

EXHIBIT 4-E

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

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.

A.12-04-019
(Filed April 23, 2012)

**CALIFORNIA-AMERICAN WATER COMPANY OPENING BRIEF
ON LEGAL ISSUES FOR EARLY RESOLUTION**

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treatment facility.²⁶ Despite clear language that a water utility can commence construction or operation of a desalination treatment facility if that entity (be it water utility, corporation, or otherwise) obtains a permit, the procedure for obtaining an operation permit requires an applicant to "provide assurances that each facility will be owned and operated by a public entity."²⁷ The Monterey County Ordinance is, therefore, internally inconsistent and contradictory.

IV. THE WATER RIGHTS CLAIMS REGARDING SALINAS VALLEY GROUNDWATER BASIN WATER DO NOT AFFECT THE FEASIBILITY OF THE PROJECT

The Division of Ratepayer Advocates, Marina Coast Water District ("MCWD"), WaterPlus, and LandWatch Monterey County all raised the issue of whether California American Water must obtain water rights to extract groundwater from the Salinas Valley Groundwater Basin ("SVGB"),²⁸ with MCWD and Water Plus arguing that the lack of such rights would doom the Monterey Peninsula Water Supply Project. The Monterey Peninsula Water Supply Project, however, likely does not require "water rights" because California American Water proposes to use ocean water as its source water supply and will return to the SVGB all water that originates therefrom. Moreover, even if water rights were required, such rights would be appropriative in nature and may be acquired, developed and perfected consistent with well-established principals of California water law. Additionally, despite allegations to the contrary, the water development for the Monterey Peninsula Water Supply Project is consistent with the Monterey County Water Resources Agency Act ("Agency Act"). Therefore, although multiple parties have raised water rights issues related to the Monterey Peninsula Water Supply Project,²⁹ none of these claims affect the feasibility of the Project.

All or almost all of the water produced by the Monterey Peninsula Water Supply

²⁶ Monterey County Code §10.72.010.

²⁷ Id. 10.72.030B.

²⁸ *Protest of The Division of Ratepayer Advocates*, filed May 25, 2012 ("DRA Protest"), p. 5; *Protest of Landwatch Monterey County to 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*, filed May 25, 2012 ("LandWatch Protest"), pp. 4, 7; *Marina Coast Water District's Protest of A.12-04-019*, filed May 25, 2012 ("MCWD Protest"), p. 4; *Protest By Water Plus*, filed May 24, 2012 ("Water Plus Protest"), p. 4.

²⁹ See e.g., Water Plus Protest; LandWatch Protest; DRA Protest; MCWD Protest.

Project will be water that originates in the Pacific Ocean. As a threshold matter, water rights are not required for development, treatment and use of water pumped from the ocean or beneath the sea floor. California surface water rights laws apply only to waters flowing or present in lakes, rivers and streams - including subterranean streams flowing in known and definite channels.³⁰ California's groundwater rights laws apply only to "percolating groundwater," which is generally defined as water found beneath the ground surface that is not flowing within a "subterranean stream."³¹ Percolating groundwater is found in geologic formations known as "groundwater basins," which have been defined as "hydrologic units containing one large aquifer or several connected and interrelated aquifers."³² The ocean and ocean waters lack the essential geologic and physical characteristics of surface water or percolating groundwater, as those terms have long been defined and interpreted in California. For this reason, it is not surprising that there is no precedent for applying California water rights laws to the development of ocean water.³³

Most questions about the Monterey Peninsula Water Supply Project have focused on the small volume of Project water that might originate from the SVGB. These questions appear to focus on (1) whether the Monterey Peninsula Water Supply Project will export groundwater from the SVGB to the Monterey Peninsula, and therefore initiate an appropriation of groundwater, and (2) whether it is legal to do this if the SVGB is in "overdraft."³⁴ California American Water's commitment to return to the SVGB all of the SVGB groundwater developed by the Monterey Peninsula Water Supply Project is, in effect, a commitment not to appropriate groundwater from the SVGB. Under these circumstances, there is no "appropriation" or "export" of groundwater from the SVGB.³⁵ However, to the extent that a court or other authorized regulatory body might determine that the Monterey Peninsula Water Supply Project

³⁰ See Wat. Code §§ 1200, 1201.

³¹ See, e.g., *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597.

³² See Todd, *Groundwater Hydrology* (1980), p. 47.

³³ This is not to say that other permits and entitlements are not required for the development and desalination of seawater, and California American Water intends to comply with all applicable permit requirements and obtain all entitlements required for the Project.

³⁴ RT 60:8-10 (ALJ Weatherford); see also RT 18:16-28 (Nancy Isakson/Salinas Water Coalition), RT 59:22 - 60:2 (Mark Fogelman/MCWD).

³⁵ This commitment also ensures compliance with Section 21 of the Agency Act.

involves an "appropriation" of groundwater from the SVGB, such appropriation is entirely legal and valid under California water law, whether or not the SVGB is considered to be in "overdraft."

There is no State, County, or other permit or entitlement requirement for development of groundwater in the proposed location of the Monterey Peninsula Water Supply Project.³⁶ In this area of Monterey County, a prospective water user need only obtain a well construction permit from the county to begin pumping water from beneath the ground surface. Therefore, the fundamental water right question at issue for the Monterey Peninsula Water Supply Project is not whether California American Water needs to establish a "water right," but rather it is whether a third party or other SVGB pumper would have some legal basis to enjoin the development of the Monterey Peninsula Water Supply Project. Based on the available modeling and technical information that concludes there will be no significant effects from the proposed slant well operations,³⁷ there is no basis for a court or other authorized regulatory body to prohibit the incidental production of the small volume of SVGB groundwater that may be developed by the Monterey Peninsula Water Supply Project.

A. Project Configuration

As proposed, the Monterey Peninsula Water Supply Project will include a system of approximately eight subsurface "slant wells" to be constructed on the CEMEX property north of Marina, between the Pacific Ocean (Monterey Bay) and Highway 1. Water pumped by the slant wells will be conveyed by pipe to a desalination plant to be constructed on vacant and disturbed land adjacent to the Monterey Regional Water Pollution Control Agency's ("MRWPCA") Regional Treatment Plant ("RTP"). Water produced at the desalination plant will be delivered directly to the Monterey Peninsula for municipal uses within the California American Water service area, or will be delivered to the Seaside Basin for aquifer storage,

³⁶ Unlike surface water rights, there is no established State, County or local application or permitting requirement for initiating or developing a "groundwater right"; rather, in most unadjudicated groundwater basins such as the SVGB, a groundwater right is established by pumping and beneficially using groundwater from the groundwater basin.

³⁷ Svindland Direct, Attachment 3.

recovery and subsequent municipal use in the California American Water service area.³⁸

An amount of treated water, equal to the volume of Monterey Peninsula Water Supply Project water that is determined by testing to originate from the SVGB, will be delivered to an 80 acre-foot storage pond on the MRWPCA RTP property. This water will be blended with recycled wastewater produced by the MRWPCA at the RTP, and then distributed by the Monterey County Water Resources Agency ("MCWRA") to the agricultural water users in the "Castroville Seawater Intrusion Project" ("CSIP"), which overlies the SVGB. The desalinated water from the Monterey Peninsula Water Supply Project, being of potable quality, is expected to significantly improve the quality of water deliveries to the CSIP. The water delivered to the MRWPCA and MCWRA also will contribute to the supply of agricultural water in the SVGB, in lieu of a like volume of groundwater pumped by overlying users, and thus will assist the MCWRA in its efforts to address seawater intrusion in the SVGB.

The Monterey Peninsula Water Supply Project slant wells will be configured at an angle to extend out from the shoreline and will draw seawater from beneath the seafloor. The wells will be constructed using modified vertical well construction methods to allow the wells to extract water with higher salinity than can be produced with conventional vertical wells. The angled drilling results in increased screen length, as compared to conventional vertical wells. Despite the use of slant wells, preliminary modeling results indicate that over the long term, the water pumped at the slant wells may include a small volume of seawater-contaminated groundwater originating from the SVGB.³⁹ Groundwater in this area of the SVGB currently is highly contaminated with seawater that has intruded many miles inland from the coast. This water generally is not suitable for beneficial uses without significant treatment and desalination.

³⁸ California American Water will utilize the Project water supply consistent with its authority to provide for drinking water and other municipal uses on the Monterey Peninsula. *See* 23 Cal. Code Regs. § 663 (defining "municipal use").

³⁹ Existing modeling analyses assume full and successful implementation of MCWRA's CSIP and Salinas Valley Water Project and uses future pumping predictions, and concludes that even under those conditions the volume of groundwater originating from the SVGB would be less than 3% of the total volume of water produced at the desalination plant.

B. California American Water Intends to Return All Groundwater Developed from the SVGB, and, Therefore, Does Not Intend to Initiate an Appropriation of Such Water for Beneficial Use

The taking of groundwater for other than overlying or riparian use in California is considered an "appropriative" use.⁴⁰ Under the California water rights law, a valid appropriation must include all the following elements: (1) the intent to apply the water to an existing or future beneficial use; (2) an actual diversion from the basin or natural channel; and (3) an application of the water within a reasonable time to some beneficial use.⁴¹ It is not enough that an appropriator exercise dominion and control over pumped groundwater; the appropriator must intend to apply the water to a beneficial use, and must actually do so.

California American Water's potential incidental development of groundwater from the SVGB does not satisfy the requisite elements required for an appropriation. As noted above, the slant wells are designed to pump seawater and to avoid or minimize the capture of groundwater from the SVGB; because the slant wells are located at the mouth of the SVGB, however, it is possible that they may capture water discharging from the basin in the transitional geology between the ocean and the basin. To address this possibility, the Project is designed such that any SVGB groundwater developed by the Project will be returned to the basin. This volume of "groundwater," determined by ongoing monitoring, will be delivered to the MRWPCA and/or the MCWRA to be used by overlying groundwater users in the CSIP project. Under these circumstances, California American Water's return of groundwater incidentally developed from the SVGB evidences California American Water's intent not to apply the water to authorized municipal use within the California American Water service area. There is no "appropriation" of groundwater because all of the essential elements of an appropriation have not been satisfied.⁴²

⁴⁰ See *Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925-926.

⁴¹ Wells A. Hutchins, *The California Law of Water Rights* ("Hutchins"), at p. 108, citing *Simons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App.524, 537.

⁴² See SWRCB Decision No. D-379 at p. 13 [finding: "Since an appropriation of water consists not only in taking the water under control but also subsequently applying it to beneficial use, the district is not authorized to appropriate water under the act but merely to take temporary possession thereof."], available at <http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d0350_d0399/wrd379.pdf>

C. To the Extent Water Rights are Required for the Monterey Peninsula Water Supply Project, California American Water May Lawfully Initiate and Develop An Appropriative Groundwater Right in the Circumstances of the Proposed Project

If, however, California American Water's pumping of SVGB groundwater were deemed by a court or other authorized regulatory body to be an "appropriation" of groundwater – despite California American Water's commitment to deliver all of that water to MRWPCA and MCWRA for use in the SVGB – the unique circumstances of the Monterey Peninsula Water Supply Project would still be found to be a valid exercise of appropriative groundwater rights. The slant well program in the similar North Marina project was extensively analyzed in the Commission's 2009 Final Environmental Impact Report ("FEIR"), and the Commission concluded that it would not adversely affect other groundwater users or groundwater elevations and conditions in the SVGB.⁴³ As a general rule, groundwater appropriations will not be enjoined unless the proposed appropriation can be shown to adversely affect other prior right holders in a groundwater basin.⁴⁴ Under the particular circumstances and conditions of the Monterey Peninsula Water Supply Project, there would be no reason for a court or regulatory body to enjoin or prohibit California American Water from incidentally appropriating a small volume of contaminated SVGB groundwater, particularly since that volume would be returned to the basin for beneficial use by overlying landowners.

Any SVGB groundwater that may be pumped by the Monterey Peninsula Water Supply Project is clearly surplus to the needs of all other SVGB water users because it can be pumped without adversely impacting other users or groundwater elevations and conditions in the SVGB. As the California Supreme Court has stated:

Public interest requires that there be the greatest number of beneficial uses that the supply can yield, and water may be

⁴³ A.04-09-019, Reference Exhibit B, *Final Environmental Impact Report*, dated October 30, 2009, Section 5.2.2.1.

⁴⁴ See, e.g., *Peabody v. Vallejo* (1935) 2 Cal.2d 351 at 374 ["[T]he appropriator may use the stream surface or underground or percolating water, so long as the land having the paramount right is not materially damaged"]; *Pasadena v. Alhambra* (1949) 33 Cal.2d at 930 ["[only] where . . . subsequent appropriators reduce the available supply and their acts, if continued, will render it impossible for the holder of a prior right to pump in the future, is there an enjoined invasion"]; *Burr v. Maclay Rancho Water Co.* (1911) 160 Cal. 268, 273 [discussing the doctrine established in *Katz v. Walkinshaw* (1903) 141 Cal. 116 and cases following it which provide that appropriative uses of groundwater can be enjoined only "if such taking is injurious to" prior right holders].

appropriated for beneficial uses subject to the rights of those who have a lawful priority. Any water not needed for the reasonable and beneficial uses of those having prior rights is excess or surplus water. In California, surplus water may rightfully be appropriated on privately owned land for non-overlying uses, such as devotion to a public use or exportation beyond the basin or watershed.⁴⁵

Even if the SVGB were determined to be in "overdraft,"⁴⁶ therefore, the small volume of water that California American Water will pump from the SVGB is "surplus" or "supplemental safe yield" water, and subject to appropriation.⁴⁷

D. The Annexation Agreement Does Not Affect the Project or Restrict California American Water's Actions

MCWD argues that a 1996 *Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands* ("Annexation Agreement"), by and among MCWD, MCWRA, J.G. Armstrong Family Members, and RMC Lonestar, may limit California American Water's proposed use of water for the Project. Among other applications, the Annexation Agreement applies to 400 acres of land along the Monterey Coast that includes the CEMEX Property where California American Water would develop the slant wells for the Monterey Peninsula Water Supply Project. The Agreement limits withdrawal of groundwater from the SVGB to 500 acre-feet per year of groundwater for use on the property, and prohibits export of SVGB groundwater from the basin.

There is no basis to interpret the Annexation Agreement as affecting the Monterey Peninsula Water Supply Project or otherwise restricting California American Water's ability to appropriate a small amount of groundwater that may originate from the SVGB, particularly if that SVGB groundwater is returned to the SVGB as proposed. Whatever limitations and

⁴⁵ *Pasadena v. Alhambra* (1949) 33 Cal.2d 908, 925-926.

⁴⁶ It has been alleged by some parties to this proceeding that the SVGB is in "overdraft" and therefore appropriation from the SVGB is unlawful. Although there are areas of the SVGB where groundwater pumping has exceeded recharge rates, causing seawater intrusion and other indicia of groundwater level decline, there has not been any judicial determination of "overdraft."

⁴⁷ Safe yield is defined as "the maximum average annual pumping which can be withdrawn annually from a groundwater supply under a given set of conditions without causing an undesired result." *Los Angeles v. San Fernando, et al.* (1975) 14 Cal.3d 199, 278. To the extent the Project will pump seawater-contaminated groundwater from the SVGB without reducing the usable volume of groundwater in the basin, the Project will result in an increase of the maximum amount of pumping which can be withdrawn from the SVGB without causing an undesirable result, and thus supplements the safe yield of the SVGB.

restrictions the Annexation Agreement may have with respect to the use of groundwater on the CEMEX property, it has no application to the Monterey Peninsula Water Supply Project. Overlying or contractual groundwater rights, and associated uses and limitations, are legally distinct from appropriative groundwater rights and uses.⁴⁸ “Surplus water may rightfully be appropriated on privately owned land for nonoverlying purposes, such as devotion to a public use or exportation beyond the basin or watershed.”⁴⁹ “Unlike . . . overlying rights, [an] appropriative right is not dependent upon the ownership of real property. The right to use water under an appropriative right is distinct from the property through which the water flows or the land where the water is ultimately placed to beneficial use.”⁵⁰ Thus, assuming California American Water establishes an appropriative groundwater right in connection with the Monterey Peninsula Water Supply Project, that right would be legally distinct from the overlying or contractual groundwater rights (and any limitations thereon) that may be appurtenant to the use of groundwater on the CEMEX property.

E. The Monterey Peninsula Water Supply Project is in Furtherance of Prevailing State Water Policies and Laws

California American Water’s proposed development and desalination of otherwise unusable ocean water and groundwater, in a manner that does not adversely affect other SVGB groundwater users, and includes return of SVGB groundwater to the SVGB for beneficial use, significantly furthers the policy set forth in Article X, Section 2 of the California Constitution to foster the maximum beneficial use of water and to avoid waste.⁵¹ The Monterey Peninsula Water Supply Project is also consistent with salvaged and developed water doctrines and statutes

⁴⁸ See *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 [“Appropriation” refers “to any taking of water other than riparian or overlying uses” (emphasis added)]; *Corona Foothill Lemon Company v. Lillibridge* (1937) 8 Cal.2d 522.

⁴⁹ *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926.

⁵⁰ Slater, *California Water Law and Policy* (Vol. 1, 1995) § 2.16, at 2-98 [citing various cases].

⁵¹ See, *Pasadena*, 33 Cal.2d at 926 [“It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a surplus, whether of surface or ground water, the holder of prior rights may not enjoin its appropriation”]; *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 436 [“It is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation which gives him a legal right to water to prevent another from using it, while he, himself, does not desire to do so”]; *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 370-371 [same].

encouraging the use of desalinated and reclaimed waters.⁵²

F. The Monterey Peninsula Water Supply Project is Consistent With the Agency Act

In protests and prehearing conference statements, several parties alleged that the Monterey Peninsula Water Supply Project was inconsistent with the Agency Act.⁵³ Section 21 of the Agency Act provides:

The Legislature finds and determines that the Agency is developing a project which will establish a substantial balance between extraction and recharge within the Salinas River Groundwater Basin. For purposes of preserving that balance, 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, the Agency may obtain from the superior court, and the court shall grant, injunctive relief prohibiting that exportation of groundwater.⁵⁴

The Monterey Peninsula Water Supply Project is consistent with Section 21 of the Agency Act because California American Water proposes to deliver to the MRWPCA, for use in the SVGB, a volume of water equal to that groundwater that may incidentally be pumped by the Project. There will be no "export" of groundwater from the SVGB. Moreover, the export prohibition in Article 21 applies only to the extent that the proposed exportation negatively affects the balance of extraction and recharge in the SVGB. This reading of the Agency Act ensures that the statute is interpreted and implemented consistent with the requirements to maximize the beneficial use of water and avoid waste as set forth in Article X, Section 2 of the California Constitution, as discussed above. The proposed Monterey Peninsula Water Supply Project will not exacerbate (and actually will improve) the balance of extraction and recharge of usable groundwater.

⁵² See *Pomona Land & Water Co. v. San Antonio Water Co.* (1908) 152 Cal. 618, 623-629 [holding that a water supply saved from loss or made available for use without injury to other water users may be used by the salvager]; see also, Wat. Code § 1010 [encouraging and facilitating use of desalinated and recycled water].

⁵³ LandWatch Protest, p. 7; MCWD Protest, pp. 4, 6; *Pre-Hearing Conference Statement of Landwatch Monterey County*, filed June 1, 2012, p. 5; *Marina Coast Water District's Prehearing Conference Statement*, filed June 4, 2012, pp. 7, 13, 16; *Prehearing Conference Statement of The County of Monterey and The Monterey County Water Resources Agency*, filed June 4, 2012, pp. 1-2.

⁵⁴ MWCWRA Act, Water Code Appendix § 52-21