

# CALIFORNIA ENVIRONMENTAL LAW PROJECT

A Non-Profit Legal Corporation



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January 31, 2019

The Honorable Chief Justice Tani G. Cantil-Sakauye  
And the Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

Re: City of Marina and Marina Coast Water District, Petitioners, v.  
Public Utilities Commission of the State of California, Respondent,  
California American Water Company et al., Real Parties In  
Interest. Case No. S253585. Amicus Letter of Sierra Club In  
Support of the City of Marina's and Marina Coast Water District's  
Petitions For Review/ Mandate

Dear Chief Justice Cantil-Sakauye and Associate Justices:

## **I. Introduction**

Pursuant to California Rule of Court 8.500(g), Sierra Club submits this *amicus curiae* letter in support of the City of Marina's and Marina Coast Water District's Petitions for Review/Mandate seeking review of the actions of the California Public Utilities Commission (the "Commission") in certifying an Environmental Impact Report ("EIR") under the California Environmental Quality Act ("CEQA") in connection with its approval of a Certificate of Public Convenience and Necessity for the California-American Water Company ("Cal-

Am”) desalination facility (“Project”), and its grant to Cal-Am of a Certificate of Public Convenience and Necessity.

Sierra Club argues herein that the Commission erred when it failed to consider a reasonable range of alternatives to the Project. Since the Commission was aware of at least one feasible alternative that would have avoided or substantially lessened significant impacts caused by the Project that were identified in the EIR, and would have made it unnecessary to construct the proposed desalination facility, it was prejudicial error for the Commission to have failed to consider this feasible alternative in its FEIR for the Cal-Am desalination facility.

## **II. Statement of Interest**

Amicus, Sierra Club, is a California nonprofit membership organization incorporated under the laws of the State of California in 1892. The Sierra Club has approximately 790,000 members, approximately one-fourth of whom live in California. The Sierra Club functions to educate and enlist people to protect and restore the natural and human environment, to practice and promote responsible use of the earth’s ecosystems and resources, to explore, enjoy, and protect wild places, and to use all lawful means to achieve these objectives. Sierra Club and its members are adversely affected by the CPUC’S failure to comply with CEQA in approving the Project without considering the recycled water Pure Water Monterey feasible alternative.

Sierra Club has been involved in water supply issues in the Monterey Peninsula since 1991 when it initiated a Complaint to the SWRCB, claiming that Cal-Am was unlawfully diverting water from the Carmel River alluvium without a permit to appropriate water. Sierra Club claimed these unlawful diversions were harming a drastically declining population of steelhead that inhabited the River. Sierra Club was a party to the proceedings before the SWRCB that resulted in SWRCB Order 95-10. Order 95-10 determined that California-American was diverting over 7,600 AFY from the Carmel River alluvium without a permit, and by reason of its unlawful diversions was adversely affecting trust resources in the Carmel River. The State Board, by Order 95-10, thirty-three years ago, ordered California-American to find a replacement water supply, and eliminate its unlawful diversions from the

Carmel River. When California-American failed to do so, the State Board initiated a cease and desist order proceeding against California-American. By Order 2009-0060, the SWRCB required that California-American cease its unlawful diversions from the Carmel River by 2016., and in the interim take measures to limit harm to the steelhead (which by then was listed under the Endangered Species Act as a threatened species). Sierra Club was a party to this proceeding as well. In Order 2016-0016, the State Board extended the deadline for termination of the unlawful California-American diversions to 2021 but required California-American to reduce its diversions from the River incrementally until 2021, and imposed upon Cal-Am an effective diversion maximum level based on its diversion amounts from all sources during the previous three years. Sierra Club was also an active party to this proceeding.

Sierra Club promptly intervened in the Public Utility Commission's administrative proceeding in connection with for Cal-Am's application for construction of a desalination facility (A-12-04-019). Sierra Club's ultimate goal in its intervention was to ensure that the Commission carefully considered alternatives to the proposed 9.6 mgd desalination plant that would avoid or minimize significant environmental impacts that would likely be caused by the Project, including large consumption of energy, discharge of greenhouse gasses, disturbance of environmentally sensitive habitat, and adverse effects on the Salinas Valley Groundwater Basin.

In order to reduce the size and environmental impacts of the proposed 9.6 mgd desalination plant, Sierra Club and other intervenors successfully advocated that the Commission consider approving a Water Purchase Agreement authorizing Cal-Am to purchase 3,500 acre-feet per year of water from the Pure Water Monterey ("PWM") water recycling project. With the purchase of the recycled water from Pure Water Monterey, the Project, for the purpose of CEQA analysis, became the much smaller desalination plant (6.4 gpd) alternative proposed in the Cal-Am application. The Commission considered and approved the Agreement in a distinct earlier phase of its proceedings before issuance of the EIR. The PWM project is at the present time expected this year to deliver water to Cal-Am pursuant to the Water Purchase Agreement for use by its customers (an additional water supply of 3500 afy).

Sierra Club thus has a substantial interest in the proceedings before the CPUC relating to the Cal-Am Desalination project and is convinced the CPUC unlawfully acted when it declined to consider a Pure Water Monterey supplemental project that could produce an additional 2,250 AFY for the Peninsula, and that would make it unnecessary to build the 6.4 gpd facility at the present time.

### **III. Amicus Sierra Club's Statement of Support of MCWD's City of Marina's Petitions For Review/ Mandate.**

The fundamental objective of the Cal-Am application to the Commission was to obtain permission to construct a water supply project for the Cal-Am service area that would meet foreseeable demand and allow Cal-Am to cease its illegal diversions from the Carmel River that for over 30 years had been causing harm to public trust resources and threatening the resident steelhead population with extirpation.

However, as a result of the Commission's approval of the 3,500 afy PWM recycled water project, it was evident that Cal-Am no longer needed any more than 6.4 mgd of additional capacity. Despite the fact that a 9.6 mgd desalination plant (as proposed in the Cal-Am application) was no longer needed to meet any of the Project's objectives, the FEIR still identifies the proposed project as a 9.6 mgd desalination plant and examines the 6.4 mgd project as a "reduced capacity" alternative. Thus, the EIR treats a hypothetical, infeasible (and unnecessary) project as the proposed project, and fails adequately to consider "reduced capacity" alternatives to a 6.4 mgd project that would still meet the needs of Peninsula residents. As a result, the Commission failed to comply with CEQA's mandate to consider a reasonable range of alternatives to the 6.4 mgd plant, which legally became the Project after the 9.6 mgd plant was discarded. (Public Resources Code, § 21002; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

In addition, as pointed out in MCWD's Petition, the EIR's alternatives analysis relies on an overstatement of foreseeable water demand. In particular, the EIR fails to acknowledge what is evident from more than a decade of consistently declining demand on the Monterey Peninsula: a 6.4 mgd desalination plant is not needed in the Cal-Am service territory due to

permanent conservation measures. implemented by Cal-Am pursuant in large part to conservation measures mandated by MPWMD, which is a party to this action.

As is evident from the record in this action, Sierra Club, along with numerous other parties, repeatedly urged the CPUC to consider a PWM supplemental water alternative that could produce an additional 2250 afy for the customers of Cal-Am. In furtherance of this objective, Sierra Club was a party to a January 18, 2018 Motion for Additional Hearings before the Public Utilities Commission, filed in Application 12-04-019. The additional hearings requested were with respect to expansion of Pure Water Monterey as an alternative supplemental supply of water. In this petition it was noted that it would be possible to expand the Pure Water Monterey project by 2250 AFY (in addition to the 3500 AFY already subject to a Water Purchase Agreement approved by the Commission in D16-09-021). If this expansion of the PWM project occurred, it would facilitate a smaller desalination facility and/or allow for the deferral of the desalination project through the issuance of a conditional CPCN to Cal-Am (when considered in connection with additional water offered by MCWD for sale to Cal-Am to supplement the PWM water).

In comments on the proposed decision for the Monterey Peninsula Water Supply Project, numerous parties pointed out that even though the Commission had not ruled on the parties' Motion for a Phase 3 hearing to confirm the viability of Pure Water Monterey expansion of 2250 AFY to allow California-American to meet current and future needs, there was within the existing record, extensive evidence on the viability of Pure Water Monterey Expansion that ought at least to have been considered in the FEIR or in a recirculated EIR prior to approval by the Commission of a Certificate of Public Convenience and Necessity. MCWD Petition at 130-141.

The testimony of Paul Sciuto, the General Manager of One Water Monterey, provided evidence that all the work One Water Monterey had already completed would allow a timely Phase 3 hearing on Pure Water Monterey expansion and the expansion could be complete in time to meet the Cease and Desist Order's December 2021 deadline and provide sufficient water (2250 AFY) to meet realistic growth estimates. (Ex. PCA-7, with appendices.)

Ample testimony in the record demonstrates that with the Pure Water Monterey expansion of 2250 acre-feet per year, together with CalAm's other reliable sources of supply, and the additional water offered by Petitioner, MCWD, Cal-Am's available supply would significantly exceed the future demand. (*See, e.g.*, Ex. CA-51 (Mr. Crooks for Cal-Am), p. 14 at Table 4 (showing 2,005 acre feet year difference between estimated 2021 demand and future demand). *See also* Ex. WD-15 (Mr. Stoldt for MPWMD), pp. 11-14.))

#### **IV. The Commission Unlawfully Approved the Project Based On an Improper Project Description And Without Considering a Reasonable Range of Potentially Feasible Alternatives.**

Under CEQA's "substantive mandate," agencies are prohibited from approving projects if there are feasible alternatives or mitigation measures available that would lessen the project's significant environmental impacts. (Pub. Resources Code § 21002; CEQA Guidelines, § 15092; *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4<sup>th</sup> 105, 134.) To enable agencies to achieve this mandate, CEQA requires an EIR to "describe a range of reasonable alternatives to the project . . . which would feasibly attain *most of the basic objectives of the project* but would avoid or *substantially lessen any of the significant effects of the project*, and evaluate the comparative merits of alternatives." (CEQA Guidelines, § 15126.6, subd. (a), italics added.) An "EIR should not exclude an alternative from detailed consideration merely because it "would impede to some degree the attainment of the project objectives." (CEQA Guidelines § 15126.6, subd.(b).) Similarly, the "applicant's feeling about an alternative cannot substitute for the required facts and independent reasoning" regarding the feasibility of alternatives. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4<sup>th</sup> 1336, 1356; see also, *Laurel Heights I*, (1988) 47 Cal.3d 376 at 404 [courts will not "countenance a result that would require blind trust by the public"].)

As discussed *supra*, the FEIR's alternatives analysis violated CEQA mandates by: (1) failing to examine a reasonable range of alternatives to the "proposed project," (2) failing to evaluate a true "reduced size" desalination plant alternative because it improperly assumed the project must supply all of Cal-Am's purported water demand immediately; (3) delegating to Cal-Am the

duty to investigate the viable and environmentally superior Pure Water Monterey expansion alternative as part of the project approval; and determining that the 6.4 mgd facility was the environmentally superior alternative. Unless review is granted, the oversized MPWSP will move forward in violation of CEQA's most fundamental requirement, despite the fact there are feasible alternatives that would avoid or lessen the project's significant and unavoidable environmental impacts.

The "proposed Cal-Am project" identified and analyzed in the EIR was not the actual project that the Commission was considering for approval at the time it certified the EIR and approved the CPCN. Cal-Am's initial project application included a variant (the "MPWSP" Variant") consisting of a 6.4 MGD rated capacity plant combined with a water purchase agreement for 3,500 AFY of potable, advanced-treated recycled water from MIW from its Pure Water Monterey project (April 2015 Draft EIR ("DEIR"), p. 3-4.) This proposal was developed to meet *all* of Cal-Am's purported water demand as well as *all* of Cal-Am's other project objectives. While the Commission was preparing the revised EIR, the PWM project was approved when the Commission approved Cal-Am's proposed water purchase agreement with M1W on September 22, 2016 (D16-09 021, p. 19). Thus, after the Commission acted, the 6.4 MGD rated capacity plant, as approved together with the water purchase agreement, should have been identified as the proposed project in the EIR. When the Commission circulated its revised draft EIR in 2017, it still identified the 9.6 MGD capacity plant as the "proposed project." (See FEIR § 3, p. 3-9.)

Given that the PWM project and water purchase agreement were approved prior to the circulation of the RDEIR, CEQA required the EIR to assume the PWM project would be built as approved, and to treat the 6.4 mgd plant as the major facility of the Project. (See *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal 4<sup>th</sup> 1086, 1119-1121) [EIR's analysis must be based on "the proposed project as actually approved".] The EIR left the public and sister agencies uncertain about what version of the project to comment on and diverted attention from considering feasible alternative to the 6.4gpd desalination facility that had already been approved. This error was prejudicial, because "(o)nly through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit

against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the ‘no project’ alternative) and weigh other alternatives in the balance.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.) An accurate and stable project description is an essential element of a legally adequate FEIR. *Id.* at 192-193.

A “major function” of an EIR “is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” (*Laurel Heights I, supra*, 47 Cal.3d at 400 ). As this Court has emphasized, the discussion of alternatives (and mitigation measures) is the “core of an EIR,” which itself is the “heart of CEQA.”; *In re Bay-Delta Programmatic Environmental Impact Report Programmatic Proceedings* (2008) 43 Cal.4th 1143 (“*In re Bay-Delta*”), 1162; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 587.)

Here, the CPUC failed to comply with CEQA because its decision relied on and certified the EIR’s alternatives analysis, based on the 9.6 MGD desalination plant (D.18-09-017, p. 78-80 [11]APP1,A182-184]) despite the fact that the 9.6 mgd project was rendered infeasible and unnecessary after the CPUC’s approval of the PWM Water Purchase Agreement.

#### **V. The Commission’s Decision Ignores California Public Policy Favoring Use of Recycled Water in the Coastal Zone.**

The Legislature has indicated that where feasible in the coastal zone, adequately treated recycled water should “be made available to supplement existing surface and underground supplies” and to assist in meeting future water requirements of the coastal zone. (Water Code § 13142.5, subd. (e)(1).) This is precisely the policy behind the public benefit that the PWM project will soon provide, pursuant to Commission approval in D.16-09-021, by supplying 3,500 AFY of advanced treated recycled water for Cal-Am’s use to serve its Monterey District. (D.16-09-021, pp. 2 54 [19APP315, pp. A14155, 14207.] Consistent with this statutory directive concerning use of recycled water in



the coastal zone, the Commission was obligated as well to fully explore the possibility of purchasing additional supplemental recycled PWM water, either from an expanded project as proposed by M1W, or by utilizing MCWD's offer for a long-term sale of its unneeded portion of PWM supply or both. This the Commission failed to do.

**VI. The CPUC Not Only Declined the Requests of Multiple Parties For Further Investigation of the Supplemental Recycled Water Alternative, It Ordered The Project Proponent Cal-Am To Evaluate the Alternative In the Future, After Issuance of a Certificate of Public Convenience and Necessity.**

Remarkably, however, the CPUC not only declined the multiple requests of interested parties and responsible agencies for further investigation of the PWM supplemental water alternative before it reached a final decision to issue a CPCN, it ordered Cal-Am to evaluate the alternative in the future, after the CPUC already approved the project. (*Ibid.* p. 43 [11APP1, p. A147].) CEQA does not permit an agency to delegate the investigation of potentially feasible alternatives to project proponents; rather, the agency "must independently participate, review, analyze and discuss the alternative in good faith." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4<sup>th</sup> 1437, 1460.)<sup>1</sup>

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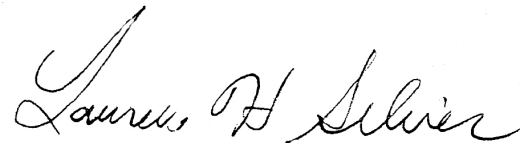
<sup>1</sup> See, e.g., Motion of Monterey Regional Water Pollution Control Agency, Sierra Club, California Unions for Reliable Energy, Citizens for Just Water, City of Marina, Landwatch Monterey County, Marina Coast Water District, Monterey Peninsula Water Management District, Planning and Conservation League, Public Trust Alliance, Public Water Now, and Surfrider Foundation asking the Commission to Open a Phase 3 to examine feasible alternatives in this proceeding, May 11, 2018. [39APP524, A25208]].

## **VII. Conclusion**

For the foregoing reasons, Sierra Club urges this Honorable Court to grant the MCWD's and City of Marina's Verified Petitions for Writ of Mandate/Review.

Sincerely,

CALIFORNIA ENVIRONMENTAL LAW  
PROJECT

A handwritten signature in black ink that reads "Laurens H. Silver". The signature is written in a cursive style with a large initial 'L'.

Laurens H. Silver, on behalf of the Sierra Club

## **PROOF OF SERVICE**

*Marina Coast Water District v. Public Utilities Commission of the State of California, Case No. S251935*

I declare that I am employed in the County of Marin, California. I am over the age of eighteen years and not a party to the within cause; my business address is P.O. Box 667, Mill Valley, California, 94942.

On January 31, 2019, I caused to be served the within:

### **Amicus Letter of Sierra Club**

in said cause, by placing a true copy thereof, enclosed in a prepaid sealed envelope, addressed as follows:

   **BY HAND DELIVERY:** I personally delivered the documents to the person(s) listed below.

   **BY E-MAIL:** By transmitting a true copy thereof by electronic mail from e-mail address [larrysilver@earthlink.net](mailto:larrysilver@earthlink.net) to the interested party(ies) or their attorney(s) of record to said action at the electronic e-mail address(es) shown below.

   **BY FAX TRANSMISSION:** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in Item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

   **BY OVERNIGHT DELIVERY:** the documents were enclosed in an envelope or package provided by an overnight delivery carrier and addressed to persons at the addresses below. The envelope or package was placed for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on January 31, 2019.



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