in 25 years. It is possible that Cal-Am could identify the locations of wells in the future that are not feasible today, for example. Moreover, because Cal-Am is required to obtain a permit amendment after the 25-year permit term to remove, relocate or rehabilitate the wells, the Commission can conduct its environmental review at the appropriate time when it is no longer speculative, If the wells need to be removed and there are no feasible alternative locations that are consistent with the

Coastal Act and LCP, then the Commission has the discretion to deny the permit amendment, and Cal-Am may be required to cease operation of the project."

(AR 38411)

14 Cal. Code Regs. section 15145, CEQA Guidelines states: "Speculation - If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." The Commission did exactly that here: it thoroughly investigated, analyzed and then articulated its conclusion that the future impacts are speculative.

> "[A] contention that an agency's factual findings are wrong, as a different example, is subject to substantial evidence review. But questions about the relevant standard of review are not always so clear." (*Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 95, 284 Cal.Rptr.3d 307.) "This is especially so when the issue is whether an EIR's discussion of environmental impacts is adequate, that is, whether the discussion sufficiently performs the function of facilitating 'informed agency decisionmaking and informed public participation.' " (*Sierra Club*, *supra*, 6 Cal.5th at 513.) Those types of "inquir[ies] present[ ] a mixed question of law and fact" and are "generally subject to independent review." (*Id.* at 516; see also, *Id.* at p. 514 (stating "whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question").) But if "factual questions predominate, a more deferential standard is warranted." (*Id.* at p. 516, 241 Cal.Rptr.3d 508; *County of Butte, supra,* 90 Cal.App.5th at p. 59.)
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> Under either standard of review, the Commission's analysis here was sufficient.

As a threshold matter, the effects of the environment on a project are generally irrelevant except to the extent that those effects will in turn exacerbate adverse impacts on the environment. (*California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369.) Furthermore, as noted in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1120, and recently reiterated in *Marina Coast Water District, supra,* 96 Cal.App.5th at p. 70, if a proposed project cannot be carried out as approved, then the project's proponents will have to seek approval of any additional activities and, at that time, will have to address the potential environmental effects of those additional activities.[53]

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[53] Special Condition No. 14 of the CDP here not only prohibits the erection of any shoreline protective device and requires Cal-Am to apply to remove the development if provision of essential services cannot be maintained (specifically referencing as an example utilities); it also requires removal of any portions of development which fall to the beach before removal, with CDP permit for same required. (AR 34-35). Further, the Commission noted (AR 100) that the Final EIR/EIS Mitigation Measure 4.2-10 requires Cal-Am to monitor and remove the slant wells prior to any earlier anticipated exposure to erosion or sea level change.

To the extent that potential future *economic impacts* of slant well removal/relocation/rehabilitation could have an impact on the environment - assuming this issue is even relevant (i.e., not simply an issue of economic viability of the project *California Building Industry Association,* supra, 62 Cal.4th 369), the Commission addressed the uncertainty of such economic impacts on ratepayers. The Commission recognized a "... concern that Cal-Am's desalination facility may not be able to operate for its overall expected 60-year operating life ... A shorter operating life may also create substantial changes in the Project's financing and water rates, since Cal-Am may seek to recover its costs in a much shorter time that the anticipated 60 years. These issues are discussed in more detail below and in Section IV.I -Assessment of Alternatives and in Section IV.O – Environmental Justice." (AR 100)[54]

The Staff Report states:

> "As noted above, Cal-Am will also likely need to either account for recouping its Project costs over a shorter Project operating life – i.e., the 25 years it expects the wells to operate – or account for the additional costs to relocate or rehabilitate those wells if they are to continue operating beyond that period. ... It remains unclear how Cal-Am's proposed $10 per month cost cap for its low-income ratepayers would affect its other ratepayers."

(AR 150, Staff Report's Assessment of Alternatives analysis).

The potential impacts of possible slant well relocation are so uncertain that the Commission sufficiently recognized and addressed the issue in its role as a responsible agency - bearing in mind that the CPUC actually approves rates. The Commission's assessment, since any economic impact of shortened economic life of the project is a function of the speculative and uncertain future effects and timing of the forces of nature (erosion, sea level rise, dune recession), has not been shown to have fallen short of meeting its role as a responsible agency or to constitute improper piecemealing. (*Cal. Coastkeeper,* supra, 64 Cal.App.5th at 54.)

<u>"Piecemealing" claims respecting erosion setbacks under the City's LCP.</u>

The City also asserts a piecemealing challenge to what it contends was improper deferral in addressing the LCP LCLIP setback standard which imposes a setback "... great enough to protect the economic life of the proposed development (at least 50 years) and be east of the tsunami hazard zone. The exact extent of this setback shall be determined by a qualified geologist, selected from an approved list compiled and maintained by the City." (AR 32245.)

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[54] The correct reference to Environmental Justice is at section IV.-I (AR104-116), and reference to Assessment of Alternatives is at section IV.O. The environmental justice issue is addressed at AR 104-116, under the Coastal Act standards which, as noted below, provide that the Commission 'may' consider environmental justice. Public Resources Code section 30604(h).

With respect to CEQA compliance and review, the Commission noted that the FEIR/FEIS had already assessed the effects of sea level rise and coastal erosion on the proposed well field and the most seaward sections of the Source Water Pipeline and imposed mitigation measures. (AR 32246.)[55] The Commission extensively discussed subsequent projections of increased sea level rise on one hand, cessation of existing sand mining activity on the other, and required further assessment from Cal-Am of projections of sea level rise and coastal erosion, which Cal-Am provided and the Commission's coastal engineer reviewed. (AR 32245-32248.) The Commission went on to state: "Cal-Am expected its wells would operate no more than 20 to 25 years and then need to be rehabilitated or relocated, which would presumably result in them avoiding coastal hazards related to erosion during the term of this permit. This would allow for conformity with the LCP's coastal hazards provision related to the expected economic life of the development." (AR 32248.)

The Commission further noted:

> "**Special Condition 6** is based on Cal-Am's characterization that the wells have an approximated 20– to 25-year economic life and limits the term of this permit for 25 years after installation or until January 1, 2050. This latter date is in recognition of the increased uncertainty about our current projections of sea level rise and climate change after 2050. **Special Condition 6** also requires Cal-Am to apply for a new or amended CDP to remove or relocate the wells at least two years before the end of this permit term."

(AR 32248.) Respondent Commission then stated that this special condition removes the project's inconsistency with the LCP provision which specifies a 50-year economic life, and the economic impact potential for accelerated cost recovery by Cal-Am was discussed separately by the Commission. (AR 32248.)

Respondents have not demonstrated improper "piecemealing" as to the erosion setbacks under the City's LCP.

IV. Commission's approval of less than the entire 6.4 mgd Project the Commission was not an impermissible collateral attack on CPUC ruling in violation of Public Utilities Code section 1709.

Petitioners argue that the Commission lacked authority to grant approval in 2022 to only a scaled-down version of what the CPUC approved in 2018 in its CPCN determination as a lead CEQA agency. Petitioners contend that by subsequently only approving scaled-down Phase 1 of the Project, the Commission engaged in a collateral attack on the CPUC's approval of the full-scale 6.4 mgd project.

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[55] Petitioners' CEQA challenges directed at coastal erosion are discussed separately below.

Acceptance of this argument would require complete disregard of the CPUC's repeated statements recognizing the Commission's authority under the Coastal Act, of the subsequent evidence considered by the Commission, and of the practical realities of obtaining approvals for a project from multiple governmental agencies.

It is clear that the CPUC recognized future changes might be required by the Coastal Commission in its role under the Coastal Act to determine consistency.[56]

Respondents accurately cite to AR 9619 (FEIR/FEIS of CPUC) as showing that the CPUC recognized project changes might be necessary. That section of the Final EIR, titled "2.1 Project Changes," includes language regarding changes, "including mitigation measures listed herein" – and describes the process by which CPUC approval of such changes is to be sought. Additionally, Respondents correctly note that CPUC recognized "[f]inal determinations regarding project consistency [with the Coastal Act] are reserved for the Coastal Commission." (AR 10881.)

The CPUC also recognized elsewhere that "[f]inal determinations regarding project consistency are reserved for the Coastal Commission. MPWSP subsurface slant wells would be potentially inconsistent with Coastal Act policies." (AR 10400.) In other words, the CPUC appears to have recognized that the Commission might completely find the Project at odds with the Coastal Act and completely deny a CDP for the Project. The same is repeated by the CPUC in the Final EIR again at AR 10477 (noting that the Commission makes the "final determinations regarding project consistency" with policies for management of natural resources and public access within the coastal zone), 11079 (recognizing that final determinations regarding project consistency with the Coastal Act's hazards and hazardous materials policies are reserved for the Commission); AR 10329 (noting a Coastal Development Permit would be required, among various other governmental agency permits – a recognition of the practical realities of obtaining approvals from multiple agencies, which in turn underscores the propriety of the Commission deferring future supply/demand determinations to CPUC via CPUC permit imposed as Special Condition 1); and at AR 9563 (recognizing in accordance with FEIR Mitigation Measure 4.6-2a, parts of the Cal-Am Project are within the coastal zone and require that Cal-Am consult with the Coastal Commission or local jurisdiction and obtain necessary permits to proceed with the

[56] In related case 20CV001387 before this Court, Cal-Am and others made a similar argument that pursuant to Public Utilities Code section 1759, the CPUC's decision on the CPCN foreclosed any ruling regarding Cal-Am's water rights, and this Court ruled it did not – as the CPUC decision itself noted. The CPUC decision clearly envisioned that a final decision re water rights would be rendered by another body, and the CPUC decision said "Naturally, if [Cal-Am] does not have the right to the supply water for the proposed project, the proposed project could not proceed and would thus prove infeasible." (See Court's 5/10/24 Order After Submission in 20CV001387 at p.11 of 56, citing Final EIR, p. 2-32.)

project; the Coastal Commission or local agency would authorize the project if it conforms to ESHA policies or other policies of the Coastal Act).[57]

Under the Coastal Act, Public Resources Code section 30607, the Commission has the authority and obligation to impose conditions to ensure that development allowed under a CDP will be in accordance with the Coastal Act.[58] Under CEQA, the Commission has an obligation as a responsible agency to mitigate or avoid impacts within its jurisdiction, CEQA Guidelines, section 15096(g)(1)[[59]], to consider any additional feasible mitigation measures would reduce or avoid impacts. Petitioners have not met their burden to show that the phasing here was not such a measure.

After the CPUC 2018 Final EIR approval, additional information was presented to the Commission in 2022 indicating that: (i) a 4.8 mgd facility would that reduced the number of wellpads to be constructed (three, as opposed to five at the time of CPUC approval – compare AR 9368 with AR 42, as noted by Respondents at Respondents' Brief 36:18-21); and (ii) the ability of the PWM expansion to close the gap between supply and demand – which was speculative at the time of CPUC approval (AR 9337 (concluding that it could not rely upon the hypothetical nature of the PWM expansion and stating "[a]t this point all we have are ideas…[that] lack…specifics in the hypothetical scenarios") and 9467 (stating that the CPUC "cannot rely upon the concept of potential expansion of the PWM project absent more concrete and specific information to find that additional supply is available to Cal-Am")) --was less so, at least in terms of near term water supply at the time of the 2022 hearing before the Coastal Commission. (AR 145-148). There was substantial evidence to support the Commission's conclusion that a the full-scale 6.4 mgd facility could reasonably be mitigated by reducing its

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[57] The latter two references demonstrate that the CPUC as well imposed further approval by the Coastal Commission as a mitigation measure, much as the Coastal Commission conditioned its approval upon that of other involved agencies including the CPUC, in Special Condition 1 (AR 12-14).

[58] This section of the Coastal Act states:

"Any permit that is issued or any development or action approved on appeal, pursuant to this chapter, shall be reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division."

(Pub. R. C. § 30607.)

[59] Section 15096, subdivision (g)(1) of the CEQA Guidelines states:

"(g) Adoption of Alternatives or Mitigation Measures.

(1) When considering alternatives and mitigation measures, a responsible agency is more limited than a lead agency. A responsible agency has responsibility for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve."

initial operations to 4.8 mgd, based on presently available information. The Commission met its obligation to assess this information.

Furthermore, the Commission recognized that there was a proceeding pending before the CPUC to determine whether there is a projected demand for additional water supply beyond the PWM Expansion (CPUC Proceeding A.21-11—024) (AR13, 54.). The Commission conditioned its issuance of the CDP on completion of that CPUC proceeding "with a determination that there is projected demand for additional water supply beyond the Pure Water Monterey Project Expansion ... by on or before 2050 and a showing that Cal-Am has authorization from the CPUC to proceed with the Project." (AR13, Special Condition No. 1.)

In other words, issuance of the CDP was conditioned upon the CPUC's determination of a projected increased need. The Commission's decision to approve the CDP was based on the Commission's determination from the evidence before it that there would likely be an unmet need and warranting the desalination project Phase 1 for long-term water supply prior to 2050. The Commission approval of the CDPs did not undercut or preclude a determination by the CPUC to the contrary. The evidence in the record shows that in approving only a lesser phase of the Project, the Commission met its statutory obligation to impose conditions bringing the proposed development in conformity with the Coastal Act, while at the same time acknowledging that ultimate determination of supply and demand rests with the CPUC in a then-pending proceeding.

Based on the foregoing, the Commission's decision was not a collateral attack on the CPUC's decision and conclusions reached in the FEIR/FEIS.

V. Coastal High Geologic Hazards and related Public Trust contentions.

Petitioners contend that the Commission failed to assess and mitigate hazards from sea level rise and erosion in relation to possible future slant well relocation. City also argues that the CDP approval was inconsistent with and violated the Coastal Act[60] and City's Local Coastal Program Implementation Plan ("LCPIP").[61]

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[60] The Coastal Act provides in pertinent part that "[n]ew development shall do all of the following: (a) Minimize risks to life and property in area of high geologic, flood, and fire hazard. (b.) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. ..." Pub Res Code section 30253 (a), (b).

[61] City's Local Coastal Plan consists of its Local Coastal Land Use Plan ("LCLUP") and its LCPIP. The LCPIP states: "Standards for Coastal Protection Structures: ...future development shall be placed beyond the area vulnerable both to wave erosion and tsunami hazard. This Setback shall be great enough to protect the economic life of the proposed development (at least 50 years) and be east of the tsunami hazard zone. The exact extent of this setback shall be determined by a qualified geologist, selected from an approved list compiled and maintained by the City. Because of variation from site to site, the setback line shall be determined at the time development of a site or parcel is proposed." (AR 97, 9041)

The Commission limited the term of the Project CDPs to 25 years (Special Condition 6, AR 16), prohibited any shoreline protective devices (Special Condition 14, AR 34-35), noted that the FEIR already imposed a requirement (Mitigation Measure 4.2-10) requiring Cal-Am to monitor and remove the slant wells 5 years prior to any anticipated exposure (AR 100), and found that with these conditions and limitations on the Project would be consistent with the Coastal Act and City's LCP policies related to coastal erosion. (AR 100, 103, and 10442) The Commission's interpretation of those local coastal policies, which it approved in certifying the City's LCP, Public Resources Code section 30512, is entitled to deference. (*Hines, supra,* 186 Cal.App.4th at p. 849 ["[W]e grant broad deference to the Commission's interpretation of the [local coastal program] since it is well-established that great weight must be given to the administrative construction of those charged with enforcement and interpretation of a statute", citing in turn *Alberstone, supra,* 169 Cal.App.4th at 866.) Petitioners have failed to show the Commission's finding of consistency was not supported by substantial evidence.

CEQA claims regarding geologic hazards.

To the extent Petitioners' coastal geologic hazard arguments rest upon claims of improper piecemealing and deferral of environmental impact analysis, the Court has previously found that Petitioners have failed to show that the Commission abused its discretion as a responsible agency. It is important to note that the existing CPUC FEIR Mitigation Measure 4.2-10 requires Cal-Am to monitor the rate of coastal retreat relative to the slant wells and begin, at least 5 years prior to anticipated exposure to the wells from sea level rise or erosion, to implement planning and permitting necessary to abandon the wells. (AR 10442). The Commission recognized and took this into account in finding the Project consistent with City's LCP policies related to coastal erosion. (AR 100-102).

Utilizing the independent review of its Coastal Engineer (AR 99-102, 32247-32248, 32325-32300), the Commission also studied potential risks from dune recession, which had not been studied by the CPUC in the FEIR. (AR 101, fn.81). The Commission found that it was difficult to estimate exactly when dune recession inland from coastal erosion and the impact of sea level rise on shoreline erosion would occur, citing to evidence that during the 25-year period of the CDP, such risks were not appreciable prior to 2040 and that from 2040 to 2060 there was only a small risk to the test well, which was at greatest risk, from storm-related erosion; and that whether or when slant wells would need to be relocated or removed was speculative for the period beyond 25 years. (AR 101).

Respondent Commission also found that Cal-Am's proposal to locate the well heads inland of the tsunami runup zone and at a height of 30 feet would be above the most recently identified tsunami maximum runup estimate of 18 feet, even under projections of several feet of sea level rise. (AR 102, 32250.)

As added mitigation against impacts from removal, relocation, and premature failure of the slant wells, the Commission imposed conditions requiring monitoring of the wells' condition

and mandatory removal if essential services to the site can no longer be feasibly maintained, if the development is no longer located on private property due to migration of the public trust boundary (i.e., as a result of sea level rise or erosion), if the development would require a shoreline protection device, if any government agency has ordered that the structures are not to be occupied due to coastal hazards, or if portions of the development fall to the beach before removal. (Special Condition 14, AR 34-35, 103.) In conjunction with these requirements, the Commission mandated that Cal-Am submit CDP applications for the removal, rehabilitation or relocation of the wells. (AR 8, 16-17, 34-35, 100, 103.)

To the extent Petitioners argue that the Commission violated CEQA by failing to assess the economic *viability* of the Project because of effects of the environment on the Project, the argument is irrelevant unless it is shown that adverse environmental impacts would be exacerbated as a consequence. (*California Building Industry Association,* supra, 62 Cal.4th 369.)

In any event, as noted above, the Commission did discuss the potential of economic consequences, including potential shortened economic life of the Project (AR 4-6, 100, 113-117). Again, however, it is important to note that the Commission was acting in its role as a responsible agency. The lead agency, the CPUC, also has exclusive jurisdiction to regulate the amounts which Cal-Am may charge its customers. (AR 53, 24365).

In summary, the record shows that the Commission recognized its role as a responsible agency (AR 53), considered and recognized the continued value of the FEIR as an informational document, and evaluated at length newly presented information and the contentions of Petitioners regarding coastal erosion, sea level rise and possible slant well relocation or removal (AR 97-103). Its findings in this regard are reviewed under the deferential substantial evidence standard. (*California Coastkeeper, supra*, 64 Cal.App.5th at pp. 58-59.)

Petitioners have not shown that the Commission abused its discretion or failed to proceed in the manner required by law.

Local Coastal Plan claims regarding geologic hazards.[62]

Petitioners also contend that the Project is not sited in compliance with the requirements of Coastal Act section 30253 and the City's LCP[63] which require that new development be sited to avoid and minimize risks with associated coastal and geologic hazards. (City OB at 45, Marina Water OB at 68.)

The Commission, however, recognized and performed its jurisdictional role under the Coastal Act (AR 53). Noting that since the test well site was at risk from expected long-term erosion scenarios, the Commission's findings stated:

> "The Project could include development in an area subject to wave erosion during the next 50 years. This presents some tension with the LUP and IP policies that generally require setbacks adequate to protect new development for 'the economic life of the proposed Project (at least 50 years).' " (AR 100).

After finding that an exception in the LCP did not apply, the Commission continued:

> "Without an adequate setback to allow for 50 years of protection, ... the Project's well field could be inconsistent with the LCP policies related to coastal erosion. Unless there is a requirement to remove the test well when it becomes threatened. However,

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[62] It is noted that the Commission approved the Project's siting, specifically the location of the well field, based on Special Condition 6 that limits the term of the CDP to no more than 25 years and requires Cal-Am to submit a complete CDP application before the end of that term to propose relocation, rehabilitation, or removal of the wells. (AR 102) In doing so, the Commission specifically recognized Cal-Am's estimation that the wells could only operate for only 20 to 25 years before they would need to be relocated due to the decreased water yields over time, and that it was unclear where the wells would be relocate din the future given Cal-Am had no legal interest in possible sites further inland (and, therefore, evaluation of future well sites and operations beyond 25 years would be speculative). (AR 97-103) In other words, the Commission addressed the Project's alleged inconsistencies with the Coastal Act and LCP provisions through Special Condition 6.

[63] In addition to the provision of the LCLIP cited in the footnote above (requiring setback great enough to protect the economic life of the proposed development), the LCLUP states: "[b]efore development is permitted in the Coastal Zone, a geotechnical report...shall be prepared for that development in the dunes or in the vicinity of any vernal pond...[and] shall include at least geologic and seismic stability...identification of an appropriate hazard setback to protect the economic life of structures....No new development shall be permitted which will require the construction of shoreline protection structures unless...when such structures are necessary to serve coastal dependent uses (as defined in the Coastal Act) or to protect publicly owned beaches from erosion."

The LCLUP states: "Tsunami Hazard: Tsunamis are seismic sea waves....Because of the height and dept of the Coastal dunes in Marina, inland areas are not within the tsunami hazard zone. The areas most subject to tsunami in Marina are the sandy beaches and dunes....Since there is little development within the tsunami run-up zone, there is little present threat. Future development should not occur in the tsunami run-up zone (on the sandy beaches and foredune area).

The LCP's North Reservation Road Planning Area requires proposed development consider: "Public safety and vulnerability to wave erosion" as well as "[t]sunami and other coastal hazards."

Mitigation Measure 4.2-10 in the FEIR/FEIS requires Cal-Am to monitor and remove the slant wells five years prior to any anticipated exposure. Thus, the Project is consistent with LCP policies related to coastal erosion because there is a requirement to remove the slant wells when they become threatened.

"Cal-Am expects that its wells would operate for no more than 20 to 25 years and then need to be rehabilitated or relocated, which presumably would result in them avoiding coastal hazards related to erosion during the term of this permit. This would allow for conformity with the LCP's coastal hazards provision related to the expected economic life of the development. **Special Condition 6** is based on Cal-Am's characterization that the wells have an approximately 20-to25-year economic life and limits the term of this permit for 25 years after installation or until January 1, 2050. This latter date is in recognition of the increased uncertainty about our current projections of sea level rise and climate change after 2050. **Special Condition 6** also requires Cal-Am to apply for a new or amended CDP to remove or relocate the wells at least two years before the end of this permit term. While this special condition removes the Project's inconsistency with the LCP provision that specifies a 50-year economic life, it creates a different concern that Cal-Am's desalination facility may not be able to operate for its overall expected 60-year operating life since Cal-Am does not currently have a legal interest in locations further inland where Cal-Am might be able to relocate its wells. ..." (AR 100).

Additionally, as noted above, utilizing the independent review of its Coastal Engineer (AR 99, 32247-32248, 32325-32300), the Commission found that no appreciable erosion risks are anticipated to occur at the test well or well field areas by 2040; that there are small risks to the test well site from storm-related erosion between 2040 and 2060; that there are small risks to the test well site and well field sites from possible sand burial that would be minimal through 2040; that there is a small chance that the well field site might experience several feet of sand burial between 2040 and 2060 (AR 101); but that within the 25 year operating period of the CDP and with no alternative sites known to be available, whether or when slant wells would need to be relocated or removed was speculative (AR 102). Substantial evidence in the record supports this determination.

As added mitigation against impacts from removal, relocation, and premature failure of the slant wells, the Commission imposed conditions already noted above (requiring monitoring of the wells' condition and mandatory removal, etc.) The Commission found that, with the Special Conditions imposed, the Project would conform to the relevant Coastal Act and LCP provisions regarding coastal hazards and the avoidance of risk from those hazards. (AR 103).

Petitioners have failed to show that the findings of Commission consistency with the Coastal Act and LCP were not supported by substantial evidence.

Public Trust claims.

City also has made a brief argument in the Coastal Hazards section of its briefing that the Commission's coastal hazards determination violates the Public Trust Doctrine with respect to the coastal area between the low tide line and mean high tide line. City implies that the Commission failed to fulfill its duty to protect and preserve public trust resources by failing to incorporate protections for the public trust and prioritizing private interests over public interests. (City OB at 46:16-47:4)

City points to no factual support for this claim. On the other hand, City also fails to mention the provision in Special Condition 14 which imposes, among many other events which mandate removal of the development authorized by the permit if "... (c) the development is no longer located on private property due to the migration of the public trust boundary." (Special Condition 14 b.)(c). (AR 35)) There is no evidence in the record from which the court may conclude that the Commission failed to protect and preserve public trust resources.

Petitioners accordingly have failed to show that Commission abused its discretion by failing adequately to consider the topic or by failing to protect the public trust resource, or that its findings are not supported by substantial evidence.

VI. Vernal Ponds and Wetlands.

The FEIR found that there was no hydrologic connection between the Project and vernal ponds and wetlands. The Commission also found, after reviewing subsequently presented information, that there was no established hydrologic connection between the Project pumping and the vernal ponds and wetlands (and hence no significant adverse impacts from the Project on those resources), but nonetheless imposed conditions that required: (i) baseline monitoring of the ponds and wetlands prior to Project operation followed by, (ii) monitoring upon commencement of Project operations, and (iii) immediate cessation or reduction of pumping in the event that monitoring suggested an impact on those resources.

Petitioners have advanced a variety of arguments challenging the Commission's actions in the context of vernal ponds and wetlands. One recurrent premise underlying the arguments is the erroneous assumption that the evidence before the Commission can only lead to the conclusion that the Project will reduce groundwater levels (aka 'drawdown') beyond those identified in the CPUC's EIR and which have corroborative support in the data subsequently collected by Cal-Am and analyzed by its retained expert. (See, e.g., Marina Water OB at 76:17-22). The arguments also ignore the Court's reference to the SWRCB in the pending related action 20CV001387, in which the source and effects of water drawn for the Project will be adjudicated at trial set for November 12, 2025. However, in the context of the present CDP approval, there was substantial evidence before the Commission to support its findings and action.

The Commission's analysis, discussion of evidence and requirements of the mandatory monitoring program, and findings are at AR 90-95. Special Condition 13, imposed by the Commission as a safeguard, appears at AR 31-34; and the Commission's summary addressing this topic is at AR 8.

The applicable Coastal Act Provisions argued by Petitioners are Public Resources Code section 30231[64], City LCP Policy 24[65] and its LCLUP Habitat Protection Policies[66] all noted and addressed by the Commission and set forth at AR 90-91.

The FEIR found no impact upon vernal ponds or wetlands from the Project.

The FEIR/FEIS previously concluded that the vernal ponds and wetlands were 'likely hydrologically disconnected' from the underlying groundwater and therefore would not be affected by the pumping. (AR 92).

Information presented after approval of the FEIR.

The City presented information to the Commission suggesting that the wetlands and vernal ponds are connected to the underlying groundwater. (AR 92-93) Then, in July 2020, the Commission's own hydrogeologist conducted a *modeling* study – which the hydrogeologist cautioned is "not a substitute for surveyed and measured groundwater elevations" – which

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[64] Coastal Act Section 30231 states, in relevant part:

> "The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marina organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies...."

[65] LCP Policy 24 states:

> "To protect and encourage the restoration of the vernal ponds to their original state and allow only those uses adjacent which will reinforce and conserve the unique habitat qualities of these ponds."

[66] LCLUP Habitat Protection Policies include:

> "Before any use or change in use, areas identified as potential habitat for rare and endangered plant and animal species shall be investigated by a qualified biologist to determine the physical extent of the primary habitat areas for the specific rare and endangered plants and animals on that site.
>
> Primary habitat areas shall be protected and preserved against any significant disruption of habitat values and only uses dependent on those resources shall be allowed within those areas. All development must be sited and designed so as not to interfere with the natural functions of such habitat areas. Management and enhancement opportunities should be incorporated into use or development proposals; potential impacts shall be fully mitigated, including the assurance of long-term mitigation and maintenance of habitat through the use of appropriate acreage replacement/ restoration ratios for any unavoidable direct impacts to habitat areas."

showed potential impact of pumping in the area of influence of the Project well field based on model-predicted drawdowns for pumping rates of 7.75 and 15.5 mgd (AR 93, 25324).[67] The City then presented a July 2020 report which stated the areas should be considered Groundwater Dependent Ecosystems ("GDEs"). (AR 92-93).[68]

Claims of failure to consider significant new information regarding vernal pond and wetland impact.

Petitioners contend that the Commission failed to analyze significant new information regarding impacts to groundwater-dependent vernal ponds and wetlands from groundwater drawdown. In support of this contention, Petitioners MCWD/MPWMD cite several different conclusions reached in various instances, including but not limited to: (a) MCWD's conclusions differing as to what data cited by Cal-Am's expert shows (AR 4185-4189); MCWD's attorney's letter to the Commission arguing the same expert's difference of opinion based on that data (AR 4190-4206); (b) City's expert's difference of opinion based on the Cal-Am data (AR 4207-4238)[69]; (c) the first two pages of a letter from City's attorney stating that the letter will address information about project impacts to wetlands – but not any pages actually doing so (AR 4836-4837); (d) information contained in a 2019 Commission staff report (AR 24404-24407); and, (e) buried among the citations presented by Petitioners as "...significant new evidence showing that reductions in groundwater levels (or drawdowns) induced by Project pumping would result in additional adverse impacts beyond those identified in the CPUC's EIR." (Marina Water OB at 76:19-22). The "significant new evidence" is an AR reference to the May 2021 report of a Cal-Am retained expert which actually *supports* the Commission's conclusion that the vernal ponds and wetlands are *not* hydraulically connected to groundwater but rather are dependent upon seasonal rainfall (AR 3130-3184), stating:

> "In August 2020 and in November 2020, Geoscience Support Services, Inc. (Geoscience)[70] prepared a technical memorandum regarding the potential relationship between proposed pumping associated with [Cal-Am's] Monterey Peninsula Water

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[67] The parties agree that the 15.5 mgd calculation referred to the extracted, rather than produced water.

[68] As described in the Commission's Findings, "GDEs include various types of wetland areas with hydrology supported entirely or in part by underlying groundwater. They include permanent, seasonal, and temporary wetlands (including vernal ponds) that change in extent and depth in response to underlying groundwater elevations." (AR 92)

[69] Respondent points out that many of the same arguments of hydrologic connectivity of the vernal ponds and wetlands and underlying aquifer were made by Petitioners before the CPUC regarding the FEIR and were rejected. To the extent these identical challenges are based upon information which was known or could have been known at the time of the 2018 FEIR/FEIS approval, Respondent is correct that the arguments fail. (*A.L.A.R.M. v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1800-1802.) This Court, however, addresses subsequently collected evidence presented to the Commission.

[70] Geoscience was the entity hired by Cal-Am.

Supply Project (MPWSP) and potential coastal wetlands/vernal ponds identified by Formation Environmental (Formation) on behalf of the City of Marina ... The August and November 2020 memorandums explain that the Armstrong Ranch ponds[71]are not dependent on groundwater but rather are dependent on seasonal rainfall that collects at the bottom of the ponds. [Para.] This report provides the results of seven months of groundwater level and groundwater quality analysis for the Armstrong Ranch ponds. ... The data collected reinforce the August and November 2020 memorandums' conclusions that pumping from the Dune Sand Aquifer will not impact the Armstrong Ranch ponds because groundwater in the Dune Sand Aquifer is not connected to the surface water that feeds the pond nor the shallow seasonal perched groundwater that develops from surface percolation." (AR 3138)

To the extent that Petitioners failed to "...lay out the evidence in the record which is favorable to the other side and show why it is lacking ... ," that alone is fatal to their challenges. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.)

After reviewing all of the foregoing, the Commission Staff Report noted that the recent analyses from the City "...although not comprehensive, suggest that changes in groundwater levels associated with drawdown from the proposed pumping could adversely affect..." the vernal ponds and wetlands, but that "[b]ecause the City's analyses and those submitted by Cal-Am diverge on key points, it is difficult to precisely determine the specific nature and magnitude of expected effects, if any, as they ... could not be definitively identified until after Project operations begin. Under the Phased Project, potential effects are likely to be less, since Phase 1 would extract less water, but the differences have not yet been adequately quantified." (AR 94).

In short, the Commission reviewed the information presented by Petitioner City, and found it to be only suggestive of a possibility of adverse effects. The Commission could not find that even the effects of that possibility would be significant based on the evidence before it and found that definitive identification of the presence or absence of impact could not be determined until after pumping operations begin and monitoring data collected. (AR 94-95)

"A court may not set aside an agency's approval on the ground that an opposite conclusion would have been equally or even more reasonable. A court's task is not to determine who has the better argument when the dispute is whether adverse effects have been mitigated or have been better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so." (*Laurel Heights 1, supra*, 47 Cal.3d at p. 393.) Nor should a court second-guess an agency's selection of one expert opinion over the conflicting views of another expert. (See also *Cadiz*

[71] The Armstrong Ranch Ponds are among the closest vernal ponds and wetlands to the well field for the Project, approximately 1,000 feet from the well field. (AR 92).

Land Co. v. Rail Cycle (2000) 83 Cal.App.4th 74, 101- 102, citing *Laurel Heights 1, supra*, 47 Cal.3d at 393; *Marina Coast Water Dist., supra,* 96 Cal.App.5th at pp. 72-73.)

The Commission's November 14, 2022 staff addendum to the report noted the FEIR's finding of lack of hydrologic connectivity and recommended that "[n]onetheless, because of concerns that drawdowns could potentially harm certain wetland and vernal ponds, the Commission is requiring Special Condition 13 to address potential impacts under the Coastal Act and the City's LCP." (AR 38410).

There was also more evidence to support the Commission's findings and conclusions, including testimony at the November 2022 hearing from its staff member Dr. Huckelbridge.[72] (AR 41220 (stating that "...we looked at the groundwater monitoring results and – and modeling, as well, and didn't find that there was evidence to support a direct impact.).

In approving the CDP, the Commission imposed, as part of Special Condition 13 which must be met before the CDP will issue, the requirement of a specific monitoring and reporting program[73] which includes two years' minimum pre-Project operation monitoring at identified locations to establish baseline measurements, coupled with a requirement that *if at any time during the mandated 5 years of supplemental data collection following commencement of Project pumping, the result suggests that there is a connection between the Project's pumping and the wetlands or vernal ponds areas, Cal-Am must cease or reduce pumping sufficiently to adverse effects*. (AR 34, 94-95.) If the results of Stage 1 monitoring *suggest* that there is a connection between the Project's pumping and vernal ponds or other wetlands, Cal-Am is *required to return to the Commission for a permit amendment* with a Wetlands Resiliency, Enhancement, Restoration and Monitoring Plan to continue monitoring and provide compensatory mitigation for any observed future impacts *and, until such approval is obtained, pumping must remain at the reduced or stopped rate.* (AR 34, 95).

In light of the foregoing, it has not been shown that the Commission failed to perform its role as a responsible agency in assessing and accepting the competing continued value of the FEIR/FEIS as an informational document. Nor that it failed to review all the evidence presented. Nor that it failed its role by accepting as corroborative the subsequently presented Cal-Am

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[72] Dr. Kate Huckelbridge is identified as Senior Deputy Director of the Commission at AR 38385.

[73] The monitoring requirements in Special Condition 13 include multiple specific parameters and criteria. The area of monitoring and data collection must extend at least 50% beyond the drawdown area of the project wells. Continuous monitoring is required. Sampling requirements are set forth for detection levels, spatial extent and depth, duration, water temperature, salinity, and dissolved oxygen levels, additional remote sensing requirements, delineation on no less than an annual basis of wetland areas more likely to be affected, and sampling design specific enough in detail that an independent scientist can duplicate it. They are set forth in detail at AR 31-34 and include a requirement that Cal-Am provide funding sufficient for the Commission to hire one or more independent third-party reviewers to evaluate the proposed plan.

monitoring information, rather than the competing assertions and data proffered by Petitioners. (See *California Coastkeeper, supra,* 64 Cal.App.5th 36.)

The Commission's findings regarding vernal ponds and wetlands, and consistency with the Coastal Act and LCP are supported by substantial evidence.

In its Final Decision, the Commission found:

> "With this protective Special Condition 13, the Project can be found consistent with the provisions of Coastal Act section 30231 and the 'above-referenced provisions of the LCP requiring that '[p]rimary habitat areas [will] be protected and preserved against any significant disruption of habitat values,' and that it will ensure the maintenance of the biological productivity and the quality of coastal wetlands." (AR 95).

Petitioners contend that the Commission's findings regarding vernal ponds are not supported by substantial evidence. The FEIR, the subsequently collected data and analysis presented by Cal-Am, and the opinion of Dr. Huckelbridge all support the Commission's findings. The Commission found that with Special Condition 13 the Project was consistent with the provisions of Coastal Act section 30231 and the LCP and will ensure maintenance of the biological productivity and quality of coastal wetlands. (AR 95) Petitioners have argued that the Wetlands and Vernal Pond Adaptive Management Program contained in Special Condition 13 was previously rejected by Commission Staff in 2020; however, as Respondent has shown, it is not the same plan. The numerous details for monitoring in a manner which can be cross-checked by independent scientific review, reporting and immediate reduction or cessation of pumping in the event of adverse drawdown effects, imposed by staff-recommended Special Condition 13, are additional mitigation measures, and in any event, are substantial evidence supporting the Commission's findings of consistency with the Coastal Act and the LCP. This evidence is in addition to lack of demonstrated hydrologic connectivity – i.e., of any impact between the project pumping and the vernal ponds/wetlands.

Petitioners have not only failed to lay out the evidence supporting the Commission's action, *Defend The Bay,* supra, 119 Cal.App.4th 1261, but have failed to show that its findings were unsupported by substantial evidence in light of the record as a whole, or that the Commission's conclusions were not supported by its findings. It cannot be said that 'no reasonable person could reach the same conclusion' as that of the Commission. (*Ocean View Harbor House, supra,* 163 Cal.App.4th at pp. 215, 226-227.)

Claims of failure to mitigate with respect to vernal ponds and wetlands.

Petitioners also contend that Special Condition 13 fails to ensure that adverse impacts to vernal ponds and wetlands are mitigated to the maximum extent possible to protect vernal ponds under the Coastal Act and CEQA (Marina Water OB at 79:18). This argument is not persuasive, as most of the same evidence and reasoning by the Commission which disposes of Petitioners' other contentions regarding the vernal ponds and wetlands undercuts this claim as well.

First, the Commission found it could not be established that there was any hydrogeologic connectivity between the vernal ponds and wetlands and the groundwater underlying them. The evidence noted above supports that finding. There was consequently no substantial adverse environmental impact on vernal ponds or wetlands to mitigate.

Second, the imposition of a detailed two-year monitoring requirement prior to Project pumping to establish a baseline, followed by a five-year monitoring and reporting requirement all within specific parameters, and mandatory shutdown or cessation in the event the monitoring suggests an adverse effect on the ponds or wetlands, was found by the Commission sufficient to protect them. The specific details of a mitigation measure may be developed after project approval where the agency adopts specific performance standards mitigation will achieve and identifies the types of actions that can feasibly achieve that performance standard. (CEQA Guidelines, section 15126.4(a)(1)(B)(requiring that an EIR describe feasible measures which could minimize significant adverse impacts, and where several measures are available, discuss each measure; however, specific details of a mitigation measure may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review agency subject to certain conditions).) Even were there significant adverse impacts to the vernal ponds and wetlands which would require mitigation, on judicial review the task is not to weigh conflicting evidence and determine who has the better argument about whether adverse effects have been adequately mitigated. (See *Laurel Heights 1, supra*, 47 Cal.3d at p. 393.)

Claims of improperly deferred mitigation.

Finally, Petitioners make the related claim that Special Condition 13 defers mitigation. Again, the Commission found that there was no adverse impact to mitigate. And again, it nonetheless set forth specific performance standards and identified the types of potential actions that can feasibly achieve the performance standard in the event there is even a suggestion of an adverse impact on the wetlands or ponds. Those potential actions, as noted previously -- cessation or reduction of pumping -- are to be taken immediately. The measure is on its face feasible, and Petitioners have not shown otherwise.

VII. Groundwater impacts.

The Commission reviewed the CPUC's FEIR, which had extensively studied groundwater issues similar to those presently raised by Petitioners and which concluded there was no identifiable substantial adverse impact on groundwater resources from the Project. The Commission reviewed similar arguments earlier made unsuccessfully before and rejected by the CPUC; reviewed additional evidence presented to the Commission by Petitioners which essentially repeated assertions of flaws in prior modeling evidence relied upon by the CPUC; reviewed additional evidence presented by Cal-Am; conducted studies of its own which did not show a substantial adverse impact on groundwater resources; concluded that there was no significant impact upon groundwater shown, but nonetheless imposed additional protective

measures – including a mandatory monitoring and reporting system to detect any depletion of groundwater supplies; and found that approval of the Project was consistent with Public Resources Code section 30231 of the Coastal Act.

Public Resources Code section 30231 (full text cited above) provides in pertinent part:

"The biological productivity and quality of coastal waters .... shall be maintained and, where feasible, restored through, among other means, ... preventing depletion of ground water supplies ... .") The City LCP similarly requires that "[p]rimary habitat areas be protected and preserved against any significant disruption of habitat values." (LCLUP Habitat Protection Policies (AR 8940-8941); see also, LCLUP Exhibit A (AR 9005-9006); LCP Policy 24 (AR 8939); and AR 90-91, 95.).

Many of the same factual issues and arguments made by Petitioners regarding Public Resources Code section 30231 have been discussed under the vernal ponds section above.

The Court concludes that Petitioners have failed to show that the Commission did not comply with its role as responsible agency under CEQA or with its role under the Coastal Act, and that substantial evidence supports the Commission's findings, which in turn support its conclusions and action.

Petitioners' groundwater claims

The Marina Water parties, and the City by incorporation, contend that:

(1) the Commission failed to evaluate adequately 'significant new information demonstrating the MPWSP would have new or more significant groundwater impacts beyond those previously identified' in the CPUC's EIR (Marina Water OB at 72:17-76:16). The only legal authority cited by MCWD/MPWMD Petitioners regarding this argument is the Coastal Act, namely Public Resources Code section 30231 (Marina Water OB p. 73, footnote 17), although their argument sounds in CEQA and without so acknowledging, assumes that requirements under the Coastal Act are identical those applicable under CEQA principles.[74]

(2) Special Condition 12 fails to ensure that adverse impacts to groundwater are mitigated to the maximum extent feasible, in violation of CEQA because it: (i) impermissibly defers mitigation – and Commission's finding/recital that it is not deferred mitigation for three stated reasons is not consistent with the Coastal Act or CEQA; and (ii) did not qualify for deferred mitigation exception because there was not substantial evidence to support findings it was

[74] Petitioners' arguments frequently muddy the waters, making no distinction and failing to address differences in standards under the Coastal Act and CEQA, notwithstanding the Court's pretrial instruction that for each issue raised by a party, that party was to cite the standard which applies to that issue, which party bears the burden with respect to that issue, and what the respective burden is.

impracticable to develop mitigation measures at that time, or that mitigation[75] was feasible and it also did not contain enforceable performance standards, and

(3) The Commission's finding of consistency with the groundwater protection provision of Coastal Act PRC 30231 rests solely on Special Condition 12, which MCWD/MPWMD Petitioners cursorily contend (see Marina Water OB at 82:14-15; 86:1), without explanation, violates the Coastal Act, but only cite CEQA case law and Guidelines (See Marina Water OB at 82:13-86:16). Petitioner City (City OB at 48:26-4926) contends the Project will violate Public Resources Code section 30231's requirements "preventing depletion of ground water supplies" (and contend that same provision is in City's LCP, without citation to where in the LCP it appears), but conflates the prevention of *depletion* of ground water under the statutory language with '*negative impacts* to groundwater' (City OB at 49:3), which is not the language of the statute.

The City's argument which follows contains no citations to the administrative record except the August 25, 2020 Commission Staff Report (City OB at 49:14-15, citing AR 24422-24427), the 2019 Amendment to Cal-Am's earlier CDP application (City OB at 49:14, citing AR 6801-6804) and an unidentified review of a July 2020 report from an independent hydrogeologist hired by the Commission (City OB at 49:18, citing AR 53084-5.) The City's cryptic argument misrepresents the record and the scope of the permit, stating: ""The Project requires installing an industrial wellfield to pump 17,300 feet of groundwater, or 5.5 million gallons per day, from the 'critically over-drafted' SVGB at the CEMEX Property. The intake wells for the Project will be located primarily in the groundwater basin beneath the CEMEX property, not in the ocean." (City OB at 49:7-10).

(4) The City claims that the "...Project's planned extractions will substantially deplete groundwater in the Basin, cause increased seawater intrusion, substantially lower groundwater levels resulting in adverse impacts to groundwater production wells and ... will interfere with MCWD's prior and paramount appropriative rights to pump groundwater for its customers." (City OB at 49:20-24.) The Commission's findings, supported by substantial evidence, are to the contrary.

<u>The Commission's review of the CPUC FEIR study of potential adverse impacts to groundwater</u>.

The CPUC *Decision Approving A Modified Monterey Peninsula Water Supply Project, Adopting Settlement Agreements, Issuing Certificate of Public Convenience And Necessity And Certifying Combined Environmental Report* (AR 9297 et seq.) examined extensively the interplay between source water for the project, nearby groundwater sources, seawater, and brackish water in between. The CPUC decision certifying the FEIR stated:

[75] Specifically, protection of underlying aquifers from seawater intrusion.

"In the State Water Resources Control Board's Final Review of California-American Water Company's Monterey Peninsula Water Supply Project (SWRCB Report) issued on July 31, 2013, the State Water Resources Control Board advised that extracting seawater from the ocean does not require water rights. (AR9379) ... There is no permit for appropriative groundwater rights; the project would have to be implemented by Cal-Am in a manner that meets the requirements for an appropriative groundwater right, including establishing that the project water source is surplus to the needs of groundwater users in the Salinas Valley Groundwater Basin and that operating the project will not injure other lawful users of water. [Para.] Based upon the analysis in the FEIR/EIS, the project would draw primarily seawater as source water. The 'capture zone' within which the project would draw source water could also include some brackish water that contains fresh water, but is not expected to intersect with or draw fresh water on its own. Such brackish water is not useful and usable in its current state. Thus, the withdrawal of the fresh water component of the source water is not expected to cause harm or injury to existing legal water users. ..."

(AR 9380). The CPUC Decision further articulates:

"In light of the evidence in the FEIR/EIS and otherwise in the administrative record, the Commission concludes that Cal-Am's extraction will not harm the quality of the Salinas Valley Groundwater Basin water, and over the years, by returning supply water to the Salinas Valley Groundwater Basin, the project will ultimately benefit Salinas Valley Groundwater Basin groundwater users. Therefore, there is every reason to believe that Cal-Am will perfect legal water rights for the project and that the project is not made infeasible by concerns over water rights. ..."(AR 9381)

"Because the FEIR/FEIS demonstrated that the proposed project would not exacerbate seawater intrusion or cause other adverse groundwater quality or quantity impacts outside of the capture zone, and because the Marina Coast Water District wells would not be included in the project's modeled capture zone (i.e., where the actual water will come from), no socioeconomic or environmental justice-related effect would be expected to result from such physical impacts. ..." (AR9383).

"**Return Water Settlement Agreement.** The potable water supply that the MPWSP will provide to Cal-Am customers will come from source water generated from subterranean slant wells drilled adjacent to the ocean. These slant wells will draw water from strata underlying the ocean, with the location of the wells overlying the western portion of the Salinas River Groundwater Basin (SRGB). A concern regarding the production of source water for the MPWSP arose in the proceeding early on. The issues concerned whether the production source water for MPWSP would conflict with the anti-export provisions of the Monterey Water Resources Agency Act (Agency Act) and infringe upon the groundwater rights of members of the Salinas Valley Water Coalition and Monterey County Farm

Bureau. Because water cannot be exported from the Salinas Valley, ensuring compliance with the Agency Act becomes a critical component to the proposed project. In order to address these concerns Cal-Am has committed, through the Return Water Settlement, 'to make available for delivery 'Return' Water' equal to the percentage of SRGB groundwater in the total source water production, as distinguished from seawater in the source water.' The water to meet this commitment will be delivered to the Castroville Community Services District (CCSD) and to the Castroville Seawater Intrusion Project (CSIP). ..." (AR 9402-9403).

The Commission's actions in its role as a subsequent, Responsible Agency under CEQA: substantial evidence supports the Commission's findings that no adverse impacts to groundwater had been shown.

In exercising its role as a responsible agency under CEQA, the Commission recognized the informational value of the exhaustive study by the CPUC FEIR. In that role, the Commission also thoroughly considered and analyzed information presented after the FEIR approval. "The purpose behind the requirement of a subsequent or supplemental EIR ... is to explore environmental impacts not considered in the original environmental document ... The event of a change in the project is not an occasion to revisit environmental concerns laid to rest in the original analysis. Only changed circumstances ... are at issue." (*San Mateo Gardens, supra,* 1 Cal.5th at p. 949; see also, *California Coastkeeper, supra*, 64 Cal.App.5th at p.58.)

The Commission Findings and Decision noted that "...subsequent modeling studies undertaken by Cal-Am concluded that the proposed Project's well field would have relatively limited effects on nearby groundwater resources. However, other entities point to other studies to identify greater potential for adverse impacts to groundwater resources." (AR 81)

The Commission then noted the continuing contentions that yet other modeling showed an increased likelihood that Cal-Am would extract a higher-than-expected percentage of non-seawater, and that the Project would adversely affect the water supply wells of the Marina Coast Water District which are located about two miles from the project's proposed well field. It then stated:

"Neither the CPUC in certifying the FEIR/FEIS nor the Commission's independent hydrogeologist (as part of the Commission's independent review in 2020) found evidence concluding that such impacts would occur; however, the Commission's independent hydrogeologist recommended additional studies to more fully characterize the Project's likely effects on groundwater. Additionally, a pending lawsuit filed in 2020 by the City of Marin is challenging Cal-Am's ability to withdraw more than 500 acre-feet per year of groundwater from the proposed well field location. In that lawsuit, the trial court referred a series of issues to the State Water Board's Administrative Hearing Office for determination pursuant to Cal. Water Code section 2000. After the Administrative Hearing Office's referee issues a proposed report and provides it to the State Water Board

for consideration, the State Water Board will issue its final report to the trial court to guide an adjudication of the case. ...

"Although the Project's potential impacts to area groundwater have been extensively analyzed in connection with the CEQA review relating to the Project, operation of the slant test well at the former CEMEX site, by the Commission's independent hydrology expert, and other analyses [sic]; however, some degree of uncertainty remains. Therefore, staff believes it is appropriate to require several Special Conditions to require additional protections. ... necessary to ensure that Cal-Am can withdraw its proposed volumes of groundwater from this site, that it can operate its wells in a manner that avoids harm to aquifers that are a source of drinking water for the City of Marina and MCWD, and that it provides adequate monitoring and reporting to identify potential impacts to other nearby groundwater users before they occur." (AR 81-82).

The Commission then discussed at length the fact that competing studies and contentions *had been presented to the CPUC* during the FEIR process – in particular by the same Petitioners making such contentions here – City of Marina and MCWD--that those contentions included claims that Cal-Am's data was inadequate, whether the proposed extractions would induce seawater intrusion[76] or remove greater volumes of non-seawater than predicted (based on a 2018 study) or whether Project pumping would adversely affect any water in freshwater or drinking water aquifers. The Commission discussed that the competing studies utilized different baseline standards, different data collection methods, different criteria to analyze and identify fresh water, brackish water and seawater, and different modeling approaches; that the CPUC-approved Return Water Agreement required a return, within Salinas Valley Groundwater Basin boundaries by Cal-Am of any portion of extracted water that is not considered seawater; that the CPUC's CEQA review included the establishment of a Hydrologic Working Group ("HWG") comprised of two hydrogeologists working on behalf of Cal-Am, and one each working for the Salinas Valley Water Coalition and the Monterey County Farm Bureau; that the City of Marina and MCWD filed a motion for rehearing in the CPUC proceeding, arguing that the FEIR utilized an erroneous baseline, which was denied; that the City of Marina has argued, in the pending lawsuit for which the State Water Board reference is underway, that a more recent 2020 study by the same authors as the 2018 study those entities presented to the CPUC demonstrates that the desalination facility would adversely affect the aquifers which are a source of drinking water for the City of Marina and MCWD; that 'a party' to the CPUC proceeding to certify the FEIR/FEIS has filed a pending petition to the CPUC to modify its decision, renewing previously rejected claims of data corruption through errors or misapplication of data. (AR 83-85) It also noted that the CPUC CEQA review had included extensive groundwater modeling and monitoring data from a number of wells, including Cal-Am's test well (AR 82).

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[76] Many similar claims were also made and rejected by these Petitioners on appeal in *Marina Coast Water Dist., supra,* 96 Cal.App.5th at p. 46, regarding the County of Monterey's approval of this desalination plant.

The Commission then went on to state that "[s]ome of these issues and areas of disagreement cannot be fully resolved without additional data collection and monitoring, and some will not be determined unless and until Cal-Am actually conducts pumping." (AR 85).

The Commission's analysis did not stop with review of the FEIR and the repeated legal challenges to it, but went on to state:

> "To reduce some of the uncertainties to determine whether the proposed project would conform to the groundwater protection provision of Coastal Act [Public Resources Code] Section 30231, Commission staff, as part of its prior review of the Project, contracted with an independent licensed hydrogeologist to review some of these studies and conclusions, to conduct additional analyses, and to reach independent conclusions about these issues." (AR 85).

The independent hydrogeologist critiqued the study of the HWG working group, (see AR 83, fn. 57), and suggested further study to determine how much non-seawater would be extracted. At the November 2019 hearing before the Commission, Cal-Am agreed to finance the studies. The further studies were done and critiqued the following summer[77] by the Commission's independent hydrogeologist, Weiss, who assessed that seawater draw would be in range of 88-99% but variable and recommended further study using more dynamic modeling aspects. (AR 86-87) HWG agreed with Weiss' estimates of seawater percentage and in July 2022 Cal-Am presented further analysis by HWG which implemented the work Weiss recommended in June or July of 2020, showing that non-seawater could under some conditions be as high as 20%, requiring Cal-Am to return a higher amount of water to the SVGB under the Return Water Settlement Agreement approved by the CPUC than earlier anticipated.[78] (AR 86-88)

The Commission noted that, to address concerns related to Coastal Act Section 30231's provision for protection of groundwater supplies, Cal-Am had thereafter revised its project to include several new components, including: (i) extending the slant wells to 1,000 feet so as to maximize the amount of seawater extracted; and (ii) phasing the project to allow less pumping while also providing the opportunity to actually monitor the potential adverse effects of the pumping. (AR 29 and 88)

After this lengthy discussion and analysis, the Commission stated as follows:

> "Even with these recent commitments, there will still be uncertainty about the effects of Cal-Am's groundwater pumping from this location. To provide additional protection and

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[77] The exact date is unclear. (See AR 86, fn.69 and compare AR 87, 3rd paragraph.)

[78] Relevant to the Economic Justice challenges raised by Petitioners, the Commission noted that this could result in additional costs of production to Cal-Am that it might seek to recover through cost recovery requests to the CPUC, but that would be prohibited unless the CPUC were to modify its decision approving the Project. (AR 87-88)

avoid or minimize potential impacts, the Commission is imposing Several Conditions. ..." (AR 88).

Cal-Am subsequently presented newer 2022 modeling results to the Commission which concluded there would be no significant effect on regional groundwater levels, drawdown, or water storage; no significant effect on seawater intrusion and water quality in coastal aquifers; and the Project would not exacerbate seawater intrusion or contribute to water quality degradation; that at least 90% of the source water for the Project would be seawater from Monterey Bay (AR 61398).

The Addendum to the Commission's Staff Report (at AR 38409-38410) noted that "...neither the FEIR/FEIS nor the Commission's independent hydrogeologist found evidence that impacts to groundwater are reasonably foreseeable." Likewise, Dr. Huckelbridge, the Commission Senior Deputy Director, stated at the Nov. 2022 hearing for the instant CDP that "[t]he sum of the model suggest[s] that it's a very low likelihood of impacts to the water supply that Marina would rely on. But given the uncertainty, we thought we'd be – take the precautionary principle and develop additional monitoring requirements, essentially setting up a sentinel well system so that any potential impacts could be detected well in advance of when the effects would show up in the Marina water supply." (AR 41327)

The Commission's concluding groundwater discussion, thus, explained that it had imposed three (not just one, as Petitioners suggest) Special Conditions to protect groundwater resources and avoid or minimize potential impacts: Special Condition 1 (that Cal-Am submit the final decision in the related litigation before this trial court in 20CV001387 which is expected to adjudicate Cal-Am's right to extract groundwater, as well as how much); Special Condition 11 (requiring Cal-Am to extend its wells at least 1,000 feet seaward, if feasible and, if not to submit a revised plan to the Commission Director for approval, or an amended CDP if the Commission Director determines it necessary); and Special Condition 12, to provide *further* protection for other groundwater users (a monitoring and reporting plan, to be reviewed by an independent third party, to identify monitoring measures which will provide an early warning of any depletion of groundwater supplies resulting from Cal-Am's extractions – and which goes beyond the requirements of Mitigation Measure 4.4-3 in the FEIR).[79] (AR 88)

The Commission's conclusion was that "Even though there is uncertainty about the potential impacts Cal-Am's water extraction would have on other users in the Basin, the analyses and Special Conditions described above allow the Commission to determine the Project will be protective of groundwater resources and therefore consistent with the relevant provision of Coastal Act Section 30231." (AR 88).

[79] The details for the Special Condition 12 Monitoring and Reporting Plan are lengthy, detailed, and set forth at AR 29-31.

The Court's role in reviewing the Commission's actions – whether at the trial court or appellate level, is essentially the same. Although the Petitioners consistently point to competing evidence they presented to the Commission, the Court's "...deferential review, however, turns not on the existence of evidence in support of MCWD's concerns but on the existence of substantial evidence in support of the [Commission's] findings." (*Marina Coast Water Dist., supra*, 96 Cal.App.5th at 72.) The Commission recognized the conflict in the claims but elected to accept and rely upon the statements by its Staff Deputy Director, its independent hydrogeologist, and the HWG which included experts from two Monterey County agencies – not simply Cal-Am's expert on the latter group, as MCWD implies. It concluded based upon that evidence that no demonstrable impact on groundwater resources had been shown, but that since some uncertainty remained and some of the uncertainty could never be resolved unless and until Cal-Am starts pumping, and to safeguard against these uncertainties mandated monitoring and reporting.

The Commission further found that with the safeguards imposed by the Special Conditions, the Project would be consistent with the relevant provisions of Coastal Act section 30231. Given its factually supported finding that no significant adverse impact to groundwater had been shown, the conclusion that with the Special Conditions approval of the Project would "prevent depletion of groundwater supplies" in conformity with Public Resources Code section 30231 was adequately supported by substantial evidence.

Mitigation was not improperly deferred. Not only was it not required, but the Commission nonetheless did impose reasonable and enforceable mitigation measures to ensure project compliance with the Coastal Act.

Petitioners' contention that the Commission improperly deferred mitigation of adverse groundwater impacts rests upon the erroneous assumption that such impacts were shown. As noted above, substantial evidence supports the Commission's finding that the impacts were not shown. Consequently, as Respondents point out, there was no mitigation required.

The Commission's finding that no significant adverse impact upon groundwater had been shown, followed an extensive review of fact and what the record reflects, was a good faith and reasoned effort to confront and resolve a highly involved factual dispute. Courts accord great deference to an agency's substantive factual conclusions. "In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable, for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.'" (*Vineyard, supra,* (2007) 40 Cal.4th at p. 435, quoting from *Laurel Heights I, supra*, 47 Cal.3d at p. 393. Likewise, *Marina Coast Water Dist., supra,* 96 Cal.App.5th at pp. 65-66 contains similar language, quoting from *California Native Plant, supra,* 177 Cal.App.4th at pp. 984-985.) Under this standard, the court may reverse the Commission's decision only if, "based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency."

(*La Costa Beach Homeowners' Assn., supra,* 101 Cal.App.4th at p. 814.) That is not the case here.

The disagreement among the parties ultimately centers upon whether the Project will significantly impact (under CEQA) or deplete (Coastal Act section 30231) groundwater resources. While there are conflicting expert reports concerning the Project's effects on the groundwater, ultimately, the Court should defer to the Commission's technical expertise and its hired expert. (*California Coastkeeper, supra*, 64 Cal.App.5th at p. 58; *Dore, supra,* 23 Cal.App.4th at pp. 326-327 (stating "[b]ecause the administrative agency has technical expertise to aid it arriving at its decision, we should not interfere with the discretionary judgments made by the agency"); see also, *Marina Coast Water Dist., supra*, 96 Cal.App.5th at pp. 72-73 (stating "While there plainly was a dispute between consultants in this case, we are unable to identify any reason to deem HWG's opinion inadequate as a matter of law. Accordingly, we conclude that substantial evidence supported the County's determination that the new monitoring well did not constitute the sort of new information of substantial importance that would necessitate further environmental review.").)

The Commission adequately analyzed the "new" information[80] concerning the groundwater impacts, and the Commission's decision that no adverse environmental impacts upon groundwater was shown is supported by substantial evidence.

Yet even though no mitigation was required under CEQA, nevertheless, in its role under the Coastal Act, the Commission imposed additional requirements in Special Conditions 1, 11 and 12 to ensure consistency with the Coastal Act, specifically Public Resources Code section 30231.

Special Conditions imposed by the Commission to further protect groundwater resources are sufficient to support the finding of consistency with Coastal Act section 30231.

Special Condition 1, which must be met before the CDP will issue, requires that Cal-Am is to present a final judgment in pending Monterey Superior Court action 20CV001387 and if that judgment demonstrates that Cal-Am: "(a) …does not have, and cannot feasibly obtain, water rights (to the extent applicable)[81] for the Project or (b) Cal-Am's Project would cause harm to

[80] Petitioners argue that there was significant "new" information that demonstrated that the Project would have new or more significant groundwater impacts beyond those previously identified in the CPUC's FEIR. (Marina Water OB at 72, citing AR 33727-33728) The "new" evidence included information from the AHO proceeding, including expert opinions regarding the Project's potential impacts to groundwater resources. (Marina Water OB at 74, citing AR 333737.)

[81] This parenthetical phrase appears to be made in reference to the fact that Cal-Am does not need a permit to withdraw seawater.

any aquifer that is the source of drinking water to the City of Marina or the Marina Coast Water District," *the CDP shall not be issued.* (AR 12-13, 88).[82]

This condition provides an additional buffer against groundwater impacts and affords all parties the opportunity to present in the pending litigation additional evidence from the ongoing collection of data and competing experts' studies and opinions. It also conforms to the Coastal Act limitation on the Commission's powers via Public Resources Code section 30412, subd. (b), which unequivocally states that the "State Water Resources Control Board has primary responsibility for the administration of water rights pursuant to applicable law," and the Commission shall not act in a manner that conflicts with any determination by the State Water Resources Control Board "in matters relating to water quality or the administration of water rights." The Commission expressly noted this limitation and took it into account in imposing Special Condition 1. (AR 55-56)

Petitioners avoid directly discussing Special Condition 1 and its significance as a measure to protect groundwater resources, suggesting that evidence of Cal-Am's inability to obtain appropriative water rights was 'new evidence' and implying that the Commission should have bypassed the both the SWRCB and the trial court in City of Marina v. RMC Lonestar et al., Case No. 20CV001387, in which the origin of and rights to any source water for the project and the effects of any drawdown are hotly contested issues to be determined. Petitioners have cited no authority for the proposition that the Commission could not, under the Coastal Act, properly condition approval of the CDP upon adjudication of these issues by the other official entities before which those issues are pending, let alone any authority contrary to Public Resources Code section 30412, subd. (b).

Likewise, **Special Condition 11** requires Cal-Am to install its wells to extend at least 1,000 feet seaward of the wellhead locations if feasible, and if found not feasible, to submit a revised plan to the Executive Director for approval of any proposed changes, and if the Executive Director deems it necessary, an amended CDP application, showing the revised installation and identifying any expected changes in the proportion of seawater to be extracted. (AR 29, 88) It also requires the wells be screened to extract water as far seaward as possible and without penetrating the 400-foot aquifer. (AR 29) Petitioners contend that extending the wells 1,000 feet seaward is not feasible. It is important to note that these conditions were imposed by the Commission pursuant to the Coastal Act – not under CEQA, since no mitigation was required

[82] As an alternative, prior to final judgment of the pending litigation, Cal-Am may submit for an amended CDP application the SWRCB's adopted order in the matter referred to the SWRCB by the trial court in the litigation. However, the SWRCB order must contain the same showing. (AR 13.) One can reasonably surmise that the SWRCB order alternative is afforded in recognition of the seemingly interminable litigation in the courts which has swamped this Project.

in view of the findings that no significant adverse impact to groundwater had been shown.[83] (Pub. R. C. § 30231.)

Mitigation of groundwater impacts was not required under CEQA since substantial evidence supports the Commission's finding that no adverse impacts to groundwater had been shown.

Petitioners seek to deflect groundwater impact focus toward only **Special Condition 12**, arguing inapplicable CEQA case law and principles for support of their contentions that in violation of Public Resources Code section 30231 of the Coastal Act the condition impermissibly defers mitigation, that there is no evidence to support a finding that present mitigation is not feasible, and that no specific standards of performance for future mitigation measures are established by the condition.

Mitigation was not required under CEQA, based upon the Commission's finding that no significant adverse impacts to groundwater had been shown. The Commission made this finding after having properly exercised its role as a responsible agency assessing post-FEIR information, acknowledging the value of the original FEIR as an informational document, and affording it the deference the Commission deemed appropriate. (*Cal Coastkeeper, supra*, 64 Cal.App.5th 36.) This court reviews those findings under the " 'highly deferential substantial evidence standard of review in Public Resources Code section 21168.5' to such determinations, ... [because] 'the agency has the discretion to resolve factual issues and to make policy decisions.'" (*Marina Coast Water Dist., supra,* 96 Cal.App.5th at 65-66; see also, *California Native Plant Society, supra,* 177 Cal.App.4th at pp. 984-985.)

The Commission specifically pointed out that Special Condition 12 was *not* a CEQA mitigation measure, but instead was a measure imposed to ensure protection of groundwater resources under the Coastal Act (AR 38410)

> "Future review and approval of [the Groundwater Monitoring Plan] is not improper 'deferred mitigation.' First, the plan is not a CEQA mitigation measure; instead, it is a measure to ensure protection of groundwater resources under the Coastal Act. As such, the CEQA deferred mitigation cases cited by MCWD are inapplicable. The CPUC already determined the Project will have no significant impacts to groundwater. Second, the plan would be developed prior to permit issuance, which avoids any impact before the plan is developed. Third, review of the plan will return to the Commission in the form of a proposed CDP amendment, with an opportunity for public scrutiny and comments. None of the cases cited by MCWD involve a mitigation plan that went back to the decision-making body for environmental review prior to issuance of the permit; therefore,

[83] Even under CEQA case law, if a proposed project cannot be built as approved, then the project's proponents will have to seek approval of any additional activities and at that time will have to address the potential environmental effects of those activities. (*Berkeley Hillside Preservation, supra,* 60 Cal.4th at p. 1120; *Marina Coast Water Dist., supra*, 96 Cal.App.5th at p.70.)

those cases are distinguishable. Finally, the special condition sets out parameters to guide development of the plan." (AR 38410).

The Commission's finding of consistency with the Coastal Act mandate to prevent depletion of groundwater resources is supported by substantial evidence.

The Special Conditions followed a finding by the FEIR and by the Commission after extensive study that no significant adverse impacts on groundwater were shown. (AR 88.) The Special Conditions superimposed requirements that prior to CDP issuance Cal-Am present evidence that its rights to the source water have been adjudicated in its favor and groundwater monitoring and reporting before (to establish baselines) and after commencement of the project. (AR 29-31.)

Petitioners have failed to show that no substantial evidence supports the Commission's findings that the Project, with the imposition of the Special Conditions, "will be protective of groundwater resources" (AR 88.) - and hence adequately 'prevent depletion of groundwater supplies,' consistent with Public Resources Code 30231.

Although further evaluation of the mitigation measures imposed by Special Conditions 1, 11, and 12 is unnecessary in view of the Court's ruling that: (i) mitigation was not necessary under CEQA; and (ii) Petitioners have failed to show that there is no substantial evidence to support the Commission's finding of consistency with Coastal Act Public Resources Code section 30231, the following points are noted.

First, Petitioners' challenge to Special Condition 11's 1,000 foot well reach requirement as not feasible, was, Respondents contend, waived because the issue was not raised before the Commission. (*Greene v. California Coastal Com.* (2019), 40 Cal.App.5th 1227,1237-1238 ("*Greene*").) Petitioners bear the burden of showing that the issue was raised at the administrative level, *Greene, supra,* 40 Cal.App.5th at p.1237, but have not done so in their Reply briefing. It appears Respondents are correct on this point.

Second, as Respondents have pointed out, the CPUC approved slant wells nearly this length (AR 10283); and the Central Coast Regional Water Quality Control Board ("CCRWQCB") found them feasible (See, AR 42979, January 15, 2019 letter from CCRWQCB to Commission (stating "[T]he six new permanent wells [then proposed] will be approximately 900 to 1,000 feet long … Water Board's staff concludes that the Project's proposed site and intake technology are the best site and intake technology available.").) Hence substantial evidence supports the threshold finding of feasibility of Special Condition 11, and Special Condition 11 makes provision for alternate measures if the extended installation turns out not to be feasible. (AR 29, 88).

Finally, even if Special Condition 12 purported to be a CEQA mitigation measure – which it does not – and CEQA standards applied to measure its validity (a proposition for which Petitioners have presented no authority), mitigation measures under CEQA may specify

performance standards which would mitigate the significant effect of the project and defer the specifics where the agency commits itself to mitigation, sets forth specific performance criteria for a mitigation plan to follow and identifies the types of potential action that can achieve the performance standard. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 CalAp4th 777, 793; *East Oakland Stadium Alliance v. City of Oakland* (2023) 89 Cal.App.5th 1226, 1254-1255.)

Special Condition 12 requires that Cal-Am submit, prior to issuance of the CDP, a "Groundwater Monitoring and Reporting Plan intended to ensure that the Project's source water pumping does not adversely affect the aquifers that are a source of drinking water to the City of Marina and the Marina Coast Water District." (AR 29, 88). That is a performance standard. So are the requirements that the plan contain proposed thresholds or other criteria for the measurement of dissolved solids, analyses to be conducted, and proposed remedial measures and operational controls to be implemented should any of the thresholds be reached. Specific requirements for plan content are set forth in nearly three pages of the Commission's Decision, which include baseline measurements of groundwater at identified locations before, and monitoring after, pumping, and the Commission Director must review and approve the plan before the CDP will issue. (AR 29-31) That is a commitment by the Commission to enforce the performance standard. All monitoring appears to be directed toward the detection of any non-seawater levels affected in the future by Project pumping and remedial measures should such appear. Even under CEQA standards, the Groundwater Monitoring and Reporting Plan imposed by Special Condition 12 passes muster.

VIII. ESHA impacts.

The Commission found that, as described in the CPUC's FEIR, and as described by Cal-Am, "... the primary components of the proposed Project within the coastal zone include a well field that would be located at the site of the CEMEX sand mining facility on the shore of Monterey Bay within the City of Marina's LCP jurisdiction, several water transmission pipelines would be located within the LCP jurisdictions of the Cities of Marina and Seaside and the County of Monterey, and an existing outfall that Cal-Am would modify, which is located within the City of Marina's LCP jurisdiction and the Commission's retained jurisdiction ... . All these main components would be located in whole or in part within environmentally sensitive habitat areas ("ESHA") ... ." (AR 41). "The effects on ESHA are first described as they are presented in the Project's FEIR/FEIS, and then additionally detailed where significant changes have occurred due to changes in the Project as currently proposed." (AR 42)

Petitioners contend that ESHA impacts were not adequately evaluated or mitigated to the maximum extent feasible. Here again, Petitioners' challenges fail to fully distinguish between CEQA and the Coastal Act. Not the least shortcoming is the assumption that the standards for mitigation for requirements peculiar to the Coastal Act are identical to those under CEQA, a proposition for which Petitioners have cited no authority.

Under CEQA, the Commission's actions have not been shown to be improper.

The CPUC FEIR found that the environmental impacts would be the same for a 4.8 mgd plant as a 6.4 mgd plant:

> "In addition, a 4.8 mgd desalination plant would not avoid or substantially lessen any significant impacts of the project: the significant impacts that would result from construction would be the same as the plant would have the same footprint, and require the same pipelines, and while one fewer well would be drilled, it would still require five wellpads at the CEMEX site.. … a 4.8 mgd desalination plant would not alleviate or substantially reduce the greenhouse gas emission impacts of the project." (AR 9368, CPUC Decision Certifying Combined Environmental Report).

The Commission, in its role as a responsible agency under CEQA, acknowledged the CPUC FEIR (AR 72-73) and the multiple FEIR mitigation measures imposed[84] and addressed post-FEIR changes in the Project which reduced ESHA impacts, namely: that Cal-Am had modified its proposal to provide that the first phase would have a smaller footprint which " … would reduce ESHA impacts in the initial phase (and permanently if the second phase is not constructed)" (AR 23); and that Cal-Am had also " … modified its proposal in several ways to avoid or reduce some of the previously expected impacts – most notably through its recent revision that would install several sections of the Project's pipelines using tunneling techniques rather than trenching, which will reduce surface ESHA impacts by up to several acres, and also through its recently proposed Project phasing, which would reduce the ESHA impacts at the Project site by about one half acre. Many of the expected impacts are addressed through several Special Conditions that would require verification of expected Project impacts before and during construction, submittal of revised mitigation plans that fully address these impacts and provide ongoing monitoring and remediation and other protective measures…" (AR 7; see also AR 44-45, 68.); that the revised proposal first phase "…would require just two well pads, [and] would allow for a shorter access road; that Cal-Am had " …also modified the design of these two well pads to initially accommodate two slant wells and could accommodate a third well during the

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[84] "The FEIR/FEIS includes a number of mitigation measures meant to avoid or reduce some of these known or potential impacts to ESHA (see Exhibit 6). They include several commonly required measures, such as requiring the presence of one or more qualified biologists to oversee implementation of protective measures, conducting environmental awareness training and education to construction personnel, conducting pre-construction surveys and ongoing monitoring, and numerous best management practices. They also include Mitigation Measure 4.6-1n that requires Cal-Am to submit, prior to construction, a comprehensive Habitat Mitigation and Monitoring Plan ("HMMP") that describes Cal-Am's proposed mitigation including providing mitigation success criteria, implementation plans, maintenance, monitoring, and reporting plans, and contingency measures needed to address restoration and compensatory mitigation on all sensitive habitats and species affected by the Project. It also anticipates that Cal-Am would coordinate with several resource agencies (including staff of the Commission, California Department of Fish and Wildlife, Regional Water Quality Control Board, U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service) to determine the full suite of mitigation measures that would ultimately be needed. [Para.] The mitigation measures included in the FEIR/FEIS are critical in reducing the impacts associated with the Project. …" (AR 73).

Project's second phase (i.e., without constructing an additional well pad) if hydrogeologic monitoring during the first phase indicated one or both well pads could accommodate the additional well. This would allow the reduce Project footprint and reduced impacts to continue into the second phase … ." (AR 42)

"'[W]hen an agency proposes changes to a previously approved project, CEQA Guidelines section 15162 generally prohibits the agency from requiring a subsequent or supplemental EIR unless the agency determines, 'on the basis of substantial evidence in light of the whole record,' that '[s]ubstantial changes will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.' Substantial evidence in this context means substantial evidence that proposed modifications will involve '[s]ubstantial changes' that 'require major revisions of the previous EIR … due to the involvement of new or significantly more severe environmental effects.'" (*California Coastkeeper, supra,* 64 Cal.App.5th at p. 57, quoting *Friends of San Mateo Gardens, supra,* 1 Cal.5th at pp. 937, 957.) "The event of a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis." (*Id.* at p. 949; *California Coastkeeper, supra*, 64 Cal.App.5th at p.58.)

The Commission fulfilled its role as a responsible agency under CEQA by acknowledging the FEIR for its informational value and reviewing the additional evidence regarding ESHA impacts. (See 14 CCR § 15050(b) (requiring a responsible agency to certify that its decision making body has reviewed and considered the information in the lead agency's EIR before acting on the project).) Based upon evidence of lesser ESHA impacts from the modified Project, the Commission did not find that under CEQA an EIR or subsequent or supplemental EIR was necessary. This is a predominantly factual question, for the agency to answer in the first instance, drawing on its particular expertise, and a court should tread with extraordinary care before reversing an agency's determination, whether explicit or implicit, that its initial environmental document retains some relevance to the decision making process. (*San Mateo Gardens, supra,* 1 Cal.5th at pp.952-953; *California Coastkeeper, supra* 59 Cal.App.5th at pp.58-59.) Petitioners have not shown that the Commission's finding that ESHA impacts are reduced from those addressed in the FEIR is lacking in substantial evidence, nor shown that further action under CEQA was required.

ESHA Impacts Under the Coastal Act.

The Commission's Findings and Discussion set forth the applicable provisions of the Coastal Act[85] and City's LCP[86], exhaustively discussed ESHA impacts (See AR 59-80), and

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[85] Coastal Act section 30240 states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas and shall be compatible with the continuances of those habitat and recreation areas.

Coastal Act section 30107.5 states:

"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activity and developments.

[86] LCLUP Policy 19:

Promote reclamation and protection of native dune habitat and vegetation.

LCLUP Policy 25:

Protect the habitat of recognized rare and endangered species found in the Coastal dune area.

LCLUP Policy 26:

Regulate development in areas adjacent to recognized rare and endangered species of their habitats so they will not threaten continuation of the species or its habitat.

LCLUP Policy 41:

Give priority to coastal-dependent development on or near the shoreline and to ensure environmental effects are mitigated to the greatest extent possible.

LCLUP Habitat Protection Policies include:

Before any use or change in use, areas identified as potential habitat for rare and endangered plant or animal species shall be investigated by one or more qualified biologist(s) to determine the physical extent of the primary habitat areas for the specific rare and endangered plants and animals on that site.

Primary habitat areas shall be protected and preserved against any significant disruption of habitat values and only uses dependent on those resources shall be allowed within those areas. All development must be sited and designed so as not to interfere with the natural functions of such habitat areas. Management and enhancement opportunities should be incorporated into use or development proposals; potential impacts shall be fully mitigated, including the assurance of long-term mitigation and maintenance of habitat through the use of appropriate acreage replacement/ restoration ratios for any unavoidable direct impacts to habitat areas.

found that although the Project did not conform to a portion of the City's LCP or to the Coastal Act, the Project met the requirements for the industrial override of PRC 30260 and approved the Project:

> "Based on the discussion above, the Commission finds that the Project, as Proposed, does not conform to provisions of Habitat Policies in the City's LCLUP, including LCLUP Policies 25, 26, and 41 and those requiring that only uses dependent on habitat resources be allowed within primary habitat areas." ... Based on the discussion above, the Commission finds that the Project, as proposed, does not conform to the Coastal Act's ESHA policies. [Para.] However, because the Project is considered a coastal-dependent facility, the Commission has the discretion to apply the three tests of Coastal Act section 30260 and approve the Project notwithstanding its inconsistencies with Coastal Act and LCP provisions (see Section IV.P)." (AR 80)

The applicability, and sufficiency of findings in support, of the 'Industrial Override" provisions of PRC 30260 (AR 158-164) have been addressed at length above and are consequently not repeated here.

> Potential secondary or support habitat areas to the primary habitats identified on the site should also be defined. Secondary habitat investigation should include identification of the role and importance of the secondary area to the primary habitat area and should stress the impact of use or development in the secondary area on the primary habitat. All development in this area must be designed to prevent significant adverse impacts on the primary habitat areas. In concern with State law, City ordinances shall require environmental review and appropriate mitigation of identified impacts for all development in the Coastal Zone, including the assurance of long-term mitigation and maintenance of habitat through the use of appropriate acreage replacement/ restoration ratios for any unavoidable direct impacts to habitat areas.
>
> Available evidence indicates that dune vegetation is more resilient than previously thought, and areas damages by illegal use or negligence shall be considered restorable and eligible for restoration.
>
> Where habitats of rare and endangered species are located on any parcel, owners and/ or operators shall, at such time that development is proposed, develop and execute a Management Plan which will protect identified rare and endangered plant and animal communities. Each plan shall be drawn up by a qualified biologist(s) in co-operation with the property owner/ developer.

LCPIP Regulations for Coastal Conservation and Development District Policy (b)(2):

> Regulations for coastal conservation and development uses shall be specified in the Coastal Development Permit. The permit-issuing body may approve Permit applications if the following factors, where relevant are found to apply:...
>
> b. Development is limited to already-disturbed areas.
>
> c. Rare and endangered plant and animal habitats are adequately protected
>
> d. Grading and roadway construction are the minimum necessary for the development....
>
> g. All significant adverse environmental effects are either avoided or adequately mitigated.

As noted in its findings under Public Resources Code section 30260 and City's LCLUP Habitat Protection Policy, the Commission applied numerous conditions to reduce ESHA impacts, not just Special Condition 10 which Petitioners MCWD/MPWMD single out for challenge:

> "As noted in the Findings above, the Commission is imposing an array of Special Conditions requiring that Cal-Am implement substantial mitigation measures to address a range of expected or potential impacts to coastal resources to the extent feasible – from extensive requirements for habitat restoration to address the Project's impacts to sensitive resources to comprehensive design changes and monitoring to ensure groundwater sources are protected. In addition, the CPUC has imposed a Mitigation Monitoring and Reporting Program ("MMRP") as part of its process in certifying the FEIR/FEIS, which includes a number of mitigation measures designed to avoid or reduce potential environmental impacts. The CPUC's MMRP, combined with the Special Conditions and Cal-Am's proposed ratepayer programs, will ensure that any adverse environmental effects to coastal resources are mitigated to the maximum extent feasible." (AR 163-164).

Mitigation measures imposed by the Commission to reduce ESHA impacts include: Special Condition 3 [Construction Best Management Practices, AR 14-16]; Special Condition 4 [Spill Prevention and Response Plan, AR 16]; Special Condition 5 [Closures for Species Protection, AR 16]; Special Condition 7 [Pre-Construction Biological Surveys and Monitoring During Construction, AR 17-19]; Special Condition 8 [Construction Impact Validation and Compensatory Mitigation Ratios for Habitat, AR 19-22]; Special Condition 9 Dune Habitat and Open Space Protection [AR 22-23]; and Special Condition 10 [Habitat Mitigation and Monitoring Plan, AR 23-29, further discussed below].

Substantial evidence supports Commission's findings that ESHA impact mitigation measures collectively mitigated such impacts to the maximum extent feasible.

As Respondents have correctly noted, although Petitioners claim the ESHA mitigation measures are inadequate, Petitioners fail to articulate specific challenges to Special Conditions 3, 4, 5, 7, 8 or 9, and thus waive those challenges. (*San Diego Navy Broadway Complex Coal. v. Cal. Coastal Com.* (2019) 40 Cal.App.5th 563, 588.) Petitioners have also failed to show that the Commission's determination that these mitigated ESHA impacts to the maximum extent feasible under the Coastal Act was unsupported by substantial evidence or that they impermissibly defer mitigation.

Petitioners MPWMD/MCWD contend that Special Condition 10, which allows payment of an in-lieu fee as one of three options for the compensatory mitigation component of the

Habitat Mitigation and Monitoring Plan, which in turn is only one of several ESHA mitigation measures imposed[87], does not measure up to CEQA standards.[88]

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[87] Again, the evidence in support of the Commission's finding of maximum feasible mitigation is reviewed for substantial evidence in light of the whole record, not simply an isolated portion.

[88] Special Condition 10 appears at AR 23-29. The Commission further described Condition No. 10 as follows:

> "With alternative mitigation options still being pursued but not finalized, **Special Condition 10** importantly provides for three options by which compensatory mitigation for habitat impacts could be implemented. In all cases, the options would be limited to Project-associated habitats (i.e., primarily foredunes and dune scrubs, but also maritime chaparral, etc.) in the coastal zone between the southern boundary of the Salinas River and the northern boundary of the City of Monterey, and west of Highway 1. This spatial focus ensures that comparable ecosystems under the Commission's jurisdiction would benefit directly from mitigation efforts. **Special Condition 10** also ensures that any and all lands used for mitigation, apart from where temporary impacts would be mitigated in-place and in-kind within the TAMC corridor, would be protected in perpetuity.
>
> "The first mitigation option under **Special Condition 10** would allow for Cal-Am to protect and potentially improve currently unprotected lands, effectively removing them from future development threats and providing for more habitat than might otherwise exist. This approach would be required, at a minimum and as part of a significant contribution to restoring coastal dune processes, as creation of dune habitat to ensure no net loss due to the Project's permanent footprint, presently estimated as 1.9 acres. For example, the protection of remaining gaps among otherwise conserved areas might enable broader restoration efforts, or the removal of legacy materials such as roadbeds or revetments could restore beach-dune connectivity where those processes have been lost. Beyond the minimum requirement to compensate for no net loss of dune habitat, additional acreage could be moved into protection and would be eligible for preservation credit if unimproved; if improvements would be proposed in addition to new protections, the mitigation may alternatively qualify the lands for enhancement or restoration credit, based on standards typically applied for these thresholds.[]
>
> "**Special Condition 10** also allows for a second mitigation option where lands already protected from development could be improved, either through enhancement or substantial restoration efforts, and whether implemented by Cal-Am, the landowner, or an agreed-upon third party. This option would necessarily occur in coordination with the landowner, allow for landowner specification of available acreage and terms of agreement with Cal-Am, and ensure landowner involvement in all discussions concerning site restoration priorities, goals and objectives, methods, maintenance, etc. Land already obligated to existing regulatory or legal requirements would generally be considered unavailable as compensation for Cal-Am's Project and the Executive Director would review and approve any tentative agreement between Cal-Am and a landowner prior to its execution, to ensure that all terms would be consistent with the requirements of this and other special conditions. If Cal-Am decides to pursue mitigation at the CEMEX site under this option, it would also need to demonstrate that proposed restoration work goes above and beyond what is expected from the Settlement Agreement.
>
> "A third mitigation option under **Special Condition 10** would assess an in-lieu fee of $250,000 per acre of required restoration with an annual adjustment per consumer price index beginning one year after Commission approval and continuing until all fees are paid. The in-lieu fee amount of $250,000 per acre of required restoration is based upon a range of examples from other permits, practices, and

Even assuming mitigation measures required only by the Coastal Act are required to meet the CEQA in-lieu fee standard, a proposition for which Petitioners have presented no authority, Special Condition 10 does meet the standard.

Sufficiency of in-lieu fees as a mitigation measure.

Petitioners also claim that the in-lieu mitigation fee option for compensatory mitigation contained in Special Condition 10 does not meet CEQA standards, because it is not imposed pursuant to an existing program evaluated under CEQA. Later, following a parenthetical "cf.," Petitioners note the *actual* language from *California Native Plant Society v. County of El Dorado, supra,* 170 Cal.App.4th 1026, 1055, is that "...for an in-lieu fee system to satisfy the

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published literature. For example, elsewhere in Monterey County, in the Asilomar Dunes of Pacific Grove, an in- lieu fee program has been used for dune habitat and most recently, in 2018 (Smith CDP 3-18-0286), applied a fee of $2 per square foot. This is approximately equal to $87,000 per acre, and if that amount is then adjusted for consumer price index would be approximately $102,000 per acre today. Another example from a small project in San Mateo County (Caltrans 2-22-0192-W) included a proposal with budget that, if simply scaled-up, would create and restore dunes at a cost of approximately $740,000 per acre. Published literature for large complex projects involving dunes in California suggests a starting point of $1,000,000 per acre.[] Conversations with experienced dune restoration practitioners in southern California have indicated that a relatively simple project can readily cost somewhere between $100,000-$250,000 per acre and that up to $1,000,000 per acre is reasonable for complex or significantly degraded sites requiring significant engineering effort for components such as grading topography or removing contaminated materials. Because the existing restoration opportunities in the region are as variable as these examples, a fee assessment of $250,000 per acre is considered reasonable and could likely afford significant improvements to local dune ecosystems.

"Fees would be deposited into an interest-bearing account established and managed by a government or non-governmental organization as approved by the Executive Director, with the sole purpose of financing dune habitat protection, restoration, and related activities in the southern Monterey Bay region. Should such an account not already exist, Cal-Am would be responsible for facilitating its development and initiation and covering the costs associated with administering the fees. The in-lieu fee option may be elected by Cal-Am for any fraction of mitigation acreage due except the required habitat creation to assure no net loss. The in-lieu fee option should be viewed as the last resort mitigation option and should be selected by Cal-Am only if neither of the other two options is feasible. If, at no less than 90 days prior to anticipated permit issuance, Cal- Am has failed to secure sufficient acreage to mitigate for Project impacts to habitat, the prescribed fee will be assessed for any outstanding acreage and evidence of all fees having been paid into an approved account would be required prior to permit issuance. The mitigation measures and Special Conditions described above will ensure that impacts to ESHA are avoided, minimized, and mitigated to the maximum extent feasible. Nonetheless, the Project remains inconsistent with Coastal Act and LCP provisions requiring that development in ESHA be dependent on the habitat resources within the ESHA, as neither the well field nor pipeline components are dependent on those resources. Therefore, the Project may only be approved if it meets the requirements of Coastal Act Section 30260, as discussed below in Section P (Coastal- Dependent Industrial Facility Override).

(AR 76-78, footnotes omitted).

duty to mitigate, either that system must be evaluated by CEQA, … *or the in-lieu fees or other mitigation must be evaluated on a project-specific basis."* (*Ibid.* (emphasis added.))

It is clear from the record here that the Commission evaluated the in-lieu fee option on a basis specific to this Project. It reviewed competing evidence as to the cost to restore dune habitat "…based upon a range of examples from other permits, practices, and published literature," citing specific coastal locations (including dune restoration in nearby Pacific Grove) and amounts charged (AR 77-78). It specifically stated that the in-lieu fee option would only be allowed for the instant Project as a last resort, directed how and where funds would be deposited, required that only an entity approved by the Executive Director would be allowed to manage them, and that they be used for the "…sole purpose of financing dune habitat protection, restoration and related activities in the southern Monterey Bay region." (AR 78).

The fee is proportional to the habitat affected by the Project, being imposed on a $250,000 per acre basis (AR 24, 77-78). Furthermore, the mitigation projects to be funded by the in-lieu fees, should that last-resort option be applied, would be analyzed for environmental review before they occur. Thus, they would be 'development' within the meaning of Coastal Act, Public Resources Code section 30106, requiring further discretionary review. (PRC §§30101.5, 30600.)

Analysis of the future environmental impacts of the mitigation projects toward which the in-lieu fees would be applied is not necessary for legitimacy of an in-lieu mitigation fee. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1190 (recognizing environmental effects of interstate highway improvements toward which in-lieu fees were to be paid need not be analyzed, although the Court found that the project in-lieu fees were otherwise not appropriately imposed because the improvement itself was not shown sufficiently certain to occur.))

Another of Petitioners' contentions rests upon evidence conflicting with that accepted by the Commission as to the reasonable amount of an in-lieu mitigation fee – i.e., $250,000 per acre. The impact acreages are to be determined and finalized as provided in Special Condition 8 (AR 23), which sets forth specified impact acreage ratios for each type of habitat impacted (AR 19-22). Petitioner cites to evidence to support a significantly higher amount for in-lieu fees. An agency's findings and conclusions as to the adequacy of mitigation measures are reviewed for substantial evidence. (*Laurel Heights I, supra,* 47 Cal.3d at p. 407.) Such evidence exists here. Review by the court does not extend to reweighing the evidence to see if, as Petitioners argue, their expert's mitigation cost opinions are more reasonable.

Again, it is not the Court's role to decide who has the better argument or whether it might have been equally reasonable for the Commission to reach an opposite conclusion. (*Marina Coast Water Dist., supra,* 96 Cal.App.5th at pp 72-72 (stating that "Some consultants opined that the reversal called for further study, but another consultant – HWG -- reached the opposite conclusion. … The County credited HWG … While there was plainly a dispute between

consultants in this case, we are unable to identify any reason to deem HWG's opinion inadequate as a matter of law.")) The extent of the Court's inquiry is whether there is substantial evidence in support of the Commission's conclusion, "...not to review each item of evidence in the record with such exactitude that the court loses sight of the rule that the evidence must be considered as a whole."); see also, *Laurel Heights I, supra*, 47 Cal.3d at p. 408.) Disagreement among experts does not make an EIR inadequate. (*Ibid*, 47 Cal.3d at p.409; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 795 (quoting *Laurel Heights I* and recognizing that when a challenge is brought to studies on which an EIR is based, "the issue is not whether the studies are irrefutable or whether they could have been better [rather] [t]he relevant issue is only whether the studies are sufficiently credible to be considered as part of the total evidence that supports the agency's decision"....[a] clearly inadequate or unsupported study is entitled to no judicial deference."))

Habitat Mitigation and Monitoring Plan

Petitioner City has also challenged the requirement that of Special Condition 10 that Cal-Am present for approval ("HMMP") portion of Special Condition 10, which provides in part:

> "PRIOR TO PERMIT ISSUANCE, the Permittee shall submit two copies of a final Habitat Mitigation and Monitoring Plan (HMMP) prepared by a qualified restoration ecologist to the Executive Director for review and approval." (AR 23)

Special Condition 10 then continues to set forth multiple specific mandatory minimum components for the plan (in addition to the compensatory mitigation component options, one of which is the in-lieu fee discussed above), which include: mitigation goals and objectives, description of existing habitats, design plans and construction methods (including mitigation design, site preparation, best management practices, and revegetation plans), an as-built report, invasive species control, monitoring plan (for which specifics of monitoring frequency, success criteria, performance assessment, and sampling design are set forth), reporting schedules for annual and long-term monitoring, long-term maintenance and adaptive management, remediation and Executive Director oversight requirements (AR 23-29).

City's contentions boil down to City's reliance on Commission staff criticism of an earlier June 2020 HMMP plan submitted by Cal-Am and a claim that it impermissibly allows the submission of a mitigation plan after CDP approval. There are multiple problems with these claims. First, the Commission noted FEIR/FEIS already contained a requirement in its Mitigation Measure 4.6-1 for an HMMP plan to be submitted (AR 73) and there has not been shown any new significant information which would require further action by the Commission. Second, while pointing to the Commission staff criticism of the previous 2020 plan, Petitioners omit reference to evidence showing that the staff found subsequent mitigation options feasible. Specifically, Petitioners neglect to mention that the earlier-criticized plan:

"...relied heavily on anticipated opportunities to restore portions of the CEMEX site ...," that "...several concerns have arisen that will require Cal-Am to also consider mitigation options outside the CEMEX site... include[ing] the scope of net dune habitat loss, concentration of mitigation in one area while Project impacts would be distributed throughout a much larger region, and ongoing negotiations concerning the final implementation of the CEMEX Settlement Agreement. More specifically, the full scope of final implementation of the CEMEX settlement Agreement and resolution of the underlying violation is undetermined at this time. Thus, it is unclear what, if any, mitigation opportunities will remain at the CEMEX site once the Agreement is fully implemented. To address these concerns, Cal-Am has worked in recent months to identify potential alternative mitigation options and while none have yet formally come together, several appear to be feasible or are even making significant progress towards partially resolving anticipated mitigation requirements. The options span dune ecosystems within the coastal zone, between the northern border of the CEMEX site and the southern border of Sand City and include potential private land acquisitions as well as restoration on publicly owned lands. Importantly, after investigating and reviewing alternative mitigation options, Commission staff is confident that there is sufficient acreage available in the appropriate geography and within appropriate ecosystems to accommodate anticipated mitigation requirements for this Project with or without use of the CEMEX site."

(AR 74-75)

The Commission continued discussing the rationale for the imposition of the Special Conditions addressing habitat impacts (AR 75-80).

The failure of the Petitioner City to lay out the evidence *supportive of* the Commission's HMMP findings and adequacy of Special Condition 10 alone would warrant ignoring this part of their claim. (See CCP § 1094.5(c) (requiring trial court to determine whether substantial evidence supports the Commission's decision); *Ross*, *supra*, 199 Cal.App.4th 921 (noting that a petitioner challenging the administrative decision bears the burden of demonstrating error).)[89]

Third, Petitioners have cited no authority under the Coastal Act which requires that an HMMP be submitted prior to CDP approval rather than imposed as a condition which must be met before issuance of the CDP. As noted above, even under CEQA an agency may adopt a mitigation plan and defer mitigation specifics if the agency has evaluated the potentially significant impacts and has identified measures that will mitigate those impacts, commits to

[89] See also, *LaCosta Beach Homeowners' Assn., supra,* 101 Cal.App.4th at p. 814 (stating that "[c]ourts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency"); *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1213-1214 (acknowledging that as long as the findings are supported by substantial evidence, it is sufficient to support the decision of the Commission.))

mitigating the significant impacts of the project and commits itself to devising measures that will satisfy specific performance criteria articulated at the time of project approval. (*California Native Plant Society, supra*, 172 Cal.App.4th at p.61; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 629.) The Commission here identified the potential impacts and mitigation measures to counter them, set forth specific performance standards for the HMMP, and committed to enforce the standards: the permit will not issue until Cal-Am submits an HMMP prepared by a qualified restoration ecologist and that HMMP is approved by the Executive Director of the Commission.

Again, even assuming the CEQA mitigation standards apply to mitigation determinations under provisions specific to the Coastal Act, there is substantial evidence to support the Commission's finding that, notwithstanding the Project's nonconformance to LCLUP or Coastal act policies, mitigation existed to the maximum extent feasible as required under Public Resources Code section 30260, the Coastal Act's "Industrial Override" provision for coastal-dependent projects. Petitioners have not shown otherwise.

IX. Environmental Justice

Public Resources Code section 30604, subd. (h), states that "[w]hen acting on a coastal development permit, the issuing agency, or the commission on appeal, ***may*** consider environmental justice, or the equitable distribution of environmental benefits throughout the state." (emphasis added).

Public Resources Code section 30107.3, subd. (a) states that "'Environmental Justice' means the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies." Subsection (b) goes on to state that:

> "'Environmental justice' includes, but is not limited to, all of the following:
>
> (1) The availability of a healthy environment for all people.
>
> (2) The deterrence, reduction, and elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution, so that the effects of the pollution are not disproportionately borne by those populations and communities.
>
> (3) Governmental entities engaging and providing technical assistance to populations and communities most impacted by pollution to promote their meaningful participation in all phases of the environmental and land use decisionmaking process.
>
> (4) At a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decision.

Additionally, in March 2019 the Commission unanimously adopted an environmental justice policy that ("EJ Policy") provides guidance on the implementation of Section 30604(h).

There, the Commission indicated:

> "The term 'environmental justice' is currently understood to include both substantive and procedural rights, meaning that in addition to the equitable distribution of environmental benefits, underserved communities also deserve equitable access to the process where significant environmental and land use decisions are made."
>
> (Commission's Environmental Justice Policy, p. 3.)

The court has granted Respondent's Request for Judicial Notice of the Commission's EJ Policy. That policy states, among other things, that the Commission "...committed as an agency to protecting coastal natural resources and providing public access and lower-cost recreation opportunities for everyone," "to ensuring that those opportunities will not be denied on the basis of background, culture, race, color, religion, national origin, income, ethnic group, age, disability status, sexual orientation, or gender identity." The policy also states:

> "The Commission will use its legal authority to ensure equitable access to clean, healthy, and accessible coastal environments for communities that have been disproportionately overburdened by pollution or with natural resources that have been subjected to permanent damage for the benefit of wealthier communities. ... all aspects of our mission are best advanced with the participation and leadership of people from diverse backgrounds, cultures, races, color, religions, national origin, ethnic groups, ages, income levels disability status [*sic*], sexual orientation, and gender identity. The Commission is committed to compliance and enforcement of Government Code Section 11135, as well as consideration of environmental justice principles as defined in Government Code Section 65040.12, consistent with Coastal Act policies, during the planning, decision-making, and implementation of Commission actions, programs, policies, and activities. ..."

Coastal Act Public Resources Code section 30013 prohibits discrimination or denial of equal access to the benefits of any activity or program administered under the Coastal Act.[90]

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[90] Public Resources Code section 30013 provides that "... in order to advance the principles of environmental justice and equality, ... subdivision (e) of Section 65040.12 of the Government Code appl[ies] to the commission and all public agencies implementing the provisions of this division. ... [N]o person in the State of California, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, shall ... unlawfully be denied full and equal access to the benefits of, or be unlawfully subjected to discrimination, under any program or activity that is conducted, operated or administered pursuant to this division ... ." Government Code section 65040.12(e) defines 'environmental justice' using language similar to that in Coastal Act Public Resources Code section 30107.3(a).

Petitioners' contentions. The primary contentions here based on environmental justice laws are those raised by City.[91] Discussion of Petitioners' arguments starts with some basic observations. First, environmental justice is not an area of inquiry mandated under CEQA, as noted by the FEIR (AR 11551), and Petitioners have not supplied any authority in support of such a contention, as Respondents point out. Section 21083.1 of the Public Resources Code prohibits courts from interpreting CEQA or the CEQA guidelines ".. in a manner which imposes procedural or substantive requirements beyond those explicitly stated...." The California Supreme Court explained that "the purpose of this statute was to 'limit judicial expansion of CEQA requirements[.]" (*Berkeley Hillside Preservation, supra,* 60 Cal.4th at p. 1107.)

Second, environmental justice is not a required topic for consideration by the statutory language of Coastal Act section 30604(h) (stating "... the issuing agency, or the commission on appeal, *may* consider environmental justice, or the equitable distribution of environmental benefits throughout the state." (emphasis added).). The plain language of the statute does not *mandate* environmental justice consideration by the Commission.

Third, neither the legislation nor the Commission policy mandate that environmental justice concerns be *prioritized* over other concerns, as City has contended (See City OB at 30:15-16). The Commission stated, in explaining its policy: "Ensuring access to the Commission's proceedings means making sure that those who are affected by proposed development have a meaningful and equitable *opportunity to voice concerns in an open and transparent process*. Substantively, the EJ Policy describes how the *Commission will work to ensure equitable access* to the coast, *support measures that protect existing affordable housing*, and ensure that environmental justice communities are not *disproportionately affected* by climate change, water contamination, overuse, or diminished environmental services." (AR 104 (emphasis added).) Deference is accorded to the Commission's interpretation of its own regulations. (*Ross, supra,* 199 Cal.App.4th at 938.) No authority has been presented indicating deference should not also be given to the Commission's interpretation of its own policies.

Fourth, nothing in either the statutory language or EJ Policy provisions mandates that environmental justice issues be *resolved*.

The City has not shown that the Commission failed to afford equal access, meaningful involvement or equitable distribution of environmental access. The record shows, however, extensive efforts by the Commission to engage, and a commitment that it will in the future monitor mandatory engagement, with the several communities affected to obtain their respective views and concerns. The record also shows that the Commission engaged in a lengthy

[91] To a much lesser extent, MCWD/MPWMD briefly mention section 30604(h) as a segue to their claims that the Commission's findings under Coastal Act section 30260, the industrial Override' provision of the Coastal Act, are not supported by substantial evidence. Those assertions have been addressed above and will not be repeated here.

deliberative process of weighing competing interests and access to water and other coastal environmental benefits, while imposing safeguards against adverse impacts to them.

As with Petitioners' challenges to Commission's findings regarding water supply and demand, the City relies heavily upon earlier Cal-Am Project proposals and Commission staff reports regarding the desalination Project rather than the modified Project at issue here which was ultimately proposed, reviewed by the Commission staff, and approved by the Commission in November 2022, with several conditions imposed. The City's failure to cite to the changes in the Project (e.g., lower Phase 1 mgd output, smaller project footprint, fewer slant wells, extended well lines seaward, required baseline measurements and mandatory monitoring and reporting for groundwater levels, vernal ponds/wetlands and ESHA) falls short of meeting its burden to cite evidence favorable to the Commission and show its deficiencies. "Failure to do so is fatal." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266; see also, *San Diego Navy*, *supra*, 40 Cal.App.5th at p. 588.)

Moreover, the Commission discussed at length competing environmental justice considerations. (AR 104-120). Much, if not most, of this evidence, analysis and discussion is omitted by Petitioners. After the earlier 2020 project proposed to the Commission, "... [t]wo years later, opponents of the Project continue[d] to express procedural and substantive concerns about its impacts on communities of color and low-income communities located near the Project site in the City of Marina, as well as the Cal-Am service area ratepayers." (AR 105)

In carrying out the Commission's EJ Policy, Commission staff itself conducted research to identify communities marginalized or disproportionately burdened by industrial development, "...to make sure those voices are thoughtfully considered by the Commission during the decision-making process." (AR 105) In so doing, staff identified by color, limited proficiency in English, and lower-level to poverty-level income, disadvantaged groups in the communities involved, including Marina, Seaside, Sand City, and Castroville. (AR 105-108). Staff conducted outreach with community members and leaders in person in 2019 and, due to travel restrictions from COVID-19, by phone and email in 2020 with "Castroville residents including community Services District Staff, social justice advocates, a county representative, water experts, and other stakeholders." (AR 108).

Staff's engagement with community members from Castroville, Marina, and the Monterey Peninsula continued in 2022 by phone and video. Staff identified specific ethnic groups in various communities, identified residents' expressed concerns that included: impact on Marina's groundwater resources, saltwater intrusion, concerns that the burden of the desalination plant presence would be in Marina but that Marina would receive none of the benefits of the Project that other communities would receive, concerns by low-income Cal-Am ratepayers that water rates would rise significantly as a result of the Project, lack of affordable housing, Castroville's agricultural existence and resultant severe lack of safe, affordable and reliable drinking water as a result of overdraft from decades of agricultural use, the fact that two source

wells for Castroville have already been shut down as a result of saltwater intrusion; that Castroville's population majority is people of color, and nearly half the households live in poverty; that "[s]ince 2020, the water needs in [Castroville] have become increasingly desperate and the survival of the community is dependent upon finding new sources of water"; that the Castroville Community Services District ("CCSD") "... was able to secure a long-term-source of new water through a Return Water Agreement developed during the CPUC's review of Cal-Am's Project in a prior proceeding" because under that agreement, water which Cal-Am processes in the desalination Project but which must be returned to users of the Salinas Valley Groundwater Basin[92] must be supplied to Castroville at greatly reduced rates - $580 per acre-foot as opposed to $6,100 per acre-foot Cal-Am expects its ratepayers will pay for water from the Project (AR 116); any amounts of such Return Water which exceed the amount to be supplied to Castroville may go to the Castroville Seawater Intrusion Project, which provides recycled water and surface water in lieu of groundwater pumping for agricultural use on the Castroville area, at a rate of $110 per acre-foot (AR 116 and 105-111).

The Commission also noted that:

> "While the Project provides a benefit to the Monterey Peninsula by providing a secure water source and helps to avoid future overwithdrawal of water from the Carmel River, it will disproportionately burden low-income ratepayers in the service area and residents in the City of Marina. Cal-Am proposed a number of measures to help offset costs to low-income ratepayers and provide community benefits for the City of Marina. These proposed measures by Cal-Am and additional conditions imposed by the Commission help to offset adverse impacts and ensure accountability. Even so some environmental justice issues related to the Project remain contentious."

(AR 6.)

Following procedural concerns expressed by the City and its residents to the effect that they felt excluded from the process prior to the 2020 Commission hearing because they are not Cal-Am ratepayers,[93] Cal-Am met with City officials in 2020 and 2021, but were unable to reach agreement on any community benefits to Marina or to gain support for the Project. In mid-July 2022, Cal-Am met with Commission staff to discuss renewed outreach to the environmental justice communities in the area. (AR 111)[94]

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[92] The amount of water to be provided to Castroville and excess to be returned to the SVGB is based upon amounts of groundwater extracted during the desalination process. This agreement was approved by the CPUC. The Special Conditions imposed by the Commission for the establishment of baseline measurements and monitoring of levels thereafter provide a basis for determining how much is to be returned.

[93] This reference by the Commission was apparently to the CPUC proceeding.

[94] As used in the staff report, the terms "underserved communities" and "environmental justice communities" are used interchangeably with the term "communities of concern." "All these terms refer to low-income communities, communities of color, and other populations is with higher exposure and/or sensitivity to adverse project impacts

Starting in August 2022, three months before the Commission hearing under challenge here, Cal-Am advertised and began conducting a series of 12 community meetings in Marina, Seaside, Sand City, Castroville and Salinas to discuss the Project, answer questions in writing and distribute a handout in multiple languages to event participants, as well as posted it on Cal-Am's website (AR 111). Concerns about these sessions persisted, and in response, the Commission created an FAQ in English and Spanish about the Commission and how to participate in meetings, and regularly spoke with Marina officials to answer questions and provide guidance on how to enable community members to testify from Marina City Hall. Cal-Am agreed to provide Spanish interpretation and translation services for the hearing, available for anyone attending in person or by Zoom. (AR 111-112). Petitioners neglect to mention any of this in their briefing or argument.

Through this process, three main substantive concerns emerged about the Project: (1) increased costs for water; (2) benefits to Castroville's water supply through the Return Water Agreement; and (3) environmental burdens that will contribute to cumulative impacts to the City of Marina, including groundwater impacts. (AR 112.)

The Commission considered each of these areas of concern and attempted to mitigate their impacts. Cal-Am proposed, among other things, the following benefits to offset cost impacts from the desalination facility to low-income customers:

- "Cal-Am will increase its contribution of up to $500,000 to the United Way Monterey's Hardship Benefit Program, which helps customers with impeding water-shut offs, and that it would increase outreach to inform customers about the federal [low-income household water assistance program (LIWAHP)]."[95]

- "Cal-Am will also seek approval from the CPUC for one or more of seven different proposals to achieve this goal of offsetting cost impacts to low-income customers. These proposals range from expanding participation to and increasing the Customer Assistance Program or CAP discount from 30% to 50%, to expanding existing programs to multi-family residences to eliminating bill impacts relating to the cost of the proposed desalination facility."[96]

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due to historical marginalization, discriminatory land use practices, and/or less capacity to mitigate adverse impacts." (AR 105 at fn. 85.)

[95] This was made part of CDP Special Condition 16, which specifically *requires* that Cal-Am pay the amount of $500,000, not 'up to' that amount. (AR 36.)

[96] The language of Special Condition 16 requires Cal-Am to submit, prior to CDP issuance, a low-income ratepayer relief plan which allows options of working with the CPUC or creating or expanding existing ratepayer relief plans independently of the CPUC. The language in the Special Condition does not expressly state to whom the plan is to be submitted or who will review it (AR 36) but in its Findings and Discussion, the Commission clarified it is the Executive Director. (AR 120.)

- "...Cal-Am would offer to all ratepayers enrolled in its Customer Assistance Program free installation of low-flow fixtures (sink and bathtub faucets, showerheads, and toilets) that met state efficiency standards."[97]

- "... Cal-Am would take steps to ensure that any ratepayers enrolled in that Program once deliveries of desalinated water from the Project begin, would have a rate increase of no more than S10 per month for water provided by the Project for at least five years after those deliveries begin."[98]

- "Cal-Am also recommended the Commission include a special condition requiring annual reporting on both of these benefits, which is included as Special Condition 16."

- "At the hearing, Cal-Am modified its proposal to provide a cap of $10 per month for customers who qualify for Cal-Am's Customer Assistance Program until it implements any CPUC-approved rate relief programs that effectively cap rate increase to no more than $10 per month for such customers."[99]

- "...to address a prohibition against exporting groundwater from the Salinas Valley Groundwater Basin, Cal-Am agreed to provide potable water to Castroville at about S580 per acre-foot. The agreement also contemplates that return water in excess of that provided to Castroville would be directed to the Castroville Seawater Intrusion Program ("CSIP") at a cost of about $110 per acre-foot to help reduce seawater intrusion in the Basin."

- To address possible higher return water percentages than expected, the CPUC "required Cal-Am's shareholders, not ratepayers, to pay excess costs if return water obligations exceeded certain percentages.....Special Condition 12...require[s] Cal-Am to conduct comprehensive monitoring that will detect the amounts of groundwater subject to the Return Water Agreement provisions and to modify its operations if necessary to reduce any of several groundwater-related impacts."

- With regard to the environmental impacts, "Cal-Am offered to provide access around its Project, but Marina officials said it preferred a cohesive network of trails, which they believed would be more achievable through restoration and access

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[97] Special Condition 16 requires annual reporting by Cal-Am to the Executive Director of the status of this measure. (AR 36-37.)

[98] Special Condition 16 imposes this as a condition, but states that it is to continue "for the duration of the Project Annual reporting required here." It does not expressly state how long that period is, although it does require the proposed pre-CDP-issuance plan contain a provision for annual reporting. (AR 36.)

[99] Special Condition 16 mandates annual reporting of the status of such a measure. (AR 37.)

requirements under the 2017 Settlement Agreement to which CEMEX, the Coastal Commission, the City of Marina and the State Lands Commission are collectively signatories.

- Cal-Am also offered "increased groundwater monitoring, property tax revenues, a public access plan, and habitat mitigation on the Cemex site, as well as an offer of S1 million in funding for improved public access, public facilities and recreational opportunities and restoration for the City, though it did not specify how this amount to help off-set impacts from the construction of the $419 million Project was determined....[at the hearing], Cal-Am increased its offer to the City from S1 million to $3 million for implementation of these amenities." The Commission imposed as part of Special Condition 17 (AR 38)

- "Under Special Condition 10, if Cal-Am proposes any restoration on the CEMEX site as mitigation for habitat impacts, it would have to demonstrate that this work is above and beyond any restoration and benefits that result from the CEMEX settlement."

- "Special Condition 17 requires Cal-Am to submit, for Executive Director review and approval, a Public Access and Amenities Plan that will result in benefits to the City's residents." This is to be prepared as part of a Community Engagement Plan to be prepared by an independent neutral third party selected and approved by the Executive Director. (AR 37-38, 120).

(AR 112-120.)

The Commission acknowledged that these mitigation efforts "have not resolved all the environmental justice issues related to this Project, which remain contentious." (AR 120.) As Respondents have accurately noted, Cal-Am proposed a package of community benefits to Marina in conjunction with the Project, which City largely rejected (AR 120, 163, 189-191).

Attempts between the parties reached an apparent impasse, according to Cal-Am, with City officials refusing even to discuss potential benefit offers from Cal-Am to the City. (AR 120). The Commission imposed **Special Condition 17**, which requires that prior to issuance of the CDP Cal-Am submit for review and approval by the Executive Director a Community Engagement Plan that ensures residents and representatives of the City of Marina will be equitably engaged in development of a Revised Public Access and Amenities Plan. The engagement plan "... shall be developed by a neutral third party selected and approved by the Executive Director in consultation with the City of Marina. ...," and "... shall describe how [Cal-Am] will provide opportunities for Marina community members to identify public access priorities and projects for benefit of Marina residents." (AR 37) The engagement plan must also provide for a specified number of community workshops with neutral third-party facilitation (AR 37). Once the engagement plan is approved, Cal-Am must " ... implement it as approved to

prepare a Public Access and Amenities Plan." The Plan must describe all coastal access amenities to be provided, identify the permits and approvals needed, a schedule to implement the improvements within 5 years of CDP issuance, provide that Cal-Am will pay $3 million in funding to implement the amenities plan (for public access, public facilities, recreational opportunities, and restoration within the City of Marina) as well as funding for one appropriately credentialed, full-time staff person at the City of Marina to provide technical oversight regarding the plan for a period of ten years. (AR 37-38, 120.)

In explaining these provisions, the Commission added: "While this Special Condition is not expected to eliminate the burdens identified by the City and its residents, it will provide assurance that Cal-Am will provide benefits to the community based on the preferences of the residents with potential to be affected by the Project." (AR 120)

The Commission's concluding remarks on this issue bear repeating here:

> "The Project has become extraordinarily controversial, including some of the most significant environmental justice concerns the Commission has considered since it adopted an Environmental Justice Policy in 2019. There is a long history of government institutions not giving low-income communities and communities of color adequate consideration in the decision-making process, even when it comes to the welfare of their own communities. Here, a historic drought has swept across California, increasing pressure for new sources of water in a region already struggling with longstanding, critical water shortages. This has resulted in a project with range of benefits and burdens to nearby environmental justice communities that need affordable water but are also often the site of unwanted industrial development. Cal-Am said it has tried to resolve these concerns through increasing outreach to get greater input from nearby communities of concern. Cal-Am updated the Project description to include measures designed to alleviate impacts to low-income ratepayers, and they put together a package of benefits for Marina, which were largely rejected by the City. Further, Cal-Am's proposed changes and Special Conditions 16 and 17 provide additional measures to offset adverse impacts and ensure accountability. Even so, these efforts have not resolved all the environmental justice issues related to this Project, which remains contentious."

(AR 120.)

The Commission cannot be expected or required to make the City agree to receive offsetting benefits proffered in an effort to ameliorate the burden on the City from a desalination Project which will provide desperately needed water to Castroville, not just the Monterey Peninsula, and offset decades of overdraft from the Carmel River. The record shows that the Commission has, however, made significant efforts to provide for inclusion of City and environmental justice communities in the CDP approval process and in having a voice in where and what public amenities will be made to the City's residents as part of an effort toward equity. The record also shows that the Commission examined the issue thoroughly, explained its

reasoning for approval with Special Conditions, and stated its intention to oversee effectuation of the environmental justice policy along with monitoring the environmental impacts.

As noted above, Public Resources Code section 30604, subd. (h), provides that "[w]hen acting on a coastal development permit, the issuing agency, or the commission on appeal, ***may*** consider environmental justice, or the equitable distribution of environmental benefits throughout the state." The Commission's consideration of environmental justice issues, borne out by the record, demonstrates considerable effort by it to fulfill its EJ Policy and also attempted to mitigate the issues.

Petitioners have failed to show that the Commission failed to do its job. There is no showing it failed to identify, include, and mandate future inclusion of, affected communities from participating in coastal resource and access mitigation efforts. Failure to show an absence of substantial evidence and support such a contention with supporting evidence and argument waives the argument. (*San Diego Navy*, supra, 40 Cal.App.5th at 588). Even had they made such a showing, prejudice must be shown and is not presumed. (*Id.* at 588-589.) Petitioners have not shown any prejudice sustained by virtue of the claimed violation of Public Resources Code section 30604 subd. (h) or the Commission's EJ Policy.

X. CEQA/Fair Hearing claims based upon notice of hearing, response to comments and opportunity to be heard at hearing.

The original Staff Report recommending approval of the Project with conditions was released on November 4, 2022 (AR 32154-32458), along with the Notice of the Hearing. The deadline for the response to comments was November 11, 2022. The Commission Staff issued an addendum which included responses to comments on November 14, 2022. (AR 38385-38616) The hearing was held November 17, 2022.

Petitioners make three arguments regarding the November 17, 2022 hearing at which the Commission approved the Project: (1) that insufficient notice was given; (2) that the Commission failed to respond adequately to comments; and (3) that a meaningful opportunity to be heard was not afforded at the hearing.[100]

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[100] Petitioners' claim that the Commission committed errors "in rushing to approve the Project" are not supported by the record. The Project was before the Commission for at least three years before that hearing. It had been the subject of two prior scheduled hearings, extensive review of proposals and studies by Commission staff and independent experts and multiple competing expert reports from Petitioners, proceedings before Petitioner City, multiple lawsuits in which Petitioners have been parties challenging approval of the Project, including objections and challenges to the CPUC's approval of a larger Project than that for which the instant CDPs were issued and at which many of the same arguments made here were raised by Petitioners, and multiple appeals, in which Petitioners were prominently involved and to some extent involved similar contentions, to higher courts. Petitioners had also submitted multiple reports from consultant experts opposing the Project, as Cal-Am had submitted its own in support. As Petitioners have noted repeatedly in briefing, the Commission Staff had previously prepared reports regarding the project in 2018 and 2020, recommending denial, and was quite familiar with the Project generally.

Under Code of Civil Procedure section 1094.5, the Court reviews the fair hearing issues de novo. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 776; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443 (noting "the ultimate determination of whether the administrative proceedings were fundamentally fair is a question of law" and subject to de novo review of the administrative record.))

As to the first argument, despite Petitioners' claims to the contrary, the sufficiency of the notice given (including the contemporaneous circulation of the staff report prior to the hearing) has already been litigated in this action and ruled upon by the Court in its April 24, 2024 order. The Court concluded that the notice given complied with Public Resources Code section 21080.5's core requirements for the Commission's Secretary-certified program and regulations enacted for the program. The Court incorporates and reiterates its prior ruling on that issue, but also notes the evidence of numerous, lengthy, detailed comments and reports, outlined below, submitted by Petitioners and their consultants responding to the Project. Petitioners have not shown that the hearing notice and comment period were unreasonably short or that they were prejudiced by inability to respond in their comments to the Staff Report

As for the second issue, the record shows that not only did the Commission in its Addendum Report (see AR 38406-38413) respond to comments made but articulated its reasoning. These issues included supply uncertainty and demand; contentions regarding ongoing CPUC proceedings; the approval of a 4.8 mgd rather than a 6.4 mgd pumping operation; lack of demonstrated hydrogeologic connectivity between the Project pumping and groundwater or vernal ponds and wetlands and rationale for nonetheless imposing special conditions of monitoring and reporting as an early warning system against such effects; ESHA impact analysis; explanation of why future impacts of well relocation or removal was speculative; the rationale for assessing a permit for modification of the outfall separately; and impact on Cal-Am customer rates, emphasizing that ultimately the CPUC has exclusive jurisdiction over the establishment of rates. (AR 38406-38413)

In other words, as Respondents have pointed out, the responses addressed and explained the Commission analysis on exactly the substantive topics which Petitioners have challenged in in this action.

Commission Staff also explained that in response to comments received it had made extensive changes to recommended findings and special conditions (AR 38406; the changes are set forth at AR 38386-38406).

Petitioners suggest that, because over 500 comment letters were received by the Commission in response to its staff report, the comments required a greater response. Petitioners have not shown that any of the arguments they sought to make were curtailed and, in fact, their arguments seem to be in large part the same as those made in prior proceedings. The record discloses the Commission made a 'good faith, reasoned analysis in response' to comments. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344,

1367.) "Disagreement among experts does not render an EIR inadequate; the report need simply summarize the main points of disagreement." (14 CCR §15151; see also, *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.))

Petitioners have demonstrated no inadequacy in, or prejudice from, the Commission staff response to comments.

Petitioners' third contention – that the hearing was not fair and public participation was cut short, appears to proceed on the assumption that any party who wished to appear at the hearing should have been afforded an opportunity to speak at the hearing without time restriction. The Procedure for the meeting and time allotted to speakers was outlined in the Special Hearing Procedures for the November 17, 2022 meeting, both in English and Spanish (AR 32461-32466). The record here reflects that the hearing started at 8:30 a.m. (AR 40822), consumed 13 hours, and was attended by numerous public members both in person at an auditorium and remotely via Zoom. (AR 40745-40845) Spanish translation and interpretation was provided. (See AR 32459-32466; 40364-40367, 112). So many individuals appeared at the hearing that, because of time constraints, the Commission Chair finally called for a show of hands, for and against the Project. (AR 41205-41207; see also AR 40745-40815 (speaker tracking chart); AR 40823-40832 (transcript identifying persons who spoke at the hearing).) –

Review of the transcript reveals that those who spoke included David Stoldt, General Manager of Petitioner MPWMD, who noted he had already submitted to the Commission 'a letter with eight reasons why [the CDP] application should be denied' (AR 40965; he had on October 19, 2022 sent to the Commission a letter with attachments totaling approximately 40 pages, found at AR 3789-38199, and on November 11, 2022, sent another letter, with a consultant's report attached, responding to the November 4, 2022 staff report, see AR 33709 et seq.), the Mayor of Marina, who was given 15 minutes to speak, requested and was given 30 seconds additional time to speak (AR 40876, 40903-40916), Marina City Manager (AR 40907), Marina mayor pro tem (AR 40903-40904), a Tribal Chair (AR 40917); the Marina Coast Water District president (AR 40978) and an expert (Dr. Vera Nelson) presented by MCWD (AR 40982-40985), the general manager of Marina Coast Groundwater Sustainability Agency (AR 40996) and its expert (AR 40997-40998); MCWD's attorney in this action was given the opportunity to speak but apparently declined, unsuccessfully attempting to cede his time to give additional time to MCWD's expert (AR 40999); the chairperson for the water committee for the Sierra Club, California (AR 41011), and the Chair of the Seaside Groundwater Basin Watermaster (AR 41065), a private individual who spoke of the relative affluence of the City of Marina compared to water-needy Castroville (AR 41123), among others.

MCWD's counsel also submitted on November 11, 2022, a 36 page letter outlining comments on behalf of MCWD (AR 33721-33756) and attaching the November 10, 2022 letter from its consultants responding to the Staff Report as well as the MCWD consultant's (Peter Meyer/WaterDM) approximately 40 page August 18, 2022 report (AR 33757-33802); MCWD's

expert who spoke at the November 17, 2022 hearing also submitted a November 11, 2022 letter recommending denial based upon groundwater impacts she outlined in a prior report, but also suggesting changes to the proposed special conditions in the staff report (AR 33858 et seq.).

Two members of the Monterey County Board of Supervisors each sent letters to the Commission dated November 10, 2022, responding to the Staff Report (AR 33512-33513; 33516-33519). The Mayor of the City of Marina sent a letter dated November 11, 2022 approximately 10 pages long, responding to the staff report (AR 33521-33531). The City's counsel sent a November 16, 2022 letter approximately 44 pages long, exclusive of exhibits, responding to the Staff Report (AR 37550-37593); the exhibits to City's counsel's letter included a November 14, 2022 report from one of City's consultant experts, Formation Environmental, responding to comments in the Staff Report and comprising approximately 28 pages (AR 37955-37622) and a November 15, 2022 memorandum from another of City's consultant experts, WRA Environmental, responding to the November 4, 2022 staff report (AR 33624-33632); the latter document also attached two prior reports WRA had prepared regarding the project in 2018 and 2020 (AR 32533 et seq.).

City (AR 40600-40618) presented color presentation materials at the hearing, as did MCWD (AR 40643, 40681, 40684-40685), and MPWMD (AR 40709-40711, 40721-40722).

There is no question, on the record here, that Petitioners had sufficient opportunity to submit comments in response to the November 4, 2022 staff report, and did so. And they did so effectively: as a result of the comments received, the staff prepared an addendum modifying its recommendations and Special Conditions for the CDP (AR 38385-38616), which the Commission adopted.

Neither error nor prejudice has been shown in providing notice of the hearing, responding to comments concerning the staff report, or conducting the hearing at which approval of the Coastal Development Permits was granted.

Requests for Judicial Notice. The Court's rulings on Requests for Judicial Notice are attached as Appendix A to this ruling.

CONCLUSION

Petitioners have not shown that the Commission exceeded its jurisdiction or abused its discretion. Feelings run high on both sides of the issues surrounding this desalination plant and there was evidence submitted both for and against the Project. Disagreement among experts does not make an EIR inadequate. (*Laurel Heights I, supra,* 47 Cal.3d at p. 409.) The Commission acknowledged and fulfilled its role as a responsible agency under CEQA, and under the Coastal Act both in its original and its appellate jurisdiction. The Commission and Staff understood and laid out the issues well and explored them and the evidence thoroughly. It articulated its reasoning and placed additional environmental safeguards on the Project in addition to those previously imposed by the CPUC, making provision to keep a continuing watchful eye on the

Project and its impacts. It did so following the law and based upon substantial evidence. It is not the Court's role to decide whether a different decision would have been equally reasonable. (*Laurel Heights 1*, supra, 47 Cal.3d at p.393.) The agency – here, the Commission -- is the finder of fact and the court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence if favor of the agency's decision. (*Marina Coast Water Dist.*, *supra*, 96 Cal.App.5th at pp. 65-66.)

The Petition in this action accordingly is denied. The court will decide the issues in City of Marina v. RMC Lonestar et al. 20CV001387 at the trial presently scheduled for November 12, 2025.

On March 28, 2025 the Court provided a copy of the Court's Intended Decision, allowing either party to file a statement if it felt that the court omitted reference to any issue that identified what issue or issues it believes were not addressed in the Intended Decision. On April 11, 2025 Petitioners filed their Objections and shortly thereafter, as allowed by the Court, the Respondent and Real Party in Interest filed responses thereto. The Court's ruling on Petitioners' Objections is attached as Appendix C.

Dated: May 12, 2025

Thomas W. Wills
Judge of the Superior Court

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