

Submitted by staff
at 5/7/2012
committee meeting
Item 4

MONTEREY COUNTY
BOARD OF SUPERVISORS

MEETING: April 1, 2003	AGENDA NO.: 5-7
SUBJECT: Receive Updated Report on the Proposed Desalinization Plant in Moss Landing and Submit Letter to the California Public Utilities Commission	
DEPARTMENT: Water Resources Agency and County Counsel	

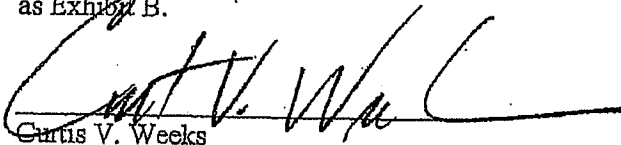
RECOMMENDATION:

It is recommended that the Board of Supervisors receive the written and oral report regarding the proposed desalinization plant in Moss Landing (Project), approved the attached letter to the California Public Utilities Commission (PUC), and direct staff to report back to the Board for further direction regarding a response to the PUC.

SUMMARY:

The County and Water Resource Agency staff have reviewed some of the available proposed Project-related materials and are concerned that the proposed Project, as currently defined, has not been designed in a manner adequate to meet the foreseeable water supply needs of the Monterey Peninsula nor has the Project scope included means to address the regional needs for water supply in northern Monterey County. Accordingly, the County and Water Resource Agency staff are interested in ensuring that the scope of the proposed Project review is carefully defined to ensure that the anticipated needs of the County will be fully evaluated by the Commission during the certificate of public convenience or necessity (CPCN) process.

We recommend that the County and Water Resources Agency immediately send a letter to the PUC in order to notify the PUC of our interest and ensure our involvement in the PUC proceedings. A copy of the suggested letter is attached as Exhibit A. As requested by the Board at the March 25, 2003, County Counsel has done a preliminary analysis of issues pertaining to the permitting and environmental review of the Project. A copy of the memorandum from County Counsel is attached as Exhibit B.


Curtis V. Weeks
General Manager

Cc: Sally Reed, CAO
Jim Colangelo, Chief Assistant CAO
Keith Honda, Assistant CAO
David Nawi, Acting County Counsel
Allen Stroh, Environmental Health

Attachments:

Exhibit A Proposed Letter to California Public Utilities Commission
Exhibit B Memorandum from County Counsel

EXHIBIT A

April __, 2003

VIA FEDERAL EXPRESS

Assigned Commissioner Susan P. Kennedy
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102-3298

Re: In the Matter of Application of California-American Water Company (U 210 W)
for a Certificate of Public Convenience and Necessity: First Amendment
Regarding Coastal Water Project ("Plan B") Option, Application No. 97-03-052

Dear Commissioner Kennedy:

The County of Monterey (County) and the Monterey County Water Resources Agency (MCWRA) have recently become aware that California-American Water Company (Cal-Am) filed an application in February for a certificate of public convenience and necessity (CPCN) to implement the Coastal Water Project described in the California Public Utilities Commission's (Commission) Plan B Report (First Amendment to Application (Revised) Re Coastal Water Project ("Plan B") Option, A.97-03-052 (the Proposed Project)).

The County and MCWRA are extremely interested in the Proposed Project because it will be located entirely in the County of Monterey, affecting issues within the purview of both agencies. Specifically, the County is responsible for issuing land use and environmental health permits for facilities like the Proposed Project. MCWRA is responsible for managing water resources in the County and seeks to assure that reasonable water needs throughout the County are met.

The County and MCWRA have reviewed some of the available Proposed Project-related materials and are concerned that the Proposed Project, as currently defined, has not been designed in a manner adequate to meet the foreseeable water supply needs of Monterey County. Accordingly, the County and MCWRA are interested in ensuring that the scope of the Proposed Project review is carefully defined to ensure that the anticipated needs of the County will be fully evaluated and addressed by the Commission during the CPCN process.

The County and MCWRA are also interested in Proposed Project-related environmental issues, including the County's role in the California Environmental Quality Act review process. Thus, we appreciate Administrative Law Judge Cooke's March 12 Ruling directing Cal-Am to (1) serve its amended application and motion for lead agency designation on agencies with

permitting authority over the Proposed Project, and (2) file additional information regarding permitting issues with the Commission.¹ We look forward to reviewing Cal-Am's April 1, 2003

Susan P. Kennedy

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filing describing the permits and authorizations that might be required for the Proposed Project and identifying the relevant authorizing agencies. As appropriate, the County and MCWRA will submit comments regarding Cal-Am's April 1 filing. In order to ensure the County and MCWRA are afforded full opportunity to participate in the Commission's process, we hereby request that the County of Monterey and Monterey County Water Resources Agency be added to the mailing list for purposes of the April 1 filing. The filing should be sent to:

County of Monterey
Attn: Clerk to the Board
Post Office Box 1728
Salinas, California 93902
Telephone: (831) 755-5066
Facsimile: (831) 755-5888

Curtis Weeks
General Manager
Monterey County Water Resources Agency
Post Office Box 930
Salinas, California 93901
Telephone: (831) 755-4860
Facsimile: (831) 424-7935

Please contact me if you have any questions regarding this letter, or require additional information.²

Sincerely,

Fernando Armenta
Chair, Board of Supervisors of County of Monterey

Curtis Weeks
General Manager, Monterey County Water Resources Agency

cc: Administrative Law Judge Michelle Cooke
Lenard G. Weiss, Attorney for Cal-Am

¹ The County notes that Cal-Am did not include the County in its March 17 service of its amended application and motion, apparently as the result of an inadvertent oversight. However, we requested a copy of these materials from Cal-Am, and Cal-Am subsequently served the County.

² We are sending a copy of this letter to Cal-Am's attorney. Because service list for A.97-03-052 appears to have been developed for the original, much different proposed project, we have not served the other parties on the service list. We would be pleased to do so upon request.

EXHIBIT B

MEMORANDUM

OFFICE OF THE COUNTY COUNSEL
COUNTY OF MONTEREY

DATE: April 1, 2003

TO: Honorable Chair and Members of the
Board of Supervisors

FROM: David Nawi
Acting County Counsel

SUBJECT: Proposed Desalination Facility of Moss Landing

SUMMARY

At its meeting of March 18, 2003, the Board requested information from County Counsel regarding issues related to the permitting, regulation and environmental review of a desalination facility proposed to be located in Monterey County. Our initial analysis is set forth below. In summary:

1. Both the County and the California Public Utilities Commission have authority with respect to the project. Because the Commission is a constitutionally created state agency, its authority is generally paramount.
2. The applicable provisions of the County ordinance relating to ownership and operation of desalination facilities by public entities are ambiguous and subject to interpretation by the Board.
3. Various considerations affect the determination of lead agency for purposes of environmental review under the California Environmental Quality Act. If the County is not lead agency, it would participate in the environmental review process as a responsible agency.

BACKGROUND

California-American Water Company (Cal-Am) filed in February an application with the California Public Utilities Commission (Commission or PUC) for authorization to develop a new long-term water supply through construction and operation of a desalination plant and pipeline, in conjunction with use of underground storage areas (the Project). The Project would be located entirely in Monterey County.

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The Monterey County Water Resources Agency (MCWRA) and the County have identified concerns regarding the Project based on information available at the early stages of the PUC process. MCWRA and the County are concerned that, as presently defined, the Cal-Am Project would not be able to accommodate both Cal-Am's proposal and the need for new sources of water MCWRA and the County have identified. They are also concerned about the potential environmental impacts of the Project. To provide information on potential means to address these concerns as the Project moves forward, this memorandum presents County Counsel's initial analysis of issues that have been identified regarding the permitting and environmental review of the Project.

Pursuant to an order of the PUC dated March 12, 2003, Cal-Am is to file by April 1 additional information regarding permitting issues, and parties may comment on Cal-Am's submissions, including the issue of CEQA lead agency designation, by April 11. We anticipate the potential of further analysis after receipt and review of Cal-Am's submission.

PUC AND COUNTY PERMITTING AUTHORITY

The PUC has jurisdiction over the Project pursuant to provisions of the California Public Utilities Code specifying that no water corporation may begin the construction of a line, plant, or system without first obtaining a certificate of public convenience and necessity (CPCN) from the Commission. (Pub. Util. Code sec. 1001.) The County also has permitting authority over the Project because the Project would be within the County in the Coastal Zone on the property southeast of the Dolan Road/Highway 1 intersection. Our understanding is that the project would be commonly known as the Kaiser property, which is mainly zoned for High Industrial uses. It also contains a portion of land zoned for Resource Conservation. Authority to issue permits for development in the Coastal Zone was granted to the County through the California Coastal Commission certification of County's Local Coastal Plan. (Pub. Res. Code sec. 30519(a).) The placement of a pipeline from the proposed plant to Cal-Am's Monterey Division service area could require additional Coastal Development Permits from the County.

The PUC is an agency of the State, created by the California Constitution. Consequently, its powers are superior to those of local entities, such as the County. The California Constitution provides that "[a] city, county, or other body may not regulate matters over which the Legislature grants regulatory power to the Commission."¹ The power of a city or county to "make and enforce within its limits all local, police, sanitary, and other regulations" is specifically limited to such regulations as are "not in conflict with general laws."² Thus, it follows that in the event of a conflict between an action by a county and a lawful order of the Commission, the Commission order prevails.³ "[T]he commission has been held to have

¹ Cal. Const. Art. XII, § 8.

² Cal. Const. Art. XI, § 7.

³ *Harbor Carriers, Inc. v. City of Sausalito*, (1975) 46 Cal.App. 3d 1 773, 775.

paramount jurisdiction in cases where it has exercised its authority, and its authority is pitted against that of a local government involving a matter of statewide concern.”⁴

The California Constitution, in Article XII, § 8, and Public Utilities Code sections 2901 through 2907 appear to authorize local authorities to exercise a measure of regulatory power over public utilities notwithstanding state preemption. State law explicitly states that a local agency is not required to surrender to the PUC “its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public.” (Pub. Util. Code sec. 2902.) However, these state statutes do not provide absolute statements outlining the powers and limitations on local zoning regulation of public utilities.

In general, courts have held that, where a local agency regulates matters over which the PUC has regulatory power, state law impliedly preempts local legislation because regulation of utilities is a matter of statewide concern. For example, in *Harbor Carriers*, the certificate of public convenience and necessity (CPCN) issued by the Commission authorized the respondent to conduct a common carrier service, by ferry, between San Francisco and Sausalito. A terminal and docking facility were necessary for operation of the service. The city of Sausalito tried to apply its zoning ordinance to prevent construction of a terminal. The court held that “to the extent that the city’s zoning ordinance is applied to prevent establishment of any terminal in Sausalito, it must give way to the commission’s grant of the right to operate a service to and from Sausalito.” The court further concluded that a city terminal site was “necessarily contemplated by the commission’s certificate authorizing service” and ordered the city to afford the opportunity for a reasonable terminal site.⁵

Applying these principles and precedent to the Cal-Am Project, it appears that if the PUC issues a CPCN authorizing the Project, the County will not have the power to deny the Project when it considers an application for land use authorization. However, the County may include appropriate conditions relating to matters of local concern in any land use authorization. An analysis of the precise scope of the County’s permitting authority and of the conditions it may impose must await further information regarding the Project as it develops and the terms of a CPCN that the PUC may issue.

Any permits issued by the County governing aspects of the Project within the Coastal Zone would be subject to appeal to and review by the Coastal Commission. Additionally, the Coastal Commission has permitting authority for development in tidelands, submerged lands, or on public trust lands, whether filled or unfilled, lying within the Coastal Zone. (Pub. Res. Code sec. 30519(b).) In the case of the proposed desalinization plant, this

⁴ Id. (quoting *Orange County Air Pollution Control District v. Public Utilities Commission*, (1971)

4 Cal. 3d 945, 950-951).

⁵ Id. at 775-776.

authority would likely apply to the placing of intake and outlet pipes below mean high tide in the Moss Landing area. If federal funding or federal permitting is needed to implement the project within the coastal zone, the Coastal Commission will likely have to undertake Federal consistency review pursuant to the Coastal Zone Management Act.

COUNTY ORDINANCE REGARDING DESALINIZATION FACILITIES

In addition to the above land use permits, the County's "Desalinization Treatment Facility" ordinance (Monterey County Code, chapter 10.72) requires an applicant for a desalinization facility to obtain a permit from the Director of Environmental Health to construct and operate the facility. The Board has asked for County Counsel's guidance as to whether the ordinance requires the facility to be owned and operated by a public entity. County Counsel's view is that the ordinance is ambiguous and therefore subject to the Board's interpretation on this point.

Section 10.72 .030 provides, in relevant part:

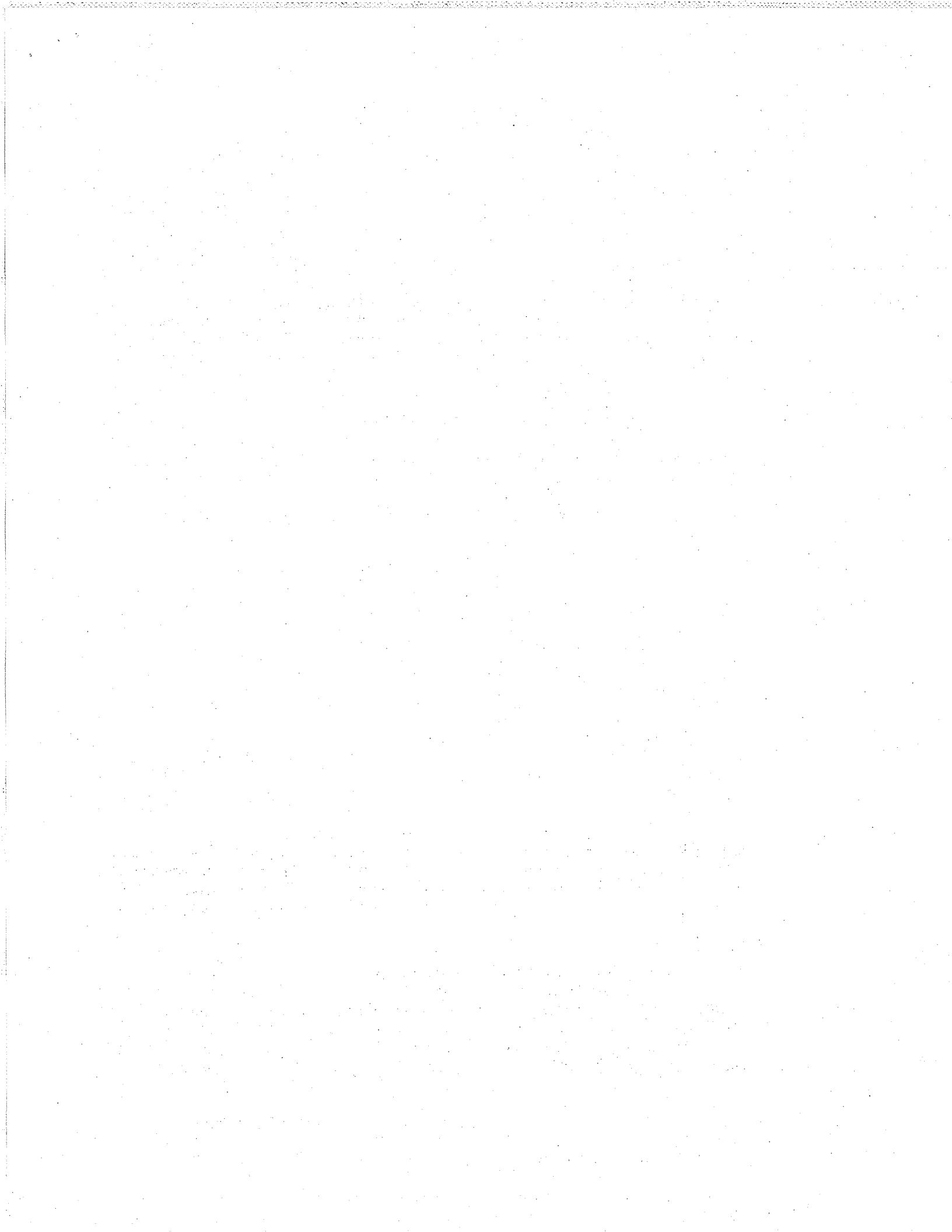
All applicants for an operation permit as required by Section 10.72.010 shall:

- A. Provide proof of financial capability and commitment to the operation, continuing maintenance replacement, repairs, periodic noise studies and sound analyses, and emergency contingencies of said facility. . . . For regional desalinization projects undertaken by any public agency, such proof shall be consistent with financial market requirements for similar capital projects.
- B. Provide assurances that each facility will be owned and operated by a public entity.

Subsection "B," taken alone, appears to require a public entity to own and operate the facility.⁶ However, the section of the ordinance that sets forth the basic permit requirement, section 10.72.010, does not restrict potential permittees to public entities. Section 10.72.010 states that "no person, firm, water utility, association, corporation, organization, or partnership, or any city, county, district, or any department or agency of the State shall commence construction of or operate any Desalinization Treatment Facility... without first securing a permit to construct and a permit to operate said facility."

The above two provisions appear facially inconsistent, thus presenting a question of interpretation. The Board could read subsection B to restrict owners and operators of desalination facilities to public entities in all cases. Alternatively, reading the requirements of

⁶ It is possible that the Board could interpret the phrase "public entity" in the ordinance to apply to Cal-Am, even though Cal-Am is a privately-owned for profit entity that would not be considered a public entity in most contexts. The interpretation would rest on Cal-Am's status as a regulated public utility. However, if this interpretation were accepted, the provision in Section 10.72.030.B would be rendered meaningless.



Honorable Board of Supervisors

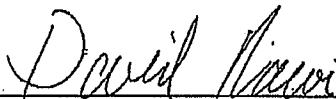
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the CEQA process as a responsible agency. A responsible agency has a more limited role in the CEQA process than the lead agency and generally speaking is limited to areas within the scope of its regulatory authority. (See CEQA Guidelines Sec. 15096.)

The County may also consider pursuing an agreement with the PUC pursuant to which the PUC and the County would act as joint lead agencies. As a joint lead agency the County would have a much more significant role in the CEQA process.

The County will have the opportunity to address the CEQA lead agency issue in detail in its April 11 comments addressing Cal-Am's April 1 filing.



DAVID NAWI
Acting County Counsel

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