BEFORE THE PUBLIC UTILTIIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California American Water Company (U 210 W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	A.12-04-019 (Filed April 23, 2012)

ORDER MODIFYING DECISION (D.) 18-09-017, AND DENYING REHEARING OF DECISION, AS MODIFIED

I. INTRODUCTION

In today's decision, we address the applications for rehearing of Decision (D.) 18-09-017 (or "Decision"),[1] filed by Marina Coast Water District ("MCWD") and the City of Marina ("Marina). After a careful review of each of the issues raised in both rehearing applications, we believe that good cause does not exist for the granting of rehearing of D.18-09-017. However, for purposes of clarification, we modify D.18-09-017, as set forth below. Rehearing of the Decision, as modified, is hereby denied, since no legal error has been demonstrated.

II. FACTS

In the Decision, the Commission certified and applied the combined Final Environmental Impact Report /Environmental Impact Statement ("FEIR/EIS" or "FEIR"), adopted a Statement of Overriding Considerations (or "SOC"), and authorized a Certificate of Public Convenience and Necessity (or "CPCN") for California-American Water Company's ("Cal-Am's" or "CalAm's") Monterey Peninsula Water Supply Project (or

[1] Unless otherwise noted, citations to Commission decisions, orders, and resolutions since 2000 are to the official pdf versions, which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

"MPWSP"), as modified, with a desalination plant sized at 6.4 million gallons per day ("mgd"). The Decision also addressed four proposed settlement agreements.

The Decision determined that water rate relief bonds issued by the Monterey Peninsula Water Management District will provide savings to customers on the Monterey Peninsula. The Decision directed Cal-Am to prepare progress reports during construction of the Monterey Peninsula Water Supply Project and to publish them on its website. In the Decision, the Commission also discussed the need for water supplies in Cal-Am's Monterey District, reviewing demand and supply estimates and selecting estimates supported by record evidence.

Cal-Am is a Class A investor-owned water utility regulated by the Commission. Cal-Am's Monterey District, with 40,000 connections, serves most of the Monterey Peninsula, including Carmel-by-the-Sea, Del Rey Oaks, Monterey, Pacific Grove, Sand City, and Seaside, as well as the unincorporated areas of Carmel Highlands, Carmel Valley, Pebble Beach, and the Del Monte Forest. This service territory is known as the Monterey Main System. Cal-Am also serves a number of small satellite systems along the Highway 68 corridor east of the City of Monterey, including the unincorporated communities of Bishop, Hidden Hills, Ryan Ranch, Ambler, Chualar, Garrapata, and Toro. Cal-Am plans to serve the Monterey Main System, Bishop, Hidden Hills, and Ryan Ranch with the proposed Monterey Peninsula Water Supply Project ("MPWSP").

Currently, Cal-Am supplies its main district with surface water and groundwater from the Carmel River System and the coastal subarea of the Seaside Groundwater Basin (also known as the Seaside Basin). Cal-Am's main distribution system also includes eight wells in the Coastal subarea of the Seaside Basin. In addition, Cal-Am owns nine wells in the Laguna Seca subarea, which serve the three independent water systems of Bishop, Hidden Hills and Ryan Ranch along Highway 68.

Water supply on the Monterey Peninsula is available largely from rainfall and has long been constrained due to frequent drought conditions on the semi-arid

Peninsula. Water supply constraints have been extensively documented and have existed for decades on the Monterey Peninsula.[2]

Role of Other Agencies

In addition to this Commission, many federal, state, and local agencies are involved in the regulation of water, water rights, and water supply on the Monterey Peninsula. These agencies include, but are not limited to, the State Water Resources Control Board ("SWRCB"), Monterey Peninsula Water Management District ("MPWMD" or "WD"), Monterey County Water Resources Agency ("MCWRA"), Monterey Regional Water Pollution Control Agency ("MRWPCA"), and the Seaside Groundwater Basin Watermaster. A number of agencies (Monterey Peninsula Regional Water Authority (MPRWA" or "RWA"), Marina Coast Water District ("MWCD"), MCWRA, MRWPCA, and MPWMD) in the area have actively participated as parties in this proceeding.[3]

Background

Cal-Am has been attempting to address the water supply constraints in Monterey for more than 20 years. On the Carmel River, Cal-Am owned and operated the San Clemente Dam until its Commission authorized removal in 2015. The Los Padres Dam, also on the Carmel River, was continuing to lose usable storage space due to sedimentation. By 1995, the primary source of water supply for Cal-Am was multiple wells drawing from the lower Carmel River. These wells supplied approximately 70 percent of Cal-Am's demand, with the balance of supply provided by storage at the Los Padres Reservoir, diversions from the San Clemente reservoir until its dam removal, and water pumped from the Seaside Basin.

[2] See D.18-09-017, p. 4, fn. 4.

[3] In *Decision Approving Regional Project, Adopting Settlement Agreement and Issuing CPCN for Cal-Am Water Facilities* [D.10-12-016] (2010), as modified by *Order Modifying D.10-12-016, and Denying Rehearing, as Modified* [D.11-4-035] (2011), the Commission provided a brief background on the MWCD, the MCWRA, the MRWPCA. The RWA is a Joint Powers Authority consisting of the Mayors representing the cities of Carmel-by-the-Sea, Del Rey Oaks, Monterey, Pacific Grove, San City, and Seaside.

Since 1995, several legal actions occurred that have significantly reduced Cal-Am's ability to draw water from the Carmel River and from the Seaside Basin. In 1995, the State Water Resources Control Board ("SWRCB") issued Order No. WR 95-10 ("Order 95-10").[4] The SWRCB concluded that Cal-Am, which had been diverting an average of 14,106 acre-feet per year ("afy") from the Carmel River, had a legal right to only 3,376 afy from the Carmel River. SWRCB ordered Cal-Am to replace what SWRCB determined to be unlawful diversions of about 10,730 afy from the Carmel River through obtaining additional rights to the Carmel River or other sources of water and through other actions, such as conservation. SWRCB also directed Cal-Am to maximize use of the Seaside Groundwater Basin for the purpose of serving existing connections and to reduce diversions from the Carmel River to the greatest practicable extent.

In addition to supplying water to local consumers, the Carmel River provides a habitat for the California red-legged frog and the South Central California Coast steelhead trout, both of which are threatened species. The U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") contend that any entity that pumps water from the Carmel Valley Aquifer may be liable for a "take" because such pumping may alter the riparian habitat, affect the steelhead's ability to migrate, and affect the California red-legged frog's ability to mature. Cal-Am has entered into agreements with USFWS and NMFS with the long-term goal of procuring an alternative water supply source to reduce withdrawals from the Carmel Valley Aquifer. Should the federal agencies prosecute Cal-Am for "takes," enforcement actions could include further reduction of the water supply and heavy fines.[5]

In 2006, the Monterey County Superior Court issued a final decision regarding adjudication of water rights of various parties who use groundwater from the Seaside Basin. (*Cal-Am v. City of Seaside et al.*, Super. Ct. Monterey County, 2006, No.

[4] Order on Four Complaints Filed Against California-American Water Company, SWRCB Order No. WR 95-10 (July 6, 1995).

[5] FEIR/EIS at 2-7.

M66343). The trial court's decision established physical limitations to various users' water allocations to reduce the drawdown of the aquifer and prevent additional seawater intrusion. It also set up a Watermaster to administer and enforce the Court's decision. Cal-Am is currently allocated 3,504 afy from the Coastal subarea of the Seaside Basin and 345 afy from the Laguna Seca subareas. These allocations will be reduced over time until they eventually reach 1,474 afy from the overall Seaside Basin. Prior to the Seaside Basin adjudication, Cal-Am's pumping from the Coastal subarea was 4,000 afy. Cal-Am must also repay the Seaside Basin for overdrafts and has therefore assumed a reduction of supply of 700 afy over 25 years, resulting in a net supply available to Cal-Am of 774 afy from the Seaside Basin.

Finally, the timing associated with water supply constraints became particularly critical with the issuance of Order 2009-0060, the SWRCB's Cease and Desist Order ("CDO").[6] The CDO was adopted by the SWRCB on October 20, 2009 and ordered Cal-Am to undertake additional measures to cease its unauthorized diversions from the Carmel River and to terminate all such diversions no later than December 31, 2016. The CDO stated in no uncertain terms that Cal-Am must reduce its unlawful diversions from the Carmel River without further delay. The SWRCB ordered Cal-Am to begin complying immediately with the CDO, including reducing its diversions from the Carmel River by five percent or 549 afy starting in October 2009; further reducing diversion from the Carmel River in subsequent years through additional water savings from demand management programs; and prohibiting new service connections or certain increased uses of water at existing service connections.[7]

On July 19, 2016, the SWRCB adopted Order 2016-0016,[8] which partially superseded Orders 95-10 and 2009-0060. Order 2016-0016 extended the date by which

[6] SWRCB Order No. WR 2009-0060 (Oct. 20, 2009).

[7] See D.11-03-048, issued in A.10-05-020, which authorizes Cal-Am to implement moratorium on new connections mandated in the 2009 CDO.

[8] SWRCB Order No. WR 2016-0016 (July 19, 2016).

Cal-Am must terminate all unlawful diversions from the Carmel River from December 31, 2016, to December 31, 2021. The order set an initial diversion limit from the Carmel River of 8,310 afy for Water Year 2015-2016 (October 1, 2015-September 30, 2016) and ordered Cal-Am to terminate all unlawful diversions from the Carmel River no later than December 31, 2021.[9]

Cal-Am's Previous Applications before the Commission

After Order 95-10 was issued by the SWRCB, Cal-Am anticipated that it would be able to obtain additional water from a proposed new dam to be funded by bonds (the New Los Padres Dam). However, public financing of this project was rejected by voters. Cal-Am then filed Application (A.) 97-03-052, requesting authority to build the Carmel River Dam.

At that point, the State Legislature enacted Assembly Bill (AB) 1182 that required the Commission to identify a long-term water supply contingency plan to replace 10,730 afy from the Carmel River.[10] The Commission issued its report in August 2002 regarding the development of a new water supply source, known as "Plan B," recommending a desalination plant to address the water supply problem.

Cal-Am filed a request to modify A.97-03-052 to seek authorization for a Certificate of Public Convenience and Necessity ("CPCN") to construct a desalination project with an Aquifer Storage and Recovery ("ASR") component. In 2003, the Commission dismissed the application for the Carmel River Project and instructed Cal-Am to file a new application. (D.03-09-022).

In 2004, Cal-Am filed A.04-09-019, seeking the authority for a desalination plant. In 2009, the Commission certified the FEIR for that project (D.09-12-017). The following year, the Commission approved Cal-Am's participation in the Regional Desalination Project, issued a CPCN for the "Cal-Am Only" facilities, and approved a

[9] SWRCB Order 2016-0016 at 19.

[10] Assembly Bill No. 1182 (1997-1998 Reg. Sess.) (Ch. 797, Stats. 1998).

settlement agreement (D.10-12-016).[11] Unfortunately, various issues arose during the implementation of the Regional Desalination Project and Cal-Am withdrew its support for that project on January 17, 2012.

Application (A.) 12-04-019

On April 23, 2012, Cal-Am filed the instant application for approval for the Monterey Peninsula Water Supply Project (or "MPWSP" or "Project").[12] Cal-Am sought authorization to initially size the desalination portion of the Project at 9.6 million gallons per day ("mgd"). Cal-Am also sought authorization to reduce the size of the desalination plant component to 6.4 mgd and supplement this with water from the Monterey Peninsula Groundwater Replenishment Project ("GWR"), if the GWR reached certain milestones bv the time Cal-Am was ready to construct the desalination plant.[13]

An amended Scoping Memo was issued on August 29, 2012, which defined the scope of the proceeding before the Commission. As set forth by the Commission, the issues were whether the proposed Monterey Peninsula Water Supply Project was:

- required for public convenience and necessity;
- a reasonable and prudent means of securing replacement water for the Monterey district of Cal-Am; and
- in the public interest.

(August 29, 2012 ALJ Ruling, p. 6.) In addition to modifying the schedule, this ruling set up parallel but separate tracks for consideration of (a) issues relating to the proposed

[11] Pursuant to the settlement agreement, MCWD would have owned the desalination plant, Cal-Am would own the associated transportation and system facilities, and the Monterey County Water Resources Agency would own the wells to pump seawater from the Salinas Valley Groundwater Basin. D.10-12-016 also approved a complex Water Purchase Agreement ("WPA") among the three entities (Cal-Am, Marina Coast Water District, and Monterey County Water Resources Agency).

[12] The complete Procedural History for this proceeding is attached as Appendix A to D.18-09-017.

[13] The Monterey Regional Water Pollution Control Agency (or "MRWPCA") is responsible for the GWR project. The MRWPCA is now called Monterey One Water and the GWR project is now referred to as Pure Water Monterey ("PWM").

issuance of a Certificate of Public Convenience and Necessity ("CPCN") issues and (b) California Environmental Quality Act ("CEQA") issues.

On July 26-27, 2012, a technical workshop was held that addressed demand projections; available water supply; project sizing, costs and ratepayer impacts; project governance; and contingency planning. A workshop on project cost, cost impacts of contingencies, and related financial modeling was held on December 11-13, 2012.

On October 12, 2012, the Commission issued a Notice of Preparation of an EIR. Public Participation Hearings ("PPHs") were held in Monterey on January 9, 2013. Ten and a half days of evidentiary hearings were held in April and May of 2013. An additional workshop concerning the GWR Project was held in San Francisco on June 12, 2013. An all-party settlement meeting was held on April 30, 2013 at the Commission. Settlement discussions occurred from May through July 2013.

On October 25, 2012, the Commission adopted D.12-10-030,[14] which held that the authority of the Commission preempts Monterey County Code of Ordinance, Title 10, Chapter 1072, concerning local authority over the construction, operation, and ownership of desalination plants.

Sixteen parties (a sub-set of parties, including the applicant, ratepayer advocates, environmental groups, and public water agencies) submitted a proposed Comprehensive Settlement Agreement ("Comprehensive Settlement") that addresses O&M expenses, cost caps, financing and ratemaking for the MPWSP. The Comprehensive Settlement was submitted as Attachment A to the Settling Parties' Motion to Approve Settlement Agreement filed on July 31, 2013. (D.18-09-017, p. 88.)

A Sizing Settlement Agreement ("Sizing Settlement) was filed by nine parties on July 31, 2013.[15] The Sizing Settlement Agreement was addressed two major

[14] *Order Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction* [D.12-10-030] (2012), as modified and rehearing denied in *Order Modifying D.12-10-030 and Denying Rehearing, As Modified* [D.13-07-048] (2013).

[15] D.18-09-017, Appendix A, p. 8.

issues: 1) desalination plant sizing; and 2) City of Pacific Grove Project.[16] The nine parties to the Sizing Settlement agreed that the desalination plant should be sized at 1) 9.6 mgd without water from the GWR Project; 2) 6.4 mgd with 3,500 afy from the GWR Project; or, 3) 6.9 mgd with 3,000 afy from the GWR Project. These sizes were intended for designing and planning purposes only. (D.18-09-017, p. 100.)

Both settlements were opposed by MCWD, Water Plus, and Public Trust Alliance, while Surfrider and Landwatch Monterey County opposed the Sizing Settlement. In the Decision, the Commission declined to adopt the Comprehensive Settlement and the Sizing Settlement, in part because the settlements were proposed five years prior to the issuance of the Decision and several provisions had become moot. (D.18-09-017, pp. 2, 98, 102.) Nevertheless, the Commission adopted the essential framework of the Comprehensive Settlement, based on the evidence submitted independent of the settlement. (D.18-09-017, pp. 2, 90.)

On September 25, 2013, the Assigned Commissioner issued an Amended Scoping Memo affirming the August 29, 2013 ALJ Ruling. In addition, the ruling bifurcated the proceeding in response to a motion by Cal-Am. Phase 1 would address whether or not a CPCN should be granted for the desalination plant. Phase 2 would address the GWR/PWM project and whether Cal-Am should be authorized to enter into a Water Purchase Agreement for some of the PWM water.

On January 17, 2014, Governor Brown declared a drought state of emergency. That same year, the Legislature enacted Senate Bill (SB) 936, Chapter 482, which among other things, authorizes the Commission to issue financing orders to facilitate the recovery, financing, or refinancing of water supply costs, defined to mean reasonable and necessary costs incurred or expected to be incurred by a qualifying water utility.[17] This bill authorized the Monterey Peninsula Water Management District to issue water rate

[16] The City of Pacific Grove Project consists of three interconnected components that use recycled water, storm water and dry weather flow to provide new non-potable water supply to use for irrigation as well as residential and commercial uses.

[17] Senate Bill No. 936 (2013-2014 Reg. Sess.) (Ch. 482 Stats. 2014).

relief bonds if the Commission finds that the bonds will provide savings to water customers on the Monterey Peninsula. Savings from these bonds would result from the lower interest rates that would apply to this financing compared to market-rate financing.

On January 23, 2015, a ruling was issued which updated the Phase 1 schedule to allow additional time to incorporate more complete data in the DEIR. In addition, ex parte communications with decision makers (which were previously allowed under the rules for the ratesetting category) were prohibited effective immediately. On April 30, 2015, a DEIR was released for a 60-day comment period, which was later extended to September 30, 2015. On May 19, 2015, the Commission's Energy Division held a groundwater modeling workshop.

In a Second Amended Scoping Memo issued on August 19, 2015, the Assigned Commissioner noted, among other things, the possibility of coordinating the state CEQA process with the analogous federal process under the National Environmental Policy Act ("NEPA"). On September 8, 2015, the Commission decided to revise and recirculate a new EIR, this time as a combined state and federal EIR/EIS under CEQA and NEPA. On November 17, 2015, an ALJ ruling was issued which framed the issues and set a schedule for hearings to complete the evidentiary record on Phases 1 and 2.

On February 22, 2016, the Assigned Commissioner ordered Cal-Am to file an amended application to reflect an updated project description. Cal-Am filed the amended application on March 14, 2016. The revised project description required additional review in the EIR/EIS. On March 17, 2016, a revised schedule was announced for the release of the DEIR/EIS.

On June 14, 2016, a motion was filed by eight parties for approval of the Desalination Plant Return Water Settlement Agreement ("Return Water Settlement"). On that same day, a motion was filed by seven parties for approval of the Brine Discharge Settlement Agreement ("Brine Discharge Settlement").

The Return Water Settlement addresses a concern raised early on about the location of the slant wells for the desalination plant, which overlay the western portion of the Salinas River Groundwater Basin ("SRGB"). Specifically, the issue was whether the

production source water for the Project would conflict with the anti-export provision of the Monterey Water Resources Agency Act and infringe upon the groundwater rights of members of the Salinas Valley Water Coalition and the Monterey County Farm Bureau. In order to address these concerns, Cal-Am committed, through the Return Water Settlement, to make available for delivery "Return Water" equal to the percent of SRGB groundwater in the total source water production, as distinguished from seawater in the source water. (D.18-09-017, pp. 103-105.) The Commission approved the Return Water Settlement, finding it was reasonable, consistent with the law, in the public interest, and fully supported by the record. (D.18-09-017, p. 111.)

Brine discharges from the desalination plant pose a potential environment impact. The Brine Discharge Settlement provides for monitoring and sets out potential mitigation of brine discharge effects from the MPWSP, which are incorporated in the FEIR. The Commission stated that "[t]he Brine Discharge Settlement resolves a contested issue in this proceeding and enjoys the broad support from a coalition of parties representing diverse interests." (D.18-09-017, p. 117.) The Commission approved the Brine Discharge Settlement without modification. (*Ibid*.)

On September 1, 2016, a PPH was held in Carmel. On September 1, 2016, the Commission held a workshop in Carmel to examine the Draft North Marina Groundwater Model Technical Memo.

Phase 2 (the Water Purchase Agreement with GWR) of the proceeding was completed before Phase 1. On September 15, 2016, the Commission adopted D.16-09-021 resolving all Phase 2 issues.[18] The decision approved the Water Purchase Agreement for 3,500 afy of water from the GWR project.

[18] *Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates – Decision on California-American Water Company's Application for Approval of the Monterey Peninsula Supply Project in Regards to Phase 2* [D.16-09-021] (2016).

On January 13, 2017, the joint Draft EIR/EIS was issued for public review and comment. The Commission also held public presentations and hearings (PPHs) on the Draft EIR. Comments were due on March 29, 2017.

A June 9, 2017 ruling requested parties to identify issues for further hearings. On June 30, 2017, 23 parties filed a Joint Statement of issues. A ruling was issued on August 28, 2017 which set forth issues for further hearings, including demand, supply, costs, project financing, possible plant downsizing, the use of solar and renewables, the CEMEX site, settlement agreements, and Public Utilities Code section 1001 factors. Seven days of evidentiary hearings were held in October -November 2017. Opening briefs were filed on the CPCN issues on December 15, 2017, and replies filed on January 9, 2018.

After the 2016 approval of the Water Purchase Agreement ("WPA") Cal-Am, Monterey Regional Water Pollution Control Agency ("MRWPCA"), now Monterey One Water, had been continuing to explore the possibility of expanding the GWR, now called Pure Water Monterey ("PWM"), to provide additional water to the Monterey Peninsula. This part of the project is called the PWM Expansion. On January 9, 2018, a Joint Motion for Additional Evidentiary Hearings was filed by ten parties. The motion requested further hearings to address the possible expansion of the GWR beyond the 3,500 afy of water already approved in D.16-09-021, as well as purchase of water from MCWD.

The FEIR/EIS was released on March 30, 2018. On April 19, 2018, opening briefs were filed on environmental issues. Reply briefs were filed on May 3, 2018.

On May 11, 2018, a motion to open Phase 3 to the proceeding was filed by twelve parties. This motion requested a third phase of the proceeding to deal with further the PWM Expansion. This motion was denied. (D.18-09-017, pp. 39-42.)

The Proposed Decision in this case was filed and served on August 13, 2018. Parties filed comments and reply comments on the PD and oral argument was held before the Commission. On September 20, 2018, the Commission issued D.18-09-017.

Applications for Rehearing

On October 19, 2018, both Marina and MCWD filed applications for rehearing of D.18-09-017, challenging the Decision on multiple grounds. They raise numerous issues, including non-CEQA and CEQA issues.

Most of the non-CEQA issues encompass constitutional and statutory claims, which include the following: (1) impairment of the U.S. Constitutional Contract Clause; (2) claims of unlawful takings; (3) alleged prohibition of the Monterey County's Public Ownership Ordinance; (4) failure to consider the County's moratorium on new wells; (5) due process claims, including alleged requirements for evidentiary hearing for Public Utilities Code section 1002(b) and other related matters, when the Notice of Determination should have been issued, whether groundwater impacts could be addressed in a CEQA document, whether the issue of the water rights should have been referred to another body, and whether the Commission acted consistently with the conflict of roles principles; (6) due process claims of the use of alleged extra-record evidence; (7) claimed error in permitting public speakers at the voting meeting; (8) alleged error regarding the ex-parte ban; (9) violations of Public Utilities Code section 311; (10) the Commission's compliance with Public Utilities Code sections 451 and 701.10; (11) alleged error regarding compliance with Public Utilities Code section 1705; (12) allegations regarding the infeasibility of utilizing MCWD's pipeline to wheel desalinated water; and (13) assertion of interference with the public system; (14) claims the Commission should have responded to the Public Records Act ("PRA") before the Decision was issued; and (15) the compliance with the requirements set forth in Public Utilities Code section 1001 and 1002.

The CEQA claims include the following: (1) whether there is record support for the demand analysis (e.g. the 9.6 mgd and 6.4 mgd capacity desalination plant options and the rejection of a smaller project (4.8 mgd) as an alternative) in D.18-09-017 and FEIR; (2) whether the Commission erred in not considering the Pure Water Monterey ("PWM") Expansion as a source of supply; (3) did the Commission adequately analyzed alternative intake technologies; (4) whether the FEIR's analysis of growth-inducing impacts, of habitats and sensitive ecosystems and land use plans, of terrestrial species, marine resources, of cultural and paleontological resources comply, and

of air quality and greenhouse gas emissions ("GHG") with CEQA comply with CEQA; (5) was the Statement of Overriding Consideration ("SOC") consistent with the requirements of CEQA growth-inducing impacts; (6) whether the FEIR's responses to comments complied with CEQA; (7) did the Commission act lawful in not revising and recirculating the FEIR; (8) was there adequate consultation with the responsible agencies; (9) whether CEQA required the holding of an evidentiary hearing of an alternative proposed by a public agency; (10) did the Decision properly consider the environmental justice issue; and (11) did the Commission independently review the ground water analysis.

On October 29, 2018, responses to the rehearing applications were filed by: Water Plus, Public Water Now and Citizens for Just Water. On November 5, 2018, responses to the rehearing applications were filed by: Cal-Am, County of Monterey, Monterey County Water Resources Agency, Public Trust Alliance and California unions for Reliable Energy.

III. DISCUSSION

In their rehearing applications MCWD and Marina raise numerous allegations of error in their lengthy rehearing applications. For reasons of clarity and convenience, the issues have been grouped into the following 3 subject areas, below: Constitutional and Statutory Claims; CEQA; and Groundwater Issues.

A. Constitutional and Statutory Claims

1. The allegations regarding the Contracts Clause lack merit.

MCWD alleges that our approval of the project impairs the contractual benefits MCWD has bargained for with various local agencies and landowners. (MCWD reh. app., pp. 49-51.) MCWD claims that such impairment of its contractual rights violates both the U.S. and California Constitutions because it impairs MCWD's contracted-for rights to continued conservation of groundwater in the CEMEX area. (MCWD reh, app., pp. 49-51.) This allegation of error is without merit.

As a political subdivision, MCWD lacks standing to sue the State of California, or an arm of the State of California like the Commission, on due process or contracts clause grounds. This is an ancient rule:

> The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted.

(*Trustees of Dartmouth Coll. v. Woodward* (1819) 17 U.S. (4 Wheat.) 518, 629 (Marshall, C.J.). As the United States Supreme Court more recently put it: "Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." (*Coleman v. Miller* (1939) 307 U.S. 433, 441.) The rule is the same in California, as to both the federal and state Constitutions. (See *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal. 3d 1, 6 ("[S]ubordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution."); *Marin County v. Superior Ct.* (1960) 53 Cal.2d 633, 639 ("[A]s against the state, the county has no ultimate interest in the property under its care."); *Bd. of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296 (holding, in a municipal standing case, "we see no basis to distinguish state and federal due process protections here.").) The Commission, established under the California Constitution, is an arm of the State of California. (*Sable Comm'ns of Cal. v. Pac. Tel. & Tel. Co.* (9th Cir. 1989) 890 F.2d 184, 191.) As a public agency MCWD is an arm of the State of California, similar in position to the Butte County Board of Supervisors when the court found it did not have standing to sue the California Department of Social Services, and the same is true for Marina as a California city. (See *Bd. Of Supervisors v. McMahon*, 219 Cal.App.3d at p. 296.)

Were there any doubt that the Commission's authority is statewide and trumps that of local political subdivisions, the California Constitution makes this point

clear. Article XII, section 8 of the California Constitution expressly states that "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission." (California Constitution, Article XII, section 8.) For this reason, MCWD lacks standing to sue the Commission on the contracts clause claim alleged in its rehearing application.

2. There has been no violation of the Takings Clause.

In its rehearing application, MCWD alleges that our approval of the project could lead to impairment of its reasonable and beneficial use of its existing right to pump from the aquifers of the SVGB in order to provide a public water supply. (MCWD reh. app., p. 46.) MCWD further claims that this alleged impairment constitutes an unconstitutional taking and could entitle MCWD to compensation of approximately $54 million per year in the case of a total loss of MCWD's SVGB groundwater supply. (MCWD reh. app., p. 46.) This allegation of error lacks merit.

MCWD's application for rehearing alleges that Cal-Am and the Commission have caused a compensable "taking" under the state and federal constitutions. (MCWD reh. app., p. 46.) Citing two California cases, *Tulare Lake Water Storage District v. United States* (2001) 49 Fed.Cl. 313, and *Casitas Municipal Water District v. United States* (2008) 543 F.3d 1276, MCWD asserts that "the federal courts have found takings of property and required just compensation when withdrawal restrictions are placed on lawful users in California." (MCWD reh. app., p. 46.) These cases, and the takings theory in general, are inapplicable to the present circumstances. The cited cases involve circumstances where federal regulatory agencies have imposed permit restrictions directly on the complaining water districts, limiting the districts' ability to exercise their respective water rights and entitlements. MCWD's takings theory is not applicable to the present circumstances. Specifically, in D.18-09-017 we placed no restrictions on MCWD or MCWD operations, and made no attempt to regulate MCWD in any manner. For these reasons, the constitutional doctrines alleged by MCWD are not relevant in the present circumstances. As such, MCWD's allegation of error lacks merit.

3. Monterey County's Public Ownership Ordinance did not prohibit the Commission from approving the project.

In its rehearing application, MCWD contends that the Commission erred in approving a project that does not comply with Monterey County's Public Ownership requirements. (MCWD reh. app., pp. 37-38.) These requirements are part of the Monterey County Desalination Order ("Ordinance"). Specifically, MCWD asserts that the Commission should have reconsidered its preemption determination made in D.12-10-030, as modified by D.13-07-048,[19] and should have found that determination to be invalid. This contention has no merit.

In D.12-10-030, the Commission determined that the Ordinance, which included the public ownership requirement, was preempted in its entirety. (D.12-10-30, at p. 9.) The Commission reasoned that the Ordinance constituted an attempt "to regulate a specific subject matter – the siting, construction, operation and ownership of a facility proposed to be constructed by a water utility subject to the Commission jurisdiction . . . ." (D.12-10-030, at pp. 9, 20 & 24 [Conclusion of Law No. 1].)

In D.13-07-048, we addressed two applications for rehearing of D.12-10-030, including one filed by MCWD. (D.13-07-048, at p. 2.) In that decision the Commission denied the applications for rehearing, but modified D.12-10-030, to clarify that D.12-10-030 only preempted the Ordinance when it impacted the Commission's exclusive jurisdiction and regulation of public utilities, including a water utility such as Cal-Am. (See D.13-07-048, at pp. 7 & 11 [Ordering Paragraphs 1-6].) Further, the Commission affirmed its determination that it occupied the field of water utility facility regulation. (D.13-07-048, at p. 10.)

Pursuant to Public Utilities Code section 1756, rehearing applicants may seek juridical review, within thirty days of the Commission's order disposing of the rehearing.

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[19] *Order Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction* [D.12-10-030] (2012), as modified and rehearing denied in *Order Modifying D.12-10-030 and Denying Rehearing, As Modified* [D.13-07-048] (2013).

(Pub. Util. Code, §1756, subd. (a).) Here that order was D.13-07-048, which was issued July 29, 2013. Neither rehearing applicants, including MCWD, filed a petition for writ of review challenging the lawfulness of D.12-10-030, as modified by D.13-07-048. When no court challenge was filed, D.12-10-030 and D.13-07-048 became final and unappealable. (See also, Pub. Util. Code, § 1709.)

Through its instant rehearing application, MCWD now attempts to impermissibly collaterally challenge the lawfulness of these final and unappealable decisions. Pursuant to Public Utilities Code section 1709: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." (Pub. Util. Code, §1709; *Miller v. Railroad Com.* (1937) 9 Cal.2d 190, 199; *People v. Western Air Lines* (1954) 42 Cal.2d 621, 630; see also, *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 552, citing *Northern Cal. Assn v. Public Util. Com.* (1964) 61 Cal.2d 125, 135.) Clearly when rehearing on a decision is denied (or no application for rehearing has been filed) and not challenged in court, that decision and its holdings become final and are not subject to collateral challenge. Commission "decisions and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law." (*Sale v. Railroad Com.* (1940) 15 Cal.2d 612, 616.)

Accordingly, MCWD is barred from making this impermissible collateral challenge of D.12-10-030 and D.13-07-048. Thus, we reject this contention.

4. The County Moratorium on new wells did not prevent the Commission from approving the project.

In its rehearing application, MCWD contends that the Commission failed to consider Monterey County's recent moratorium on the drilling certain new wells in the area and that the approved project is in violation of that moratorium. (MCWD reh. app., pp. 38-39.) This contention has no merit.

Monterey County Ordinances 5302 and 5203 ("Ordinances") were adopted in mid-2018 and established a moratorium on new wells within certain aquifers.[20] However, the act expressly exempted "municipal water supply wells." (See Ordinances at Section 5.A.4.) It defined "municipal water supply wells" as a "water well that supplies potable water for the domestic needs of a permitted public water system." (See Ordinances at Section 3.G.) A "public water system" is defined as a "water system for the provision of water for human consumption through pipes or other constructed conveyances that has fifteen or more service connections or regularly serves at least twenty-five individuals daily at least sixty days out of the year." (See Ordinances at Section 3.H.) The County of Monterey is the entity charged with enforcing the ordinance. (See Ordinances at Section 6.)

Monterey County has stated that the wells at issue in this case are exempt from the ordinance as they are new "municipal water supply wells." (See County and MCWRA Reply Comments, p. 4.) As the entity that drafted this ordinance and who is charged with its enforcement, Monterey County's interpretation is due substantial deference. (See, e.g. *Californians for Political Reform Found. v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484, quoting *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd*. (1981) 29 Cal. 3d 101, 111 ["[B]ecause of the agency's expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized."], see also *Henning v. Industrial Welfare Com*. (1988) 46 Cal. 3d 1262, 1269 [" ' "[T]he construction of a statute by officials charged with its administration . . . is entitled to great weight" . . . .' "].)

MCWD disagrees with Monterey County and argues that the wells are not exempt from the moratorium because they are not for potable domestic water needs but are instead for brackish water for industrial/commercial as the desalination plant - not the wells - provides potable domestic water. (MCWD reh. app., pp. 38-39.) This argument lacks

[20] The ordinances can be found are available on the following website: http://www.co.monterey.ca.us/home/showdocument?id=65381.)

merit. Most drinking water originally derived from a well goes through some level of treatment to turn it from non-potable water, due to a high level of dissolved solids or other contaminates, to potable water that is then delivered from the industrial plant (i.e., water treatment plant) to the end use residential and/or business customer. A desalination plant performs the same function as a traditional water treatment plant but it removes salt as a source-water contaminate.

Moreover, Monterey County, which is charged with interpreting and enforcing its own ordinance, believes that the desalination plant's wells fit the definition of a "municipal water supply well" for the purposes of supplying a "public water system" with potable water and is thus exempt from the moratorium. (See County and MCWRA Rely Comments, p. 4.) As such, the approved wells are not in violation of the County's moratorium on drilling new wells.

5. Due Process Claims Regarding Evidentiary Hearings and Notice of Determination have no merit.

MCWD asserts that because of various errors the Commission has violated MCWD's due process rights under both the U.S. and California constitution. Specifically, MCWD claims error because the Commission did not have evidentiary hearings on: (1) groundwater impacts or refer the issue to another tribunal; (2) the project's influence on the environment; (3) feasible alternatives; and, (4) a potential conflict of interest concern. (MCWD reh. app., pp.42-45.) Lastly, it asserts a constitutional due process error because the Commission's Notice of Determination was issued after the Commission approved the project but before it "issued" its decision. (MCWD reh. app., p.45.)

As a threshold matter, MCWD does not have standing to bring these due process claims under the federal and state constitutions to a court. (See Discussion, Section A.1., *supra.*)

However, we look at the due process issues in the contest of what CEQA requires. But as discussed below, there is no violation of MCWD's due process rights.

a. CEQA does not require evidentiary hearings on a project's environmental impacts.

CEQA does not require evidentiary hearings on a project's environmental impacts, including groundwater impacts, CEQA also does not require evidentiary hearings on the feasibility of project alternatives. CEQA provides that a member of the public may submit comments orally or in writing on the adequacy of the environmental document; such comments must be submitted during the public comment period or prior to the close of the public hearing on the project. (Pub. Resources Code, §§ 21091, subd. (d) & 21177, subd. (b).) The lead agency then has an obligation to respond to comments received during the draft EIR public review period, and an opportunity to respond to comments received after the close of the public review period. (Pub. Res. Code, § 21091, subd. (d)(2)(A).) Based on the information provided to the lead agency (including public comment letters and the staff's response to those comments), the lead agency makes a determination on whether to approve the CEQA document and the project. (CEQA Guidelines, § 15092.)

MCWD and the Marina have taken full advantage of the CEQA review process that afforded them the opportunity to submit lengthy comments on the Draft EIR. The Commission even provided the public an opportunity to submit additional comments on the FEIR, which the Commission was not required to do under CEQA.

Thereafter, the Commission's obligation under CEQA was to evaluate the evidence in the record presented to the Commission prior to certification of the EIR and the approval hearing. There is nothing in the CEQA statutes or Guidelines that envisions or requires that the Commission to hold any further evidentiary hearings.

b. The argument that groundwater impacts cannot be addressed in a CEQA document lacks merit.

MCWD's argument that groundwater impacts cannot be addressed in a CEQA document without a right to cross-examine witnesses is without merit. An evidentiary hearing process, if applied, would turn CEQA proceedings into a never-ending procedural morass as the CEQA document would need to be updated with any information

from the evidentiary hearings, which in turn would require more evidentiary hearings, and so forth in a never ending feedback loop. To avoid this and to meet all legal obligations, the Commission has long addressed environmental impacts through the CEQA process. (See e.g. *Application of Lodi Gas Storage LLC for a CPCN for Construction and Operation of Gas Storage Facilities* [D.00-05-048] (2000), at pp.18-19 ["… issued a joint scoping memo and ruling (scoping memo) which recognized that the application involved the interplay between hearings on the non-environmental issues and environmental review. The scoping memo stated that the Commission's Energy Division (ED) would be conducting the environmental review . . . . The Scoping memo identified the issues to be addressed in hearings on the non-environmental issues … ."); see also *In the Matter of SDG&E for a CPCN for the Otay Mesa Power Purchase Agreement Transmission Project* [D.05-06-061], pp. 2-3 ["The EIR proceeded on a parallel track with the application."].)

This duel track process gives parties multiple occasions of notice and opportunity to be heard. In the present proceeding, the parties and the public had notice and opportunity to comment on the EIR's scope in multiple public meetings and submittal of written comments. (FEIR, Appendix A.) The parties and the public had notice and opportunity to comment on the draft EIR, including an extended comment period and multiple public meetings or hearings to receive oral and written comments. (FEIR, Sections 1 & 8.) The Commission also accepted and analyzed late CEQA comments. (D.18-09-017, Appendix J.) Responsible Agencies and other entities had further notice and opportunity to be heard, including face-to-face meetings. Additionally, the Commission held a workshop on groundwater modeling issues and allowed the parties to file opening and reply briefs on environmental issues, as well as submit opening and reply comments on the proposed decision. (D.18-09-017, Appendix A.)

The notice and comment opportunities provided sufficient due process in this ratesetting CPCN proceeding as the granting of a CPCN and any accompanying rate-making and cost allocation issues do not *per se* require evidentiary hearings. (See *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292 ["In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions

delegated to it and does not, in so doing, adjudicate vested interests in or render quasi-judicial decisions which require a public hearing for affected ratepayers."]; see also, *Mathews v. Eldridge* (1976) 424 US 319, 334, quoting *Morrissey v. Brewer* (1972) 408 US 471, 481 ["[D]ue process is flexible and calls for such procedural protections as the particular situation demands."].) This application did not adjudicate any vested rights or interest and as such the multiple notices and opportunities to be heard in the CEQA process and in the CPCN process were legally sufficient to provide due process even if no evidentiary hearings were held on environmental concerns. The Commission did hold evidentiary hearings on non-environmental issues, as well as provided opportunity for comments, briefs, oral arguments, and other manners of opportunities to be heard. (D.18-09-017, Appendix A.)

c. The Commission did not err in not referring the issue of the water rights to another body, since the Commission did not adjudicate any water rights.

To the extent MCWD is concerned about water rights as opposed to environmental impacts, it states it would rather have that issue addressed before a body that is not the Commission. (MCWD reh. app., p. 42.) In the instant proceeding, we did not adjudicate water rights. Rather, we looked at the water rights in terms of project feasibility. We sought and received the input of the SWRCB as to whether or not it was reasonably foreseeable that Cal-Am had a path forward to perfect future water rights. (D.18-09-017, p. 80 and Appendix A; SWRCB letter of July 31, 2013; see also, 9/07/18 ALJ Ruling (which allowed comments on the SWRCB letter of 9/4/18) and D.18-09-017, Appendix J.) The SWRCB confirmed attaining such water rights was possible and the issue will likely be resolved in a future body of competent jurisdiction as facts develop. (D.18-09-017, Appendix B.2.)

Lastly, it is worth noting that the SWRCB took comments on its report, and neither MCWD or Marina chose to comment. (D.18-09-018, Appendix B.2.) Ultimately, there is no legal error in not referring this matter to another body as the Commission did

not preclude any jurisdictional bodies from acting or predetermine any water rights regarding this project.

d. Public Utilities Code section 1002(b) does not require evidentiary hearings.

MCWD's argument that it suffered constitutional due process harm when the Commission did not hold evidentiary hearings on environmental impacts or project alternatives pursuant to Public Utilities Code section 1002(a) is also incorrect. (MCWD reh. app., pp.43-44.) While the Commission has an obligation to review environmental impacts pursuant to Public Utilities Code section 1002(a) and that obligation exists regardless of any separate CEQA obligations, it does not create a new higher level of required due process. Just as the Commission is not required to hold evidentiary hearings on environmental issues pursuant to its CEQA review, it is not required to hold evidentiary hearings on the same matters pursuant to its Commission's review of non-CEQA matters. (See *Wood v. Public Utilities Commission, supra,* 4 Cal.3d at p. 292 ["In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests in or render quasi-judicial decisions which require a public hearing for affected ratepayers."]; see also, *Mathews v. Eldridge* (1976) 424 US 319, 334,(quoting *Morrissey v. Brewer*, *supra*, 408 U.S. at p. 481 (1972) ["[D]ue process is flexible and calls for such procedural protections as the particular situation demands."].) The Commission has a well-established practice of considering environmental issues, be they a CEQA obligation or a Public Utilities Code obligation.

e. MCWD's reliance on certain court cases is misplaced.

MCWD cites *Northern California Power Agency v. Public Util.Com.* ("*NCPA*"), (1971) 5 Cal.3d 370, for the proposition that the Commission erred by failing to hold evidentiary hearings on the project's influence on the environment under Public Utilities Code section 1002(a). (MCWD reh. app., p. 43.) In *NCPA*, the Court held the Commission erred in not considering anti-trust considerations when it granted a CPCN with a finding that "[there] is no need to determine the [anti-trust] issue raised by NCPA."

(*Id.* at p. 379.) This case is not about holding evidentiary hearings, but rather about what issues the Commission must considered in granting a CPCN in the public interest. Thus, MCWD reliance on *NCPA* is misplaced.

And to the extent that MCWD argues that this case stands for the broader principle that the Commission cannot ignore evidence and arguments, the Commission has acted properly. As detailed below, the Commssion gave entities ample notice and opportunity to be heard and did not ignore presented evidence. Pursuant to those opportunities to be heard, and unlike in *Northern California Power Agency*, D.18-09-017 did not expressly decline to determine these issues and in fact has a whole section discussing these concerns. (D.18-09-017, pp. 156-160 (Section 7.5.).)

The environmental review topics pursuant to Public Utilities Code section 1002 were included in the CEQA process and that process gives parties and the public numerous occasions of notice and an opportunity to be heard. (See Discussion, Section A.5.b., *supra*.)

MCWD also argues the *Ashbacker Radio Corp v. FCC* ("*Ashbacker*") (1945) 326 US 327 and *Ventura County Waterworks Dist. No.5 v. Public Utilities Commission* ("*Ventura County Works*") (1964) 61 Cal.2d 462 cases require the Commission to hold evidentiary hearings on project alternatives. (MCWD reh. app., p.43.) In *Ashbacker*, the Court found that the Federal Communications Commission erred by granting one broadcaster's application without an evidentiary hearing while at the same time telling a competing applicant that their application must go forward with an evidentiary hearing to show why they would be better at serving the public than the other applicant. (See *Ashbacker, supra*, at pp. 328-331.) It stated, "[w]e only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it." (*Id*. at p. 333 (italic in original).) This case is not applicable. In this proceeding, the Commission is not implementing federal communication law and the Cal-Am CPCN application is not mutually exclusive with any other CPCN application or foreseeable CPCN application. To the extent MCWD argues it is mutually exclusive with an envisioned expansion of the Pure Water Monterey

(PWM) project, it is wrong – these are not mutually exclusive CPCN applications before the Commission. The PWM project is under the authority of a separate governmental entity which is not a public utility subject to our CPCN jurisdiction. (See D.18-09-017, p.13, 32-44.)

In *Ventura County Waterworks*, the Court found the Commission erred when it failed to consider any evidence that the public could be served better by a competing alternative project when it approved a CPCN for a water company to expand and serve a new housing development. (See *id.* at p. 464.) This pre-CEQA case is not applicable because in the proceeding at hand we considered a reasonable range of alternatives and gave entities due notice and opportunity to be heard regarding those alternatives, including the PWM expansion proposal. (FEIR, Section 5; see also, D.18-09-017, pp. 70-86 &121-160 (Sections 5 & 7), and Appendix C.)

MCWD's argument that evidentiary hearings were necessary on a potential conflict of interest is misplaced. (MCWD reh. App., pp.44-45.) MCWD has no such right. As detailed above, due process does not require evidentiary hearings in this situation. (See *Wood v. Public Utilities Commission, supra,* 4 Cal.3d at p. 292 [Absent a statutory requirement, evidentiary hearings are not required in the situation where the Commission is adopting rules governing service and in fixing rates or cost allocations.]; see also, *Mathews v. Eldridge, supra,* 424 U.S. at p. 334, *Morrissey v. Brewer*, supra, 408 US at p. 481 ["[D]ue process is flexible and calls for such procedural protections as the particular situation demands."].) Here, evidentiary hearings were not legally required. More important, and as a matter of satisfying due process, the Commission did provide parties notice and opportunity to comment on this matter: (1) in extending the DEIR comment period, it sought comments on any potential conflict of interest; (2) the Commission later recirculated the DEIR for more comments and this DEIR had a discussion of an independent evaluation, by Lawrence Berkeley National Laboratory, of the materials potentially touched by a conflict of interest (See FEIR, Section 8.2); (3) the Commission employed a new firm, HydroFocus, to independently review the prior groundwater modeling effort and to conduct groundwater modeling; (4) the Commission responded with

the FEIR to comments on this topic; and, (5) at least one party also commented on this issue in their legal briefs and comments on the proposed decision. (D.18-09-017, Appendix A & J; see also, FEIR, Section 8.2.)

f. The Commission did not act contrary to the conflict of roles principles.

MCWD also claims the Commission relied upon the advice of conflicted persons and in so doing went against the conflict of roles principles discussed in *Morongo Band of Indians v. California SWRCB* ("*Morongo*") (2009) 45 Cal.4th 731. (MCWD reh. app., p.45.) In *Morongo*, the Court found it was not improper that staff who litigated a case before the board also advised the decisionmakers of that board because the advisory and advocacy roles were on separate independent matters. (See *Morongo, supra,* at p. 740-742.) In the instant case, the facts are different from those in the *Morongo* case and did not trigger the separation of advisory and advocacy staff, as they were never co-mingled.

Geoscience was a consultant to Cal-Am (and for a limited time to the Commission's CEQA consultants as well) and Cal-Am is the applicant for this project. However, CEQA allows for and envisions that project proponents will provide the Lead Agency with environmental documents and analysis. (CEQA Guidelines, § 15084(b)-(e).) A Lead Agency has the discretion to adopt materials that it chooses, such as those drafted by the applicant or its consultants, so long as the Lead Agency independently reviews, evaluates, and exercises judgment over those materials. (See *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446; Pub. Resources Code, §21082.1, subd. (c); Cal. Code Regs., tit. 14, §15084, subd. (e).) Even if an entire EIR is initially prepared by the project applicant or a third party and subsequently adopted by the Lead Agency, that does not mean that the Lead Agency necessarily failed to exercise its independent judgment. (See *City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, 1042.) The Lead Agency also has the discretion to resolve factual issues and to make policy decisions. As an example, "[i]f the determination of a baseline condition requires choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence." (*Save Our Peninsula*

Committee v. Monterey County Board (2001) 87 Cal.App.4th 99, 120,citing *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, 1617.)

MCWD cites to *Eureka Citizens for Responsible Government* in arguing that the Commission's environmental review process was contaminated by the work of Geoscience. (MCWD reh. app., p.44.) However, in that case, the Court found the EIR was sufficient even though it was in large part prepared by an applicant. (See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 369.) The Court stated, "When an EIR is required, the lead agency is responsible for preparing it, but rather than preparing it using its own staff, the agency may enlist the initial drafting and analytical skills of an applicant's consultant so long as the agency applies its 'independent review and judgment to the work product before adopting and utilizing it.'" (*Eureka Citizens for Responsible Government*, *supra*, at p. 369 (internal citations omitted).) In the instant case, we not only used our own independent review and judgement before incorporating any work product that may have been impacted by GeoScience's work, we also had that work product peer reviewed, subject to notice and comment in the DEIR, and other steps as detailed above, and only then did we independently review it along with the whole of the record. Thus, we have properly exercised independent judgment as required under Public Resources Code section 21082.1(c)(3).

g. The timing of Commission's filing of the Notice of Determination did not constitute legal error.

Lastly, MCWD argues that the Commission's filing of its Notice of Determination under CEQA curtailed its time to seek judicial review and violated its due process rights. (MCWD Rehrg App., p.45.) Marina incorrectly suggests that there was some type of impropriety in the Commission's timing of the NOD. Again, MCWD does not have standing to pursue constitutional due process claims against another state agency, but assuming arguendo, it did, there was no due process violation.

Public Resources Code section 21108 provides that a state agency shall file a NOD after it approves a project. CEQA Guidelines section 15094(a) states that a NOD

shall be filed within five working days after the Lead Agency decides to approve the project. The Commission approved the Project by vote of the Commissioners at its September 13, 2018 business meeting, and therefore, the NOD was properly filed on September 14, 2018. The fact that the Decision was not "issued" for rehearing statute-of-limitations purposes until September 20, 2018 does not impact the Commission's legal obligation to issue a timely NOD. Moreover, MCWD is not prejudiced by the timing of the NOD because, as discussed below, the CEQA statute of limitations on court challenges is tolled during the entire period that MCWD is required to exhaust Commission review. The later mailing date simply adds an additional week to the mandatory administrative review period.

Even though CEQA has a short 30-day statute of limitation following the filing of a NOD (Pub. Res. Code, § 21167), California law provides that a statute of limitations is tolled during the period when a party is legally unable to pursue its rights, such as during the pursuit of mandatory administrative remedies. In this way, the requirements of both CEQA and the Public Utilities Code are easily harmonized, and parties can meet all requirements. Parties can fulfill the Public Utilities Code prerequisites without jeopardizing their challenges to the Commission's CEQA determinations. "It is well-established that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." (*Dillon v. Board of Pension Commrs.* (1941) 18 Cal.2d 427, 431; Code Civ. Proc., § 356.) Equitable tolling is "designed to prevent unjust and technical forfeitures of the right to a trial on the merits...." (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38.) The doctrine is applicable, "'[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'" (*Elkins v. Derby* ("*Elkins*") (1974) 12 Cal.3d 410, 414, quoting *Myers v. County of Orange* (1970) 6 Cal.App.3d 626, 634.) This includes when a party is exhausting administrative remedies. "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic. . . ." (*McDonald v. Antelope Valley Community College Dist*. (2008) 45 Cal.4th 88, 99–101; see also *Elkins*, at p. 414.)

Because exhaustion of Public Utilities Code remedies is mandatory prior to filing suit, the Public Resource Code's 30-day statute of limitations for parties' CEQA challenges is tolled during the period in which parties are pursuing those remedies. Only after the parties have filed the mandated application for rehearing at the Commission and those applications have been resolved will parties' CEQA claims be ripe. (See Pub. Util. Code, §§ 1731, 1732, 1733, subd. (b), & 1756). At that time, the CEQA statute of limitations will begin to run.

In conclusion, MCWD does not have standing to sue a fellow state-created entity over constitutional claims, but even if they could, there was no due process violations in this proceeding. CEQA does not create a right to evidentiary hearings on environmental matters. The Public Utilities Code also does not create a *per se* right to evidentiary hearings in ratesetting proceedings like this CPCN application. Constitutional due process obligations require that an entity be provided appropriate notice and opportunity to be heard. In cases such as the present one, where no vested right is being restricted, evidentiary hearings are not necessarily required. The Commission chose to hold evidentiary hearings on more traditional aspects of a CPCN proceeding while addressing environmental matters in the CEQA process. In the Commission's CEQA process, there were numerous notices and opportunities to be heard and it was legally sufficient for the Commission to consider environmental concerns, raised pursuant to CEQA and Pub. Util. Code 1002, within the CEQA process. There was also no due process or conflict of roles concerns regarding a potential conflict of interest matter. Lastly, the Commission met its legal obligation to file a NOD and in so doing did not violate any due process rights of MCWD.

6. The due process allegation regarding extra-record evidence has no merit.

Marina asserts the Commission's reliance on Appendix J to D.18-09-017 and comments from the Hydrogeologic Working Group (HWG) were extra-record evidence. (Marina reh. app., pp.117-118.) Marina further argues these documents were not provided in a timely manner for parties to have an opportunity to comment on them. (Marina reh.

app., pp.118-119.) Lastly, Marina claims the HWG is made up of persons who work for the applicant and other parties who are proponents of the project, thus giving them extra bites at the apple. (Marina reh. app., p.119.) These assertions have no merit.

Marina states these actions resulted in a violation of its due process rights. The fundamental right to due process can be found in the U.S. Const, 14th amendment and the Cal. Const Art. I, § 7. While Marina does not cite to these constitutions, the case law it cites refers to the constitutional principles of due process, which requires notice and an opportunity to be heard.[21] As to what type of process is due depends on the circumstances. (See *Mathews v. Eldridge, supra,* 424 U.S. at p. 334, quoting *Morrissey v. Brewer, supra,* 408 US at p. 481 ["[D]ue process is flexible and calls for such procedural protections as the particular situation demands."].) In the instant case, there is no due process violation because the Commission did not rely on extra record information. Contrary to Marina's assertion, the addition of Appendix J to the Proposed Decision was not improper. Appendix J, an analysis prepared by the staff and the consultants, was based on and informed by the evidentiary record, the CEQA record, comments to the proposed decision, and CEQA comments presented after the close of the draft EIR/EIS comment period.

Under CEQA, decisionmakers must be informed of all the information in the environmental record and consider all that information when making decisions. (Pub. Resources Code, § 21177, subd. (a).) In practice, this means that although comments on a final EIR are not contemplated by CEQA, if provided to the Lead Agency it should not blindly ignore them as being procedurally deficient. Appendix J is the Commission's environmental staff providing to the decisionmakers a summary of and response to comments on the final EIR and other CEQA related input after the issuance of the final EIR. Such a summary and response provided for informed decisionmaking and is good governance, as well as transparency, and a clearer basis for the Commission's determinations. Appendix J did not trigger a recirculation of a CEQA document, under

[21] As discussed above (see Discussion Section A.1), Marina does not have standing to bring these constitutional claims to a court. Nonetheless, even if Marina did have standing, there was no due process violations in this case.

CEQA law, nor did it trigger a recirculation of the Proposed Decision under the Public Utilities Code. (CEQA Guideline, § 15088.5 [describing when recirculation is required] & Pub. Util. Code, § 311 [the addition of Appendix J did not constitute an alternate, as discussed below in Discussion Section A.9].) As such, recirculation was not required.

Regarding Marina's claims that the HWG is made up of persons who work for the applicant and other parties who are proponents of the project, thus giving them extra bites at the apple – the claim is without merit. As discussed in Discussion Section A.5., under CEQA the Commission is allowed to use and consider information and analysis from all entities (including the applicant) so long as the final conclusions represent the independent judgement and analysis of the Lead Agency. In so acting, the Commission is within its legal rights and did not prejudice the rights of any other entity or party.

7. The due process contention regarding public speakers at the voting meeting are without merit.

Marina contends that the Commission violated its own rules governing who may speak at its business meetings because it allowed parties to speak, and that one Commissioner admitted to having banned ex parte communications – and that these actions resulted in a violation of its due process rights. (Marina reh. app., pp.121-122.) This contention is wrong.

Marina points to two speakers as being parties to the proceeding, and thus, banned under our rules: Ralph Rubio and Luis Allejo. Mr. Rubio introduced himself as Mayor of the City of Seaside, which is not a party to A.12-04-019. He may sit on other boards or governing structures but he did not represent himself as speaking on behalf of any organization other than the City of Seaside. As such, he was allowed to speak under the Bagley-Keene Open Meeting Act requirement that members for the public be allowed to submit public comments and did not violate our meeting rules as established in Resolution ALJ-252. Moreover, not only does Bagley-Keene guarantee the right of the public to address governmental entities in the public comment section of public meetings, it also denies the Commission the right to require that speakers prove their identity as a prerequisite for participation. (Gov't. Code, §§ 11124, subd. (a) & 11125.7, subd. (a).) It

is true that Mr. Allejo did introduce himself as a Supervisor for the County of Monterey and that entity is a party. However, this unintended deviation from the Commission's own rules about how it conducts the public comment section of its public meeting did not prejudice Marina or any other party. The public comments were not relied upon by the Commission in its final decision (as evidenced by the fact that the final version of the Proposed Decision was issued before the public comments and was not changed after the public comments) and Marina and the other parties were not harmed. Thus, at best, it was harmless error, but did not result in a violation of due process.

Regarding Marina's claim that one Commissioner admitted, from the dais in an open meeting, to having banned ex parte communications, the Commissioner merely misspoke. Contrary to Marina's claim, no banned ex parte communications occurred, and as such, no one's due process rights were violated.

8. The due process assertion related to the ex parte ban has no merit.

Marina asserts that the Commission's ex parte ban was conditioned upon the occurrence of two all-party meetings, which never happened, and that lack of meetings plus the lack of Commissioner presence at evidentiary hearings violated Marina's due process rights to present its views to any Commissioner. (Marina reh. app., pp.113-117.) Marina also argues that Senate Bill 215's changes to ex parte statutes and changed conditions in the proceeding required the Commission to lift its ex parte ban. (Marina reh. app., pp.115-116.) Marina also complains that it wasn't given enough time to speak during the Oral Arguments. (Marina reh. app., p.116.)

There is no due process right to ex parte communications with decisionmakers. As Public Utilities Code section 1701.3(h)(1) states the Commission may ban ex parte communications in ratesetting cases if it so chooses. Thus, the Commission has the discretion to have, or not have, an ex-parte ban in this particular ratesetting proceeding. The fact that the ruling banning ex parte communications stated there would be two all-party meetings, and those meetings did not happen, does not reduce the Commission's discretion to ban ex parte communications, as such a ban is not legally

predicate on any other procedural action. The fact that these two all-party meetings did not happen does not invalidate the ex parte ban, nor did it prejudice any party as all parties had the same opportunity to present their case. That Marina may have sought to be a party later in the process than others was its own choice and its late entry did not prejudice itself as it still had many years and opportunities to participate in the proceeding. Marina still submitted testimony, briefs, comments on the EIR, filed Motions, and participated in other steps that allowed it to fully present its case.

Marina asserts that the Commission's reliance on the large number of parties as a reason for the ex parte ban was "out-of-date" and "out-of-step" with other Commission proceedings, but this is irrelevant. The Commission has a right to limit or ban ex parte communications and that right can be exercised with or without express justification. That other proceedings may also have large amounts of parties and not have an ex parte ban is not dispositive. The ALJ and Assigned Commissioner chose to have an ex parte ban in this case and that is their right. That right is not limited by Senate Bill 215, which imposed more ex parte restrictions, despite Marina's argument to the contrary. We do not accept Marina's argument that Senate Bill 215 did not give the Commission more authority to refuse ex parte communications, and therefore, it is in error for continuing its ex parte ban in this proceeding. Marina ultimately acknowledges that the Commission has discretion on whether it elects to hold all-party or individual ex parte meetings – we agree. (Marina Rehrg. App., p.116.) Moreover, lack of ex parte communications does not limit a party's ability to present its case as ex parte communications are not part of the record the commission uses to decide the matters before them. (Pub. Util. Code Sec. 1701.1(e)(8).)

Lastly, while Marina complains about the time it was allotted at the Oral Argument, the running of the Oral Argument meeting is up to the discretion of the proceeding officer and Commissioners and in no way was the time so limiting that Marina's due process rights were impinged upon. Marina was one of 22 parties listed in the ruling establishing the oral argument schedule and no party, except the applicant who has the burden of proof, was given more time than Marina and some were given significantly less.

9. The Commission did not violate Public Utilities Code Section 311.

In its rehearing application, the City asserts that Commission violated Public Utilities Code section 311, which establishes the requirements for an alternate. (Marina reh. app., pp. 120-121.) Specifically, the City argues that the changes made by Commission, including the addition of Appendix J and the inclusion of 5.6 Environmental Justice and Disadvantage Communities, constituted "substantive changes," and thus, should have been sent out for comments prior to a Commission vote. There is no merit to this assertion.

Public Utilities Code section 311(g)(1) states: "Prior to voting on any commission decision not subject to subdivision (d), the decision shall be served on parties and subject to at least 30 days public review and comment. Any alternate to any [C]ommission decision shall be subject to the same requirements as provided for alternate decisions under subdivision (e)." (Pub. Util. Code, § 311, subd. (g)(1).

The Commission defines an alternate as follows:

> "An alternate proposed decision" . . . means a substantive revision by a Commissioner to a proposed decision . . . not proposed by that Commissioner which either:
>
> (1) Materially changes the resolution of a contested issue, or
>
> (2) Makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraph.

Commission Rules of Practice and Procedure, Rule 14.1(d), Cal. Code of egs., tit. 14.1, subdivision (d).

The inclusion of Appendix J and the discussion in section 5.6 of D.18-09-017 regarding environmental justice and disadvantaged communities did not constitute material changes to the proposed decision or substantive additions to the findings of fact, conclusion of law or ordering paragraphs. (See D.18-09-017, Appendix J, p. 1.) Rather, the inclusion of these items gave fuller explanations to the determinations made in the Decision and made in FEIR and responded to comments made on the proposed decision, as well as to comments submitted on the Final EIR/EIS, most notably by Marina and MCWD.

Appendix J, entitled "Memorandum Regarding Responses to Comments Received After Publication of MPWSP Final EIR/EIS," constituted a summary and a response to comments submitted on the EIR after publication of the Final EIR/EIS. (See D.18-09-017, pp. 73 & 84.) It did not change any conclusions of the FEIR and thus in no way affected the outcome of the Commission's certification of the FEIR or its approval of the CPCN.

This is also true regarding the addition of section 5.6 of the Decision, involving environmental justice and disadvantaged communities. Section 5.6. merely addresses an issue raised by Marina (see e.g., Marina's Opening Comments to the Proposed Decision, filed September 4, 2018, pp. 4, 14, fn. 72, & Appendix A, pp. 14, 16 & 20-21) and discussed during the CEQA process. (See D.18-09-017, p. 83; see also, FEIR, Section 4.20; D.18-09-017, Appendix C – CEQA/NEPA Findings, pp. C-3 & C-8; D.18-09-017, Appendix D, Table 1, p. D-58.) There was no change in the resolution of a contested issue or the additions to the findings of fact, conclusions of law, or ordering paragraphs that changed the substantive resolutions in the proposed decisions.[22] Also, even if there was a substantive revision to a proposed decision, it is not an alternate proposed decision "if the revision does no more than make changes suggested in prior comments on the proposed decision . . . ," (Rule 14.1(d) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, §14.1, subd. (d).)

Thus, contrary to the Marina's assertion, the inclusion of Appendix J and section 5.6 did not constitute substantive changes, and thus, was not an alternate that required comments within the meaning of Public Utilities Code section 311, and Rule 14.1 of the Commission's Rules of Practice and Procedures. (See *Application of San Diego Gas & Electric Company for Authorization to Recover Costs Related to the 2007* Southern

[22] Also, even if there was a substantive revision to a proposed decision, it is not an alternate proposed decision "if the revision does no more than make proposed decision "if the revision does no more than make changes suggested in prior Comments on the proposed decision . . . ," (Rule 14.1 (d) of the Commission Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, §14.1, subd. (d).) Here, Marina did raise the issue in its comments to the proposed decision.

California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA) – Order Denying Rehearing of Decision (D.) 17-11-033 [D.18-08-025], pp. 15-16 (slip op.).) Accordingly, rehearing of this issue should be denied as being without merit.

10. D.18-09-017 does not violate Public Utilities Code Sections 451 and 701.10.

In its rehearing application, MCWD argues that in relying on Cal-Am's own projected costs for MPWSP, the Commission violated Public Utilities Code section 451. (MCWD reh. App., pp. 46-47.) Specifically, it contends that Cal-Am's cost projection for the MPWSP could not be considered just and reasonable in light of the record evidence. (MCWD reh. app., p. 46.) Marina makes a similar argument. (Marina reh. app., pp. 39-41.) Specifically, Marina argues that the cost impacts are in violation of the just and reasonable standard set forth in Public Utilities Code sections 451 and 701.10. The arguments made by the rehearing applicants on this issue have no merit.

Public Utilities section 451 provides, in relevant part:

> All charges demanded or received by any public utility. . . for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful. . . .

(Pub. Util. Code, § 451.)

Public Utilities section 701.10 provides in relevant part: "The policy of the State of California is that rates and charges established by the [C]ommission for water service provided by water corporations shall do all of the following. . . [promote] the long-term stabilization of rates in order to avoid step increases in rates, . . . [and] [b]e based on the cost of providing the water service including, to extent consistent with the above policies, appropriate coverage of fixed costs with fixed revenues." (Pub. Util. Code, § 701.10, subd. (e) and (f).)

In D.18-09-027, the Commission adopted a cost cap, based upon the provisions in the Comprehensive Settlement and based on the evidence. (D.18-09-027, pp. 133-137.) The Decision discusses the evidentiary basis for finding the cost cap of $279.1

million reasonable. (D.18-09-0217, pp. 134-137, citing e.g., Exhibit CA-40 (Supplemental Testimony of Svindland), Exhibit CA-49 (Direct Testimony of Cook), Exhibit CA-51 (Direct Testimony of Crook; Exhibit CA-35 (Supplemental Testimony of Linam); Reporter's Transcript, Vol. 25, p. 4524.)[23]

For the protection of the ratepayers, we determined that any additional amount beyond the cap ($279.1 million) would be subsequently reviewed for reasonableness. As the stated by us in the Decision, "to ensure that only reasonable and prudent amounts are include," we required:

> CalAm to track all MPWSP expenses in a memorandum account that will be subject to reporting requirements and submission of a Tier 2 advice letter process when the project is completed; subject to a true-up upon review of reasonableness in the next and subsequent general rate cases.

(D.18-09-017, pp. 138, 189 [Finding of Fact 179] & 204 [Conclusion of Law 77 ["recovery of costs greater than $279.1 million will only be approved for ratepayer recovery upon a showing that these costs were the result of extraordinary circumstances and subject to a heightened level of scrutiny."].) Further, we stressed the importance "to assess whether the MPWSP is used and useful as well as ensure that the water produced is delivered for use by Cal-Am customers as opposed to a disproportionate portion of the water going to meet the return water obligation." (D.18-09-017, p. 138.)

[23] The Decision also deals with issues involving sources of financing for the MSWSPP, including Construction Funding Charge, SRF debt, public agency contribution (securitized debt), and equity (see D.18-09-017, pp. 139-144), as well as ratemaking aspects set forth in the Comprehensive Settlement (D.18-09-017, pp. 144-145). The Decision noted the importance of reports from Cal-Am regarding expenditures, construction progress, and milestones, which includes information involving annual return water obligation deliveries. (See generally, D.18-09-017, pp. 149-151.) We ordered Cal-Am to establish a memorandum account to track the Construction Funding Charge and capital costs, which will be subject to reasonableness review. (See D.18-09-017, pp. 152-153, 185 [Findings of Fact 139 & 140] & 212 [Ordering Paragraphs 27 & 28].) The Decision found that it was "reasonable to require Cal-Am to also track all construction costs other than those tracked in the Construction Funding Charge in a separate memorandum account." (D.18-09-017, p. 185 [Finding of Fact 141].) With respect to the ratemaking, we ordered the filing of a Tier 3 advice letter to ensure that "reasonable rates are recovered, and ratemaking protections are in place." (D.18-09-017, pp. 144-145.) Here, we addressed "the process for determining the revenue requirement for the rate base portion of the MPWSP," and did not authorized the actual recovery of specific costs. (D.18-09-017, p. 4.)

Thus, the Commission determined the reasonableness of the cost cap, based on the record evidence. Further, because the Commission adopted several memorandum accounts to track costs for the Project, and such costs would be subject to a reasonableness review, we did not adopt any costs that could be considered unjust and unreasonable. Therefore, there was no violation of Public Utilities Code section 451.

Further, we made our determinations regarding the reasonableness of the cost cap, the requirement for the filing of advice letters, and the ordering the memorandum accounts that was subject to reasonableness review in order to ensure that prudent and reasonable costs are recovered, and ratepayer protections are in place. (See D.18-09-017, pp. 138-139,141& 144.) Accordingly, there is no violation of Public Utilities Code section 701.10.

Moreover, the arguments that MCWD and Marina make on this issue involves their dissatisfaction with how the Commission weighed the evidence in the determination the Commission made. In their rehearing applications, they speak of how the Commission should have been convinced by a certain piece of testimony. (See MCWD reh. app., pp. 46-47; Marina reh. app., pp. 39-41.) Thus, their applications for rehearing constitute no more than relitigation of the evidence that the Commission weighed in making its decision. An application for rehearing is not an avenue for a party to ask the Commission to reweigh the evidence. Further, an application for rehearing is not a vehicle for such relitigation. Any attempts to relitigate should be denied. (Cal. Code of Regs., tit. 20, § 16.1, subd. (c), see *OIR re California Renewables Portfolio Standard Program* [D.13-02-037] (2013) at pp. 3-4; see also *Application of Exposition Metro Line Construction Authority for an order authorizing the construction of a two-track at-grade crossing for the Exposition Boulevard Corridor Light Rail Transit line* [D.11-10-022] (2011) at pp. 5-6.) Thus, on these ground rehearing is denied on this issue.

11. The allegation that the Commission did not comply with Public Utilities Code Sections 1001 and 1002 factors, including community values, has no merit.

Marina asserts that D.18-09-017 fails to follow the requirements of Public Utilities Code sections 1001 and 1002. Specifically they argue: (1) the decision did not cite to these two Public Utilities Codes sections enough and that there is no analysis that shows how the Commission complied with these two sections; (2) that it should have considered community values outside of a project's influence on the environment and the CEQA review; (3) that the community whose values should be considered is the one in which the project is located; (4) the decision's discussion about community values is not supported by the record; and, (5) the Commission had departed from its own precedent about how to review community values and as such is due no deference by the courts. (Marina reh. app., pp.7-22.) As discussed below in Discussion Section A.12, D.18-09-017 does review the relevant factors and provides an analysis of its determinations address the requirements set forth that sections 1001 and 1002 of the Public Utilities Code. Specifically, the Decision contains a whole section devoted to Public Utilities Code section 1002 factors and discussed the heart of its Public Utilities Code section 1001 analysis in the sections about the need for additional water supplies. (D.18-09-017, pp. 18-70, 156-160 [Sections 3, 4 and 7.5].) Thus, the Commission undertook the necessary analysis to support its determinations relevant to these two statutory provisions, and these determinations were based on the record. Furthermore, the Commission is not aware of any legal requirement to support its allegation that its analysis must be in a specific format. Nor does Marina cite to any law that would require it to do so.

Marina's assertion that the Commission should have reviewed community values outside of the project's influence on the environment and the CEQA review is a misstatement of the procedural background of this case. We fully considered community values under Public Utilities Code section 1002(a). D.18-09-017 states, "These [1002] factors are considered separately from the CEQA review process; however, the Commission may rely on information provided through the CEQA process in consideration

of these four factors." (D.18-09-017, pp.156-157, internal citations omitted.) Furthermore, based on the record for this proceeding, which includes the FEIR, comments submitted on the EIR, and briefings, the Commission found "that the MPWSP meets the criteria of Section 1002." (*Ibid.*, internal citations omitted.)

The Commission is correct in using the CEQA process to review environmental impact and in its approach that a community may consider its values to include protection of the environment if it so chooses. There is often, by desire of the impacted community, some overlap between environmental impacts and community values. In this proceeding, Marina has stated that environmental concerns are a large part of their community values. (See Marina's September 4, 2018 Opening Comments on the Proposed Decision, pp.4-5; D.18-09-017, p.157 ("The City of Marina and Mariana Coast Water District argue the project does not support community values. However, the majority of the arguments presented by these two parties concern arguments over water resources as opposed to any other type of community value. . . .").)

The Commission has consistently recognized that a Public Utilities Code section 1002 analysis is a separate obligation from its CEQA obligation but the Commission has also consistently found that its environmental analysis can inform its community values analysis to the extent they overlap in the eyes of the relevant communities. (See e.g. *In the Matter of the Application of SDG&E for a CPCN for the Sunrise Powerlink Transmission Project* [D.08-12-058] (2008), at p. 410, emphasis added ["The record on community values has been developed largely through public input – testimony at Public Participation Hearings and written comments (letters and emails), the later generally sent to the Commission's Public Advisor's Office *or provided through the EIR/EIS process*."].); see also, *In the Matter of the Application of SCE for a CPCN for the Eldorado-Ivanpah Transmission Project* [D.10-12-052] (2010), at p. 20, emphasis added ["In considering the project's compatibility with community values as set forth in section 1002(a), the Commission gives considerable weight to the views of the local community and, in addition, the views of the elected representatives. . . . No public or elected officials raised objections to this project *in the CEQA public comment processes* or in the formal

proceeding."]; and, *Application of Lodi Gas Storage for a CPCN of Gas Storage Facilities* [D.00-05-48] (2000), at pp.44-47, emphasis added ["Some local residents oppose the project, in part, because they believe it may frustrate the community goal of continued development of the Lodi area wine industry. . . . We cannot conclude based upon this record that it is reasonable that the existence of this project in close vicinity with the area's emerging wine tourism will damage the public's perception of the area's winegrape growing reputation. Moreover, many of the impacts of the project are shorter-term construction-related, and *the EIR concludes* that many can be mitigated . . . ."].) At both the evidentiary and public participation hearings, many community members raised safety and environmental concerns, which are *address in more detail in the EIR* discussed more fully below. According to the EIR, most, if not all, of these concerns can be mitigated."].) And Marina's claim to the counter is a misreading of Commission decisions.

Marina asserts that various Commission decisions (i.e., D.10-12-025, D.12-07-021 and D.13-07-018) stand for the proposition that CEQA information cannot be used in a community value analysis. (Marina reh. app., pp.10-14.) This assertion has no merit.

In D.10-12-025, the Commission approved an CPCN for a gas storage facility. (See *Application of Wild Goose Storage to Amend its CPCN to Expand and Construct Facilities for Gas Storage Operations* [D .10-12-025], at p. 1.) In so doing the Commission stated, "[S]ince the review process established by CEQA is the primary vehicle for review of all Section 1002(a) issues except community values, we defer discussion of the other Section 1002(a) issues to Section 5 [of the decision]. . . . As the Wild Goose application suggests, the concept of community values is somewhat fluid. The issues that need to be considered can vary greatly depending upon the nature of a project and where its proponents wish to build it." (*Id*. at pp. 8-11.) That decision did not establish that community values must be reviewed outside of the CEQA analysis. It merely stated that the legal obligations of Public Utilities Code section 1002 exist independent from CEQA and that sometimes to analyze community values environmental and non-

environmental factors may come into play. In that case, uncontested letters from elected officials showed the application to be in keeping with the community's values. (See D.10-12-025, *supra*, at pp. 12-13.) When Marina cites to this case for the proposition that "a fuller showing of need may be necessary … to establish conformity with community values" they fail to disclose that the Commission made that statement to explain that its historical approach of presuming need under a "let the market decide" approach may not be enough to meet its obligations to consider community values. (See D.10-12-025, *supra*, at p. 6, fn. 7.) It does not stand for the proposition that community values analysis must be done outside of a CEQA review and/or must have evidentiary hearings.

In D.12-07-021, the Commission denied an application to build a natural gas storage facility near a residential neighborhood. (See *Application of Sacramento Natural Gas Storage for a CPCN for a Natural Gas Storage Facility* [D.12-07-021], at p. 1.) In that decision, the Commission stated, "Community values can be measured in many ways" but ultimately found, "Given that we are denying the application on other grounds, we do not need to determine if the project is consistent with community values." (*Id*. at pp. 35-36.)

In D.13-07-018, the Commission modified a prior CPCN to have a segment of a transmission line undergrounded through a residential area. (See *In the Matter of the Application of SCE for a CPCN Concerning the Tehachapi Renewable Transmission Project*, [D.13-07-018], at p. 1.) While Marina seems to argue this proceeding stands for the proposition that CEQA analysis cannot be used for community values consideration, that is an incorrect reading of the case. In fact, the Commission expressly relied on evidence in the CEQA record as well as evidence outside of it. The Commission stated, "Section 1002 requires explicit consideration of how a proposed project comports with community values. … Moreover, Chino Hill's evidence and briefs do not pursue its more attenuated arguments (economic bight, etc.) but continue to focus on the enormous burden of the visual impact on City residents, particularly those who live along the [Right of Way ("ROW")]. . . . Our task, however, requires us to objectively assess visual impact that tend to affect most human beings in a subjective way, at least in part. Accordingly, we return to

the certified FEIR and its workpapers to review the information there about the multiple variables that contribute to visual impacts at a particular point along the Project ROW." (*Id*. at pp. 30-31.)

As the above shows it is completely appropriate for the Commission to use information gathered and analyzed, including public comments, in a CEQA document in its consideration of community values under Public Utilities Code section 1002(a) when the communities raise environmental concerns as a community value. Furthermore, the Commission has a long track record of doing just that.

Regarding Marina's argument that the community whose values should be considered is the one in which the project is located, we have considered the values of the impacted community in this proceeding. (D.18-09-017, pp.157-159.) As we stated:

> We recognize there are number of communities [sic] potentially impacted by the proposed project and we must weigh the various impacts that the MPWSP will have on each of them individually as well as the overall regional community. The Commission gives great weight to the City of Marina's [where the project will be located] community values, and also considers the values express by others ….

(D.18-09-017, p.158.) Marina's assertion of a "one-sided examination" in favor of project proponents is just plain wrong. (Marina reh. app., p.13.) The majority of the community values discussion focuses on the arguments raised by Marina and MCWD. (D.18-09-017, p.157-159.) Moreover, there is no legal requirement to consider only the community most impacted by a project. While the Commission has acknowledged that projects "should not disproportionately burden one community for the benefit of the large population" that is not the same as saying only the burdened community should have its values considered. (D.13-07-018, p. 34.) In the case at hand, we found, "On balance, the approved project reasonably reflects community values. It addresses the City of Marian's values by mitigation the negative effects on the City. . . . It also reflects the community values of others. . . ." (D.18-09-018, pp.158-159.)

Regarding Marina's argument that the Decision's discussion about community values is not supported by the record, we disagree. There is an ample record, as set forth above. We believe this argument is thinly vailed attempt to reargue the evidence the Commission has already considered. (Marina reh. app., p.14-22.) As such, it is not grounds for a rehearing. (See e.g., *Application of PG&E for Expedited Approval of the Amended Power Purchase Agreement for the Russell City Energy Company Project -- Order Modifying D.10-09-004 to Correct a Clerical Error, and Denying Rehearing of Decision, As Modified* [D.10-12-064] (2010), at p. 11, ["An application for rehearing is not a vehicle for relitigation. . . ."].)

Regarding Marina's argument that the Commission has not followed its established practice in reviewing community values, Marina is incorrect. As detailed above the Commission has often used CEQA information to inform its community values analysis. As such, Marina's argument that the Commission is due no deference since it departed from its established practice is wrong as it is based on a misreading of past Commission practices.

12. The Commission should add some additional findings of fact and conclusions of law regarding the four factors set forth in Public Utilities Code section 1002.

Marina alleges that the Commission violated Public Utilities Code section 1705 by failing include any findings of fact on the material issues of whether the Project meets the mandated requirements of Public Utilities Code section 1001 and 1002, including feasibility. (Marina reh. app., pp. 46-50.)

Public Utilities Code section 1705 provides, in relevant part:

> [T]he decision shall contain, separately stated, findings of fact and conclusions of law by the [C]omission on all issues material to the order or decision.

(Pub. Util. Code, §1705.) The California Supreme Court observed in *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251. 258-259:

> Findings are essential to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles

> relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action."

In granting the CPCN, the Commission analyzed the requirements set forth in Public Utilities Code sections 1001 and 1002, and determined that the requirements were met. (D.18-09-017, pp. 156-160.) As we stated:

> The commission, as a basis for granting any certificate pursuant to Section 1001 shall give consideration to the following factors: 1) community values; 2) recreational and park areas; 3) historical and aesthetic values; and 4) influence on environment. [Footnote omitted.]
>
> These factors are considered separately from the CEQA review process; however, the Commission may rely on information provided through the CEQA process in consideration of these four factors. [Foonote omitted.] Based on the substantial record set forth in this proceeding, including the FEIR, A.12-04-019 comments submitted on the EIR, and briefing we find that the MPWSP meets the criteria of Section 1002.

(D.18-09-017, pp.156-157.) We discussed each of the four factors set forth in Public Utilities Code section 1002. (D.18-09-017, pp. 157-160; see also D.18-09-017, p. 84, fn. 220 (community values in context of economic justice).)

D.18-09-017 contains two conclusions of law (Conclusion of Law 2 and Conclusion of Law 3) regarding Public Utilities Code sections 1001 and 1002, which state the following:

> 2. We have considered how the widely-recognized need may best be met by various water supply alternatives, as evaluated according to the statutory framework established by Pub. Util. Code. § 1001 et seq.
>
> 3. As the basis for granting a Certificate of Public Convenience and Necessity, the Commission must consider the need for the project, community values, recreational and park areas,

> historical and aesthetic values, and the influence on the environment, as set forth in Pub. Util. Code § 1002(a).

(D.18-09-017, p. 193 [Conclusions of Law 2-3.) These conclusions of the law meet the requirements for Public Utilities Code section 1705 for separately stated conclusions of law on material issues involving Public Utilities Code sections 1001 and 1002.

However, we note the discussion and the conclusions of law regarding these four factors "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission," as well as to "assist parties to know why the case lost and to prepare for rehearing or review…." (*California Manufacturers Assn. v. Public Utilities Com., supra*, at 24 Cal.3d at pp. 258-259 (internal quotation marks omitted).)

We also note that there are CEQA findings that relate to the four factors. (See e.g., D.18-09-017, Appendix C – CEQA/NEPA Findings (generally for findings regarding influence on the environment);[24] see D.18-09-017, Appendix C – CEQA/NEPA Findings, Section 4.8 (Land Use, Land Use Planning, and Recreation), pp. C-31 to C-32 (including mitigation measures involving recreational users of Fort Ord Dunes State Park regarding temporary impacts): Section 4.8 (Aesthetic Resources), pp. C-48 to C-50 (regarding permanent impacts on scenic resources (vistas, roadways, and designated scenic areas) or the visual character of the project area and its surroundings); Section 4.15 (Cultural and Paleontological Resources), pp. C-50 to C-52 (related to undiscovered

[24] *In the Matter of the Application of San Diego Gas & Electric Company for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project* [D.08-12-058] (2008), pp. 19-20 [Influence on the Environment factor in Public Utilities Code section 1002] can be "appropriately addressed through CEQA process."]; see also *In the Matter of the Application of Southern California Edison Company for Certificate of Public Convenience and Necessity Concerning the Tehachapi Renewable Project – Segments 4-11* [D.09-12-044] (2009), p. 8); *Application by Sacramento Natural Gas Storage, LLC. for a Certificate of Public Convenience and Necessity for Construction and Operation of Natural Gas Storage Facilities and Requests for Related Determinations* [D.12-07-021], p. 30 ["Influence on the environment is a factor under § 1002 but is primarily considered in the EIR process, so that the parties would not duplicate their efforts on this Public Utilities Code requirement that overlaps with CEQA requirements."].)

historical and cultural impacts); and Section 14.16 (Agricultural Resources), pp. C-52 to C-53, and p. C-66 & C-74 to C-75, regarding tourism, education and research (related to community values).)[25]

However, for purposes of clarification, we will modify D.18-09-017 to add specific findings of fact regarding the four factors, as set forth in the ordering paragraphs below. These findings of fact are based on the discussion and conclusions of law in D.18-09-017.

In its rehearing, Marina also contends that the Commission fails to comply with Public Utilities Code section 1705 because there are no findings of fact, conclusions of law, or ordering paragraphs specifically addressing Marina's testimony. (Marina reh. app., p. 49.)

This contention fails because Public Utilities Code section 1705 does not require that the Commission make a finding of fact and conclusion of law on every piece of evidence presented. The statute mandates only that findings of fact and conclusions of law must be made on material issues. (See Pub. Util. Code, §1705.) In *Toward Utility Rate Normalization v. Public Utilities Com.*, the California Supreme Court stated:

> We have never held that an administrative decision must contain a complete summary of all proceedings and evidence leading to a decision. Rather, we have repeatedly … set as our standard a statement which will allow us a meaningful opportunity to ascertain the principles and facts relied upon by the Commission in reaching its decision.

(*Toward Utility Rate Normalization v. Publ. Util. Com.* (1978) 22 Cal.3d 529, 540.)

[25] See *In the Matter of the Application of Southern California Edison Company for a Certificate of Public Convenience and Necessity for the San Joaquin Cross Valley Loop Transmission Project* [D.10-07-043] (2010), at pp. 6-7 & 24 [Commission reliance on CEQA record for its consideration of factors set forth in Public Utilities Code section 1002.].) But note that the Commission has stated: "CEQA is the primary vehicle for review of all §1002(a) issues except community values." (*Application for Wild Good Storage, LLC to Amend its Certificate of Public Convenience and Necessity to Expand and Construct Facilities for Gas Storage Operations* [D.10-07-043] (2010), at p. 6. However, there is no statute or case law mandating any restrictions or limitations on the use or reliance on the CEQA record for making its determinations on the four factors.

The issue regarding how the Commission weighed the various evidence before it, including the testimony provided by Marina, does not constitute a material issue that warrants specific findings of fact or conclusions of law within the requirements of Public Utilities Code section 1705. To hold otherwise would mean that in every case, the Commission would be required to address every piece of evidence provided during the proceeding. Obviously, this was not intended by the Legislature in its enactment of Public Utilities Code section 1705.

In the context of its Public Utilities Code sections 1001 and 1002 allegations, Marina challenges the legal sufficiency of Finding of Fact 71 and Conclusion of Law 90, which involve feasibility and water rights. (Marina reh. app., pp. 49-50.)[26]

Finding of Fact 71 states the following: "The record supports the likelihood that Cal-Am will possess legal water rights for the MPWSP and that the MPWSP is not made infeasible by concerns over water rights." (D.18-09-017, p. 175 [Finding of Fact 71].)

Conclusion of Law 90 states the following: "CalAm in all likelihood should have sufficient water rights to operate the MPWSP." (D.18-09-017, p. 206 [Conclusion of Law 90].)

Essentially, Marina challenges the finding of fact and conclusion of law because it simply disagrees with these Commission determinations regarding feasibility and water rights. However, this challenge has no merit, because Finding of Fact 71 and Conclusion of Law 90 are based on the record and the Commission's review and weighing of the evidence in the record in this proceeding. (See, e.g., D.18-09-017, Appendix C: CEQA/NEPA Findings, pp. C-7 to C-8, citing to Final Review of California American Water Company's Monterey Peninsula Water Supply Project ("SWRCB Report") and FEIR; see also, FEIR, pp. 2-31 through 2-43, 8.2-4 through 8.2-8.2-16; see also Discussion Section C.6, *infra*, regarding water rights.) Merely because Marina disagrees with Finding

[26] Feasibility is not specifically one of the factors set forth in Public Utilities Code section 1002(a) for consideration for the approval of a CPCN. It is primarily a CEQA issue.

of Fact 71 and Conclusion of Law 90, which are based on the record, does not constitute legal error.

13. The record demonstrates that there is sufficient capacity for Cal-Am to use MCWD's pipeline to wheel desalinated water.

MCWD argues that the Commission erred in approving the MPWSP without addressing the infeasibility of utilizing MCWD's pipeline to wheel desalinated water. MCWD states that its general manager testified there is likely insufficient firm capacity available in the existing MCWD-owned pipeline to permit Cal-Am to use that pipeline to pump MPWSP product water along General Jim Moore Boulevard between Coe and Hilby Avenues in Seaside. MCWD contends that Cal-Am's decision to re-route the desalinated product water pipeline in its amended application to utilize MCWD's pipeline renders the project infeasible because the capacity of the existing pipeline does not appear to be sufficient to serve all of the existing higher-priority uses while simultaneously providing firm, uninterruptible capacity for MPWSP product water. Further, MCWD argues there is not likely sufficient room in the right of way to install a parallel pipeline dedicated to desalinated water product. (MCWD reh. app., pp.39-40.)

There is record evidence to support the Commission's determination that the MPWSP's use of the joint MCWD-Cal-Am pipeline to wheel desalinated water is feasible. The April 8, 2009 Wheeling Agreement for construction and shared use of a pipeline to convey water along General Jim Moore Boulevard gives Cal-Am the right to use the shared pipeline for conveyance of potable water, regardless of the source of that water. While the FEIR found that the Wheeling Agreement would need to be revised to include the MPWSP water, such a revision would be reasonable and consistent with the requirements of the wheeling statutes. (See Water Code, §§ 1810-1814.)

Further, the FEIR indicates that capacity is sufficient:

> On March 23, 2017, [Cal-A]m provided to MCWD an assessment of estimated pipeline capacities, including pressure assumptions, for proposed uses of the MCWD-[Cal-Am] joint pipeline in General Jim Moore Boulevard, including future supply from [Cal-Am's] proposed desalination facility ([Cal-

> Am], 2017). The assessment shows there would be ample capacity in the joint pipeline for projected future uses: up to 11,081 gallons per minute (gpm) on an average day, and up to 9,996 gpm at peak hour. Since the shared pipeline is part of a pressurized system, whatever source water that is permitted to use the pipeline would become blended in the pipeline. Regardless of the source or the destination, appropriate volumes associated with each source would share the pipeline during different times of the year.

(FEIR, Vol. 8, § 8.5, p. 662.)

MCWD bases its argument on its general manager's testimony that there is "likely" insufficient firm capacity available and that the pipeline "does not appear" to be sufficient. (MCWD reh. app., p. 39.) While the FEIR response does not specifically address this testimony, MCWD's somewhat tentative testimony is contradicted by the record. For these reasons, MCWD has not shown legal error.

14. The allegation regarding interference with public system lacks merit.

MCWD contends that the Commission unlawfully approved the MPWSP without addressing, or conditioning the Project to resolve, MCWD's complaint of interference with the Public System under Public Utilities Code section 1001. (MCWD reh. app., p. 47.) MCWD argues that the Commission failed to protect MCWD's public water system from the danger of harm or destruction without imposing sufficient conditions to protect MCWD's groundwater. MCWD claims that the Commission's errors were premised on "its insufficient evaluation of groundwater baseline and impacts, as well as its misapprehension of basic constitutional and legal precepts concerning water rights and the requirement for reasonable and beneficial use of the waters of the State, as set forth above." (MCWD reh. app., p. 47.)

Public Utilities Code section 1001 requires a public utility, in this case CalAm, to obtain a certificate of public convenience and necessity before constructing a plant (with exceptions not relevant here). This statutory provision 1001 also provides:

> If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission, on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affects as to it may seem just and reasonable.

(Pub. Util. Code, § 1001.) MCWD does not explain specifically how the Commission purportedly violated this statute. But this argument seems to be linked to its argument that the desalination plant will be taking groundwater that is used by MCWD and/or Marina. As discussed above in Discussion Section A.2., the taking argument has no merit.

The salient point here is that the FEIR determined that Cal-Am's desalination plant would not result in significant impacts to groundwater. (D.18-09-017, Appendix C, CEQA Findings, at p. C-15.) The FEIR found that Impact 4.4-3 (Deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level during operations so as to expose well screens and pumps) would be less than significant, and no mitigation is required. Nonetheless, the FEIR adopted an applicant-proposed mitigation measure to monitor and remedy any potential groundwater impact. Mitigation Measure 4.4-3 was included in the adopted Mitigation Monitoring and Reporting Plan. (D.18-09-017, Appendix D.)

Furthermore, the Commission, after hearing such complaint, may "make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affects as to it may seem just and reasonable." (Pub. Util. Code § 1001.) The Commission has done that here. Therefore, MCWD has not shown legal error.

15. The Commission did not err in issuing the Decision prior to making the full record available to MCWD.

MCWD contends that the Commission legally erred in issuing the Decision because the Commission's full record has not been made available. MCWD is referring to

its Public Records Act ("PRA") requests, made in September 2017 and September 2018, pursuant to Government Code sections 6250 et seq.

This is not an issue that is appropriate in the rehearing application. The public record in this case and most of the CEQA record is available to MCWD. There is no obligation under CEQA or under the Public Utilities Code to produce a response to a PRA request. While the Commission must comply with the PRA, that issue is outside the scope of the rehearing applications. (See Pub. Util. Code, §§ 1731-1736 [Rehearings].) In addition to the fact that MCWD's PRA is not part of this proceeding, there are separate processes for challenging the Commission's compliance with a PRA request. (See General Order 66-D.)

Under CEQA, a plaintiff or petitioner may file a request for the record of proceedings, and the public agency must prepare and certify the record within 60 days of a request. (Public Res. Code section 21167.6 (a) and (b)(1).) However, section 21167.6 of the Public Resources Code is not applicable to the Public Utilities Commission.

> Notwithstanding any other law, in all actions or proceedings brought pursuant to Section 21167, except as provided in Section 21167.6.2 *or those involving the Public Utilities Commission,* all of the following shall apply. . . .

(Pub. Resources Code, § 21167.6, emphasis added.)

Pursuant to the Public Utilities Code section 1756 et seq. [Judicial Review], if a writ issues, "it shall be made returnable at a time and place specified by the court and shall direct the commission to certify its record in the case to the court within the time specified." (Pub. Util. Code, § 1756(a).) That has not yet occurred. Accordingly, MCWD has not demonstrated legal error.

B. CEQA Issues

1. The record supports the demand analysis in D.18-09-017 and in the FEIR.

MCWD contends that the supply and demand analysis of D.18-09-017 and the FEIR was based on speculation and not supported by record evidence, thereby foreclosing analysis of potentially feasible alternatives. (MCWD reh. app., pp. 4-6.) Both

MCWD and Marina argue that the demand estimates are overstated and are not based on record evidence. (MCWD reh. app., p.5; Marina reh. app., pp. 39-42.)

In D.18-09-017, the Commission reviewed numerous parties' demand estimates for Cal-Am as of November 2017. Those estimates ranged from 9,675 afy to 15,000 afy. (D.18-09-017, pp. 19-33 and 168 [Finding of Fact 16]; see also D.18-09-017, Appendix B [showing parties estimates of supply and demand].)

As set forth in the Decision, the Commission looked at certain requirements as a guide to estimating demand. GO 103-A requires a potable water system's facilities to have the capacity to meet the source capacity requirements as defined in Waterworks Standards, California Code of Regulations ("CCR") Title 22, section 64554 and requires that the system's maximum day demand ("MDD") shall be determined in accordance with that regulation. (D.18-09-017, pp. 21-22.) CCR Title 22. section 64554(a) states "a public water system's water source(s) shall have the capacity to meet the system's maximum day demand." CCR Title 22, section 64554(b)(2)(A) requires the Commission to examine "the month with the highest water usage (maximum month) during at least the most recent 10 years of operation" to determine the MDD. In addition, Waterworks Standard CCR Title 22, section 64558(a)(2) provides that when planning and permitting a water system capacity expansion, the Commission should look at the MDD going forward over a 10-year growth period.[27]

As noted in the Decision, the Commission's analysis is not bound by the methodologies set forth in CCR Title 22, section 64554. Rather, they are used as guidelines. (D.18-09-017, p. 23; see also GO 103-A, p. 1, "Applicability.") The goal of the Commission and of CCR Title 22, section 64554 is to ensure a public water system can meet the MDD and the peak hourly demand ("PHD") for 4 hours in a day with source capacity, storage capacity, and/or emergency connections. (D.18-09-022, p. 23.)

[27] In evaluating the projected 10-year growth period, CCR Title 22, section 10635 further provides guidance to evaluating projected water supply and use.

The Commission determined that, based on all the evidence, Cal-Am met its burden of proving that 14,355 afy is a reasonable projection for the system's demand. (D.18-09-017, p. 51; see also Decision, p. 171, FOF 42, 43.) This is made up of demand estimates for existing customers of about 12,000 afy. (D.18-09-017, p. 170 [Finding of Fact 31] and a future demand of about 2,000 afy, based on reasonable projections concerning growth of population, development and tourism growth. (D.18-09-017, pp. 46-51; see also D.18-09-017, p. 170 [Findings of Fact 31 & 32].) This is consistent with the demand assumptions in the FEIR. (See, e.g., Master Response 13, FEIR, Ch. 8, § 8.2, pp. 99 et seq.)

Both Marina and MCWD argue that the Commission failed to properly consider the steady drop in demand from 14,176 afy in 2001 to 9,545 afy in 2015 and 9,285 afy in 2016. (MCWD reh. app., p. 4, citing FEIR §8.5, p. 11; Marina reh. app., pp. 42-43.) MCWD argues that the FEIR improperly identified the water supply shortfall or need for the project as 10,750 afy. According to MCWD, that amount exceeds the total water deliveries by Cal-Am to its customers every year since 2013. MCWD contends that only about 9,500 afy is required for Cal-Am's present demand. MCWD asserts that these declines are the result of many factors, including reduction of leaks and adoption of permanent water conservation measures. MCWD argues that there is no evidence that these annual declines are not permanent. (MCWD reh. app., p. 4.)

Marina argues that the steady water declines have occurred and persisted in a variety of economic, climatic, and regulatory conditions over a 10-year period. Marina claims that the record in this case demonstrates any tourism rebound has already occurred and that any claimed increase should be assigned a value of zero. Marina contends that the Commission ignored expert testimony on demand, supply, and price impacts on the Project, and instead relied on lay opinion of the Coalition of Peninsula Businesses (CPB), an organization representing commercial interests. (Marina reh. app., p. 42-43.)

As stated above, for sizing of the desalination plant, the Project must meet maximum month and maximum day demands based on the past ten years. Thus, the fact that demand decreased over some years does not affect that equation. Furthermore, the

record on demand is substantial. Pursuant to an August 7, 2017 Commission ruling, parties were given the opportunity to update estimates of demand. Those estimates ranged from 9,675 to 15,000 afy. (See D.18-09-017, pp. 25, 24-33 & Appendix B.) The Commission thoroughly considered all the estimates and explained its reasoning for concluding that 14,000 afy total demand is reasonable. (D.18-09-017, pp. 45-65.) The Commission concluded that, based on all of the evidence, Cal-Am's forecast for demand of about 12,000 afy for existing customers was reasonable.

The Commission stated its reasons for rejecting the arguments of Marina and MCWD that water use would go lower. (D.18-09-017, pp. 52-55.) The Commission found that water use is not likely to go lower, noting that maximum usage increased from 2016 to 2017, because conservation funding is expected to go down and extreme conservation and moratorium measures implemented during the drought will end (D.18-09-017, pp. 52-53, citing MCD-59 (MCD), CA-48 (Rose), and CA-52 at p. 5 (Crooks).) The record also shows that the Monterey Peninsula is already one of the most efficient water use communities in the state and that meaningful additional conservation is not a reasonable option. (See e.g., D.18-09-017, p. 28, quoting Monterey Peninsula Regional Water Authority, Ex. RWA-27, p. 7.) For these reasons, Marina and MCWD have not demonstrated that the record fails to support the adopted demand estimates.

Marina also argues that the Decision's analysis of water demand is inadequate because it does not consider the impact of rates on demand. (Marina reh. app., pp.39-42.) The Commission discussed the role of demand in the Decision. In response to Water Plus, the Decision states:

> Water is not a traditional consumable that fits neatly into the economic theories of supply and demand. There is no easy or perfect substitutable product for water. Water Plus assumes that water consumption rises and falls based solely on cost, but that analysis does not take into account many other costs, influences, or externalities such as population change, costs of water conservation activities, public campaigns to conserve water, declarations of state of water emergency, or environmental changes.

(D.18-09-017, p. 65; see also D.18-09-017, pp. 25-26, responding to Marina; Cal-Am response, p. 142, citing CA-55 (Stephenson) pp.12-18 [because of long-term strict conservation pricing, the phenomenon of "water hardening" has occurred in the Monterey District, which mitigates the impact of the price of water on future demand].) Marina has failed to demonstrate legal error.

2. The FEIR did not err in its analyses of alternatives related to the size of the desalination plant.

MCWD and Marina argue that the FEIR erred in using a 9.6 mgd facility as the proposed project rather than a 6.4 mgd facility. (MCWD reh. app., p. 3; Marina reh. app., pp. 96-98.) Marina and MCWD contend that the 6.4 mgd facility should have been identified as the project after the Commission's approval of Cal-Am's water purchase agreement for the purchase of 3500 afy of water from the PWM project on September 15, 2016 (D.16-09-021).[28] Marina also contends that the FEIR should have considered alternatives smaller than the 6.4 mgd facility. The rehearing applicants raise two issues: (a) whether the Commission erred in its analysis of the 9.6 mgd and 6.4 mgd desalination plant options, and (b) whether the Commission should have reviewed a smaller project (4.8 mgd desalination plant) as an alternative.

In a related argument, MCWD contends that the Decision and FEIR erred in choosing Alternative 5a, the 6.4 mgd desalination plant, as the environmentally-preferred alternative. (MCWD reh. app., pp. 8-9.) MCWD repeats arguments regarding the "multitude of significant errors" in the FEIR's alternatives analysis and asserts that the 6.4 mgd plant was in reality the actual "proposed project." (MCWD reh. app., p. 8.) MCWD claims that there are environmentally superior alternatives that the Commission failed to consider, in violation of CEQA's most fundamental requirement. (See, e.g., *Laurel Heights Improvement Assn. v. Regents of the University of California* ("*Laurel Heights I*")

[28] *Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates – Decision on California-American Water Company's Application for Approval of the Monterey Peninsula Supply Project in Regards to Phase 2* [D.16-09-021] (2016).

(1988) 47 Cal.3d 376, 400-401 [CEQA requires the identification and discussion of project alternatives, even if alternatives would impede to some degree the attainment of project objectives].)

a. The Commission did not err in analyzing the 9.6 mgd and 6.4 mgd capacity desalination plant options.

Cal-Am's Amended Project Description, filed March 14, 2016, provided for two capacity options for the desalination plant: either a 9.6 mgd desalination facility, or a 6.4 mgd facility in combination with purchase of 3,500 afy from an advanced-treated recycling project (Pure Water Monterey (or "PWM"), formerly Groundwater Replenishment Project ("GWR").) This second capacity option in Cal-Am's application is reflected in Alternative 5a in the EIR. (FEIR, pp. 1-2 & 3-2.) On September 15, 2016, in D.16-09-021, the Commission authorized Cal-Am to purchase 3,500 afy of the PWM supply. If implementation of the PWM project was a certainty, a 6.4 mgd combined with the PWM project would meet the project objectives. However, the PWM project was a separate project analyzed in a separate EIR by, and funded and implemented by, a different agency. It was still not certain whether the PWM would successfully navigate NEPA review, secure all approvals from state and federal agencies, and prove viable in terms of technology and production of water. For that reason, Cal-Am was not prepared merely to commit to the smaller (6.4 mgd) desalination plant. Therefore, the Commission did what it is charged to do and analyzed the project proposed by the applicant – either a 9.6 mgd or 6.4 mgd plant,.

In addition, there were serious practical obstacles to redefining the Project at that time. The Commission was closely coordinating with its NEPA co-lead agency on all contents of the DEIR. The DEIR, which was published in January 2017, was largely completed in draft form by September 2016, when the Commission approved the WPA. In fact, the DEIR was appreciably drafted, and its organization and scope agreed upon internally between the two co-lead agencies, by the October 2015 approval of the PWM by Monterey One Water.

The implementation of Alternative 5a on its own and without the PWM project and associated water purchase agreement would only partially meet the project objectives because the 6.4 mgd project would not develop enough supply to serve the existing land uses and water entitlements (12,845 afy) baseline or associated peak demands in Cal-Am's Monterey District. However, Alternative 5a in combination with the PWM Project supply would meet the project objectives.

The Commission ultimately adopted Alternative 5a (6.4 mgd desalination plant with 3500 afy from PWM) as the environmentally preferred alternative. At this point, PWM implementation had progressed from the concept stage. Groundbreaking had occurred, significant infrastructure was in place, including the Monterey Pipeline and Pump Station, both approved in D.16-09-021, and most permits had been secured.

MCWD cites *Berkeley Hillside Preservation v. City of Berkeley* (2105) 60 Cal.4th 1086, 1119-1121 for its argument that approval of the water purchase agreement was enough to include it in the Project. That case states that a finding of environmental impacts must be based on the proposed project "as actually approved." (*Id*. at p. 1119.) Although the Commission had approved a water purchase agreement, implementation of the PWM project itself was not approved by the Commission and its future implementation was outside of the control of the Commission. The PWM project, having been approved but not yet implemented, was appropriately included in the cumulative impact analyses for most alternatives evaluated. (It was not included for the 9.6 mgd plant because the EIR logically assumed that, if the PWM project came to fruition, the 9.6 mgd plant would not be built.) (FEIR, § 4.1.7.2, p. 4-1-14 to 4-1-15, and § 5.2.6, p. 5.2-6.

MCWD also relies on *Washoe Meadows Community v. Dept. of Parks & Recreation* ("*Washoe*") (2017) 17 Cal.App.5th 277. In that case, the draft EIR presented five very different alternatives, one of which, or a variation thereof, would later be selected as the project. The EIR did not identify a preferred alternative. The court found that the EIR violated CEQA because it failed to provide the public with an "accurate, stable and finite description of the project." (*Id.* at pp. 285 & 287.) MCWD argues that, here, the FEIR gave conflicting signals to decision-makers and the public about the nature and the

scope of the project, thereby rendering the FEIR "fundamentally inadequate and misleading." (MCWD reh. app., at p. 3, quoting *Washoe*, *supra*, at p. 287)

In the instant case, the FEIR identified the project as a 9.6 mgd facility or as a 6.4 mgd facility if the PWM became a reality. *Washoe* is distinguishable from this case. There were five alternatives in *Washoe*, which were very different from one another. (There was (1) a no project alternative; (2) river restoration with reconfiguration of existing 18-hole golf course; (3) river restoration with a nine-hole golf course; (4) river stabilization with continuation of existing golf course; and (5) restoration of ecosystem and decommissioning of golf course.) (*Washoe*, *supra*, at p. 283.) In this case, it was clear that the project variants were a 9.6 mgd plant without the PWM project, and a 6.4 mgd with the PWM project. As stated above, the projects differed only in size and number of slant wells required, depending on whether the PWM became a real source of water for Cal-Am. The projects here were accurate, stable and finite under *Washoe*. For these reasons, the rehearing applicants have not demonstrated legal error.

b. The Commission did not err in rejecting a smaller project (4.8 mgd desalination plant) as an alternative.

Marina contends that the Decision errs in adopting the FEIR's "fatally flawed" alternatives analysis. (Marina reh. app., p. 94.) Marina argues the FEIR is legally flawed because it failed to evaluate a smaller project option than the 6.4 mgd desalination plant. (Marina reh. app., p. 96.) Marina asserts that a 4.8 mgd desalination plant should have been reviewed as an alternative. This argument presupposes that an additional 2,250 afy of new water from the PWM would be available. (Marina reh. app., p. 96.) As set forth below, we correctly rejected the additional PWM expansion as too speculative.

Marina relies on cases which state that the analysis of alternatives, along with mitigation, is the "core of an EIR." (*Citizens of Goleta Valley v. Board of Supervisors* ("*Citizens of Goleta Valley*") (1990) 52 Cal.3d 553, 564.) One of the EIR's "major functions" is to ensure that "*all reasonable alternatives* to proposed projects are thoroughly

assessed." (*Laurel Heights I, supra,* 47 Cal.3d at p. 400, emphasis in original and citations omitted.)

However, an EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. (CEQA Guidelines, § 15126.6, subd. (a).)

Here, the FEIR did discuss a 4.8 mgd plant in various places. (See FEIR. Section 8.2.13.5, pp. 8.2-117 through 8.2-118 & 8.5-663; and Appendix L.) However, the 4.8 mgd plant was not analyzed as a reduced capacity alternative because it would not meet the basic objectives of the project or the purpose and need for the project, and a further reduced capacity alternative would not likely avoid or substantially reduce significant environmental effects of the project. For these reasons, it was not necessary to address in detail a smaller desalination plant than those already identified as alternatives in the EIR. (See D.18-09-017, Appendix C, CEQA Findings of Facts, pp. C-72 to C-73; Appendix J, pp. 30, 31; and FEIR. pp. 5.4-52 & 5.4-59.)

For the foregoing reasons, Marina has not demonstrated that the Commission violated CEQA in its analysis of alternatives.

3. The Commission did not err in failing to consider the PWM Expansion as a source of supply.

According to the Decision, there was general agreement among parties as to the basic elements of supply available to Cal-Am. Existing water supply consists of 3,376 afy from the Carmel River; 774 afy from the Seaside Groundwater Basin; an average of 1,300 afy from the Aquifer Storage and Recovery; 94 afy from the Sand City Coastal Desalination Project; and 3,500 afy that will be provided by the approved PWM program once it is up and running. This provides a total water supply of 9,044 afy. D.18-09-017, p.

33.) Several additional sources were proposed and rejected by the Commission. (D.18-09-017, pp. 33-36.) The primary contention related to supply is that the Commission erred by failing to include *further* expansion of the supply of water from Pure Water Monterey ("PWM"), formerly Groundwater Replenishment Project ("GWR"), as part of the project or as an alternative. (See discussion below.)

Marina argues that the Commission should have considered additional expansion of PMW beyond the Commission-approved purchase of 3500 afy of water from the PWM project. (Marina reh. app., pp 44-45; 94-97.) Marina contends that an additional 2,250 afy from PWM could be available by the end of 2021. Marina asserts that the failure of the FEIR to consider any alternative standalone project is a critical deficiency in the FEIR. MCWD contends that the Commission impermissibly deferred evaluation of alternatives to Cal-Am after approval of the project. MCWD also argues that evidence showed that the expansion was feasible and that it was legal error to defer evaluation of this alternative. (MCWD reh. app., pp. 6-7)

On August 17, 2017, the Commission asked for additional testimony on plans to expand the PWM project beyond the 3,500 afy already approved ("Expansion"). The response put forward by Monterey Regional Water Pollution Control Agency, now Monterey One Water (or "M1W"), was the most detailed. Three scenarios were included: Scenario A, adding 650 afy of supply; Scenario B, adding 2,250 afy of supply and Scenario C, adding 3,570 afy of supply.[29] This proposal was offered by Monterey One Water during evidentiary hearings held in October and November 2017.

In January 2018, parties filed a motion for additional hearings. Subsequently, the Commission held a status conference in February 2018 at which several options were discussed, including PWM Expansion. No ruling was issued following the status conference.[30] On May 9, 2018, several parties filed a petition with the State Water Resources Control Board (or "SWRCB") requesting modification of the milestones in the

[29] Scenario B, adding 2,250 AFY, turned out to be the most likely prospect.

[30] The FEIR was released on March 28, 2018.

CDO to accommodate progress on the Expansion. On May 11, 2018, with the January 2018 motion still pending, twelve parties filed a joint motion asking the Commission to open a new "Phase 3" of this proceeding.[31] The motion requested that the Commission, prior to issuing a decision on Cal-Am's request for a CPCN, consider incremental supply from the PWM project.

In the meantime, Monterey One Water continued to pursue and examine Scenario B of the PWM expansion, which would add 2,250 AFY of supply. On May 11, 2018, several parties filed a motion asking the Commission to open Phase 3 of this proceeding and to do so prior to issuing a decision on Cal-Am's request for a CPCN in order to consider incremental supply from the PWM project. In a Progress Report attached to that motion, Monterey One Water addressed further expansion of the PWM. Parties claimed that the PWM project could be expanded to supply an additional 2,250 afy. The Commission determined that the Expansion was too uncertain at that point to rely on it as an alternative for additional supply. (D.18-09-017, pp. 36-42.) The Commission also noted that the proceeding has been pending for over six years and the CDO deadline was fast approaching. (D.18-09-017, p. 39.)[32]

> The evidence in the record of this proceeding is not sufficient to convince us that PWM expansion is a viable alternative at this point. Accordingly, there is no reason to consider further PWM expansion in this proceeding.

(D.18-09-017, p. 42; see also, D.18-09-017, Appendix C, CEQA findings, section X. g., p. C-70.)

[31] The following parties filed the motion: Monterey Regional Water Pollution Control Agency, California Unions for Reliable Energy, Citizens for Just Water, Marina, Landwatch Monterey County, MCWD, Monterey Peninsula Water Management District, Planning and Conservation League, Public Trust Alliance, Public Water Now, Sierra Club, and Surfrider Foundation.

[32] As stated above, the SWRCB adopted a CDO on October 20. 2009, ordering an immediate reduction of Cal-Am's unlawful diversions from the Carmel River and setting a December 31, 2016 compliance deadline by which Cal-Am must terminate all unlawful diversions from the Carmel River by December 31, 2016. This deadline was later extended to December 31, 2021.

The FEIR also acknowledged the potential for an PWM Expansion but determined that the alternative was not reasonably foreseeable and was considered speculative. (FEIR, Vol. 8, § 8.7, p. 269; see also § 8.2, p. 108.)

> Although implementation and/or expansion of the PWM project could possibly result in the need for an even smaller than 6.4 mgd desalination facility (or none at all), there is currently no formal proposal to do so. Until such time as an expanded PWM project is proposed by Monterey One Water, and unless environmental documentation is prepared and the CEQA process completed, the alternative is not reasonably foreseeable and is considered speculative at this time.

(FEIR, Ch. 8, § 8.7, p. 269, Resp. to Comment.)

We did not err in the decision to exclude the Expansion project as an alternative based on the speculative nature of the project. CEQA does not require an agency to review a project alternative that is speculative and not reasonably foreseeable. (See, e.g., *Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 566; *Laurel Heights I, supra,* 47 Cal.3d 376 at p. 395.) When the Commission approved the Water Purchase Agreement ("WPA") to secure 3,500 afy of water from the PWM Project for Cal-Am, the Commission applied nine criteria[33] to evaluate the viability of the that project and the reasonableness of the WPA Applying those nine criteria to the PWM Expansion, Monterey One Water acknowledged that the PWM Expansion did not at that time meet all nine criteria. (Monterey One Water Motion to Open Phase 3, Attachment 2, filed May 11, 2018. See also D.18-09-017, p. 42, fn. 120.) Thus, the Expansion was simply not far enough along at the time of the Decision in this case to include it as a Project alternative.

After rejecting motions to further investigate this alternative, the Commission ordered the applicant to evaluate this alternative in the future after approving the project.

[33] The nine criteria came from the Comprehensive Settlement. The Comprehensive Settlement was not adopted by the Commission, but components of the agreement were adopted based on the record independent of the settlement. (D.18-09-017, p. 99.) Briefly, the nine criteria are: Final EIR, permits, source waters, water quality and regulatory approvals, PWM project schedule compared to Desalination schedule. state of PWM project engineering. PWM project funding; reasonableness of WPA terms, and reasonableness of the PWM revenue requirement. (See Attachment 2 of May 11, 2018 Motion, pp. 14-42 for details.)

MCWD argues that this is error because CEQA does not allow an agency to delegate the investigation of potentially feasible alternatives to a project proponent. (MCWD reh. app., pp. 6-7.) Rather, an agency must independently participate, analyze, and discuss alternatives in good faith. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1460.)

The Commission was correct in rejecting the Expansion at the time because its implementation was uncertain. However, it was also reasonable for the Commission to direct Cal-Am to look into the Expansion alternative in the future. Contrary to MCWD's argument, the Commission did not violate CEQA by asking the project proponent to investigate a feasible alternative. Although we did direct Cal-Am to enter into negotiations with PWM as to the potential cost, schedule, and amount of water that might be supplied by PWM Expansion in the future, the Commission retained its oversight of this activity. The Commission further directed Cal-Am to file an advice letter stating whether it intends to file an application to pursue a Water Purchase Agreement for additional water to be supplied by the Expansion. (D.18-09-017, p. 43.)

For all of the foregoing reasons, the Commission did not err in failing to consider the PWM Expansion as a source of supply in this proceeding.

4. The Commission adequately analyzed alternative intake technologies.

MCWD contends that the FEIR and the Decision failed to adequately analyze alternative intake technologies. MCWD argues that the FEIR improperly identified Environmentally Sensitive Habitat Areas (or "ESHA") and groundwater impacts as less than significant. (These issues are addressed in Discussion Section B.6.) Further, MCWD contends that, if a desalination component were necessary to meet Cal-Am's demand, there are several alternative subsurface intake technologies (e.g. Horizontal Wells and Ranney Wells) that are feasible and would avoid or reduce the Project's significant ESHA and Groundwater impacts. MCWD asserts that, most notably, the FEIR's failure to analyze Horizontal Directional Drilling (or "HDD") as an alternative to slant wells violated CEQA. MCWD cites *Save Round Valley Alliance v. County of Inyo* (2007) 157 CalApp.4th 1437,

1457 [If an alternative is identified as at least potentially feasible, an in-depth discussion is required].)

The FEIR considered thirteen intake options. (See FEIR, Ch. 5, § 5.3, pp. 6, 9-12; see also FEIR, Appendix 12.) Certain alternative intake options were not considered in detail because they would result in increased terrestrial biology, marine biology and groundwater impacts compared to slant wells. (See FEIR, Appendix 11, pp. 4-7.) The remaining intake options carried forward were grouped into three categories: alternative slant well location, alternative subsurface well technology, and open-water intake. Alternative subsurface well technology (Ranney Wells) was not carried forward for detailed analysis because there was no demonstrable difference in the environmental effects between Ranney Wells and slant wells. Two categories of intake alternatives different from the proposed Project were carried forward - slant wells at Potrero Road and open-water intakes. However, neither of these options is environmentally superior to slant wells at the CEMEX site.

Horizontal wells were eliminated from further consideration on multiple feasibility grounds, including failure to meet Project objectives and failure to reduce significant environmental impacts. (FEIR, Ch. 8, § 8.5, p. 719; see also FEIR, Appendix 11, p.7.) For these reasons, MCWD has not demonstrated that the analysis of intake technology was inadequate.

5. The FEIR's analysis of growth-inducing impacts complied with CEQA.

Marina contends that the FEIR fails to adequately evaluate growth-inducing impacts. (Marina reh. app., pp. 79-84.) The FEIR found that the Project will not result in significant direct impacts on growth but could result in significant indirect impacts on growth. That is because the Project would remove some of the water supply limitations that are an obstacle to growth, thereby enabling a degree of growth under the approved general plans within the area served by the Project. (FEIR, Ch. 6, § 6.1, p. 44.) This contention has no merit.

First, Marina contends that the FEIR analysis of the Project water that is available for growth is flawed because it used the wrong demand figures in calculating the surplus. (Marina reh. app., pp.79-81.) Marina argues that the FEIR erred in estimating existing demand as 12,270 afy, which was the demand in 2010. (See FEIR, Ch. 2, § 2.3.1.1, p. 11.) Marina claims that the FEIR ignores and failed to discuss substantial expert and other testimony in the October/November 2017 evidentiary hearings that demonstrated that the use of this 2010 figure had no valid evidentiary basis. Marina asserts that, as a result, the current demand is overstated by almost 3,000 afy. (Marina reh. app., p. 80.) Further, Marina argues that the FEIR adopts Cal-Am's water demand "wish list," adopting an additional 2,005 afy for tourism rebound, Pebble Beach entitlements, and legal lots of record. The resulting figure is an estimated demand of 14,275 afy in the FEIR, Ch. 6, § 6.3, pp. 12-13; and 14,355 afy adopted by the Decision (p. 195 [Conclusion of Law 17]). (Marina reh. app., p. 80.) As discussed in the section on demand, Marina has not demonstrated that the Commission used incorrect demand figures.

Marina also claims that the FEIR adopted a calculation of "surplus water" for growth inducement that is not based on approved general plans. (Marina reh. App., p. 81.) According to Marina, because Cal-Am's growth projections do not "directly compare" with the growth in general plans, the FEIR instead used a 12-year-old (2006) outdated plan of the Monterey Peninsula Water Management District (or "MPWMD") to justify the larger water supply. (Marina reh. app., p. 81 citing FEIR, Ch. 6, § 6.3, pp. 35-37.) Marina cites to *County of Amador v. El Dorado County Water District* ("*County of Amador*") (1999) 76 Cal.App.4th 931, 949-951) in support of its claim. In that case, the Court found that a water project proposing to meet needs of a *draft* general plan precluded proper review of significant growth issues.

Finally, Marina argues that the FEIR failed to take steps to avoid, minimize, and mitigate these growth inducing impacts and fails to demonstrate that these impacts are unavoidable. Marina asserts that the FEIR essentially takes the position that the Lead Agencies have no authority to mitigate these impacts because "they do not have the

authority to make land use decisions or affect or approve growth." (Marina reh. app., p. 83, citing FEIR, Ch. 6, § 6.3, p. 42.)

These arguments do not demonstrate legal error. Marina appears to misunderstand pertinent law, the way that the growth-inducing impact analysis was performed, and the role of MPWMD. The point of the FEIR's growth-inducing analysis was to determine whether the project would result in any "left-over" water, after use of water for the project's stated purposes, to support additional growth within the Cal-Am service territory. Then the FEIR considered the physical effects that would be generated by such induced growth (all of which would fall within the growth estimates of the general plans of the cities and Monterey County within the service territory). (FEIR, Section 6.3.5.)

> To evaluate the proposed project's consistency with growth anticipated by these local planning agencies, the analysis compares project supply that would be available to meet future demand with an analysis of future water needs prepared by the MPWMD in collaboration with service area jurisdictions.

(FEIR, p. 6-12.)

The MPWMD plays a key role in the relationship between water supply (such as the Project) and growth in the region because the MPWMD allocates water among the pertinent jurisdictions. In the areas served by Cal-Am, it is the responsibility of the cities or Monterey County to approve or deny development proposals within their jurisdictions. In addition, on the Monterey Peninsula, the MPWMD is responsible for allocating water to the jurisdictions within its boundary (which includes the Cal-Am service area), issuing water permits, and approving new water distribution systems or expansions.

> Therefore, when deciding whether to approve or deny development projects, including whether water would be available to serve the projects, the jurisdictions within the MPWMD's boundary take into account the MPWMD's allocation and distribution determinations and permits.

(FEIR, p. 6-6; see also pp. 6-9 and 6-10 regarding the role of MPWMD.)

The last time that MPWMD undertook a water demand analysis for future growth within the Cal-Am service territory was in 2006. MPWMD used the local jurisdictions' general plans to determine how much water would be needed to support the planned growth. The 2006 MPWMD estimate was a comprehensive assessment of long-term water needs of customers in Cal-Am's Monterey District main distribution system based on information obtained from the service area jurisdictions. It included demand associated with expected remodels within the jurisdictions, and with anticipated development of single-family and multi-family residences, secondary units, and non-residential development expected to occur under each jurisdiction's general plan. The MPWMD translated the growth estimate provided by the jurisdictions into water demand using water use factors for different land use categories. (FEIRS, p. 6-35.)

Thus, it is MPWMD that makes the determination as to how much water is needed to enable growth to take place. The 2006 assessment is the most up-to-date analysis of how much water would be required to support growth under the local general plans. It is logical to use the expert agency's most recent analysis in order to determine the amount of growth that the project might induce within the region. MPWMD has not yet begun to allocate water associated with the project and most of the general plans considered in the 2006 evaluation are still in effect. (FEIR, p. 6-17.) Thus, the EIR used the 2006 MPWMD analysis as the basis for comparison, adjusted to account for the growth projected by several updated (post-2006) general plans and a conservative conservation factor, to determine the amount of growth that could be supported by the project water supply. (FEIR, p. 6-35, fn. 32.) This iterative and logical approach, relying on the most current data from the expert water demand agency, is supported by the record evidence.

Contrary to Marina's contention, *County of Amador, supra,* 76 Cal. App. 4th 931, is not applicable here. *County of Amador* involved a water supply project which was to provide sufficient water for future growth. The water district used a draft general plan to decide how much water would be needed for buildout, rather than employing an adopted general plan. The court found that approving a water program before enacting a general

plan "places the proverbial cart before the horse." (*Id.* at p. 949.) The circumstances here are very different. The EIR employed water demand rates developed by the expert agency to determine whether the project would result in extra water that could support growth already planned under adopted general plans. For all the above reasons, Marina's allegations do not demonstrate legal error.

6. The FEIR's analysis of habitats and sensitive ecosystems and land use plans complied with CEQA.

Marina and MCWD contend that the designation and assessment of significant environmental impacts for habitats and sensitive ecosystems, including effects to ESHA, are inadequate and/or violate CEQA. (Marina reh. app., pp. 61-64; MCWD reh. app., at pp. 10-11.)

Marina and MCWD also challenge the FEIR's analysis of the Project's potential inconsistencies with Marina's Local Coastal Land Use Plan (or "LCLUP"). (Marina reh. app., pp. 62-64; MCWD reh. app., pp. 10-11.) The LCLUP contains standards that govern development in these areas. Marina contends that because it will have the authority to interpret its LCLUP, and to determine exactly where ESHA is located within the City's coastal zone, the ESHA determinations in the EIR are at best "potential" or "estimated." (Marina reh. app, p. 61.)

Marina argues that the FEIR concluded, without evidentiary support, that these impacts to ESHA will be reduced to less than significant levels primarily by implementation of two mitigation measures (MM 4.6-2a and 4.6-2b). (FEIR, Ch. 4, § 4.6, at p. 4.6-197.) Marina states that these mitigation measures require consultation with local agencies and the California Coastal Commission and "unspecified" restoration and mitigation activities that will be contained in a Habitat Monitoring and Mitigation Plan (or "HMMP"). Marina argues the mitigation measures violate CEQA because they improperly defer mitigation and fail to identify appropriate performance standards. (Marina reh. app., 62.) Marina concludes that the impact was not properly mitigated and should have been identified as significant and unavoidable. MCWD similarly argues that the mitigation measures are inadequate because the Commission improperly adopted a mitigation

measure that requires Cal-Am to coordinate with Marina *after* Cal-Am applies for permits, rather than *during* the environmental review process. (Marina reh. app., pp. 61-64; MCWD reh. app., at pp. 10-11.) However, contrary to these claims, Commission staff did coordinate with Marina on multiple occasions during the preparation of the Final EIR (between April 18 and July 19, 2017), particularly as it relates to ESHA. (See D.18-09-017, Appendix J, Exhibit A.)

Marina states that the City of Marina is a certified local agency under the California Coastal Act (Pub. Resources Code, § 30000 et seq.). Marina contends that the FEIR's analysis of coastal and land use impacts "that directly bear on the City's Coastal Act jurisdiction is contrary to law and cannot stand." (Marina reh. app., p. 61.) Both Marina and MCWD claim that the Project violates Public Resources Code section 30240, which provides that only uses dependent on resources shall be allowed in ESHA or primary habitats.[34] (Marina reh. app., p. 61 MCWD reh. app., at pp. 10-11.) MCWD further contends that because of such violation, the Project is infeasible. Marina has not demonstrated legal error.

Public Resources Code section 30240(a) states:

> Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed in those areas.

The FEIR acknowledged that the slant wells are sited directly in ESHA and that the Project is not ESHA-dependent. (FEIR, Ch. 4, § 4.6, pp. 197, 235.) This would appear to violate the Coastal Act. However, Public Resources Code section 30260 states:

> [W]here 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 and 30262 if (1) alternative locations are infeasible or more environmentally

[34] "ESHA" (used in the California Coastal Act) and "primary habitat" (used in City of Marina's Local Coastal Program) have essentially the same meanings.

> damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.

Here, the Project meets all three requirements: (1) The alternative locations are infeasible or more environmentally damaging (see FEIR, Sections 5.3.3, 5.3.6.1, 5.4.3 and 5.4.8); (2) not allowing the water supply project to proceed would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible. The Coastal Commission relied on this provision to permit the existing test slant well, overriding the City of Marina's finding that the test well violated the Coastal Act. (See FEIR, § 4.6, pp. 235-236.)

The FEIR's quantitative ESHA analysis complies with the decision in *Banning Ranch Conservancy v. City of Newport Beach* ("*Banning Ranch II"*) (2017) 2 Cal.5th 918, 924, which is cited by MCWD. In that case, the court stated that an EIR must identify areas that might qualify as ESHA under the California Coastal Act, and account for those areas in its analysis of project alternatives and mitigation measures. The court held that the EIR under review in that case was inadequate because it omitted *any* consideration of potential ESHA, as well as ESHA already identified.

In contrast, the FEIR in this case acknowledged the ESHA issue and addressed it through proposed mitigation measures. In *Banning Ranch Conservancy v. City of Newport Beach* ("*Banning Ranch I"*) (2012) 211 Cal.App.4th 1209, 1234, the Court of Appeal found an EIR sufficient where it "adequately flagged potential inconsistencies [with the Coastal Act] and addressed them in advance through proposed mitigation." (*Id.* at p. 1234.)[35]

[35] The California Supreme Court denied review of that decision, and later cited it approvingly in *Banning Ranch II*. (*Banning Ranch II, supra*, at pp. 939-40.) In addition, the Supreme Court made it clear that a lead agency need only "discuss potential ESHA and their ramifications for mitigation measures and alternatives where there is credible evidence that ESHA might be present on a project site. A reviewing court considers only the sufficiency of the discussion." (*Id.* at p. 938.)

Finally, contrary to arguments by the rehearing applicants, the Commission is not required to defer to the City of Marina's ESHA determinations. Under the Coastal Act, the local coastal program and permits issued by local agencies pursuant to the Coastal Act "are not solely a matter of local law, but embody state policy." (*Charles A. Pratt Construction Co. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075. Thus, "the Legislature made the [Coastal] Commission, not the [local government], the final word on the interpretation of "local coastal programs." (*Id.* at p. 1078.)

Both Marina and MCWD contend that the FEIR failed to implement avoidance measures that could reduce significant impacts. (Marina at pp. 63-64; MCWD at pp. 10-11.) Marina and MCWD have not demonstrated legal error.

The FEIR presented two types of impact analyses and conclusions related to ESHA. The first is *physical* environmental impacts analyzed under Impact 4.6-2 (Result in Substantial Adverse Effects on Riparian Habitat, Critical Habitat, or Other Sensitive Natural Communities During Construction) and Impact 4.6-7 (Result in Substantial Adverse Effects on Riparian Habitat, Critical Habitat, or Other Sensitive Natural Communities During Project Operations). The second type of impact - *inconsistencies with local policies or plans* - was evaluated under Impact 4.6-4 (Be Inconsistent with Any Local Policies or Ordinances Protecting Biological Resources, such as a tree preservation policy or local tree ordinances).

The FEIR fully analyzed the impacts to primary habitat/ESHA and determined that, with mitigation, there would be no significant *physical impacts* to ESHA. (See FEIR Vol. 4, § 4.6.) As noted in the EIR and in responses to comments by both MCWD and Marina, the physical impacts on primary habitat/ESHA, addressed under Impacts 4.6-2 and 4.6-7, are not significant and unavoidable. In terms of the physical environment, the FEIR identified ten mitigation measures which ensure that impacts to potential ESHA would be less than significant. (FEIR, Vol. 4, § 4.6, pp. 4.6-216 to 4.6-220.) CEQA allows the deferral of mitigation measures, as long as the agency has committed itself to mitigation and to specific performance standards. (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1126; see also *Communities for a Better*

Environment v. City of Richmond (2010) 184 CalApp.4th 70, 93-94.) Contrary to Marina's argument, Mitigation Measure ("MM") 4.6-2a and MM 4.6-2b contain detailed performance standards to ensure adequate mitigation and do not improperly defer mitigation. The implementation of mitigation measures would reduce impacts on special-status species habitat by requiring implementation of appropriate compensation and development and implementation of a mitigation and monitoring plan for temporarily and permanently impacted special-status species habitat to ensure that temporary and permanent losses are fully compensated as required.

Regarding the second type of impact - *inconsistencies with local policies or plans* – the FEIR finds that there is a significant impact. This is because the slant wells would be inconsistent with the Marina LCLUP policy regarding development in primary habitat. The FEIR further finds that the impact would be unavoidable because no version of a project with slant wells at CEMEX could avoid conflicting with this policy. However, this was also the case regarding the test well. Marina denied the coastal development permit for the test well due to the LCLUP inconsistency. Nevertheless, the Coastal Commission found that despite such inconsistency, the Coastal Commission could rely upon the Coastal Act to approve the test well. (FEIR, pp. 4.6-235 to 236.)

For all the reasons stated above, the analysis of ESHA impacts complies with CEQA and is supported by evidence in the record.

7. The FEIR's analysis of terrestrial species complied with CEQA.

Marina argues that the FEIR's analysis of key ecosystem and species impacts is inadequate and that the proposed mitigation measures do not meet CEQA requirements. (Marina reh. app., pp. 64-66.) Marina contends that mitigation measures to protect the Western snowy plover (a threatened species under the federal Endangered Species Act (or "ESA") and a protected species in California) and Smith's blue butterfly (endangered under the ESA) are inadequate. Both species are found at or near the Project site. Marina's argument lacks merit, and thus, does not demonstrate legal error.

The FEIR found that the Project will have a significant impact on the snowy plover and the blue butterfly, but concluded that such impacts will be mitigated to a less that significant level. The mitigation measures adopted include general measures for worker training and awareness, biological monitoring, avoidance of resource and habitat areas, and measures to control the spread of invasive species. There are also specific measures (including measures revised to address CDFW's comments on the DEIR/EIS) to reduce impacts to particular species, including the plover and blue butterfly. (See D.18-09-017, Appendix C, pp. 17-29, and Appendix D, pp. 15-39.)

There is one mitigation measure, MM 4.6-1d, that is specific to the snowy plover. This measure (1) limits construction work to the non-breeding season unless otherwise approved by the USFWS, (2) incorporates future avoidance and mitigation measures recommended by the USFWS, (3) provides survey protocol for conducting work during the breeding seasons, and (4) provides for compensation for permanent loss of western snowy plover habitat at a minimum ratio of 3:1 which may be in the form of permanent on-site or off-site habitat creation, enhancement, restoration, or preservation. (FEIR, Ch.4 § 4.6 175-178.) There is a similar mitigation measure, MM 4.6-1f, that is specific to Smith's blue butterfly.

MM 4.6-1d would ensure that impacts to the snowy plovers are reduced to the maximum extent feasible by limiting work to the non-breeding season, unless approved by the USFWS, and by incorporating avoidance and minimization measures required as part of the federal Endangered Species Act section 7 consultation process. This measure was developed based on knowledge of western snowy plover biology, a review of similar measures that have been required by USFWS and other CEQA/NEPA lead agencies, and experience developing and implementing similar measures. (See e.g. D.18-09-017, Appendix C, pp. C-17 to C-22.)

Marina nevertheless argues that the analysis and mitigation measures are insufficient under CEQA because there is no avoidance of plover habitat areas. Marina argues that Project construction can occur during the breeding season and Project operational impacts are expected to continue for the life of the project. Thus, according to

Marina, this impact is significant even with the proposed mitigation. (Marina reh. app., p. 65.) Marina similarly takes issue with MM 4.6-1f regarding Smith's blue butterfly.

Mitigation Measure 4.6-1d describes under what circumstances the USFWS might approve work during the breeding season and describes the steps to obtaining USFWS approval during the breeding season in subpart 3. MM 4.6-1f describes the avoidance and minimization measures that Cal-Am would be required to take to ensure that impacts to the Smith's Blue Butterfly are avoided, such as installing visual and noise barriers, limiting the type of construction, installing noise controls on equipment, and other measures that USFWS may require. (FEIR, pp. 4.6-180, 181.)

Marina also argues that it is improper to defer the formulation and specification of mitigation measures to a future time. (Marina reh. app., p. 65.) As stated above, CEQA allows the deferral of mitigation measures in some circumstances, so long as the agency has committed itself to mitigation and to specific performance standards. (*Gray v. County of Madera, supra,* 167 Cal.App.4th 1099, 1126; see also *Communities for a Better Environment v. City of Richmond, supra,* 184 CalApp.4th 70, 93-94.) MM 4.6-1d includes enforceable criteria to be implemented if nests are discovered and stipulates that work may proceed, subject to USFWS approval, if the work would not cause an adult to abandon an active nest or young or change an adult's behavior so it could not care for an active nest or young, or as allowed within the take provisions authorized by USFWS. With respect to wintering plovers, the revised measure clarifies that the appropriate performance standard is to ensure that wintering plovers are not directly impacted by construction activities.

Finally, Marina contends that it has not been demonstrated that the proposed compensatory mitigation is "feasible." (Marina reh. app., p. 65.) Marina does not offer any evidence to support this contention. Moreover, the requirement is sufficiently broad - compensation for permanent loss of western snowy plover habitat in the form of permanent on-site or off-site habitat creation, enhancement, restoration, or preservation – that it appears unlikely that such compensation would be infeasible.

For all the above reasons, the record indicates that the mitigation measures regarding the Western snowy plover and Smith's blue butterfly are sufficient to reduce the impact to these species to less than significant and meet the requirements of CEQA.

8. The FEIR's analysis of marine resources complied with CEQA.

Marina argues that the marine resources section of the FEIR was legally inadequate. (Marina reh.app., pp. 74-76.) Marina first contends that the Commission failed to respond to significant environmental issues raises in comments on the Draft EIR. This argument is without basis and is addressed in another section of this order. (See Discussion Section B.7.)

Marina then asserts that the FEIR failed to include an adequate description of the existing marine environmental baseline, as required by CEQA and the California Ocean Plan. Marina alleges: (1) The Study Area was too small; (2) there was not enough information in the baseline survey of the Study Area; (3) the FEIR failed to conduct a thorough analysis of essential fish habitat under the Magnuson Act; and (4) the FEIR did not properly assess the impacts of infiltration, as opposed to impingement.

In the Decision, we found that the impacts to marine resources are less than significant. (D.18-09-017, p. 75.) Contrary to Marina's argument, the FEIR properly assessed marine resources. First, the study area for marine resources encompasses the near-shore waters (within 5 miles from shore) of Monterey Bay and extends from the Salinas River southward to the northern limits of Sand City, well beyond the slant wells at the CEMEX site and surrounding the Monterey One Water's existing ocean outfall. (FEIR, Vol 8, § 8.5, p. 584.) This area is several times greater than the area of the Project's potential impacts and is consistent with CEQA. (See Pub. Resources Code, § 21060.5 defining "environment.")

Second, Marina argues that there was not enough information in the baseline survey of the Study Area. However, the baseline for marine resources is quite detailed. The FEIR described in detail the regional oceanographic conditions and marine biological resources of Monterey Bay within the Monterey Bay National Marine Sanctuary and

provides specific information about the habitats and resources near the Project's slant wells and brine discharge facilities. The discussion of the environmental setting includes information about long-term and seasonal oceanographic conditions, marine habitat and communities, plant and animal species presence and abundance, and sensitive biological resources. The FEIR provided specific information about water quality and marine resources in the Project area at the time of the notice of preparation of the FEIR, which constituted the baseline for environmental review, as supplemented by additional information where appropriate. (See FEIR, Vol 4, § 4.5, pp. 2-29, marine biological resources and Vol 8, § 8.2, pp. 63-64 [determinations of baseline conditions].)

Third, Marina contends that the FEIR failed to conduct a thorough analysis of essential fish habitat (or "EFH") under the Magnuson-Stevens Fishery Conservation and Management Act (or "Magnuson Act") (16 U.S.C. §§ 1801-1884). On the contrary, the FEIR assessed the potential of Magnuson Act fish species to occur in the Project study area. (FEIR, Ch. 4, § 4.5, pp. 20-23, 24-25 27.) The FEIR fully analyzed the EFH and determined that the project will not adversely impact EFH. (FEIR, Ch. 4, § 4.5, p. 31.)

Fourth, Marina argues that the FEIR failed to properly assess the impacts of infiltration. *Infiltration* is the process and rate by which seawater is drawn into the seafloor. This is distinct from *impingement*, which refers to the trapping of organisms against the seafloor because of the rate of infiltration.

Marina contends that public comments on the DEIR pointed out that *infiltration* of organic matter could result in significant environmental effects. However, Marina claims that the responses to these comments did not respond to concerns about *infiltration*, but instead reiterated that clogging of the seafloor due to the *impingement* of organic matter would not occur. Marina further contends that "[o]nly on the day before the Commission's vote on the Project, in a new Appendix J" did the Commission directly respond to prior comments on the DEIR and FEIR about infiltration. (Marina reh. app., p. 76.) Marina claims that the Commission's finding that infiltration would not accumulate at levels that would result in a significant impact is not supported by the record.

A comment was submitted alleging that the DEIR incorrectly calculated the rate of infiltration at the seafloor. The FEIR stated that infiltration will occur, although not at the rate submitted by the commenter. (FEIR, § 8.6.2.4, at pp 8.6-512 to 514.) The FEIR also stated that, even if the commenter's infiltration rate was accurate, such infiltration would not result in impingement. (FEIR, pp. 8.6-514 to 515.) Therefore, the FEIR correctly concluded that the impingement of organisms and organic matter on the seafloor would not occur.

In addition, Marina argues that, in Appendix J, the Commission improperly cited to numerous studies on infiltration and inserted a new analytical table, none of which were included in the FEIR, thus depriving parties and the public of a meaningful opportunity to review the response, the studies, and the table. Marina's argument lacks merit. Appendix J merely responds to additional claims that were not presented in comments on the DEIR. Appendix J demonstrates that data included in the new claims were inappropriate for and not relevant to the Monterey Bay or the proposed Project. (See D.18-09-017, Appendix. J, pp. 24-30; see also, Discussion Section A.9., noting that Appendix J did not constitute a material change in the proposed decision or substantive additions to the findings of fact, conclusion of law or ordering paragraphs requiring further comments to be filed.)

Based on the above, Marina's allegations regarding marine resources does not demonstrate legal error.

9. The FEIR's analysis of cultural and paleontological resources complied with CEQA.

Marina asserts that the FEIR's analysis of cultural and paleontological resources is incorrect. (Marina reh. app., p. 76.) Marina contends that, despite Marina's comments on the DEIR, the Decision found that the impacts to cultural and paleontological resources are less than significant. Marina alleges that, in ignoring Marina's comments, the Commission has failed to proceed in a manner required by CEQA.

The FEIR states:

> No historical resources listed in or eligible for listing in the California Register or historic properties listed in or eligible for listing in the National Register are within the direct or indirect [areas of potential effects] of all project components. Therefore, no impact on historical resources or historic properties would result from construction of any project facilities.

(FEIR, Ch.4, § 4.15.6.1, p. 45.)

Marina states that it pointed out in comments (Comment Marina 23) to the DEIR that the Lapis Sand Mining Plant was found to be eligible for listing as a historic district and that the DEIR failed to address the impacts of the Project on contributing historic structures. The Lapis Siding is a single- and double-track rail siding that connected the Lapis Sand Mining Plant with the former Southern Pacific Monterey Branch railroad to the east, and is a contributing resource to the Lapis Sand Mining Plant historic district. The Lapis Siding was identified as extending northwesterly from the eastern boundary to the Lapis Sand Mining Plant for about 285 feet "before it becomes covered with same and dirt." (Marina reh. app., p. 77, citing Marina Comments, FEIR, Ch. 8, § 8.5.1 at p 8.5-80.)

Marina argues that the Lapis Siding is documented on both sides of the proposed Source Water Pipeline and "becomes covered with sand and dirt" in the area that extends across the location of this proposed project component. Marina argues that the FEIR failed to recognize that the Lapis Siding is likely covered by sand and dirt under the CEMEX access road. Thus, Marina argues, locating the Source Water Pipeline near the CEMEX access road does not avoid direct impacts to this resource -- a direct impact that has not been addressed in the FEIR. (Marina reh. app., p. 77.)

Marina also contends that, while not mentioned in response to Comment Marina-123, other sections of the FEIR were revised in response to comments received on the DEIR to now reflect horizontal directional drilling (or "HDD") techniques in the area following the CEMEX access road. Marina argues that this violates CEQA, which does not allow an applicant to insert mitigation into the FEIR, disguised as a project description change, in response to comments that identify a previously unidentified potentially significant impact. (Marina reh. app., p. 78.)

Marina's arguments are without merit. The fact that the Lapis Sand Mining Plant is eligible for the National Register of Historic Places does not make the analysis incorrect. The FEIR explained that, although the Project's proposed Source Water Pipeline would be installed within the boundaries of the historic district, the buildings and structures that contribute to the district are outside the direct and indirect areas of potential effects for the proposed project. (FEIR, Ch. 4, § 4.15, p. 45.) This includes the Lapis Siding. (FEIR, p. 4.15-23.) Furthermore, the California State Historic Preservation Officer concurred with the finding of no adverse impacts to historic properties. (FEIR, p. 4.15-23 and Appendix O.)

Extensive surveys were performed by Commission consultants to identify any cultural or historic resources with the Project APE. The surveys noted contributing resources to the Lapis Sand Mining Plant historical district, such as the Sorting Plant, Lapis Siding, and Canal Flume, but found no evidence to suggest that there were undiscovered underground resources that could be affected by the Source Water Pipeline or other elements of the Project construction. (FEIR, Ch. 4, § 4.15, pp. 21-23.) Out of an abundance of caution, the FEIR conservatively acknowledged the potential for uncovering previously undocumented resources in the Project vicinity and incorporates mitigation to reduce or eliminate impacts to such resources. (FEIR, Ch. 4, § 4.15, pp. 47-50.)

Finally, the additional portion of trenchless construction of the Source Water Pipeline near the CEMEX access road is not additional mitigation. Rather it is a minor modification that does not result in substantially greater significant environmental impacts. Even if it were mitigation, recirculation is not required. (*Long Beach Sav. & Loan Ass'n v. Long Beach Redevelopment Agency* (1986) 188 Cal.App.3d 249.) As the court stated there:

> We find nothing in CEQA commanding respondents to circulate for public review *additional* mitigation measures made in *response* to comments by those who oppose the project. To allow the public review period to proceed *ad nauseam* would only serve to arm persons dead set against a

> project with a paralyzing weapon -- hired experts who can always "discover" flaws in mitigation measures.

(*Id.* at p. 263, original emphasis.)

10. The FEIR's analysis of air quality and greenhouse gas emissions complied with CEQA.

Marina alleges that analyses of air quality and greenhouse gas emissions (or "GHG") fail to comply with CEQA. (Marina, reh. app., pp. 86-89.) The FEIR found that air quality impacts are significant and unavoidable and found that GHG emissions could be mitigated to less than significant. (D.18-09-017, pp. 75-76.)

Marina first asserts that air quality and potential health risks are part of "community values" that are "instructive" to the Commission's evaluation of EIR project alternatives and impacts. (Marina app. reh, p. 84, citing D.09-12-044, p. 46 [granting CPCN for Tehachapi Renewables Transmission Project ("TRTP")].)[36] Marina quotes testimony by Mayor Delgado and City Manager Long of the City of Marina indicating that protection from air emissions and GHG that impair the air quality and contribute to global climate change, including sea level rise, are a particular and important concern to the City of Marina. (Marina reh. app., p. 84, citing Ex. MNA-1, at pp. 13-14 Marina/Delgado/Long).)

Marina contends that the mayor and city manager confirmed that "[t]he degradation of . . . air quality will fundamentally affect core values of our way of life and likely would adversely affect our economy, which depends on the availability of our resources." (Marina reh. app, p. 84, citing Ex. MNA-1, at pp. 20-21 (Marina/Delgado/Long).) With respect to GHG emissions, Marina states that these witnesses also described how Marina, as a coastal city, "is particularly attuned to the

[36] Marina states this decision was later "reversed for ignoring 'community values'" under Public Utilities Code section 1002. (Marina reh. app., p. 84, fn. 398.) In *In the Matter of the Application of SCE for a CPCN Concerning the Tehachapi Renewable Transmission Project* [D.13-07-018], the Commission modified its previous decision and ordered undergrounding of the Chino Hills portion of the TRTP based on community values under section 1002. (*Id.* at pp. 18-21.) The Commission further found that "D.09-12-044 effectively ignores community values." (*Id.* at p. p. 66, Conclusion of Law 4.)

individual and cumulative effects of GHG emissions because of sea level rise, one of the major global climate consequences of such emissions, can have a devastating impact on coastal cities." (Marina reh. app, p. 85, quoting Ex. MNA-1, at pp. 18 (Marina/Delgado/Long).) The Commission's analysis of community values is addressed elsewhere in in this order. (See Discussion Section A.11.) As stated there, the Commission's analysis of community values complied with the law.

Regarding the FEIR's analysis of air quality and GHG emission, Marina alleges that the FEIR violated CEQA because it did not adopt other mitigation measures that would reduce the air quality impacts. (Marina reh. app., pp. 85-87.) In particular, Marina argues that MM 4.10-1a is inadequate because it requires Cal-Am to make a "good faith effort" to use available construction equipment that meets the highest USEPA-certified tiered emission standards. Marina claims this is inadequate because it does not "require" the use of such equipment. (Marina reh. app., p. 86.)

The mitigation measure in question was revised to address concerns such as those raised by Marina. The mitigation measure was revised to require that Cal-Am make a good faith effort to use construction equipment that meets Tier 4 (as opposed to Tier 3) standards, or be alternatively powered (e.g., with electricity, natural gas, propane, methanol and ethanol blends, or gasoline). The reason that the "good faith effort" standard is included rather than merely a flat-out requirement is that the availability of high-tiered and non-diesel-powered construction equipment at the commencement of construction of the project is currently unknown. (FEIR, p. 8.5-602.). The Commission will be overseeing compliance with this mitigation measure. In order for Cal-Am to not use the specified equipment, Cal-Am must provide to the Commission documentation from two local heavy construction equipment rental companies that indicate that the companies do not have access to higher-tiered equipment or alternatively powered equipment for the given class of equipment. Such documentation shall be provided to the Commission at least two weeks prior to the anticipated use of those pieces of equipment. (FEIR, Ch. 4, MM 4.10-1a.)

Marina also contends that the FEIR does not contain all feasible mitigation measures. Among other things, Marina objects to the response in the FEIR to Comment

Marina-97, which stated that some alternatives are not feasible because they would extend the construction period substantially. The FEIR incorporated changes to mitigation measures in response to comments where appropriate. The FEIR also explained that certain mitigation measures were "infeasible because they would extend the construction period substantially." (See, e.g., FEIR, Ch. 8, § 8.5, pp. 602-603.) This is a valid and reasonable response to comments and is consistent with CEQA. Because of the CDO, the time to complete the project was critical.

The FEIR found that, with mitigation, the impact of GHG emissions will be less than significant. (FEIR, Ch. 4 § 4.11.5, p. 15.) However, Marina alleges that the GHG emissions are not adequately analyzed. (Marina app. Reh, pp.87-89.) First, Marina contends that the mitigation measure, MM 4.11-1(b), illegally provides Cal-Am with unfettered discretion to decide how it will meet the required net zero GHG emissions.

MM 4.11-1(a) requires Cal-Am to submit a GHG Emissions Reduction Plan to the Commission. Once that Plan is approved, it is binding on Cal-Am. (FEIR, Ch. 4, § 4.11, p. 19.) MM 4.11-1(b) provides:

> Renewable Energy. CalAm shall ensure that the approved project's operational electricity use results in net zero GHG emissions. In meeting this net zero GHG emissions requirement, subject to the procedures below, CalAm shall adhere to the following loading order:
>
> (1) Obtain renewable energy from on-site solar photovoltaic (PV) panels and/or the adjacent Monterey Regional Waste Management District (MRWMD) landfill-gas-to-energy (LFGTE) facility.
>
> (2) Procure renewable energy from off-site sources within California via purchases from one or more of the following: (a) PG&E, (b) an Electric Service Provider under Direct Access service, or (c) Monterey Bay Community Power and its successors and assigns.
>
> (3) Procure and retire Renewable Energy Certificates (also known as RECs, green tags, Renewable Energy Credits, Renewable Electricity Certificates, or Tradable

Renewable Certificates) for projects or activities in California.

(4) Procure and retire Carbon Offsets, in a quantity equal to the GHG emissions attributable to the project's operational electricity use. "Carbon Offset" means an instrument issued by an Approved Registry and shall represent the past reduction or sequestration of one metric ton of CO2e achieved by any GHG emission reduction project or activity within California. "Approved Registry" means: (i) the Climate Action Reserve, the American Carbon Registry, the Verified Carbon Standard, or the Clean Development Mechanism; or (ii) any other entity approved by the California Air Resources Board to act as an "offset project registry" under the state's Cap-and-Trade Program.

CalAm may meet this net zero GHG emissions requirement via any of the options, or their future equivalents, or any combination of options, or their future equivalents, included in the aforementioned loading order.

(FEIR, Ch. 4, § 4.11, p. 20.)

It is not clear exactly what Marina is referencing when it claims that MM 4.11-1(b) allows Cal-Am to have unfettered discretion in determining how to meet GHG emission standards. However, this argument is not consistent with the clear and structured parameters of the mitigation measure.

Marina further contends that the mitigation measure is not supported by the record evidence because the assumption about on-site availability of renewable energy is at odds with the evidentiary record. Contrary to Marina's allegation, there is evidence in the record to support the feasibility of procuring renewable energy. (See FEIR, Ch. 4, § 4.11, pp. 17-19.)

Finally, Marina argues that the EIR fails to adequately evaluate all reasonable secondary impacts, specifically those that could occur as a result of installation of on-site solar PV panels. An EIR must discuss the effects of mitigation if those effects are

significant and in addition to those that would be caused by the Project as proposed. However, the effects may be discussed in less detail than significant effects of the project. (CEQA Guidelines, § 15126.4(a)(1)(D).) Here, contrary to Marina's contention, the FEIR analyzed and disclosed the potential secondary impacts of installing on-site PV panels. This includes the effects of aesthetics/glare and surface water runoff. The FEIR found that those impacts are less than significant. (FEIR, Ch. 4, § 4.11, p. 21.)

For all of the foregoing reasons, Marina has not demonstrated legal error in the air quality or GHG emissions analyses.

11. The Statement of Overriding Considerations is consistent with the requirements of CEQA.

Marina argues that the Decision's Statement of Overriding Considerations is misleading and invalid. (Marina, reh. app., p. 98-101.) First, Marina alleges that the final list of "significant and unavoidable impacts" in the FEIR omits important significant impacts. These include significant impacts on groundwater resources; impacts on terrestrial species, habitats and sensitive ecosystems (including ESHA); impacts on marine biological resources; impacts on cultural/historical resources; significantly larger secondary impacts; cultural and paleontological impacts; and socioeconomic and environmental justice impacts. Marina argues that the record does not support the conclusion that the identified impacts are "unavoidable." (Marina reh. app., p. 99.)

However, the FEIR found that there would be no unavoidable significant impacts on groundwater resources; terrestrial species, habitats, and sensitive ecosystems (including ESHA);[37] marine biological resources; and cultural/historical resources. These arguments are addressed individually elsewhere in this order. (See Discussion Sections B.1. through B.9.)

Second, Marina contends that the Commission's balancing of project benefits and detriments is incorrect, invalid, and not supported by evidence. In particular, Marina

[37] As discussed above (Discussion B.6), there is a *policy* inconsistency, as opposed to a *physical* impacts, related to ESHA - slant wells would be inconsistent with the Marina LCLUP policy regarding development in primary habitat.

asserts that the balancing of benefits and adverse impacts is one-sided and does not consider the environmental detriments of the project to the City of Marina, which include "the threatened destruction of Marina's water supply." (Marina reh. app., pp. 99-100.) Marina argues that the Commission has been "tone-deaf" to the wide-ranging environmental justice impacts of the Decision, which were testified to by Marina's mayor and city manager.

> Although the EIR admits that Marina is considered a community of concern for the environmental justice analysis, it ignored the substantial evidence in the record that the Project's environmental impacts were exacerbated for the City, which will not receive any Project water. The undermining of the economic, social cultural and environmental values of the diverse, working-class City of Marina were not properly balanced against Project benefits.

(Marina, reh. app., p. 100.) Marina asserts that the Project would bring a suite of adverse impacts to an already overburdened community.

In addition, Marina argues that there is no evidence in the record to support a finding that the Project will protect and promote the Monterey economy. (Marina reh. app., p. 101.) Finally, Marina contends that the Commission is improperly trying to reframe its rush to a decision as a Project benefit. (Marina reh. app., p. 110.) Before approving a project, CEQA requires the lead agency to find that either the project's significant environmental effects identified in the final EIR have been avoided or mitigated, or that the unmitigated effects are outweighed by the project's benefits. (*Laurel Heights Improvement Assn v. Regents of the University of California* ("*Laurel Heights II"*) (1993) 6 Cal.4th 1112, 1124, citing Pub. Resources Code, §§ 21002, 21002.1 and 21081; CEQA Guidelines, §§15091-15093.)

The adoption of the Statement of Overriding Considerations (or "SOC") alone cannot justify approval of a project that will have significant environmental effects as approved. The finding must show that the effects have either been mitigated to a less than significant level, or that there are no feasible mitigation measures or alternatives available

to further mitigate those impacts that remain significant. (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 368.)

CEQA Guidelines sections 15093(a) and (b) provide:

> (a) CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposal project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered "acceptable."
>
> (b) When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record.

The SOC, found at Appendix C of the Decision, at p. C-73, lists seven benefits:

1. Provide adequate, reliable water to customers of CalAm's Monterey District
2. Cease CalAm's illegal diversions from the Carmel River and meet obligations under the State Water Board's CDO
3. Cease extracting water beyond its allocated limit from the Seaside Groundwater Basin
4. Protect and promote the Monterey economy
5. Significant benefits to the Carmel River (reduction in pumping)
6. Arrest seawater intrusion for the Salinas Valley Groundwater Basin
7. Return component will supply reliable and clean municipal water for Castroville

Contrary to Marina's allegations, the record evidence supports the benefits of the project, including benefits to the economy. We understand that the SOC does not specifically balance the benefits of the Project to Cal-Am's service territory and the region with the alleged environmental risks to the City of Marina. The desalination plant will be located near the City of Marina, but Marina is not getting any water from the project. However, we have also concluded that many of the impacts Marina complains of have been found to be less than significant at the outset or less than significant with mitigation. Therefore, the SOC meets the requirements of CEQA.

12. The FEIR's responses to comments complied with CEQA.

MCWD argues that the FEIR's responses to comments were insufficient, and thus violated CEQA. (MCWD reh. app., p. 25.) MCWD contends that the FEIR's responses to comments on (1) feasible alternatives; (2) the applicant's demand estimates and lack of need for the project; (3) impacts and mitigation for ESHA; and (4) impacts to groundwater fall short of the standard required for responses to comments.

Agencies do have a responsibility to respond to comments from the public and from reviewing agencies. (Pub. Resources Code, § 21091, subd. (d).) Written responses "shall describe the disposition of each significant environmental issue that is raised by commenters." (Pub. Resources Code, § 21091, subd. (d)(2)(B).)

> [W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, their comments may not simply be ignored. There must be a good faith reasoned analysis in response. [Citations omitted.]

(*Banning Ranch II, supra,* 2 Cal.5th 918, 940.) "The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*Friends of Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 878.) Furthermore, responses to comments are part of the EIR itself and "their sufficiency 'should be viewed

in light of what is reasonably feasible.' [Citation.]" (*City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 550.)

Here, the Commission made good faith reasoned responses to comments. The FEIR provided detailed, written responses to each of the issues raised in comments on the Draft EIR/EIS, including comments from MCWD. While MCWD may disagree with the Commission's responses to its comments, such disagreement does not render the Commission's responses inadequate.

The Commission received 85 comment letters on the DEIR, including over 1,500 unique written comments (excluding form letters), which filled over 1,000 pages. The Commission responded to each one of the unique comments (more than 700 pages). The FEIR also contains new technical reports, supplementing 132 pages of Master Responses, addressing the most frequent comments raised by stakeholders. (See FEIR, § ES 4.1, p. ES-5; Ch. 8, § 8.2 through 8.9, pp. 8.2-1 to 8.9-30.)

MCWD does not specify any instance in which a comment was ignored. Moreover, the FEIR responded to comments on each of the four issues identified by MCWD. (See, e.g., FEIR, Ch. 8, § 8.5, pp. 650-651, 718-725 [responses to MCWD comments concerning alternatives], § 8.5 pp. 652-657 [responses to MCWD comments concerning Project need], § 8.5, pp. 658-671 [responses to MCWD comments concerning demand estimates and supply estimates], § 8.5 pp. 677-688 [responses to MCWD comments concerning groundwater], § 8.5, pp. 697-699 [responses to comments regarding ESHA].) Additionally, several of the Master Responses address topics raised in MCWD's comments. (See, e.g., FEIR, Ch. 8, § 8.2, pp. 31-52 [Master Responses addressing groundwater comments], § 8.2, pp. 99-118 [Master Response addressing demand estimates and Project need], § 8.2, pp. 127-132 [Master Response addressing alternatives]).)

Thus, MCWD has not demonstrated that the Commission's responses to comments were inadequate.

13. The Commission did not err in failing to further revise and recirculate the FEIR.

MCWD and Marina contend that the Commission improperly failed to revise and recirculate the FEIR to incorporate significant new information. (MCWD reh. app., pp. 26-27; Marina reh. app., pp. 67-70, 101-104.)

MCWD argues that MCWD and others provided extensive expert evidence demonstrating: (1) the supply and demand analysis was not supported by substantial evidence; (2) the description of baseline groundwater conditions was misleading and inaccurate; (3) modeling was based on assumptions that are demonstrably false; (4) modeling by design did not evaluate groundwater quality or cumulative groundwater impacts; and (5) proposed mitigation measures would not protect the SVGB or groundwater users as assumed.

Marina similarly claims that a "huge" amount of significant new information was made available after the DEIR was released in January 2017. According to Marina, this information includes (but is not limited to): (1) new groundwater impact reports; (2) new project alternatives information; (3) new reduced project demand information; (4) new marine resource information; (5) potential coastal ecosystem impacts; and (6) new environmental justice impacts.

MCWD further alleges that the final EIR disclosed for the first time that the project's impacts in ESHA were substantially more severe, and that the record demonstrates that there are feasible project alternatives and mitigation measures that Cal-Am has not adopted that would substantially lessen, and perhaps eliminate, the project's significant and unavoidable environmental impacts. (MCWD reh. app., pp. 26-27.)

The rehearing applicants are making two distinct arguments. First, they are contending that the FEIR was not revised even though new and significant information was presented. These arguments are addressed in sections of this order dealing with the many claims relating to inadequacy of the FEIR. (See Discussion Sections A.13, B.1 through B.10.)

Second, they are claiming that new significant information is included in the EIR that requires recirculation. CEQA requires recirculation of an EIR prior to certification when "significant new information" arises after public notice is given of the availability of the draft EIR for public review. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5.) "Significant new information" includes a disclosure showing (1) a new significant environmental impact; (2) a substantial increase in the severity of an environmental impact; (3) a new feasible project alternative or mitigation measure considerably different than others previously analyzed would lessen significant effects, but the project applicant declines to embrace it; or (4) the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (CEQA Guidelines, § 15088.5.) However, recirculation is not required where the new information added to the EIR "merely clarifies or amplifies or makes insignificant modification in an adequate EIR." (CEQA Guidelines, § 15088.5.)

No significant changes were made to the DEIR that would require recirculation. The subject areas challenged by the rehearing applicants are demand, groundwater, ESHA and environmental justice impacts. No information on groundwater altered the impact conclusions of the FEIR or indicated any significant impacts not included in the DEIR. (See, FEIR, § 8.2-57 et seq.) As to demand, the Decision and the FEIR (see Master Response 13) explain why demand numbers did not the change.

The FEIR did not show that the project's impacts on ESHA were substantially more severe than those disclosed in the DEIR. The FEIR merely clarified the definitions of primary habitat and ESHA used in the analysis (which, as also disclosed, are assumptions made in the absence of formal determinations from the California Coastal Commission or any local agencies). The FEIR also clarified the permanent or temporary nature of disturbance, which was disclosed in the DEIR but led to questions in public comments necessitating clearer descriptions of net disturbance. As noted in the DEIR in Table 4.6-4, "Primary habitat . . . includes all of the environmentally sensitive areas in Marina." Thus, the DEIR used the Marina LCLUP's term – primary habitat – to describe environmentally sensitive habitat areas in order to provide better analysis of consistency

with that local plan. The FEIR clarified that primary habitat (Marina LCLUP) and ESHA (California Coastal Commission) are considered to be synonymous. In each case in FEIR, Section 4.6.5, where impacts on ESHA from the proposed Project are disclosed, similar disclosures were made in the DEIR. Finally, with respect to environmental justice impacts, the DEIR conclusions were not altered and, thus, recirculation was not required.

For all of the foregoing reasons, the contention that revisions were made that would require recirculation of the DEIR has no merit.

14. The Commission did consult with Responsible Agencies to the extent required by CEQA.

In its rehearing application, MCWD asserts that the Commission failed to coordinate with Responsible Agencies to the extent required by CEQA and as such the Responsible Agencies cannot use the FEIR. Specifically, MCWD states the Commission failed to integrate its environmental review of the Local Coastal Program's Environmentally Sensitive Habitat Areas ("ESHA") with Marina and failed to include info in the FEIR that can be used by Responsible Agencies in regard to the SWRCB's Ocean Plan. (MCWD reh. app., pp. 9-12.) These arguments are meritless because the Commission did consult with Responsible Agencies as required by CEQA and MCWD's argument is in essence that the Commission erred when it used its own independent judgement and analysis to come to a conclusion different from MCWD's position.

Marina asserts that Commission erred when: (1) it failed to conduct the legally required consultation with Marina; and (2) the final decision did not list Responsible Agencies or discuss their concerns. (Marina Rehrg App., pp. 51-56.) Marina also asserts the FEIR is unusable because Marina disagrees with it. (Marina reh. app., pp. 56-59.) Marina's arguments are without merit.

Pursuant to CEQA Guidelines Section 15086 a Lead Agency (in this instance the Commission) has a legal obligation to consult with Responsible Agencies. Specifically, "The Lead Agency shall consult with and request comments on the draft EIR from: (1) Responsible Agencies. . . ." (CEQA Guideline, § 15086(a).) Section 15086 also lists obligations of the Responsible Agency to engage in meaningful consultation. (See

CEQA Guidelines, § 15086(c)-(d).) CEQA also requires a Lead Agency to consult "with state and local Responsible Agencies before and during preparation of an Environmental Impact Report so that the document will meet the needs of all the agencies which will use it." (CEQA Guideline, § 15006(g).) More specifically, a Lead Agency must send Responsible Agencies its Notice of Preparation of an EIR to which the Responsible Agency must respond with information about its statutory responsibility, and if the Responsible Agency does not respond the Lead Agency may presume they have no comment. (See CEQA Guidelines, § 15082(a)-(b).) If a Responsible Agency requests a meeting the Lead Agency shall grant one. (See CEQA Guidelines, § 15082(c).) A Lead Agency must consult with and request comments from Responsible Agencies in regard to its DEIR and must respond to those comments as they must to all comments on the DEIR. (See CEQA Guidelines, §§ 15086(a) & 15088.)

In this instance, those obligations were met and exceeded. The Commission recognized Marina as a Responsible Agency under CEQA and acted accordingly. D.18-09-017 details the extensive consultation the Commission had with Marina: from presentations at city council meetings to the sharing of data with Marina's consultants and many other acts of consultation spanning nearly six years. (See D.18-09-017, Appendix J, Exhibit A.) MCWD is not a Responsible Agency under CEQA as they have no permitting authority over this project. (See Public Resource Code, § 21069.) Nor has MCWD ever asserted they are a Responsible Agency. (See e.g., April 30, 2012 Motion to Intervene and FEIR Sec. 8.5.2 (MCWD's DEIR Comment Letter).) The Commission responded to extensive comments by both Marina and MCWD. (See FEIR Sec. 8.5.1 and 8.5.2.)

Marina claims in the year prior to the FEIR's issuance the Commission did not have substantive discussion with Marina and that the Commission disregarded Marina's comments. (Marina reh. app., p. 53.) Yet, the Commission met with Marina on at least two site walk-throughs and gave one presentation to the MCWD Board of Directors at Marina's City Council chambers during that time. (See D.18-09-017, Appendix J, Exhibit A.) Moreover, after the issuance of the Notice of Preparation (which starts the EIR process) and prior the preparation the FEIR, when the environmental review was in full

swing, the Commission consulted with Marina often. During that time the Commission and Marina interacted approximately 25 times in the form of meetings, exchanges of data and correspondence, public hearings in Marina's city limits, and other events. (See D.18-09-017, Appendix J, Exhibit A.) During the final months of FEIR preparation the Commission was focused on meeting its CEQA obligations to review and consider all comments on the DEIR, including comments from Marina and other Responsible Agencies. Marina's comments were fully analyzed and considered in the FEIR. (See FEIR, Section 8.5.2.) Despite Marina's claim, the Commission fully considered and analyzed the projects impacts to the ESHA, groundwater resources, protected species and the appropriate range of alternatives to address these and other impacts. (See FEIR, Section 8.5.2.) Marina, and MCWD, confuses professionally disagreeing with a Responsible Agency's comments with willfully disregarding them.

Marina cites *Banning Ranch II* for the proposition that a Lead Agency must consult to the "fullest extent possible." (Marina reh. app., p. 52, citing *Banning Ranch I, supra*.) In *Banning Ranch I*, the Court found that a Lead Agency's review of impacts to ESHAs under the Coast Act was sufficient because the EIR was required to discuss any inconsistences with the Coastal Act and address them through proposed mitigation. (See *id.* at p. 1234.) That is what the Commission did as a Lead Agency. (See FEIR, Section 8.5.2.) In *Banning Ranch II,* a disagreement existed between the City of Newport Beach, as Lead Agency, and the Coastal Commission, a Responsible Agency, as to the level of review regarding ESHA impacts. (See *Banning Ranch II, supra,* 2 Cal.5th 929-934.) The Court found that the City of Newport Beach had erred, because "the City's EIR omitted *any* analysis of the Coastal Act's ESHA requirements." (*Id*. at p. 936, emphasis in the original.) The City of Newport Beach argued it could defer the ESHA analysis; the Court disagreed finding that while the City of Newport Beach could not make a legal determination regarding ESHA it must still discuss the potential impacts and mitigations. (See *id.* at p. 938.) The Commission's FEIR has discussed the ESHA and analyzed potential impacts and mitigations. (FEIR, Section 8.5.2.)

While the Commission may disagree with the position taken by Responsible Agencies, that does not establish legal error. CEQA does not require a Lead Agency to agree with or adopt all the recommendations of Responsible Agencies. As the *Banning Ranch II* Court stated, "The lead agency may disagree with the opinions of other agencies. (See *North Coast River Alliance v. Marin Municipal Water Dist. Bd. Of Directors* (2013) 216 Cal.Appl4th 614, 642-643 [157 Cal.Rptr.3d 240]; *California Native Plant Society v. City of Ranch Cordova* (2009) 172 Cal.App.4th 603, 625-626 [91 Cal. Rptr.3d 571]." (*Id*. at p. 940.) Such disagreement does not demonstrate proof of a lack of necessary evidence to support an agency's findings.

Marina also claims that D.18-09-017 does not adequately discuss Marina's Responsible Agency role and its active participation. (Marina reh. app., pp. 54-56.) It claims that only one time did the decision mention the term Responsible Agency. However, Marina cites to no law or legal principle that has been violated. The Commission has met its substantive Responsible Agency consultation role as a Lead Agency under CEQA.

Lastly, Marina claims that the workings of CEQA and the Permit Streamlining Act put it in an untenable position. (Marina reh. app., pp. 56-59.) Marina cites to Public Resource Code section 21167.3(b) for the position that it must presume the FEIR is CEQA complainant, and that they must act on any project approval requests within 180-days or have it be deemed approved under the Government Code. It believes this conflicts with the legal challenge it has made against the FEIR under CEQA Guideline Section 15096(e). True or not, this is does not constitute legal error in D.18-09-017 and is not grounds for a rehearing argument under Rule 16.1(c) of the Commission's Rules of Practice and Procedure.

Any inconsistency that may or may not exist in statutory law is not the creation of the Commission nor within its jurisdiction to remedy. Marina's claim that the Commission must remove Marina from this situation by agreeing with its position on various aspects of the FEIR would be in violation of the legal requirement that the FEIR must represent the independent judgement and analysis of the Lead Agency. (See CEQA

Guideline Sec. 15090(a)(3).) The Commission is required to produce a legally sufficient FEIR, which it did. It is not legally required to "produce an EIR that meets a Responsible Agency's needs" when those needs are based in a misunderstanding of the law and relevant facts and would require the Lead Agency to ignore its legal obligation to produce a FEIR that represents its independent judgement and analysis. (See CEQA Guideline Sec. 15090(a)(3); see also, *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 ["Pointing to evidence of a disagreement with other agencies is not enough to carry the burden of showing a lack of substantial evidence to support the City's findings"].)

While MCWD is not a Responsible Agency it asserts a lack of coordination with Responsible Agencies because it believes the FEIR's ESHA and Ocean Plan analyses are deficient. (MCWD Rehrg App., pp. 9-12.) While MCWD mostly reargues the claim that the project is in violation of both the ESHA and SWRCB's Ocean Plan, it also asserts the Commission did not attempt to coordinate with Marina during the environmental review and instead required that Cal-Am do the coordination as a post-decisional CEQA mitigation measure. As detailed above, the Commission meet its Lead Agency Consultation obligations. In addition to the Commission's Lead Agency consultations, Mitigation Measure 4.6-2b requires Cal-Am to implement avoidance and compensation measure in regard to impacts in the ESHA and in so doing the measure recognizes the role of other regulators in this matter. (FEIR, Section 4.6.) The FEIR does not require Cal-Am to consult with entities in their Responsible Agency roles, and it does not require Cal-Am to substitute for the consultation role the Commission lawfully undertook as Lead Agency. (See D.18-09-017, Appendix J, Exhibit A.) Moreover, it is common for mitigation measures to require the project proponent to consult with other permitting agencies when seeking permits those agencies have jurisdiction over. In fact, such consultation is often required pursuant to local permitting ordinances and is independent of any prior environmental review and imposed mitigation measure.

MCWD also incorrectly asserts the Commission failed to consult with the Central Coast RWQCB with respect to the SWRCB's Ocean Plan. It is of note that the

Central Coast RWQCB is not making this claim and in fact the Commission consulted with the local RWQCB by sending them a copy of the NOP and being available if they requested to consult. Additionally, the Central Coast RWQCB and the State WRCB sent a joint DEIR comment letter. They stated, the "Water Boards staff acknowledges that the analysis required in Chapter III.M of the Ocean Plan, includes determining consistency with Water Code section 13142.5(b), is separate and distinct from the DEIR/EIS and California Environmental Quality Act (CEQA) process." (FEIR, Section 8.4.5.) They continue, "Overall, it appears that the MPWSP has been sited and designed in a manner that would result in minimal impacts to marine life and is consistent with the intent of the Ocean Plan to protect marine life and water quality." (FEIR, Section 8.4.5.) Not only did the Commission dutifully perform its consultation role as Lead Agency, but the Central Coast RWQCB and the State WRCB believe the proposed project is consistent with the Ocean Plan in question.

In conclusion, the Commission met its legal obligations as a Lead Agency to consult with Responsible Agencies. Thus, there was no legal error.

15. There was no legal error in not holding evidentiary hearing of alternative proposed by a public agency.

MCWD asserts that the Commission violated CEQA and the Public Utilities Code by failing to consider and hold evidentiary hearings on a feasible project alternative that was proposed by a public agency. (MCWD Rehrg. App. p.48.) It claims that project alternatives put forth by public agencies must be afforded an evidentiary hearing pursuant to *Ventura County Waterworks Dist. No.5 v. Public Util. Com., supra*. For the reasons addressed above in Discussion Section A.5, we were not required to hold evidentiary hearings on project alternatives, including those proposed by a public agency.

Venture County Waterworks does not stand for the proposition that if an alternative is put forth by a public agency it must be granted evidentiary hearings on that alternative. In *Ventura County Waterworks Dist.*, which pre-dates CEQA, the court found that the Commission could not reasonable determine what was in the public convenience without considering any alternatives to the proposed action. (See *id.* at p. 464.) While the

alternative in that case was put forth by a public agency, there is no legal requirement that a public agency alternative is due any more consideration an any other alternative. The Court only held that a water district was "denied a fair hearing when the commission excluded *all* evidence that the district could provide better and more economical service than [the applicant]." (*Id*., emphasis added.)

Moreover, the California Court of Appeal has stated in resolving a challenge against the Commission's Sunrise Powerlink decision that the *Ventura County Waterworks* case was limited to the factual situation where the Commission failed to consider a single alternative offered. (See *Utility Consumers' Action Network v. Pub. Util. Com*. (2010) 187 Cal. App. 4th 688, 704-705 ["In [*Ventura County Waterworks*] the Supreme Court held the Commission could not reasonably determine whether a CPCN should be granted without considering the *single* alternative offered by the water district. … This case is distinguishable on the fact and the law."], emphasis in original.)

In the present proceeding, the Commission did consider a reasonable range of alternatives to the proposed project, including those put forth by public agencies. (D.18-09-017, pp.78-79; FEIR, Sec. 5.) The Commission performed a detailed analysis on 7 alternatives to the proposed project and screened out additional alternatives as not meeting the CEQA requirements to be studied in greater detail. (FEIR/EIR, Section 5.) Additionally, to the extent that some proffered alternatives were too speculative to have meaningful review at the present time, the Commission has asked Cal-Am to monitor the situation and come back with status updates. (D.18-09-017, OP 37.) Just as the California Court of Appeals found the *Ventura County Waterworks* case distinguishable to the Sunrise Powerlink decision, it is similarly distinguishable to D.18-09-017.

16. The Commission did not ignore the issues of environmental justice.

Marina asserts the Commission ignored environmental justice concerns raised by Marina and only considered the groundwater aspect of their concerns to which it wrongly concluded that the impacts were not significant after mitigation. (Marina reh. app., pp.89-82.) In making its claims it cites to CEQA as applicable but only relies on

broad policy statements in CEQA's statutory section titled "Additional Legislative Intent" and which does not address environmental justice impacts. (Pub. Resources Code, § 21001.) In fact, CEQA does not traditionally require a review of Environmental Justice concerns but the Office of California Attorney General ("AG") has given guidance on this issue, which the Commission has followed.[38]

The introduction to Section 4.20 of the FEIR explained that a CEQA Lead Agency may use information about the economic or social impacts of a project to determine the significance of physical changes caused by the project, but the economic or social effects of a project are not themselves treated as significant effects on the environment. Although the CEQA statute and guidelines do not use the term "environmental justice," the AG has clarified that environmental justice concerns are relevant to the analysis of a project under CEQA. It has recommended that Lead Agencies address environmental justice by evaluating whether a project's impacts would affect a community whose residents are particularly sensitive to the impact (i.e., sensitive receptors) and whether a project would have significant effects on communities when considered together with any environmental burdens those communities already are bearing, or may bear from probable future projects (i.e., cumulative impacts). (AG, 2012. Environmental Justice at the Local and Regional Level Legal Background, which can be found of AG's website: http://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf.)
The impacts of this project on sensitive receptors are analyzed where appropriate. (FEIR, Section 4.) The project's impacts considered together with existing or foreseeable environmental burdens experienced by nearby communities are analyzed throughout Chapter 4 in the Cumulative Effects subsection of each resource section. Moreover, because the FEIR was a joint EIR/EIS, the document did consider environmental justice impacts themselves as required under NEPA. (FEIR, Section 4.20)

[38] The Commission also considered the issues regarding environmental justice in the context of community values. (See Discussion Sections A.9. and A.11.)

Marina also asserts that D.18-09-017 incorrectly stated that its primary environmental justice issue was groundwater impacts and improperly concluded that after mitigation no socioeconomic or environmental justice-related impacts would occur. (Marina reh. app., pp.90-91.) However, ground water impacts can fairly be characterized as Marina's primary concern regarding environmental justice concerns. (FEIR, Section 8.5.) More importantly, all impacts concerns raised by Marina were fully analyzed and addressed. (FEIR, Section 8.5.) Marina's argument that the Commission as Lead Agency wrongly concluded no significant impacts would occur after mitigation measures is merely an attempt to re-argue issues already addressed and resolved by D. 18-09-017, and as such is not grounds for a rehearing. (See D.10-12-064*, supra*, at p. 11["An application for rehearing is not a vehicle for relitigation. . . ."].)

C. Groundwater Issues

Marina and MCWD maintain that the FEIR's analysis of the project's groundwater impacts, and the mitigation measures to address any such impacts, were deficient under CEQA. (MCWD reh. app., pp. 12-23; Marina reh. app., pp. 70-73). As explained below with respect to each of the issues raised, this allegation of error lacks merit.

1. The FEIR/contains an accurate environmental baseline for groundwater resources.

An EIR must describe the existing "physical environmental conditions" in the project area and that "environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (CEQA Guidelines Section 15125(a).) MCWD claims on several grounds that the FEIR failed to ascertain and disclose the accurate baseline for groundwater impacts. (MCWD reh. app., pp. 14-17.) This is incorrect. The FEIR's groundwater baseline/environmental setting discussion is set forth at FEIR, pp. 4.4-3 through 4.4-37 and contains considerable detail concerning groundwater location, quantity, uses and quality. Responses to comments on the Draft EIR and Appendix J to D.18-09-017 further elucidate baseline conditions.

MCWD first states that the FEIR inaccurately portrays groundwater in the aquifers from which the project would draw water as all seawater-intruded without beneficial uses when there exists groundwater meeting Basin Plan standards within a mile from the project supply wells. MCWD cites its own comments on the DEIR, but fails to acknowledge and take into account the responses to those comments. For instance, the FEIR did not state, as MCWD claims, that all groundwater in the pertinent aquifers "has no beneficial uses." (MCWD reh. app, p. 14.) That precise comment was addressed in the FEIR, which recognizes that there could be localized areas containing water with lower TDS levels, *i.e.*, fresher water than the ocean water and brackish water near the coast and expected to be drawn into project supply wells. (FEIR, p. 8.5-729; see also response to comment MCWD-96, almost identical to the claim made now by MCWD, at FEIR, p. 8.5-682.) Because the project is not projected to intersect with or affect any such water that may have lower TDS values (*i.e.*, higher quality water), the fact that such water may in fact exist in pockets distant from the project does not affect the project impact analysis. (FEIR, Master Response 8: Project Source Water and Seawater Intrusion, pp. 8.2-39 through 8.2-52.)

The FEIR discussed in detail the historic and current state of seawater intrusion, and includes the latest seawater intrusion maps developed by Monterey County. (FEIR, pp. 4.4-24 through 4.4-37; D.18-09-017, Appendix J, pp. 14-21.) The FEIR sets forth monitoring well results from areas close to the coast and further away from the coast. As opposed to relying solely on County data, the FEIR employed new data derived from Cal-Am monitoring wells installed on and further inland from the project site in the Dune Sand Aquifer, the 180-Foot Equivalent Aquifer and the 400- Foot Aquifer. (FEIR, p. 4.4-34 and Appendix E3.) The FEIR presented these facts:

- Seawater intrusion (defined by the Monterey County Water Resources Agency as water with chloride concentrations greater than 500 mg/L based on the County minimum drinking water standard) extends approximately 8 miles inland in the 180-Foot Aquifer and 3.5 miles inland in the 400-Foot Aquifer. (FEIR, p. 4.4-34.)

- The level of total dissolved solids ("TDS") in ocean water along the Central California coast is approximately 33,694 mg/L and the TDS level of the water drawn from the project test well was 31,900 mg/L, very similar to the ocean water composition. (FEIR, p. 4.4-27.)
- CalAm's monitoring well clusters on and inland from the project site at varying depths showed that TDS concentrations ranged from 11,900 mg/L to 32,600 mg/L on the project site, with wells further afield netting water with TDS concentrations from 366 mg/L to 29,000 mg/L.

In response to comments from MCWD, the FEIR stated:

> The analysis recognizes that localized areas of lower TDS concentrations would be expected in areas predominantly intruded by seawater due to the heterogeneity of the water transmitting and storage properties of the sediments. EIR/EIS Section 4.4.5.2, correctly concludes that the MPWSP would extract primarily seawater and a smaller volume of brackish groundwater from a zone that has been degraded by seawater intrusion (over 23,000 mg/L) and therefore, would not be suitable as a potable supply due to the high salinity.

(FEIR. p. 8.5-729.) Thus, MCWD's allegation that the FEIR failed to portray a complete picture of the baseline groundwater conditions by failing to acknowledge areas of fresher water is inaccurate.

Second, MCWD claims that the FEIR did not recognize the role that aquifers play in recharging other aquifers and preventing seawater intrusion. (MCWD reh. app., p. 15.) This allegation is vague and cites two pages of MCWD comments on the Draft EIR containing comments MCWD-93 through MCWD-97. Those comments are fully addressed in the FEIR at pages 8.5-681 through 8.5-684. In addition, FEIR, Section 4.4.1, Setting/Affected Environment, provides detailed data on the aquifers that could be affected by the project and the issue of seawater intrusion. Additional information is provided in FEIR, Master Response 8: Project Source Water and Seawater Intrusion, pp. 8.2-39 through 8.2-52, and other responses to comments. MCWD's allegation of error in this regard is unsupported.

MCWD next alleges that the FEIR's description of groundwater flows and flow direction is not accurate and complete, asserting that groundwater flows in the Dune Sand Aquifer go toward the ocean rather than inward. This allegation repeats comments made previously by MCWD, and responded to in the FEIR: "Contrary to the comment, groundwater in the Dune Sands Aquifer flows inland from the Monterey Bay." (FEIR p. 8.5-682.) As stated at FEIR, p. 8.5-779: "Groundwater flow in this region is shown accurately on groundwater contour maps presented in Appendix E-3 (Appendix E, *MPWSP Well Completion Report and CEMEX Update, TM2*)." This is further explained in FEIR, Master Response 8, at page 8.2-44: "As discussed in FEIR, Section 4.4.1.3, the groundwater in both the Dune Sand Aquifer and 180/180-FTE Aquifer flows inland beneath the project area (i.e., from the Monterey Bay east, toward the Salinas Valley). . . . The environmental team that prepared the FEIR considered data from hydrogeologic investigations (including a 2008 study conducted by consultants to MCWD considering the effects of its own possible desalination supply wells), the County's groundwater modeling and groundwater contour maps to conclude, "What is important to consider here is that there is very little likelihood, and it would be total speculation to believe, that the existing groundwater gradient in the Dune Sand and 180-Foot Aquifers could be reversed within the life of the project." (D.18-09-017, Appendix J, p. 17.)

As with many of the FEIR issues raised by MCWD and Marina, this issue involves a disagreement among experts, namely between the consultants employed by MCWD on the one hand and, on the other hand, experts from or consulting with the applicant California American Water Company, the Salinas Valley Water Coalition and the Salinas Valley Farm Bureau (these three all participating in the Hydrogeologic Working Group (or "HWG")), the Monterey County Water Resources Agency, and the Commission's CEQA/NEPA consulting team at Environmental Science Associates that includes a certified hydrogeologist (Michael Burns), a certified engineering geologist (Peter Hudson of Sutro Science), and the experienced hydrology team at HydroFocus. When evidence on an issue conflicts, an agency may give more weight to one expert than to another. (*Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th

1383, 1397; *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 412. A lead agency may "choose between differing expert opinions." (*Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 863.) "Disagreement among experts does not make an EIR inadequate. . . ." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1467; CEQA Guidelines, § 15151).) The Commission reasonably relied on a wide variety of experts that agreed with each other, and not on MCWD's experts. As such, no legal error is demonstrated because the Commission was persuaded by one set of experts over another set of experts.

MCWD next asserts that the FEIR erred because it does not alter its characterization of the environmental baseline in light of the airborne electromagnetic ("AEM") study prepared for MCWD by Dr. Rosemary Knight and her colleagues at Stanford University. The preliminary AEM study was submitted by MCWD following the close of the public comment period on the Draft EIR, and the final AEM was submitted after publication of the final environmental document. The FEIR addressed the AEM study in considerable detail, including in the Setting/Affected Environment portion of the Groundwater Resources section (FEIR, pp. 4.4-35 and 4.4-36), concluding as follows:

> The results showed a distribution of groundwater chemistry that is consistent with the findings of the HWG hydrogeologic investigation and generally consistent with the salinity mapping for the 180-Foot and 400-Foot Aquifers published by the MCWRA. The Stanford study also provides data to help interpolate between control points provided by the MPWSP monitoring network and confirms the work completed for the hydrogeologic investigation regarding the distribution of water quality in the MPWSP study area.

(FEIR, p. 4.4-36.) An entire Master Response in the FEIR is devoted to the AEM study. (FEIR Master Response 9: Electro resistivity Tomography (or "ERT") and Airborne Electromagnetics (AEM), pp. 8.2-53 through 8.2-62.) The Master Response explains the limitations of the AEM study, why it was not used in the groundwater modeling for the project, and that consideration of the AEM study does not alter the analysis or conclusions of the FEIR. The Commission's CEQA/NEPA team also addressed the final AEM study,

concluding that the study did not alter the FEIR's approach, analysis or conclusions, and noting that the final AEM study "does not contain many of the elements that would be expected in a published academic manuscript or a scientific technical report…." (See D.18-09-017, Appendix J, p. 19.) "The lack of adherence to standard protocols for the presentation, data analysis, and technical peer review calls into question whether the report can be used as a reliable, unbiased technical source." (*Ibid*.) As noted above, after weighing all of the evidence submitted, we reasonably relied upon our own environmental experts (together with other supporting experts) instead of the AEM study.

MCWD also criticizes the FEIR for incorporating data and conclusions submitted by the HWG without subjecting such data to peer review by qualified experts. (MCWD reh. app., p. 16, fn. 6 and fn. 7.) Our CEQA/NEPA team that prepared the FEIR, which included the hydrogeologic and other experts described above, did in fact subject such information to peer review before relying upon it. (FEIR, p. 8.2-27.)

The reason that an accurate baseline is important in the CEQA equation is to ensure that impacts are fairly measured against existing conditions. MCWD criticizes the FEIR for assuming that the project's capture zone does not contain useable groundwater. MCWD's arguments are based on its citation to State Water Resources Control Board Resolution 88-63 and the Central Coast Basin Plan provisions that water containing 3,000 mg/L or less TDS should be considered potentially suitable for beneficial uses. But the capture zone for the project – the underground area from where the project supply water is projected to be drawn into the wells – is very small and quite localized. Measured TDS levels in the vicinity of the capture zone (11,900 mg/l to 30,900 mg/l TDS) greatly exceed 3,000 mg/L, meaning that the groundwater expected to be used as part of the project is in no way suitable for drinking or for use on crops. (FEIR, pp. 8.2-47 and 8.2-48.) The project effects appear to be sufficiently considered against this baseline setting.

MCWD's arguments are also based on the AEM study's purported discovery of "fresh water" at locations considerably inland of the project supply wells. However, it should be noted that the AEM study did not assign TDS values to its depicted water types. Therefore, though the AEM study showed some areas of water as being fresher than others,

that is on a relative scale and there is no indication that such fresher areas of water correspond to sufficiently low TDS levels to be water useful for drinking or crop irrigation. In any event, the evidence indicates that the quality of water at such locations removed from the project site, be it closer to fresh or also severely degraded, is of no consequence since that water would remain unaffected by the project because the capture zone would not overlap such areas. As D.18-09-017, Appendix J at page 20 stated:

> The Stanford AEM study concludes that there are zones of low TDS groundwater in the Dune Sand and 180-Foot aquifers inland of the proposed MPWSP slant wells. While this may be the case in some areas, especially the Dune Sand Aquifer following one of the wettest months in recent history (May 2017 when the AEM survey was completed), it remains inconsequential to the analysis of groundwater impacts for the MPWSP because, as discussed in the EIR/EIS, the capture zone of the MPWSP slant wells would be located along the coast and would draw most of the source water from the ocean and not from inland groundwater sources.

Both MCWD and Marina cite to *Cadiz v. Rail Cycle, L.P.* ("*Cadiz*") (2000) 83 Cal.App.4th 74, to support their assertion that the baseline condition of the pertinent groundwater aquifers were not adequately characterized. (MCWD reh. app., pp. 14, 17; Marina reh. app., pp. 69-70, 73.) But *Cadiz* involved a very different set of facts and thus does not appear applicable here. The project proposed in *Cadiz* was a landfill that might contaminate a groundwater aquifer used for agricultural production. The aquifer was in overdraft, not subject to much recharge, and might in fact dry up such that it would no longer be useful for agricultural water supply. The court ruled that it was important to know the volume of water currently in the aquifer so as to weigh the risk of groundwater contamination, *i.e.*, if the aquifer would stop serving agricultural use before landfill leachate may contaminate the aquifer, that would be less significant than if the landfill could contaminate the groundwater while it was actively being used for agriculture. Key differences exist between the facts in *Cadiz* and the FEIR in the present case. The FEIR thoroughly discussed and characterized the pertinent groundwater aquifers as to extent,

uses and water quality. (FEIR, pp. 4.4-3 through 4.4-37; 8.2-37 through 8.2-48.) The FEIR concluded, based on the record, that groundwater that may be affected is not potable water and is not used or useful for agricultural or municipal purposes; the project supply wells would not contaminate groundwater; water withdrawn by the project supply wells would be severely degraded water; and the project would not generate significant impacts to the groundwater aquifers of concern. (FEIR, pp. 4.4-64 through 4.4-80; 8.2-49 through 8.2-52.)

Based upon the discussion above, the extensive data in the record supports the FEIR baseline for groundwater analysis. As such, MCWD and Marina's allegations to the contrary are without merit.

2. The FEIR correctly concluded that the Project would be consistent with the Central Coast RWQCB Basin Plan.

MCWD and Marina maintain that D.018-09-017 and the FEIR did not appropriately interpret and apply the Central Coast Regional Water Quality Control Board Basin Plan ("Basin Plan") or the State Water Resources Control Board's Resolution 88-63, and that the project violated such policies. (MCWD reh. app, pp. 17-19, 34; Marina reh. app., pp. 70-71.) In fact, record evidence supports our conclusion that the project is not inconsistent with the Basin Plan or Resolution 88-63.

The FEIR discussed the Basin Plan's policies concerning suitable and potentially suitable groundwater in the Regulatory Framework section of the groundwater resources analysis. (FEIR, pp. 4.4-39 and 4.4-40.) MCWD states that the FEIR applied the policies only to the ASR component of the project. (MCWD reh. app., p. 18.) The FEIR addressed the application of the policies to the ASR element of the project because water would be affirmatively inserted into the ground and would need to meet particular numeric Basin Plan standards. (FEIR, p. 4.4-40.) The FEIR does not, however, indicate that the Basin Plan policies were not pertinent to, and applied to, the remaining elements of the project such as the desalination plant supply wells. The FEIR explained that the Basin Plan's water quality objectives for TDS would not be met by the groundwater expected to

be drawn into the project supply wells within the capture zone, because such water is not considered suitable for use for municipal uses or agricultural irrigation per the Basin Plan. (FEIR, pp. 8.5-574 and 8.5-575; 8.2-48.) Groundwater within the capture zone far exceeds the State's drinking water standards as to both TDS and chlorides. (FEIR, pp. 8.2-39 through 8.2-49; see also, D.018-09-017 Appendix J, p. 19-20.) The FEIR further provides:

> That alone, however, does not de-designate the MUN designation of the Salinas River Groundwater Basin, but it is instructive given that such groundwater is not considered suitable for municipal or domestic water supply. The Basin Plan states that if groundwater is beyond the levels or limits established as water quality objectives, controllable conditions shall not cause further degradation of water quality. (Basin Plan at page 3-1.) As demonstrated in EIR/EIS Section 4.4, Groundwater Resources, and Master Response 8, Project Source Water and Seawater Intrusion, the project would not cause further degradation of the water quality in the sub-basin. *Therefore, the project does not conflict with and is consistent with the Basin Plan.*

(FEIR, p. 8.5-574, emphasis added.) It is notable that the RWQCB, together with the State Water Resources Control Board, submitted a comment letter on the DEIR and did not raise any issues concerning project consistency with the Basin Plan or Resolution 88-63. (FEIR, pp. 8.4-21 through 8.4-23; see also *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 227–28 [fact that an air district was satisfied with agency's responses to comments within its area of expertise constituted evidence to support agency's conclusions].)

MCWD also challenges the FEIR for not employing the Basin Plan as a threshold of significance. (MCWD reh. app., p. 17.) Throughout the FEIR, the CEQA significance checklist questions as set forth in the CEQA Guidelines Appendix G checklist were employed, often tailored and refined to be more specific to this project. The Groundwater Resources section uses such well-established and supportable CEQA thresholds of significance. (FEIR, p. 4.4-47; see also *Jensen v. City of Santa Rosa* (2018)

23 Cal.App.5th 877, 885 ["Sample questions are set forth in Appendix G, printed following Guidelines Public Resources Code section 15387, which may be considered 'thresholds of significance.' "]); *San Francisco Baykeeper, Inc. v. State Lands Com.* ("*San Francisco Baykeepter*")(2015) 242 Cal.App.4th 202, 227.) Lead agencies such as the Commission enjoy considerable discretion in devising thresholds of significance under CEQA, including deviating from the Appendix G questions and shaping them to best fit the particular project. "CEQA grants agencies discretion to develop their own thresholds of significance (CEQA Guidelines, § 15064, subd. (d))." (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 716, quoting *Save Cuyama Valley, supra*, 213 Cal.App.4th at 1068; see also *San Francisco Baykeeper, Inc., supra*.) As discussed above, the FEIR did evaluate project consistency with the Basin Plan.

MCWD states that the project "is actually designed to exacerbate seawater intrusion in the project area…." (MCWD reh. app., p.18.) This statement is neither accurate nor complete. The FEIR did indicate that the project would result in more seawater being drawn into the project capture zone, which is depicted in the FEIR, pp. 8.2-42 and 8.2-43, and extends no further east than Highway 101. There exist no water supply wells within that area, where the water is severely intruded with seawater to begin with, such that no groundwater users would be adversely affected by project effects within the capture zone. (FEIR, pp. 8.2-47 through 8.2-53.) The project as a whole is expected to help impede seawater intrusion:

> The capture zone created by the slant well pumping would not induce additional seawater intrusion adjacent to and beyond the limits of the capture zone. The slant wells would in fact capture saline water that would otherwise flow inland as seawater intrusion and would, therefore, assist in impeding seawater intrusion along the coastline at CEMEX (site of the proposed slant wells).

(D.18-09-017, Appendix J, p. 17.)

MCWD also alleges that the project would frustrate the goals of the Sustainable Groundwater Management Act ("SGMA") for local agencies to develop and implement groundwater management plans. (MCWD reh. app., p. 18-19.) The record

evidence supports the opposite conclusion. The FEIR contained a detailed analysis of project consistency with SGMA, concluding that the project would not conflict with any of SGMA's six undesirable results, and thus would be consistent with SGMA. (FEIR, pp. 4.4-85 through 4.4-87; 4.4-100 and 4.4-101; 8.2-31 through 8.2-36; see also D.018-09-017, Appendix J, p. 18.) This record supports this conclusion.

3. D.18-09-017 did not err in adopting the FEIR's cumulative impacts analysis for groundwater.

MCWD next asserts that the FEIR's cumulative groundwater impact analysis failed to satisfy CEQA because the modeling does not reflect effects other than those of the project, and on several other bases. (MCWD reh. app., pp. 19-22.) Marina criticized the groundwater model in general, and its inability to assess cumulative groundwater impacts. (Marina reh. app., p. 73.) This allegation of error is without merit.

The groundwater modeling for the EIR employed an approach known as "superposition." Essentially, the superposition approach identifies the projected change that would result from the project all by itself, in isolation from other stresses on the environment. This approach is helpful in the field of groundwater, which is influenced by so many factors (*i.e.*, rainfall, drought, amount of pumping by other groundwater users, aquifer enhancement projects within the groundwater basin, and evolving agricultural practices) that consideration of all factors at once would make it virtually impossible to identify the effects of the project. As explained in the FEIR:

> The superposition approach in groundwater modeling is a well-established analytical tool. For this project, the NMGWM is converted to a superposition model, enabling the NMGWM2016 to solve for the groundwater changes due solely to the proposed project. These changes are independent of the effects from the other stresses on the basin such as seasonal climate and agricultural pumping trends, other pumping wells, injection wells, land use, or contributions from rivers. By using superposition, the actual effects of only the proposed project can be isolated from the combined effects of all other basin activity. For example, when the NMGWM2016 reports a 1-foot drawdown in a well, it is understood that the one foot of drawdown would be the effect on the basin of the proposed

> project only. That well may experience greater or lesser drawdown due to other stresses, such as drought or other nearby pumping wells, or may experience increases in water levels due to reduced regional pumping or an extremely wet year. But the proposed project's contribution to that drawdown in the well would remain only 1-foot.

(FEIR, p. 4.4-55.) The efficacy of the superposition approach to the groundwater modeling is further explained at FEIR, pp. 8.2-94 and 8.2-94.

Under CEQA, "a cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (CEQA Guidelines section 15130(a)(1).) The cumulative groundwater impacts analysis is not a modeled analysis, but is a qualitative analysis. (FEIR, pp. 4.4-103 through 4.4-106.) MCWD and Marina disagree with the cumulative impacts analysis on that basis. However, there is no requirement that a cumulative impact analysis must be modeled and quantitative merely because the project level impacts were analyzed in such manner. We have wide discretion in choosing the methodology to employ in an EIR's impact analyses. As stated in *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 485–86:

> "Under CEQA, an agency is not required to conduct all possible tests or exhaust all research methodologies to evaluate impacts. Simply because an additional test may be helpful does not mean an agency must complete the test to comply with the requirements of CEQA. [Citation.] An agency may exercise its discretion and decline to undertake additional tests." (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 524, 158 Cal.Rptr.3d 719.) It is the objector's burden to establish that the methodology used was misleading or that "relevant, crucial information" was omitted that rendered the analysis legally inadequate. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 738-739, 32 Cal.Rptr.2d 704; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directo*rs (2013) 216 Cal.App.4th 614, 643, 157 Cal.Rptr.3d 240.)

In the present case, the choices made as to how to analyze the groundwater impacts at both a project level and cumulative level were reasonable and supported by record evidence. As explained in the FEIR, the quantitative modeling results were useful to and used in the cumulative groundwater analysis:

> [S]uperposition is employed to isolate the expected changes and these changes are additive to future changes that occur as the net result of all other recharge and discharge processes in the basin. Any model-calculated drawdown due to proposed slant well pumping can be overlain or integrated with future basin management scenarios.

(FEIR, p. 8.5-738.)

A cumulative impact analysis may be based upon a list of "probable future projects producing related or cumulative impacts" or on a summary of projections in a planning document. (CEQA Guidelines, § 15130(b)(1).) The FEIR's groundwater analysis used the list-based method. The FEIR's cumulative groundwater analysis properly discussed future projects whose impacts could overlap those of the project. (FEIR, p. 4.4-104.) MCWD criticizes this aspect of the cumulative analysis (MCWD reh. app., p. 21), but such criticism is not supported by the law. "An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR." (CEQA Guidelines, § 15130(a)(1).) MCWD also suggests that the cumulative analysis assumed the project would not contribute to a significant cumulative effect if the project-level effect is not significant (MCWD reh. app, p. 21). This is incorrect. The evaluation considered the project effects (as modeled) together with the expected environmental effects of the cumulative projects,[39] with the result in most instances being that the combined effects on groundwater would be beneficial. (FEIR, pp. 4.4-105 through 4.4-107.) Indeed, the only cumulative project that was forecast to possibly contribute to adverse environmental change was MCWD's possible future desalination project. Even in that instance, the FEIR

[39] Since it appears that no quantified impact to the Salinas Valley Groundwater Basin was available for the listed and considered cumulative projects, it would not have been possible in any event to conduct a strictly quantitative cumulative analysis.

analysis concluded that the combined effects of the two desalination projects would not be significant.

Finally, MCWD faults the groundwater cumulative analysis for not including future projects under SGMA. Generally, in order to be required to be included in the cumulative evaluation, a project must be not speculative and unformed. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal. App. 4th 260, 277-278.) A project is considered a probable future project if it has matured to the point that the environmental process for the project is underway. (*San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal. App. 3d 61.) If a possible future proposal has not crystalized to the point that it would be practical and feasible to analyze its environmental effects, then it need not be included. (*City of Maywood v. Los Angeles Unified Sch. Dist.* (2012) 208 Cal. App. 4th 362, 397.) Future projects that may in the future be undertaken in the area to implement SGMA are not defined in any way, nor would they be expected to combine with the project to generate adverse effects.
(D.18-09-017, Appendix J, pp. 18-19.)

For the reasons discussed above, the cumulative analysis methods and conclusions are reasonable and supported by substantial evidence in the record. As such, the claims of MCWD and Marina are without merit.

4. Record evidence supports the FEIR's groundwater impact conclusions, and neither the return water nor mitigation measures are required.

MCWD and Marina disagree with the FEIR's methods, analysis and conclusions as to whether the project will significantly impact groundwater resources within the Salinas Valley Groundwater Basin. (MCWD reh. app., pp. 22-23; Marina reh. app., pp. 66-73.) As discussed above, and as documented throughout the FEIR, the challenged impact conclusion is supported by record evidence. Evidence supporting the conclusion includes FEIR, Section 4.4; pp. 8.2-17 through 8.2-97 and referenced exhibits.

MCWD and Marina suggest that the FEIR relied upon the approved Return Water Settlement Agreement to reach the conclusion that the groundwater effects are less

than significant. (MCWD reh. app., p. 22; Marina reh. app., pp. 71-72.) This is incorrect. The FEIR concluded that, with or without any return water component, the project's groundwater resources impact would be less than significant. The FEIR, at pp. 4.4-66, 4.4-67, 4.4-71 and 4.4-72, depicted project impacts with 0% return water. As the FEIR explained:

> The return water component of the MPWSP would benefit each of the aquifers by either reducing the area of influence or by increasing groundwater levels in other areas. The effects of return water on the basin water levels are discussed below and shown on Figures 4.4-14 through 4.4-16. If the proposed project did not return any water, localized depressed groundwater levels would likely persist in the three affected aquifers throughout the life of the project. However, the area affected by groundwater pumping would remain localized and the MPWSP would continue to extract only highly brackish groundwater and seawater from the coast.

(FEIR, p. 4.4-70.) Based on the analysis at FEIR, pp. 4.4-76 through 4.4-80, whether the return water is at 0%, 3%, 6% or 12% (or any percentage in between), the impact would be less than significant.

MCWD and Marina raise two other issues pertaining to the return water that are more pertinent to compliance with the Monterey County Water Resources Agency Act that prohibits export of groundwater from the Basin (Water Code App. Section 52-21) than to FEIR sufficiency. They claim that: (1) the return water component of the project serves no beneficial purpose given that the location to which water will be returned is not precisely the same as where the water will be withdrawn by the project supply wells (MCWD reh, app., p. 22); and (2) the return water amounts are too small, and should encompass all of the groundwater that will be withdrawn by the project supply wells (Marina reh. app., pp. 66 & 71-72.)

As to the first of these issues, the FEIR explained that the return water location is within the Basin such that the project is expected to be consistent with the Agency Act. (FEIR, pp. 8.2-17 through 8.2-19.)

As to the second of these issues, Marina maintains that the FEIR recharacterizes a large portion of the water that will be withdrawn from under the land (the portion that does not originate directly from the ocean) as "seawater." Marina thus calculates that the return water obligation should pertain to all water coming from the ground, and not merely the fresh water component of the supply water. The FEIR addressed comments that indicated that more return water should be provided than the amount of the fresh water component of the withdrawn brackish water as contemplated by the Return Water Settlement Agreement. (FEIR, p. 8.2-19.) However, the FEIR was transparent and informative as to the categories and definitions of water addressed. (See FEIR, pp. 8.2-2 and 8.2-3.) "Groundwater" was defined as "water located beneath the earth's surface," just as Marina urges. Such groundwater is further broken down by its originating constituents into "seawater" and "fresh water." The Return Water Settlement Agreement, as proposed, analyzed in the FEIR and approved in D.18-09-017, includes return of the fresh water component of any groundwater withdrawn by the supply wells.

Because no significant groundwater impact was identified, no mitigation measures are required. "Mitigation measures are not required for effects which are not found to be significant." (CEQA Guidelines, § 15126.4(a)(3).) The applicant voluntarily proposed a mitigation measure, denoted as Mitigation Measure 4.4-3 in the FEIR and the Mitigation Monitoring and Reporting Program ("MMRP"), to further ensure that existing legal groundwater users would not experience harm from the project in the future. Despite the fact that this measure was proposed by the applicant, it is included in the MMRP, was made a condition of approval by D.18-09-017, and its implementation will be monitored and gauged by the Commission. The mitigation measure also involves considerable oversight and verification by the Monterey County Water Resources Agency, additionally ensuring objective and effective implementation. The comprehensive mitigation measure does contain a performance standard of no harm and ensures that all existing wells continue to serve their purpose regardless of any changes caused by the project. Though the measure was volunteered by the applicant, it meets CEQA's criteria for mitigation

measures and should be implemented with the same level of vigor of the other mitigation measures.

Based on the foregoing, MCWD's and Marina's criticisms of the groundwater analysis do not indicate that we have erred as to this issue.

5. Based on the record, the Commission lawfully concluded that Cal-Am was sufficiently likely to possess water rights for the Project so as to support project feasibility.

MCWD and Marina maintain that the project is infeasible because Cal-Am does not, and will not in the future, have water rights for the supply water. (MCWD reh. app., pp. 22-31; Marina reh. app., pp. 28-33.) D.18-09-017 found "that 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." (D.18-09-017, p. 82.) The record supports the conclusion of the Commission in this regard.[40]

MCWD and Marina simultaneously argue the inconsistent positions that: (1) the Commission came to the wrong legal conclusion that the project could enjoy water rights in the future; and (2) the Commission had no jurisdiction to determine the question of project water rights. However, we did not determine in D.18-09-017 that Cal-Am will have water rights for the project, and we did not grant any water rights permits. We also did not require Cal-Am to prove that it had obtained water rights for the project, since Cal-Am's rights to ocean water are undisputed and its rights to the brackish water that is expected to be drawn into the source water wells cannot be perfected until the project starts operation. It is important to note the context in which the topic of groundwater rights was addressed by the Commission. This was set forth clearly in the FEIR:

> The [Commission] is not the arbiter of whether [CalAm] possesses water rights for the project and nothing in this EIR/EIS should be construed as the [Commission's] opinion regarding such rights, except to the extent that the [Commission]

[40] See Discussion Section A.5.c. and A.11, *supra*, regarding additional discussion regarding water rights.

must determine whether there is a sufficient degree of likelihood that [CalAm] will possess legal rights to pump and desalinate the source water that would supply the desalination plant such that the proposed project can be deemed to be feasible. Indeed, no government agency will formally grant water rights to [CalAm] for the proposed project. In California, groundwater rights are established by diversion/pumping and use, and groundwater – other than subterranean streams and underflow of surface water – is regulated through common law (court cases) rather than through the issuance of permits by government bodies. The SVGB is not an adjudicated groundwater basin, so use of the groundwater in the Basin is not subject to existing court decree, written agreements or oversight by an impartial watermaster. There are three relevant types of groundwater rights: (1) overlying rights whereby those who own land atop the Basin may make reasonable use of groundwater on such overlying land; (2) prescriptive rights whereby a water user has acquired another's rights to use water via an open, adverse and sustained use under a claim of right that such user would otherwise not be entitled to; and (3) appropriative rights whereby the groundwater may be used outside the Basin or for municipal purposes. While [CalAm] owns 46 acres of land (the proposed desalination plant location) overlying the Basin, that land would not support sufficient water for the project and would not entitle [CalAm] to use the water beyond the property that it owns. [CalAm] has no prescriptive groundwater rights in the Basin. Thus, [CalAm] would take any Basin water for the project via appropriative rights. Appropriative groundwater rights are developed subject to, and are thus junior to, existing appropriations and use by overlying users. If the proposed project is approved and any dispute arises as to whether or not [CalAm] possesses legal water rights, such dispute likely would be resolved through court action. Naturally, however, if [CalAm] does not have the right to the supply water for the proposed project, the proposed project could not proceed and would thus prove infeasible. This section [of the EIR] examines whether, based upon the evidence currently available, the [Commission] could conclude that there is a sufficient degree of likelihood that [CalAm] will possess rights to the water that would supply the desalination plant such that the proposed project can be deemed to be feasible.

(FEIR, p. 2-32.) Thus, the subject of water rights was examined to consider the likelihood that the project will prove feasible to implement so as to meet the basic project objectives (*i.e.*, the purpose of the project).

Recognizing that the complicated issue of rights to the brackish groundwater was well-suited to coordination with the State Water Resources Control Board ("SWRCB"), the expert agency as to water rights, the Commission asked that the SWRCB opine in writing as to the legal applicable framework. The SWRCB prepared a detailed report confirming that no water rights are needed for ocean water, setting forth the "developed water" legal doctrine under which Cal-Am could have water rights for the brackish water withdrawn by project wells, and explaining the factual inquiry for applying the legal test to determine the likelihood that Cal-Am would possess appropriative water rights to the brackish water. (FEIR, p. 2-33 and Appendix B-2.)[41] While MCWD and Marina disagree with our application of the facts to the law, our articulation of the pertinent legal construct expressly relies upon the legal doctrines and tests articulated by the SWRCB. The FEIR summarized the SWRCB project groundwater rights test:

> Essentially, if otherwise unusable (i.e., brackish or contaminated) Basin groundwater could be extracted without harm to existing lawful water users and any fresh groundwater extracted is returned to the Basin to avoid injury to existing legal water users, then [Cal-Am] would have rights to the portion of feedwater that comes from the Basin because the MPWSP product water that contains such Basin water would be "developed water."

(FEIR, p. 2-34.) The findings and conclusions regarding the water rights in the FEIR were upon the work of myriad independent hydrogeologists as well as test well data and interpretation by the applicant's consulting hydrogeologists, and the legal inquiry set forth in the SWRCB report. Both the FEIR and the Decision concluded that the evidence

[41] Both Marina and MCWD state that Cal-Am would be unable, in light of legal constraints posed by the Sustainable Groundwater Management Act, to rely upon prescriptive rights. (Marina reh. app., p. 24; MCWD reh. app., p. 33). However, this argument is not relevant because Cal-Am would seek to establish appropriative, and not prescriptive, rights.

supported a finding that "[Cal-Am] would likely possess water rights for the project." (FEIR, p. 2-40, based upon FEIR, pp. 2-31 through 2-40, Appendix B-2, Section 4.4 (Groundwater Resources) and pp. 8.2-4 through 8.2-16.)

Marina alleges that the legal question of whether Cal-Am would have water rights for the project should have been addressed in evidentiary hearings instead of (or perhaps in addition to) in the EIR. (Marina reh. app., pp. 23-24.) This allegation of error is without merit. The topic of water rights is not a factor in considering the issuance of a CPCN. Under CEQA, alternatives that would feasibly meet the basic objectives of the project must be considered in an EIR. (CEQA Guidelines section 15126.6(c).) The question of the likelihood of Cal-Am possessing water rights to support the project properly was examined as a feasibility issue in the FEIR. In addition, the FEIR addressed water rights in light of a Monterey County Superior Court decision overturning MCWD's use of the EIR for Cal-Am's previously proposed desalination plant (the Regional Desalination Project) partly on the basis that it lacked a discussion of water rights. (Ruling by Monterey Superior Court Judge Lydia Villarreal, February 2, 2012, Case No. M105019, p. 30.) No evidentiary hearings were required on this CEQA topic because evidentiary hearings are not a required part of the CEQA process.

Marina further asserts that the Commission "has effectively determined the existence of Cal-Am water rights required to operate its project where none exist and where the Commission has no authority to adjudicate such an outcome." (Marina reh. app., pp. 25, 29-30; MCWD reh. app., p. 29.) However, the underlying record indicates that we repeatedly made clear that we have no jurisdiction to finally adjudge project water rights, and that we examined the issue from a feasibility standpoint only:

> The function of the EIR/EIS analysis of water rights is not to definitively decide whether there are water rights to support the project, nor would a decision to approve the project function as a binding decision on [CalAm's] water rights…. [T]he level of detail and certainty for a feasibility analysis within an EIR/EIS is not the same as the more exacting level of detail, proof and legal arguments that would pertain in a court challenge on water rights. In an EIR/EIS, there is room for disagreement

> among experts, with the Final EIR/EIS still concluding that the project can be deemed feasible for current purposes on a water rights basis due to substantial evidence that [CalAm] will possess rights to the water that would supply the desalination plant.

(FEIR, p. 8.2-5; see also p. 2-32.)

Marina and MCWD maintain that our conclusion that evidence supports its belief that Cal-Am will succeed in perfecting legal water rights for the project is unsubstantiated. (Marina reh. app., pp. 25 -31; MCWD reh. app., pp. 28-34.) As discussed above, in certifying the FEIR, we reasonably and correctly applied the facts to the legal framework to reach its conclusion of preliminary feasibility on water rights grounds, and the record evidence supports our conclusion in this regard.

Marina and MCWD both address the California Constitution's reasonable and beneficial use provision as to water. MCWD claims that the project would violate its rights under the Constitution. (MCWD reh. app., pp. 28-31.) Marina claims that our water rights findings are based on a "belief that any groundwater in which the Total Dissolved Solids ('TDS') exceed 500 milligrams per liter ('mg/l') is 'waste' because it supposedly is not available for 'beneficial uses' by Basin users." (Marina reh. app., pp. 26, 28.) The FEIR provided:

> State water policy favors enhancement of beneficial uses of water. Specifically, Article X, section 2 of the California Constitution requires "that the water resources of the State be put to beneficial use to the fullest extent to which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented."

(FEIR, p. 2-25.) The report prepared by the SWRCB addressed the application of this Constitutional provision to the project, as explained in the EIR:

> The Report stated that, "Under the physical solution doctrine, although the Basin continues to be in a condition of overdraft, *to maximize beneficial use of the state's waters* CalAm may be allowed to pump a mixture of seawater, brackish water, and fresh water and export the desalinated water to non-overlying parcels." Report at 42. As discussed above, the key criteria are

> that existing water users will not be injured by [CalAm's] use of Basin groundwater and that any fresh water component withdrawn by the MPWSP supply wells will be returned to the Basin for beneficial use.

(*Ibid*., emphasis added.) Clearly, the SWRCB, which is the authority in the state concerning water law and policy (FEIR, p. 8.2-7), believes that the Constitution would support rather than hinder the establishment by Cal-Am of water rights for the project, assuming that the factual criteria were met. While the FEIR does characterize the brackish water that would be drawn into project supply wells as water that is not currently used or useable and thus could be deemed surplus water (*e.g.*, FEIR, pp. 8.2-9 through 8.2-11), the EIR did not in fact state that groundwater exceeding 500 mg/l TDS is "waste" per the California Constitution.

There also appears to be no support for MCWD's allegation that the project would contravene its constitutional rights. As explained in the FEIR, MCWD's water rights are appropriative and, as such, cannot be reserved in advance. (FEIR, pp. 8.2-13 and 8.2-14.) The project is not forecasted to affect any existing MCWD groundwater supply wells. (FEIR, pp. 2-38, 4.4-69 through 4.4-80, 8.2-37 through 8.2-61; see also, D.18-09-017, Appendix J, pp. 14-21.) While numerous individuals and entities have expressed concern over MCWD's water supply, and MCWD submitted its own studies (including the final airborne electromagnetic (AEM) study aimed at supporting such concerns), there appears to be no actual evidence that MCWD's water supply would be adversely affected, or affected at all, by the project. (*Id*.) Even if it were the case – as alleged by MCWD – that the AEM study shows pockets of "fresh water" within the Basin, the record supports the conclusion that the project would not draw such water into the supply wells, nor would it adversely affect the quality or quantity of water currently used by MCWD. (FEIR, pp. 4.4-35 and 4.4-36, 8.2-53 through 8.2-62; see also, D.18-09-017, Appendix J, pp. 19-21.) Indeed, MCWD itself has contemplated constructing a desalination plant similar to the project in order to transform unusable groundwater into potable water. (FEIR, pp. 4.4-105 through 4.4-107.) The record fails to support Marina's

and MCWD's contentions that the project violated the reasonable and beneficial use provisions of the California Constitution.

Marina implies that our water rights conclusions are inconsistent with SWRCB Resolution 88-63 (stating that groundwater is presumptively suitable or potentially suitable for beneficial use) and asserts that the project would require de-designation under Resolution 88-63. (Marina reh. app., p. 26.) However, the pertinent water rights inquiry is whether the project would use otherwise unusable Basin groundwater without harming existing legal groundwater users. As explained above, the FEIR showed that the brackish groundwater at issue is not usable and that the project would not harm existing water users. Resolution 88-63 simply does not come into play, nor is de-designation required. If Resolution 88-63 did control in some way and if de-designation were necessary, one would expect that SWRCB would have addressed those matters in its extensive report on the legal framework for project water rights and its comments on the Proposed Decision. That did not occur.

Marina next refers to the SWRCB's September 4, 2018 comments on the Commission's Proposed Decision and alleges that the language changes suggested by the SWRCB (and incorporated into D.18-09-017) somehow change the meaning and conclusions of the FEIR. (Marina reh. app., pp. 26-27.) However, the minor language changes proposed in the SWRCB letter were consistent with the FEIR and the Commission's Proposed Decision. The FEIR did plainly analyze whether the project withdrawal of brackish Basin water (not merely the fresh water component of the brackish water) would satisfy the water rights legal tests. (FEIR, p. 2-34.)

Marina notes that the SWRCB report identifies numerous areas of missing information required before conclusions could be drawn as to water rights. (Marina reh. app., p. 28.) This is true, but the requisite data was accumulated before the final EIR was prepared. It was incorporated into the FEIR's analysis and formed the basis for the water rights analysis. (FEIR, p.2-36.)

Marina next maintains that Cal-Am would not be able to meet its burden (in order to establish water rights over Basin surplus water under a "developed water" theory)

to show that the project will not cause harm or injury to other legal groundwater users. (Marina reh. app., 28-29.) The analysis of groundwater impacts in the FEIR appears sound and is based upon the analyses, studies and opinions of numerous hydrogeology experts, including groundwater modeling conducted by HydroFocus, a firm independently consulting for the Commission. Such reasoned analysis was relied upon in applying the water rights legal framework (as articulated by the SWRCB) to the facts in the water rights analysis. (FEIR, pp. 2-36 through 2-40.) Specifically, Marina states that the water rights conclusion in the FEIR and D.18-09-017 contradicts evidence that the project supply wells "could destroy a fresh water barrier to seawater intrusion and threaten to significantly worsen the Basin's serious seawater intrusion issues." (Marina reh. app., p. 29.)[42] Comments to this effect were raised and responded to in the Commission's CEQA process, with the opposite conclusion being reached. (FEIR, pp. 8.5-731, 8.5-758 and 8.5-759.) Disagreement among experts occurs regularly, but our conclusions will be upheld so long as they are supported by record evidence. We had ample evidence before us to conclude that the project would not likely cause harm or injury to existing groundwater users.

MCWD claims that feasible project alternatives that would not degrade aquifers in the project area should have been explored and pursued. (MCWD reh. app., pp. 30-31). The topic of alternatives is addressed in other sections of today's order. (See e.g., Discussion Section B.2.) As discussed extensively in the FEIR and explained in this order, the FEIR concluded that the project would not degrade groundwater in the project area. Because no significant impacts were identified in this arena, alternatives were not required to be designed to lessen groundwater effects. (CEQA Guidelines, § 15126.6(b) ["the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of

[42] In a footnote, Marina also criticizes the groundwater mitigation measure proposed by Cal-Am. (Marina reh. app., p. 29, fn. 149.) The validity and efficacy of this mitigation measure has been addressed in the groundwater portions of today's order (see Discussion Section C.4), and the measure will be implemented with abundant oversight and accountability through involvement of both the Commission and Monterey County.

the project…."].) In any event, the FEIR analyzed in considerable detail numerous alternatives to the project, including alternatives to a desalination plant, and a desalination plant at multiple other locations and using other supply methods. (FEIR, Section 5, Alternatives Screening and Analysis.)

Marina and MCWD further allege that Cal-Am will be unable to establish appropriative water rights under a "developed water" theory, claiming that there can be no "surplus" groundwater given that the Salinas Valley Water Basin has been designated as "critically overdrafted" for purposes of the Sustainable Groundwater Management Act ("SGMA"). (Marina reh. app., pp. 24, 66; MCWD reh. app., pp. 32-34.) The FEIR provides background on SGMA as follows:

> The Sustainable Groundwater Management Act (SGMA) was adopted in 2014 and became effective January 1, 2015. SGMA gives local agencies the authority to customize groundwater sustainability plans to their regional economic and environmental needs and manage groundwater in a sustainable manner to protect groundwater resources. SGMA establishes a definition of sustainable groundwater management and a framework for local agencies to develop plans and implement sustainable management strategies to manage groundwater resources, prioritizes basins (ranked as high- and medium-priority) with the greatest problems (i.e., the undesirable results as discussed below), and sets a 20-year timeline for implementation.
>
> The [Department of Water Resources ("DWR")] and the SWRCB are the lead state agencies responsible for developing regulations and reporting requirements necessary to carry out SGMA. DWR sets basin prioritization, basin boundaries, and develops regulations for groundwater sustainability. The SWRCB is responsible for fee schedules, data reporting, probationary designations and interim sustainability plans (DWR, 2016a). The State of California has designated the Salinas Valley as a priority basin and stakeholders have been working since 2015 to form a Groundwater Sustainability Agency for the Salinas Valley….
>
> SGMA requires the creation of a Groundwater Sustainability Agency (GSA) for medium- and high-priority groundwater

> basins in accordance with Water Code §10723 et seq. Each GSA is to develop and implement a Groundwater Sustainability Plan (GSP) in accordance with Water Code §10727 et seq. The GSP would describe how users of groundwater within the basin would manage and use groundwater in a manner that can be sustainably maintained during the planning and implementation horizon without causing undesirable results.

(FEIR, p. 4.4-42.) However, there is no clear legal relationship between water rights (in terms of whether there is surplus water that can become "developed water"), and the designation of the Basin as critically overdrafted (and thus a high-priority basin as to the timing of a GSP, for SGMA purposes). Indeed, the SWRCB more than once noted in its report on water rights that the Basin is overdrafted and it set forth the water rights legal test with that in mind:

> Because CalAm proposes to export water from the Basin to non-overlying parcels in the Monterey Region, an appropriative groundwater right is required. To appropriate groundwater, a user must show the water is "surplus" to existing uses or does not exceed the "safe yield" of the affected basin. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 214.) The appropriator must show the use will not harm or cause injury to any other legal user of water. The burden is on the appropriator to demonstrate a surplus exists. (*Allen v. California Water and Tel. Co.* (1946) 29 Cal.2d 466, 481.) But if, after excluding all present and potential reasonable beneficial uses, there is water wasted or unused or not put to any beneficial uses, "the supply… may be said to be ample for all, a surplus or excess exists… and the appropriator may take the surplus or excess…" (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368-369 (*Peabody*).) As discussed previously, *because groundwater in the Basin is in a condition of overdraft, the only way to show there is surplus water available for export to non-overlying parcels is for a user to develop a new water source.*

(FEIR, Appendix B-2, p. 35, emphasis added.) That same report states: "Under the physical solution doctrine, although the Basin continues to be in a condition of overdraft, to maximize beneficial use of the state's waters CalAm may be allowed to pump a mixture of

seawater, brackish water, and fresh water and export the desalinated water to non-overlying parcels." (FEIR, Appendix B-2, p.42.) Clearly, the SWRCB acknowledged that the Basin is in an overdrafted state, yet found that Cal-Am could establish water rights to the Basin groundwater extracted by the project. The condition of the Basin has not changed since the SWRCB issued its report.

Marina further notes that the SWRCB report was written before SGMA was adopted. (Marina reh. app., p. 25.) However, SGMA itself specifies plainly that nothing in the new law "modifies rights or priorities to use or store groundwater" or "determines or alters surface water rights or groundwater rights under common law." (Water Code, § 10720.5(a) and (b).) Further, the SWRB was engaged in the underlying Commission proceeding, even submitting a letter on the Proposed Decision concerning water rights on September 4, 2018, and did not alter its report concerning the water rights legal framework or disagree with the FEIR's and Commission's water rights feasibility conclusions. Given the SWRCB's role in California water planning and rights, and in implementing SGMA, this is a strong indication that the SWRCB continues to endorse its report on project water rights.

Based on the discussion above, our conclusion that the project appears feasible as to water rights is supported by law and the underlying record. All that is required is that Cal-Am have a path to obtaining the necessary water rights. Accordingly, no legal error has been demonstrated.

6. The Project does not violate the Basin Plan.

MCWD next alleges that the project violates the RWQCB's Central Coast Basin Plan requiring protection of water capable of beneficial use. (MCWD reh. app., p. 34.) The core of MCWD's argument is that the Basin Plan considers water with TDS levels at or below 3,000 mg/L to be potentially suitable for beneficial uses and that the project "cannot be operated without unlawfully degrading these resources in violation of the Basin Plan, and it plainly cannot due to the project objective of exacerbating seawater intrusion." (*Ibid*.) As discussed above regarding project consistency with the Basin Plan, the brackish groundwater expected to be drawn in part into the project supply wells

currently far exceeds, and is projected to continue throughout project life to far exceed, the Basin Plan's water quality objectives. (FEIR, pp. 8.5-574 and 8.5-575; 8.2-39 through 8.2-49; see also, D.18-09-017, Appendix J, p. 19-20.) This means that no water meeting Basin Plan standards would be disturbed. Even if it is the case that areas of fresh water exist within the Basin, no evidence has been provided to indicate that the project would intersect with or adversely affect such areas of water. As the EIR concludes in this regard:

> If there are pockets or lenses of fresher groundwater inland and outside of the MPWSP capture zone, it is of minor consequence because while the water located inland from the coast may be less intruded and have lower TDS, it would not be drawn into and would not become source water for the MPWSP slant wells.

(FEIR, p. 8.2-61.) The project is not forecasted to adversely affect groundwater quality or quantity within the Basin and, far from being designed to exacerbate seawater intrusion, the project is expected to assist in arresting seawater intrusion:

> Figure 4.4-17 illustrates the MPWSP's contribution to redirecting or reversing the inland advance of seawater intrusion. Because there are many stresses in the basin, the MPWSP project would not necessarily draw the leading edge of the seawater intrusion line back towards the coast to the extent shown by the particle-tracking output, but it does indicate that the MPWSP provides a benefit for the basin. Based on the particle-tracking results, the MPWSP would not exacerbate seawater intrusion, and groundwater extraction from the coast, as part of project operations, would be expected to retard future inland migration of the seawater intrusion front. The proposed project would facilitate the reduction of seawater intrusion in the long term, and the impacts of the proposed project are considered less than significant.

(FEIR, pp. 4.4-91 and 4.4-92; see also D.18-09-017, Appendix J, p. 17.) The project objectives are set forth in the FEIR and they do not indicate an objective to exacerbate seawater intrusion. (FEIR, pp. 1-5 and 1-6.) MCWD's allegations as to this issue are without merit.

7. The Commission did not err in not requiring proof of legal feasibility of groundwater pumping.

MCWD claims that we committed legal error by failing to require proof of project feasibility concerning Basin harm, water rights or Basin Plan compliance. (MCWD reh. app., pp. 34-36.) These topics have been addressed previously in today's order. (See Discussion Section C.5.) Issues pertaining to alleged violations of the California Constitution and interference with MCWD's water system have also been addressed in today's order, with the conclusion that the Commission did not err in its process or findings. (See generally, Discussion Section A.)

MCWD specifically assails the Commission's proceeding for failing to refer groundwater harm and rights issues to the SWRCB and failing to seek a determination (presumably from the RWQCB) as to the project's consistency with the Basin Plan. (MCWD reh. app., pp. 35-36.) MCWD has not identified any requirement for such referrals and there is no indication that we proceeded in an unlawful or irregular manner.[43]

As to referring the question of water rights to the SWRCB, we did just that. As discussed above, Commission staff requested that the SWRCB opine as to the legal framework pertinent to water rights for the project. The SWRCB prepared a written report, outlined the legal construct and the facts that Cal-Am would need to establish for water rights to exist, accepted public comment on its report, and then modified and finalized the report. (FEIR, Appendix B-2.) That report was used as the basis for the FEIR's water rights analysis. (FEIR, Section 2.6.) As is also discussed above, an appropriative right to groundwater is a creature of common law. The SWRCB cannot issue any permit or approval for such a right, and thus further referral to SWRCB for any decision is not an option. SWRCB participated in the EIR process, submitting a comment letter on the DEIR (on topics other than water rights) and a comment letter on the Proposed Decision (precisely on the topic of water rights). (FEIR, pp. 8.4-21 through 8.4-24; see also, D.18-09-017, Appendix J, Exhibit C.) The SWRCB was extensively engaged in the

[43] See Discussion Section A.5.c, regarding referral of the water right issues to another agency.

Commission's process, had every opportunity to participate in the water rights analysis, and did so. It is not clear what more MCWD desires in this regard, but no more is required by law.

MCWD cites two cases to support its contention that the Commission was required to refer the water rights issues to the SWRCB or to the courts for resolution. These cases (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286-288; *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 480) merely indicate that courts have jurisdiction over water rights issues, including adjudication of a water basin. Neither of these cases pertain specifically to a CEQA lead agency's determination that a project is preliminarily feasible based on water rights grounds, and neither affirmatively requires a referral at this stage. The FEIR fully recognized that the water rights and harm issue might ultimately be resolved in a court proceeding. (FEIR, pp. 8.2-6 and 8.2-7.) The FEIR also noted that referral to a court at this stage would be premature:

> Since under the legal construct, an appropriative right to developed water is a right that exists based upon the facts at hand, and need not be formally established in advance, there is no possibility for the Lead Agencies to insist that CalAm obtain or perfect water rights prior to project approval.

(FEIR, p. 8.2-6.) Thus, we have secured all the certainty viable at this stage as to project water rights.

With regard to the Basin Plan, MCWD has not articulated any legal requirement to seek a determination from either the RWQCB or the SWRCB concerning consistency with the Basin Plan. CEQA requires that an EIR discuss any inconsistencies between a project and applicable regional plans, such as the Basin Plan. (CEQA Guidelines, § 15125(d).) It is the purview of the lead agency to make those consistency judgments. The FEIR analyzed Basin Plan consistency. (FEIR, pp. 4.4-39 and 4.4-30; 8.5-574 and 8.4-575.) The RWQCB is a responsible agency under CEQA for the project and was consulted as such by the Commission staff and consultants. The RWQCB participated in the process, submitting a comment letter on the Draft EIR (in conjunction with the

SWRCB), and did not comment on any Basin Plan issues. (FEIR, pp. 8.4-21 through 8.4-24.)

For the reasons discussed above, the Commission did not commit any legal error as to these allegations.

8. The Project does not violate SGMA.

MCWD next alleges that the project conflicts with the Sustainable Groundwater Management Act (or "SGMA"), that "the Commission has ignored and contravened SGMA," and that the project will exacerbate seawater intrusion and degrade sub-basins in the project area. (MCWD reh. app., p. 37.) This is not the case. Seawater intrusion and degrading the Basin groundwater are addressed above regarding the Basin Plan and in the discussion of groundwater impacts in today's order. The topic of SGMA consistency is addressed in our discussion today groundwater impacts and water rights. (See Discussion Sections C.1, C.3 through C.5.) The Commission in no way ignored SGMA, but thoroughly considered and addressed SGMA and evaluated whether the project would lead to SGMA's stated undesirable results, concluding that it would not. (FEIR, pp. 4.4-42 and 4.4-43; 8.2-31 through 8.2-36; see also, D.18-09-017, Appendix J, p. 18.) No evidence supports the view that we erred and failed to regularly pursue our authority with respect to our treatment and consideration of SGMA.

9. The Commission's determinations that the project was feasible in terms of compliance with the Agency Act were correct.

Marina disagrees with the Commission 's findings that the project appears preliminarily feasible in terms of compliance with the Monterey County Water Resources Agency Act, codified at Water Code Appendix, Chapter 52 (or "Agency Act"). (Marina reh. app., pp. 31-38.) The Agency Act established the Monterey County Water Resources Agency ("MCWRA"). As explained in the FEIR:

> Per the Agency Act, MCWRA is charged with preventing the waste or diminution of the water supply in its territory by, among other things, controlling groundwater extractions and prohibiting groundwater exportation from the Salinas River

> Groundwater Basin. When it enacted the Agency Act, the California State Legislature expressly provided that: "no groundwater from that basin may be exported for any use outside the basin, except that use of water from the basin on any part of Fort Ord shall not be deemed such an export. If any export of water from the basin is attempted, [MCWRA] may obtain from the superior court, and the court shall grant, injunctive relief prohibiting that export of groundwater." Agency Act at Section 21. The Agency Act further empowers the MCWRA to prevent extraction of groundwater from particular areas of the Basin if needed to protect groundwater supplies. Accordingly, MCWRA adopted Ordinance 3709 (the "Ordinance") prohibiting well drilling and/or groundwater extraction within certain portions of the northern Salinas Valley between the depths of 0 mean sea level and -250 mean sea level.

(FEIR, p. 2-41.) The Commission has considered in detail (in the proceeding and in the FEIR) the issue of Agency Act compliance as a project feasibility issue (much like the topic of water rights). (FEIR, pp. 2-41 and 2-42; 8.2-17 through 8.2-13.) The FEIR evaluated "the proposed project's consistency with the Agency Act (and the Ordinance) such that the application of the Agency Act or the Ordinance would not undermine the project's right to withdraw and supply water and thus, impair the feasibility of the project from water rights and legal feasibility perspectives." (FEIR, p. 2-41.) The FEIR further stated:

> In order to satisfy the Agency Act, [Cal-Am] has proposed that it will calculate annually (based on the total dissolved solids (TDS) concentration of the water being drawn through the slant wells) the percentage of supply water that originated in the Salinas Valley Groundwater Basin (SVGB, which is the same as the Salinas River Groundwater Basin) as fresh water, i.e., the fresh water component of the brackish water drawn by the slant wells. [Cal-Am] would then "return" to the SVGB that same amount of water by providing desalinated product water to CCSD and CSIP.

(FEIR, p. 8.2-17.) This method of ensuring "no net loss" of fresh water within the Basin was the subject of the Return Water Settlement Agreement approved by the Commission.

(D.18-09-017, pp. 103-112.) Thus, the Commission reasonably found and concluded that the project was feasible and in compliance with the Agency Act. This analysis is supported by MCWRA. (See Comments of MCWRA-1 on the DEIR/EIS, referred to in the FEIR, Section 8.4.5, pp. 3.5-528 [" . . . . The updated groundwater analysis in the DEIR/EIS demonstrates that the proposed project will not harm or cause injury to other basin users. It is the opinion of the MCWRA that the concerns regarding groundwater modeling, SVGB impacts, and water rights have been adequately addressed throughout the DEIR/EIS."]; see also, generally, Response of MCWRA and County of Monterey to the Rehearing Applications, pp. 1-5.)

Marina also alleges that the conclusions in D.18-09-017 concerning Agency Act compliance "are *not* supported by the law, exceed the Commission's jurisdiction and have *no* binding effect on the jurisdictional agency charged with implementation and enforcement of the Agency Act…." (Marina reh. app., p. 33.) Our conclusions on project feasibility appear to be supported by the law and the facts. (See Discussion Section B.2.) We did not exceed our jurisdiction in that we fully recognized that our feasibility conclusions do not and could not bind the MCWRA, which is empowered to enforce the Agency Act. (D.18-09-017, p. 107, citing Return Water Settlement Agreement Section 3.) There naturally is some possibility that a court facing a future lawsuit by MCWRA against Cal-Am to enforce the Agency Act, or by a third party against MCWRA seeking enforcement of the Agency Act, could decide that the project failed in some respect to comport with the Agency Act. At this stage, however, our determinations that the project is not infeasible with respect to compliance with the Agency Act are reasonable based on the analysis in the FEIR, and consistent with the law.

Marina raises five separate arguments challenging the Commission's conclusions that the Return Water Settlement is in the public interest and supported by the law and the record. (Marina reh. app., pp. 34-36.) Marina further asserts that Alternative 5a, the approved project, conflicts with the Agency Act. (Marina reh. app., pp. 36-38.) Each of these specific arguments is addressed below.

First, Marina maintains that the Return Water Settlement Agreement is irrelevant to Agency Act compliance, could not authorize an action inconsistent with the Agency Act, and relies upon Cal-Am obtaining water rights to the project source water. (Marina reh. app., p.34.) It is true that the Return Water Settlement approved via D.18-09-017 does not alter or diminish the right and obligation of the MCWRA, the agency under the Agency Act who enforces the law. The Commission found the project, and the Return Water Settlement Agreement, to be consistent with the Agency Act. (See D.18-09-017, pp. 113-117, 202, 215.) The issue of project water rights is addressed elsewhere (see Discussion Section C.5.), is not a barrier to compliance with the Agency Act.

Second, Marina maintains that the MCWRA lacks authority to waive or modify the Agency Act (Marina reh. app., p. 34), but the MCWRA has done neither.

Third, Marina claims that the participation by MCWRA as a party to the Return Water Settlement Agreement is of no value in interpreting Agency Act. (Marina reh. app., pp. 34-36.) This claim lacks lack merit.

In terms of the deference owed to MCWRA's interpretation of the Agency Act, we note that the California Supreme Court has stated:

> Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court.

(Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal. 4th 1, 7; see also Marina reh. app., pp. 35-36; MCWRA Response, pp. 7-9.)

Fourth, Marina asserts that neither the findings of the Commission concerning Agency Act consistency for the Regional Desalination Project (D.10-12-016), nor the statements about the Agency Act by SWRCB in its report on project water rights, would be of evidentiary value in any court proceeding on Agency Act compliance. (Marina reh. app., p. 36) In the event of a future court proceeding concerning Agency Act

enforcement, what would be controlling is MCWRA's interpretation. Based on the analysis in the FEIR, the Commission's findings and conclusion on the matter would be supportive.

There are two referenced data points. With respect to the first, MCWD (the water supplier for Marina) previously agreed that the very same return water formula should be employed for the Regional Desalination Project. The Commission logically could deduce that the same conclusions should pertain to the project. With respect to the second, as explained in the FEIR:

> Furthermore, as discussed in EIR/EIS Section 2.6.3 and included as EIR/EIS Appendix B2, the SWRCB opined on page 40 of its Final Review of California American Water Company's Monterey Peninsula Water Supply Project ("Report") that because "the Project as proposed would return any incidentally extracted usable groundwater to the Basin ... , it does not appear that the Agency Act or the Ordinance [3709] operate to prohibit the Project." Pages 39 to 40 of the SWRCB Report noted that while the word "export" is not defined in the Agency Act, "limitations on export ordinarily are not interpreted to apply to situations where the conveyance of water to areas outside a watershed or stream system is accompanied by an augmentation of the waters in that area, so there is no net export."

(FEIR, p. 8.2-18 (citing EIR Appendix B-2).) The SWRCB is California's expert water rights and water protection agency and the Commission correctly relied upon its advice and opinions. Taking into account the legal construct, the history, and the scientific analysis as well as input from key agencies, the Commission reasonably determined that the project was not infeasible based on Agency Act consistency grounds.

Fifth, Marina criticizes the "net effect" approach of the Commission's Agency Act consistency determination, claiming that it is based on an assumption that groundwater with a TDS level above 500 mg/L is "waste." (Marina reh. app., p. 36.) As noted above, the Commission did not assume that water with a TDS level above 500 mg/L is classified as "waste," but the EIR did employ this TDS level as the "fresh water"

definition, consistent with MCWRA regulations. (FEIR, p. 8.2-2 and 8.2-3.) The groundwater that could be pulled into project supply wells far exceeds these TDS levels and is not useable. (FEIR, p. 8.2-48.) The "net effect" approach is a reasonable interpretation of the Agency Act viewed as a whole, and is embraced by the MCWRA and the SWRCB. The Commission's findings in this regard are supported by record evidence.

Finally, Marina claims that the Commission erroneously concluded that FEIR Alternative 5a (the project approved by the Commission) comports with the Agency Act "and does not comply with CEQA requirements for conflicts with existing plans and law to be identified and addressed." (Marina reh. app., pp. 36-38.) Marina does not provide a CEQA citation for its allegation, but presumably it refers to the requirement to identify "any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans." (CEQA Guidelines, § 15125(d).) The Agency Act is none of these. It is a state law, and the FEIR considered consistency with the Agency Act as a feasibility matter.

As to the FEIR's conclusion with respect to project consistency with the Agency Act, the EIR's findings are lawful because they are supported by record evidence. At the outset, all of the discussion above concerning project consistency with the Agency Act pertains to the approved project alternative. Marina's critique is that the Agency Act export prohibition applies to "groundwater" of any quality, while the Agency Act consistency finding is predicated upon Cal-Am returning to the Basin the quantity of "fresh water" or "useable water" that is extracted by the project source wells (*i.e.*, the fresh water component of the brackish groundwater withdrawn). (Marina reh. app., pp. 37-38.) We disagree with Marina's critique, because the return water amount (the fresh water component of the source water) is projected to be no more than 10% in the first few months of project pumping, and no more than 5% within 5 years of project commencement. (FEIR, pp. 8.2-21 through 8.2-23.)

Moreover, in its response to the rehearing applications, MCWRA addresses this contention and argues that when the Agency Act is interpreted and construed as a harmonized whole, use in Section 21 of the term "groundwater" does not prevent an

exchange of useable groundwater (*e.g.*, per the Return Water Settlement Agreement). (MCWRA Response, pp. 2-5.) Such a view of the Agency Act through a harmonized lens has merit. This view is consistent with the analysis in the FEIR.

10. The Commission independently reviewed the groundwater analysis.

MCWD contends that "D.18-09-017 relies heavily on the groundwater impact conclusions of the project proponents' HWG." (MCWD reh. app., p. 24.) According to MCWD, HWG's "deeply flawed" analysis of the model's prediction of groundwater impacts was incorporated into the FEIR wholesale as Appendix E-3, with no evidence of independent/peer review by the Commission. (MCWD reh. app., pp. 24-25.)[44]

There is no basis for MCWD's assertions. As noted in FEIR, Section 4.4.1.2, the August 2012 Settlement Agreement provided that parties would support the issuance of a CPCN. However, support by some of the parties[45] depended on the resolution of certain issues, including the potential harm to the Salinas Valley Groundwater Basin (or "SVGB") and its users from Cal-Am's pumping of source water. Therefore, their CPCN support was contingent on resolving the feasibility of Cal-Am being able to extract seawater from beneath the ocean floor using a shallow, slant well intake system at the CEMEX property. This was to be informed by the Hydrogeologic Study and the Technical Report provided for in the Settlement Agreement (HWG, 2017; see FEIR, Appendix E3).

Appendix E3 was prepared by the HWG and represents the Technical Report required by the Settlement Agreement. It provides findings and recommendations with respect to appropriate development of a desalination source water supply for the MPWSP. Contrary to MCWD's contention, HWG's composition includes hydrogeologists representing Cal-Am, the Salinas Valley Water Coalition and the Monterey County Farm

[44] There is some overlap between this issue and similar arguments raised by MCWD and Marina in the context of due process claims. (See generally Discussion Sections A.5 through A.8, above.)

[45] The Salinas Valley Water Coalition (or "SVWC"), Monterey County Farm Bureau (MCFB), LandWatch Monterey County, and Citizens for Public Water.

Bureau, who all worked together. Therefore, HWG work product is not an applicant product but was compiled by several parties' experts representing diverse interests.[46]

In support of the CEQA/NEPA review process, work products developed by the HWG were peer reviewed by a certified hydrogeologist from Environmental Science Associates, an engineering geologist from Sutro Science and hydrogeologists/groundwater modelers from HydroFocus, Inc. Each of these experts were part of the CEQA/NEPA team contracted to provide independent review and analysis. The CEQA/NEPA team peer reviewed all data and findings developed by the HWG, provided comments, and recommended changes prior to incorporating the hydrogeologic information and data into the body of technical information necessary to complete the groundwater analysis in the FEIR. (See FEIR, p. 4.4-6.)

As MCWD acknowledges, the Commission did discover an apparent conflict regarding Geoscience, the company that performed the groundwater modeling for the previous April 2015 Draft EIR. In order to address the accuracy and credibility of the groundwater modeling, the Commission employed the Lawrence Berkeley National Laboratory to conduct an independent evaluation of the groundwater data. In addition, the Commission engaged with Monterey Bay National Marine Sanctuary as co-lead agency and prepared an updated FEIR that used an independent groundwater modeling consultant, HydroFocus. (See Master Response 5, FEIR, Ch. 8, section 8.2.5.6; see also D.18-09-017, Appendix A., at pp. 18-19.) HydroFocus performed the groundwater modeling for the EIR/EIS lead agencies, and prepared Final EIR/EIS Appendix E2 (North Marina Groundwater Model Review, Revision, and Implementation for Slant Well Pumping Scenarios). It was Appendix E2 (not Appendix E3 as claimed by MCWD) that provided

[46] To the extent any work product is considered that of the project proponent, there is nothing wrong with this. There is nothing improper about using a document prepared by an applicant "so long as the agency applies its 'independent review and judgment to the work product before adopting and utilizing it.'" (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 369 [court found initial draft of EIR prepared by the applicant was not legally inadequate where City independently reviewed and modified the document].) The Commission conducted an independent review in this case.

the basis for the groundwater impacts incorporated into section 4.4 of the FEIR. Accordingly, MCWD has not demonstrated legal error.

MCWD also alleges that the project consultant, ESA, actively assisted Cal-Am's expert in responding to cross-examination. On April 11, 2016, Pete Leffler, Cal-Am's expert witness and HWG representative, gave testimony before the Commission in evidentiary hearings. That evening, Eric Zigas (an ESA employee and consultant to the Commission), and Dennis Williams and Johnson Yeh (Geoscience employees and consultants to Cal-Am), received an email from Pete Leffler that requested clarification on information contained in the publicly available April 2015 Draft EIR. Johnson Yeh provided technical responses to Pete Leffler and Eric Zigas provided responses to the email chain by referencing DEIR figures and DEIR Appendix E2. The only thing that the ESA employee did was state where in the public DEIR something could be found. This does not amount to any improper assistance to Cal-Am's expert.

IV. CONCLUSION

As discussed above, the rehearing applications of D.18-09-017, filed by MCWD and Marina, do not establish legal error. However, we will modify the Decision to add some additional findings of facts, as set forth in the ordering paragraphs below. Rehearing of D.18-09-017, as modified, is denied, because good cause has not been established for the granting of rehearing.

THEREFORE, IT IS ORDERED that:

1. Decision 18-09-017 is modified to add the following findings of fact on page 193:

> 207. Based on the record evidence in the proceeding, including the FEIR, and considering the positions set forth by the City of Marina and others, the approved project reasonably reflects and is consistent with community values, including those involving agriculture, tourism, education, and research, as well as the provision for providing necessary water and jobs.

208. The record shows that CalAm provided sufficient consideration of potential impacts on recreational and park areas, some of which were determined to be temporary.

209. Based on the record, there is no specific significant historic resources that have been impacted by the MPWSP.

210. CalAm is committed to mitigate against any impacts to undiscovered archeological resources, and to comply with all mitigation required in the Mitigation Monitoring and Reporting Program (MMRP) for the MPWSP.

211. The issues involving the influence on the environment have been adequately considered with the determination to certify the FEIR.

2. Rehearing of D.18-09-017, as modified, is hereby denied.

This order is effective today.

Dated: January 31, 2019, at Sacramento, California.

MICHAEL PICKER
President
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners

I abstain.

/s/ GENEVIEVE SHIROMA
Commissioner