

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

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

Application 12-04-019
(Filed April 23, 2012)

**REPLY BRIEF OF LANDWATCH MONTEREY COUNTY REGARDING
GROUNDWATER RIGHTS**

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I. Introduction

LandWatch submits the following in response to the Administrative Law Judge's Ruling of June 1, 2012, inviting reply briefing on the issue of the adequacy of water rights to support the project.

In its Opening Brief On Legal Issues For Early Resolution, Cal-Am first argues that the project "likely" does not require water rights because it will return all water originating from the Salinas Valley Groundwater Basin ("SVGB").¹ Cal-Am argues that, although it would "incidentally" be pumping SVGB groundwater, it would not be appropriating it because it would not be putting it to beneficial use.² In fact, however, Cal-Am would be putting it to beneficial use in the Castroville Seawater Intrusion Project and thereby appropriating it.³

¹ California-American Water Company Opening Brief On Legal Issues For Early Resolution, July 11, 2012, p. 10.

² Id. at 14.

³ Id. at 13.

Alternatively, Cal-Am argues that if appropriative rights were required, Cal-Am could exercise them on two theories. First, Cal-Am argues it could appropriate groundwater as surplus because available modeling shows no adverse effects to other groundwater users.⁴ Second, Cal-Am argues that the SVGB has not been judicially determined to be in overdraft.⁵ However, Cal-Am does not adequately demonstrate that its pumping would do no harm and there is overwhelming evidence that the SVGB is in fact in overdraft.

Cal-Am argues that it need not establish a water right because no permit is required for appropriation from an unadjudicated basin.⁶ This argument appears to suggest that the Commission need not further address the issue of groundwater rights and should simply wait to see if “a third party or other SVGB pumper would have some legal basis to enjoin the development of the Monterey Peninsula Water Supply Project.”⁷ However, it would be irresponsible not to address the question now – before substantial financial commitments are made and more critical time runs toward the 2017 deadline.

The critical factual question that remains to be addressed is whether the project would cause harm to others’ groundwater rights. This factual issue should be addressed through an independent hydrological assessment as soon as possible.

II. There Is No Surplus Water Because The Salinas Valley Groundwater Basin Is In Overdraft

“[A]n appropriative taking of water which is not surplus is wrongful”⁸ Cal-Am’s argues that the SVGB has not been judicially determined to be in overdraft, apparently implying that there is surplus water available for appropriation – at least until Cal-Am forces an adjudication by wrongful taking. Any implication that the Commission might simply wait for a legal challenge is irresponsible. And the implication that there is surplus water is belied by uncontroverted evidence that the SVGB is in fact in overdraft.

⁴ Id. at 12.

⁵ Id. at 16.

⁶ Id. at 12.

⁷ Id.

⁸ *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.

Basin overdraft was documented in 1946 by the State of California in Bulletin 52.⁹ The Monterey County Water Resources Agency ("MCWRA") EIR for the Salinas Valley Water Project estimated "Basin Overdraft" in 1995 to be 17,000 acre feet.¹⁰ The MCWRA EIR's introductory paragraph "Basin Overdraft and Seawater Intrusion" stated that an "ongoing imbalance between the rate of groundwater withdrawal and recharge has resulted in overdraft conditions in the Basin" and seawater intrusion advancing at 425 feet per year.¹¹

In 1977, the State Water Resources Control Board listed the Basin as a candidate for adjudication, and in 1993, the Board "reinforced the urgency of the water problems" by initiating adjudication proceedings.¹² In 2004, the California Department of Water Resources Bulletin 118 again stated that heavy pumping of the 180- and 400-foot aquifers had caused significant seawater intrusion into both aquifers.¹³

The CWP EIR contains a description of overdraft at Chapter 4.2, Groundwater Resources (under section headings "Groundwater Recharge" and "Seawater Intrusion"), and Chapter 6.2, Groundwater Resources (under Impact 6.2-5).¹⁴ The EIR acknowledges that "many of the County's aquifers have had more water pumped out of them than is replaced" naturally, and that this "process of overdrafting the aquifers" has caused reduced water levels and saltwater intrusion on the north and east side of the Salinas Valley.¹⁵

Best Best & Krieger, on behalf of Ocean Mist Farming Company, commented that the draft CWP EIR failed to discuss the nature and extent of basin overdraft.¹⁶ The FEIR responded

⁹ MCWRA, Draft EIR/EIS for the Salinas Valley Water Project, section 5.3.1 (Existing Conditions, Existing Land Use, Precipitation and Overdraft), available at http://www.mcwra.co.monterey.ca.us/SVWP/DEIR_EIS_2001/index.htm.

¹⁰ Id., section 1.3 (History & Background), Table 1-2.

¹¹ Id., section 1.2.1 (Basin Overdraft and Seawater Intrusion)

¹² Id., section 1.3 (History & Background)

¹³ California Dept. of Water Resources, Bulletin 118, Salinas Valley Groundwater Basin, 180/400 Foot Aquifer Subbasin, Feb. 27, 2004, available at http://www.water.ca.gov/pubs/groundwater/bulletin_118/basindescriptions/3-4.01.pdf.

¹⁴ CWP EIR, pp. 4.2-16, 4.2-21, 6.2-21, available at http://mryrdp.org/docs/project_library/9-1_CWP_FEIR_and_Addenda/index.php.

¹⁵ CWP EIR, p. 4.11-6.

¹⁶ CWP EIR, Vol. 4, Comments G_OceMi-01 and 02.

"[t]he overdraft condition of the Salinas Valley is adequately acknowledged in the EIR. The EIR reveals the overdraft condition in the basin in Chapter 4.2 ... and Chapter 6.2"¹⁷

In sum, it is clear that the Salinas Valley Groundwater Basin is in overdraft – even if that fact has not been judicially determined. Under the circumstances, there is no surplus water for the project to appropriate.

III. Cal-Am Would Be Appropriating Water Since “Returning” Groundwater Via CSIP Puts It To Beneficial Use

Cal-Am argues that appropriation requires the intent to apply the water to an existing or future beneficial use.¹⁸ Cal-Am then argues that it would not be appropriating groundwater because it will not “apply the water to authorized municipal use within the California American Water service area.”¹⁹ Cal-Am’s argument simply ignores the fact that it would be putting the water to beneficial use by providing it to the Castroville Seawater Intrusion Project (“CSIP”).

The authority cited by Cal-Am is readily distinguishable. SWRCB Decision No. D-379 held that a flood control district was not appropriating the water stored temporarily in its dam because it was not putting the water to beneficial use. The SWRCB held that there had been no showing that the flood control dam was not beneficial to water rights holders and the limitations period had run on any possible claim that the dam harmed percolation.²⁰ Here, a showing of harm may well be made timely. More fundamentally, Cal-Am does in fact propose to put the SVGB groundwater it pumps to a beneficial use through the CSIP project.

By providing the groundwater to CSIP, Cal-Am may avoid violation of the MCWRA Agency Act’s ban on export of groundwater. However, this does not mean that Cal-Am is not appropriating groundwater. The appropriation benefits the CSIP project, but it may do so at the expense of other groundwater users, *e.g.*, those that do not receive water from the CSIP project and who may be injured by any additional pumping.

¹⁷ CWP EIR, p. 14.5-170 (Response G_OceMi-01)

¹⁸ California-American Water Company Opening Brief On Legal Issues For Early Resolution, July 11, 2012, p. 14.

¹⁹ *Id.*

²⁰ SWRCB Decision No. D-379, pp. 16-17.

IV. Cal-Am Has Not Demonstrated That The Project Would Not Harm Others' Groundwater Rights

Cal-Am admits that if it is deemed to be appropriating groundwater, it must do so without adversely affecting other prior right holders in the SVGB.²¹ Cal-Am simply has not demonstrated that the project is not likely to result in successful claims that it injures groundwater rights holders.

A. Mere Compliance With MCWRA Agency Act Is Not Sufficient

Cal-Am claims that no third party could enjoin source water pumping because “available modeling and technical information . . . concludes that will be no significant effects from the proposed slant well operations.”²² The evidence Cal-Am cites for this claim is an April 20, 2012 memorandum from RBF Consulting.²³ The only relevant claim in the memorandum is that the proposed project will return a portion of the desalinated water to Salinas Valley users. The purpose of this return is to comply with the MCWRA Agency Act ban on export of groundwater from the SVGB.²⁴

Even if water is returned to some users, it would not necessarily ensure that no other groundwater users are harmed by the project. For example, as LandWatch has argued, the project may still injure the up-gradient North County groundwater users who will not be receiving the “returned” desalinated water. These users may be able to show that the project injures them notwithstanding its purported compliance with the MCWRA Agency Act.

B. The CWP EIR Does Not Demonstrate That Water Rights Holders Will Not Be Injured

The only other evidence Cal-Am cites to support its claim that the project “would not adversely affect other groundwater users or groundwater elevations and conditions in the SVGB” is section 5.2.2.1 of the CWP EIR.²⁵ This section is irrelevant because it addresses the impacts of the Regional Desalination Project, not the North Marina Alternative. Since the project

²¹ California-American Water Company Opening Brief On Legal Issues For Early Resolution, July 11, 2012, p. 15.

²² Id. at 12.

²³ Svindland Direct Testimony, Attachment 3

²⁴ Water Code App., § 52-21.

²⁵ California-American Water Company Opening Brief On Legal Issues for Early Resolution, July 11, 2012, p. 15.

currently under review is a variation of the North Marina Alternative, the potentially relevant discussion of groundwater impacts in the CWP EIR would be in section 4.2.4.3, which discusses the North Marina Alternative. The CWP EIR discusses impacts to groundwater levels in the immediate vicinity (Impact 4.2-4); depletion of the SVGB groundwater resources and export (Impact 4.2-5); and inducement of seawater intrusion (Impact 4.2-6).²⁶ This discussion is not sufficient to establish that the current project would not be vulnerable to a successful challenge that it harms groundwater rights for a number of reasons.

First, the discussion of the impacts from the North Marina Alternative is based on 2008 modeling by GeoScience.²⁷ However, Cal-Am subsequently admitted that the 2008 GeoScience Report was based on faulty assumptions, which resulted in understating the seawater intrusion. In particular, the 2008 modeling “overestimated water levels for the southern boundary” of the model area and, “[a]s a result, the 2008 report underestimated the ocean inflow.”²⁸

Second, the relevant question for groundwater rights analysis will not be whether there is a “significant effect” under CEQA, but whether any groundwater rights holders will be able to show cognizable injury. It is not clear that the threshold for significant impacts employed the CWP EIR can be equated to the legal standard that would govern a water rights claim. The CWP EIR identifies the following thresholds:

- “Violate any water quality standards or waste discharge requirements;
- Substantially 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;
- Otherwise substantially degrade water quality;”²⁹

²⁶ CWP EIR, pp. 4.2-42 to 4.2-52.

²⁷ Id., Appendix E, GeoScience Support Services, Inc., North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008. We note that the CWP EIR unaccountably references this report with both a July 25, 2008 and a September 26, 2008 date. CWP EIR, pp. 4.1-64, 4.2-53, 4.2-43. The CWP EIR does not include a separate September 26, 2008 Geosciences report.

²⁸ A0409019, Cal-Am, Response to DRA’s Data Request #51, undated, p. 17 available at https://dl.dropbox.com/u/93807551/Data%20Request%20CWP%2351%20Response%20Letter_February%2026%202010_Final-1.pdf. While the February 2009 GeoScience report included as Appendix Q to the CWP EIR reportedly corrected this error, this report does not discuss the North Marina Alternative; it discusses only the Regional Desalination Project scenarios because its focus was to evaluate changes made to that project. CWP EIR, Appendix Q.

²⁹ CWP EIR, p. 4.2-36.

The CEQA analysis concludes that there will be no “substantial” depletion of groundwater resources or substantial degradation of water quality. However, as discussed below, the modeling in fact demonstrates a loss of groundwater resources to inland users and an increase in the extent and duration of seawater intrusion, which effects may be actionable by groundwater rights holders regardless of the CEQA significance conclusion.

SUBSTANTIAL DEPLETION: The CWP EIR does not define what a “substantial” depletion of groundwater supplies would be. Furthermore, regardless of the CEQA significance threshold, the relevant water rights question is not whether the impact would amount to a “substantial” depletion of groundwater supplies, however that qualitative standard is determined, but whether any rights holders suffer cognizable injury. The modeling in the CWP EIR, even with its flawed assumptions about groundwater elevations, documents a loss of 762 afa to inland water users as a result of the project.³⁰ It is not clear why this loss does not constitute a “substantial” depletion under CEQA.³¹ More importantly, it is not clear why this loss of available water would not be actionable by inland water rights holders. Again, the fact that CSIP users receive a boon when this water is “replaced” does not mean that other groundwater rights holders would not be injured.

For example, LandWatch pointed out that the CWP EIR failed to evaluate the effects of project pumping on the upgradient North County aquifer.³² Water rights holders in North County who do not receive CSIP water may be injured by the project’s pumping, which will draw water from inland areas. LandWatch identified the following defects in the EIR’s analysis and proposed mitigation of groundwater impacts to North County:

- The North Monterey County Hydrogeologic Study (Fugro West, Inc., 1995) establishes that

³⁰ Id., pp. E-30 (Appendix E) and 4.2-48.

³¹ The CWP EIR dismisses the impact to SVGB groundwater as less than significant by irrelevantly comparing it to the amount of ocean water pumped (“the fraction of water extracted from the SVGB would be minor compared to the volume of ocean water pumped . . .”) and by claiming that the water would be replaced annually. CWP EIR, pp. 4.2-50 to 4.2-51.

³² Amy White, LandWatch, letter to Andrew Barnsdale, CPUC, Nov. 24, 2009; Amy White, LandWatch, letter to California Coastal Commission, August 4, 2011. Both documents are available at <http://www.coastal.ca.gov/meetings/mtg-mm11-8.html>, see link to additional correspondence under August 12, 2011 item 6a, Application No. E-11-019 (Monterey County Water Resources Agency, Marina Coast Water District, California-American Water Company, Monterey Co.)

- North County groundwater is hydrologically connected and interdependent with the SVGB,
 - North County groundwater is up-gradient from the SVGB,
 - Increased pumping in the SVGB depletes available groundwater in North County
- None of the wells upon which projected groundwater elevations were modeled in the CWP EIR are located in the up-gradient subareas of North County. Thus the projected groundwater contours in the EIR are not well founded.
 - The EIR admits that monitoring wells are inadequate to support its conclusions, but proposes that this defect can be remedied after the project is constructed by augmenting the monitoring network in North County.
 - No meaningful, measureable, or enforceable mitigation was proposed if future monitoring identified impacts.

Because North County groundwater impacts have not been evaluated, Cal-Am’s assertion that pumping will not impair groundwater rights is simply unfounded with respect to potential North County claims.

DEGRADED WATER QUALITY: The CWP EIR claims that seawater intrusion will be reversed with or without the project, but it admits that duration and extent of seawater intrusion will be prolonged by the project.³³ Again, this analysis is based on faulty assumptions about groundwater elevations and the extent of seawater intrusion. Thus, corrected modeling may reveal even more substantial effects.

The CWP FEIR Master Response 13.6.4 claims that groundwater extraction for the project “would halt the advancement and, in most cases, reverse the effects of intrusion of seawater into the 180-foot aquifer. When compared to the baseline extent of intruded seawater, the project scenarios show an accelerated seaward retreat of intruded seawater. . . .”³⁴ This claim is simply inconsistent with the modeling results for the North Marina Alternative showing that the duration and extent of seawater intrusion will be prolonged by that project. Furthermore, Cal-Am subsequently admitted that “[t]he cause of the retreat of seawater intrusion is due largely

³³ CWP EIR, pp. 4.2-52, E-28 (Appendix E).

³⁴ Id., p. 13.6-5.

to Baseline conditions,” which include the assumed success of the Salinas Valley Water project and CSIP programs.³⁵

In short, the retreat of seawater is not due to the project, and the project actually results in a longer period of degraded groundwater quality.

UNDETERMINED EXTENT OF GROUNDWATER PUMPING: Cal-Am claims that less than 3% of the project pumping would be SVGB groundwater.³⁶ However, Cal-Am has admitted that additional analysis is required to determine how much groundwater will actually be pumped by the project because the location of the slant wells has changed since the North Marina Alternative was evaluated in the CWP EIR.³⁷ Furthermore, Cal-Am has admitted that modeling may understate the groundwater by as much as 4%.³⁸

DENSITY DRIVEN EFFECTS: As previously argued, the Division of Ratepayer Advocates objected that the groundwater modeling presented in the Coastal Water Project EIR was not adequate, because it failed to recognize density-driven effects.³⁹ In particular, the North Marina groundwater model did not reflect the fact that seawater is denser and heavier than freshwater. DRA asked that additional modeling be done that would incorporate density-dependent groundwater flow and solute-transport. These issues were ignored because they were not raised in the parallel CEQA track.⁴⁰

³⁵ A0409019, Cal-Am, Response to DRA’s Data Request #51, undated, pp. 22-23, available at https://dl.dropbox.com/u/93807551/Data%20Request%20CWP%2351%20Response%20Letter_February%2026%202010_Final-1.pdf.

³⁶ California-American Water Company Opening Brief On Legal Issues for Early Resolution, July 11, 2012, p. 13, fn. 39.

³⁷ Svindland Direct Testimony, p. 10.

³⁸ A0409019, Cal-Am, Response to DRA’s Data Request #51, undated, p. 37, available at https://dl.dropbox.com/u/93807551/Data%20Request%20CWP%2351%20Response%20Letter_February%2026%202010_Final-1.pdf.

³⁹ DRA, Comments of the Division of Ratepayer Advocates on the Proposed Settlement Agreement, April 30, 2010, pp. 54-56, Application 04-09-019, available at <http://docs.cpuc.ca.gov/EFILE/CM/117212.htm>.

⁴⁰ Administrative Law Judge’s Ruling Granting In Part And Denying In Part Monterey County Water Resources Agency Motion To Strike Comments Of The Division Of Ratepayer Advocates, May 24, 2010, available at <http://docs.cpuc.ca.gov/efile/RULINGS/118406.pdf>.

MODELING UNCERTAINTY: Cal-Am has acknowledged that the modeling used in the CWP EIR is limited by available data and therefore uncertain and prone to possible error.⁴¹ Thus, Cal-Am admits that the model is “subject to further refinement and improvement.”⁴² This will require drilling new test wells and monitoring wells, collecting new geohydrologic data, and recalibrating the model. Given this acknowledged uncertainty, it is difficult to understand how the Commission could conclude that successful groundwater injury claims are sufficiently unlikely that it should authorize the project.

V. Groundwater Rights Impacts Should Be Evaluated As a Threshold Factual Inquiry By An Independent Hydrologist

For the foregoing reasons, Cal-Am’s claim that potential groundwater rights injuries have been adequately evaluated in the CWP EIR is not accurate. The CWP EIR suffers from two critical defects. First, as a CEQA document that dismisses responsibility to evaluate groundwater rights, it does not evaluate the merits of potential groundwater injury claims. For example, in response to comments by the Salinas Valley Water Coalition asking under what water right would groundwater be pumped, the FEIR responded that “[w]ater rights are not considered an environmental issue” and that “[d]etails of the water rights is [sic] beyond the scope of CEQA because the acquisition of water rights does not determine the feasibility of this project.”⁴³ As the Court found in the Ag Land Trust decision, the CWP EIR was flawed because it “assumes that groundwater rights well be perfected in the future and that such rights do not need to be addressed in an EIR.”⁴⁴

Second, the CWP EIR suffers from at least the appearance of advocacy rather than neutral fact-finding. For example, the FEIR’s Master Response claim that the project, rather than the Salinas Valley Water Project and the CSIP project, would retard seawater intrusion is simply misleading in light of the admission that other factors are actually largely responsible for this effect.

⁴¹ A0409019, Cal-Am, Response to DRA’s Data Request #51, undated, p. 37, available at https://dl.dropbox.com/u/93807551/Data%20Request%20CWP%2351%20Response%20Letter_February%2026%202010_Final-1.pdf.

⁴² Id.

⁴³ CWP EIR, p. 14.5-198 (Response SVWC-10).

⁴⁴ Intended Decision, Ag Land Trust vs. Marina Coast Water District, Monterey Superior Court Case No. M105019, Dec. 19, 2011, p. 30, Exhibit A to Opening Brief of Waterplus Regarding Groundwater Rights and Public Ownership, July 11, 2012.

The factual question whether the project would potentially give rise to successful groundwater rights claims is currently and critically unresolved. The question should not await further, potentially inadequate analysis in a Subsequent EIR for several reasons. First, the Administrative Law Judge has correctly determined that the issue of groundwater rights is a potential show-stopper that should be resolved as soon as possible. The ALJ does not control the SEIR process, and an SEIR may not be released for months. Second, even if an SEIR does address the issue, the CWP EIR provides no assurance that an adequate analysis will be provided. Third, the CPCN process provides independent authority and responsibility for the ALJ to evaluate environmental impacts and to determine project feasibility.⁴⁵

Given the importance of this question, the Commission should direct that Cal-Am fund an independent hydrologic analysis of potential groundwater injury claims. LandWatch notes that the Commission has in the past ordered Cal-Am to pay for a reimbursable contract with outside consultants to consider such technical issues as desalination, sediment management, and tax consequences.⁴⁶ Such a consultant could be tasked with analysis under the direction of DRA and/or interested parties.

Dated: July 25, 2012

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⁴⁵ Public Utility Code, § 1002(a)(4); *Re Southern California Edison Co.* (1990) 37 CPUC 2d 413 Ca.P.U.C. 1990 (“However, our responsibility to respond to the health, safety and environmental concerns of those exposed to utility facilities is not limited to CEQA. As cited above, PU Code Section 1002 provides us with responsibility independent of CEQA to include environmental influences and community values in our consideration of a request for a CPCN.”).

⁴⁶ A0409019, In the Matter of the Application of California-American Water Company (U210W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates, Joint Scoping Memo Ruling Of Assigned Commissioner And Administrative Law Judge Setting Forth Scope And Schedule For Phase 2, April 26, 2009, pp. 12, 15; A1009018, Application of California-American Water Company (U210W) for Authorization to Implement the Carmel River Reroute and San Clemente Dam Removal Project and to Recover the Costs Associated with the Project in Rates, Assigned Commissioner and Administrative Law Judge’s Ruling and Scoping Memo, Dec. 23, 2010, p. 10.