
State Water Resources Control Board

NOTICE OF ASSIGNMENT AND STATUS CONFERENCE

The State Water Resources Control Board
has assigned the court's reference to the Board
pursuant to Water Code section 2000 in

City of Marina v. RMC Lonestar,
Monterey County Superior Court No. 20CV001387

to the Board's Administrative Hearings Office
to conduct an adjudicative hearing and any necessary related proceedings,
and to prepare a proposed report of referee.

The Administrative Hearings Office will hold a Status Conference,
beginning on **January 18, 2022 at 1:00 p.m.**

This Status Conference will be held by Zoom teleconference.

Any interested party may participate in the Zoom teleconference by using the link:
<https://waterboards.zoom.us/j/98804130016?pwd=RTM3TVNyVzRYRUx2MmswQUMvcFhQQT09> with Meeting ID: 988 0413 0016 and Passcode: 953904

or by calling in at:

+16699009128,,98804130016#,,,,*953904# US (San Jose)

Any interested member of the public who would like to watch this hearing without participating may access the Administrative Hearings Office YouTube channel at:
https://www.youtube.com/channel/UCM-gmipRyd7Nw-g8l-C7Nig?view_as=subscriber

COURT REFERENCE

On October 7, 2021, the Monterey County Superior Court, in *City of Marina v. RMC Lonestar*, Case No. 20CV001387, issued an Order After Hearing. A copy of the court's order is attached to this notice as Attachment 2. In this order, the court ordered a reference to the State Water Resources Control Board ("State Water Board" or "Board") pursuant to Water Code sections 2000-2048. The court's order seeks expert opinion from the State Water Board on eight listed questions, some of which contain sub-questions.

The court's order also contains a ninth question, which asks the Board to provide a reasonable time estimate for the completion of the Board's report of referee.

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1110 established the Administrative Hearings Office ("AHO") within the State Water Board. Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing to the AHO. Water Code section 1112, subdivision (c)(3), provides that AHO hearing officers may perform additional work requested by the board, including, but not limited to, presiding over hearings on non-adjudicative matters, mediations, and overseeing investigations.

Water Code section 1114 provides that, after the AHO holds a hearing and the matter is submitted to the AHO, the AHO hearing officer shall prepare a proposed order and provide it to the Board for the Board's consideration.

On November 2, 2021, Tina Cannon Leahy, Staff Counsel IV in the Board's Office of Chief Counsel ("OCC"), transmitted a memorandum to Eileen Sobeck, Executive Director of the State Water Board. A copy of Ms. Leahy's memorandum is attached to this notice as Attachment 3. This memorandum recommended that the State Water Board assign this court reference to the AHO for an evidentiary hearing.

On November 17, 2021, Ms. Sobeck transmitted a memorandum to Alan Lilly, Presiding Hearing Officer of the Administrative Hearings Office. A copy of Ms. Sobeck's memorandum is attached to this notice as Attachment 4. This memorandum assigned this court reference to the AHO to conduct an adjudicative hearing and any necessary related proceedings, and to prepare a proposed report of referee with answers to Questions 1-8 in the court's October 7, 2021 order, for transmittal to and consideration by the Board. This memorandum also directed the AHO to prepare a preliminary answer to Question 9 in the court's order and provide that answer to OCC, for OCC to transmit to the court before the court's next hearing, which now is scheduled for January 25, 2022.

HEARING OFFICER AND HEARING TEAM

A hearing officer from the State Water Board's Administrative Hearings Office will preside over any hearing in this matter. Other members of the AHO may be present and assist the hearing officer throughout these proceedings. The hearing officer and other AHO staff members may consult with staff of the Board's Division of Water Rights and the Board's Office of Research, Planning, and Performance, attorneys in the Board's Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding.

HEARING ISSUES

The AHO will hold a hearing, and possibly related proceedings, on the following issues, which are specified in the court's October 7, 2021 order:

1. Where are the subsurface drawing source points (including capture zones) for each of the currently proposed California-American Water Company ("Cal-Am") wells located in relation to:
 - a. seawater in the ocean itself;
 - b. drawing source points for the Marina Coast Water District ("MCWD") production wells;
 - c. the Subbasin Interface Zone;
 - d. the 180/400 foot Aquifer Subbasin;
 - e. the Monterey Subbasin;
 - f. the Cemex property;
 - g. the MCWD wells.

Graphic depictions, if available, would be helpful.

2. Would water drawn by any of the currently proposed Cal-Am wells come from any source other than seawater from directly beneath the Ocean?

If so, from which sources? And which if any of these sources lie in whole or in part beneath the Cemex property?

If so, can one approximate with reasonable certainty in what quantities the water would be drawn from each source? Can this be expressed in percentages?

If so, do the relative amounts drawn from each source vary depending upon amounts drawn by the slant wells?

If so, can it be said with reasonable certainty that the amount drawn by the Cal-Am wells will not exceed 500 acre-feet per year ("afy") from any water source beneath the Cemex property?

3. What is the hydrogeological connectivity, if any, between the areas from which Cal-Am proposes to draw water and the areas from which MCWD extracts water?
4. Is it likely that any of the proposed draw for the Cal-Am wells would (a) result in or (b) increase any seawater intrusion into the Subbasin Interface Zone, the 180/400 foot Aquifer or the Monterey Aquifer, or any source for the MCWD production wells?

If so, what is the likely extent of the intrusion?

5. Is it likely that any of the proposed draw will (a) lower the groundwater table or (b) reduce the storage space in any source other than seawater, and if so, can the extent be approximated?
6. Has MCWD been pumping water from the Subbasin Interface Zone and, if so, for approximately what period of time?
7. What effect, if any, would the proposed draw by Cal-Am slant wells have upon any primary or paramount water right of the City of Marina or MCWD?

What impact on quantity and quality of the water sourced by MCWD wells is likely?

8. Does SWRCB have an opinion as to whether: (a) there is any legal theory upon which Cal-Am may rely to extract the proposed draw; and (b) the proposed Cal-Am extraction would infringe upon MCWD's appropriate rights to groundwater?

PROPOSED ADMINISTRATIVE HEARINGS OFFICE AND BOARD PROCESSES

The AHO's proposed process is for the AHO to issue a notice and hold a hearing on the hearing issues, pursuant to California Code of Regulations, title 23, sections 648-648.5.1. Following this hearing, the AHO would prepare a draft report of referee and circulate it to the parties for their review, comments and objections, pursuant to Water Code sections 2010-2015. After considering the parties' comments and objections, the AHO would prepare a proposed final report of referee and transmit it to the Board pursuant to Water Code section 1114, for consideration and action by the Board pursuant to Water Code sections 1114 and 2016.

Following completion of the Board's final report of referee and transmittal of it to the clerk of the court, the AHO would issue a notice and hold a hearing to determine an appropriate allocation of the Board's expenses pursuant to Water Code sections 2040-2043. The AHO then would prepare a draft allocation order, circulate it to the parties for their review and comments, and then transmit the AHO's final proposed allocation order to the Board pursuant to Water Code section 1114, for consideration and action by the Board pursuant to Water Code sections 1114 and 2043.

STATUS CONFERENCE

The AHO hearing officer will hold a status conference on the date and beginning at the time specified on the first page of this notice. The AHO will hold this status conference

by Zoom teleconference without any in-person appearances. The AHO hearing officer will prepare a status conference order and a hearing notice after the conference. The AHO will not retain a court reporter for the status conference. Any party may arrange for a court reporter at its own expense.

The AHO hearing office will discuss the following issues during the status conference:

1. Should the notice of public hearing issued by the AHO include any hearing issues besides the hearing issues listed in the "Hearing Issues" section above? Should the AHO modify any of these issues before issuing the hearing notice?
2. Does any party have any comments on the proposed AHO and Board processes described above?
3. Should the AHO conduct, or direct the parties to conduct, any processes separate from the hearing process, particularly any separate process regarding expert witnesses' technical work or models, before the AHO begins its hearing?
4. What is a reasonable preliminary schedule for the AHO to conduct and complete its proceedings and for the State Water Board to complete the final report of referee and transmit it to the clerk of the court?
5. Are there any other procedural or hearing issues any party would like to discuss? If so, what issues?
6. Are there any documents that have been filed in the court proceeding for this matter besides those that the AHO already has posted to the AHO-FTP folder, which is described in the Administrative Record section below, that the AHO should add to the initial administrative record for this proceeding?
7. What are the current operative pleadings (complaints, cross-complaints and answers) in the court proceeding?
8. Are there any background documents besides those that the AHO already has posted to the AHO-FTP folder that the AHO should add to the initial administrative record for this proceeding?
9. Should the attached initial service list for this proceeding be amended? If so, what amendments should the AHO make to this list?

NOTICES OF INTENT TO APPEAR; UPDATED SERVICE LIST

Any person or entity who wants to participate in this status conference must file a Notice of Intent to Appear (NOI), using the form attached to this notice, with the AHO before the deadline listed below. Parties do not need to send copies of their NOIs to other parties.

After the status conference, the AHO will issue a status conference order with an updated service list, which the AHO and the parties then will use for future notices and filings in this proceeding. The AHO will include in this updated service list only the people and entities that have filed NOIs or that otherwise have advised the AHO that they want to be on the service list for this matter. People that want to receive AHO notices regarding this proceeding and are not filing NOIs must advise the AHO in writing, using one of the methods listed below, that they want to receive AHO notices regarding this proceeding. People do not need to send copies of such requests to the other parties.

The AHO encourages parties and people to agree to accept electronic service (by e-mail) of all documents regarding this proceeding. If a party or person is not willing to do this, then the party may check the appropriate box on the NOI form or the person may so advise the AHO. If this box is not checked or if the person does not so advise the AHO, then the AHO will assume that the party or person agrees to accept electronic service. Parties and people that do not agree to accept electronic service will experience delays in receiving documents by U.S. Mail from the AHO and other parties.

STATUS CONFERENCE STATEMENTS

On or before the deadline listed below, each party shall file a status conference statement that separately addresses each of the status conference issues listed above that the party wants to address. Parties also may include in their status conference statements discussions of any other issues they believe are relevant. Parties with common interests may file joint status conference statements, and the AHO encourages them to do so.

NOI and Status Conference Deadlines and Schedule

Deadline for filing NOIs and status conference statements.	January 5, 2022, 1:00 pm
Status conference date and time.	January 18, 2022, 1:00 pm

After the filing deadline for NOIs and status conference statements, the AHO will post the parties' NOIs and status conference statements in the AHO-FTP folder described in the Administrative Record section that appears below.

SUBMITTAL OF DOCUMENTS TO AHO AND OTHER PARTIES

All documents submitted to the AHO, including NOIs and status conference statements, shall be addressed and submitted by one of the following methods:

By Email	AdminHrgOffice@waterboards.ca.gov With Subject Line "City of Marina Court Reference"
By Mail	State Water Resources Control Board Administrative Hearings Office P. O. Box 100 Sacramento, CA 95812-0100
By Hand Delivery (see instructions below)	Joe Serna Jr. CalEPA Building Administrative Hearings Office c/o Water Rights Records Unit 1001 I Street, 2nd Floor, Room 114 Sacramento, CA 95814

Submittals of documents by hand-delivery may be more difficult or delayed due to building or office closures during the COVID-19 pandemic. Please plan ahead if you wish to hand-deliver documents. Any hand-delivered submittals must be date-and-time stamped by the Water Rights Records Unit personnel before the submittal deadline. Persons delivering submittals to the Water Rights Records Unit must first check in with CalEPA Building lobby security personnel on the first floor of the CalEPA Building and obtain authorization to go to the Water Rights Records Unit on the second floor.

STATUS CONFERENCE LIVE-STREAM AND RECORDING

The status conference will be live-streamed through the Administrative Hearings Office YouTube channel, which is accessible by clicking on the link provided below. After the conclusion of the status conference, a recording of the YouTube live-stream sessions will be available on the Administrative Hearings Office YouTube channel. These recordings will include automatic captions for accessibility. The live-stream and YouTube recordings may be accessed at the following link:

https://www.youtube.com/channel/UCM-gmipRyd7Nw-g8l-C7Nig?view_as=subscriber

ADMINISTRATIVE RECORD

The AHO has filed copies of documents from the court's files in the initial administrative record for this proceeding. The AHO has posted this initial administrative record to the State Water Board's FTP site in the AHO-FTP folder. The AHO will post the parties'

NOIs and status conference statements to this folder after the filing deadline specified above. The AHO will post the Zoom recording of the status conference to this folder. The AHO will post all other administrative record documents that it receives during this proceeding to this folder.

Instructions regarding how to access the AHO-FTP folder on this FTP site are on the AHO's webpage at:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-09_ftp_sites.pdf

PROHIBITION ON EX PARTE COMMUNICATIONS

All parties are prohibited from having any *ex parte* communications with any members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.) The AHO has posted a discussion of *ex parte* communications on the AHO's webpage at

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021_04_06_webpage_faq.pdf. (See response to FAQ 18.)

If any party wants to communicate with the AHO at any time regarding any procedural or substantive issue regarding these proceedings, including any issue regarding the status conference, hearing procedures or the filing of documents, then that party shall make such communication to the AHO in writing (by e-mail or letter) and, except as otherwise provided in this notice, shall serve all other parties with copies of the communication and include a proof of service demonstrating such service with the written communication to the AHO. For e-mails, the verification of service shall be a list of the e-mail addresses of the parties or their representatives in an electronic-mail "cc" (carbon copy) list. For letters, the verification of service shall be a list of the names and mailing addresses of the other parties or their representatives in the cc portion of the letter. The AHO will post copies of all such communications to the AHO-FTP folder described above.

Please do not attempt to communicate by telephone or in person with any AHO hearing team member regarding any procedural or substantive issue concerning this hearing, because other parties would not be able to participate in such communications. If oral communications with any members of the AHO hearing team are necessary to discuss any procedural or substantive issue, then the AHO will set up a Zoom conference in which representatives of all parties may participate. Any party may request such a conference at any time using the written communications protocols described above.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO has posted and will post all notices and

other AHO documents regarding these proceedings on the AHO's internet webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person may sign up to receive all AHO notices at https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html.

Date: December 13, 2021

SIGNATURE ON FILE
Alan B. Lilly, Presiding Hearing Officer

Attachments:

- Attachment 1 – Notice of Intent to Appear Form
- Attachment 2 – October 7, 2021 Court Order After Hearing
- Attachment 3 – November 2, 2021 Memo from OCC to Executive Director
- Attachment 4 – November 17, 2021 Memo from Executive Director to AHO
- Attachment 5 – Initial Service List (copies of this notice are being sent by e-mail and U.S. Mail to everyone on this list)

ATTACHMENT 1
NOTICE OF INTENT TO APPEAR FORM

(Name of Participant or Party) _____ plans to participate in the State Water Resources Control Board Administrative Hearings Office's Status Conference in the City of Marina court reference.

This status conference is scheduled to begin on January 18, 2022, at 1:00 pm

Please fill in the following information of the participant, party, attorney, or other representative:

Name (type or print):

Represented party (if applicable):

Mailing Address:

Telephone Number:

E-mail Address:

Optional:

I/we decline electronic service of hearing-related materials.

Signature: _____

Date: _____

ATTACHMENT 2

**Court's October 7, 2021 Order in *City of Marina v. RMC Lodestar, Inc.*,
Monterey County Superior Court No. 20CV001387**

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY**

ELECTRONICALLY FILED BY
Superior Court of California,
County of Monterey
On 10/07/2021
By Deputy: Conder, Perla

City of Marina, et al.

Plaintiff/Petitioner

vs.

RMC Lonestar, et al.

Defendant/Respondent

Case No.: 20CV001387

ORDER AFTER HEARING

This matter came on before the Court on October 6, 2021 for further hearing on the motion of Defendants California-American Water Company (“Cal-AM”), RMC Lonestar and RMC Pacific Materials, LLC dba CEMEX (“CEMEX”) for referral of this matter to the State Water Resources Control Board (“SWRCB”).

This action involves fairly complex factual history and disputes regarding the slant wells proposed by Cal-AM for a proposed desalination project.

The motion for referral to SWRCB is well-taken, particularly in view of the fact that SWRCB prepared a report previously in 2013 regarding the same proposed project, and the motion is GRANTED.

The Court, by reference to the SWRCB pursuant to California Water Code section 2000, seeks the expert opinion from the SWRCB on the following questions in this action:

1. Where are the subsurface drawing source points (including capture zones) for each of the currently proposed Cal-Am wells located in relation to:

a. seawater in the ocean itself;

b. drawing source points for the Marina Coast Water District (“MCWD”) production wells;

- c. the Subbasin Interface Zone;
- d. the 180/400 foot Aquifer Subbasin;
- e. the Monterey Subbasin;
- f. the Cemex property;
- g. the MCWD wells.

Graphic depictions, if available, would be helpful.

2. Would water drawn by any of the currently proposed Cal-Am wells come from any source other than seawater from directly beneath the Ocean?

If so, from which sources? And which if any of these sources lie in whole or in part beneath the Cemex property?

If so, can one approximate with reasonable certainty in what quantities the water would be drawn from each source? Can this be expressed in percentages?

If so, do the relative amounts drawn from each source vary depending upon amounts drawn by the slant wells?

If so, can it be said with reasonable certainty that the amount drawn by the Cal-Am wells will not exceed 500 acre-feet per year (“afy”) from any water source beneath the Cemex property?

3. What is the hydrogeological connectivity, if any, between the areas from which Cal-Am proposes to draw water and the areas from which MCWD extracts water?

4. Is it likely that any of the proposed draw for the Cal-Am wells would (a.) result in or (b.) increase any seawater intrusion into the Subbasin Interface Zone, the 180/400 foot Aquifer or the Monterey Aquifer, or any source for the MCWD production wells?

If so, what is the likely extent of the intrusion?

5. Is it likely that any of the proposed draw will (a.) lower the groundwater table or (b.) reduce the storage space in any source other than seawater and if so, can the extent be approximated?

6. Has MCWD been pumping water from the Subbasin Interface Zone and, if so, for approximately what period of time?

7. What effect, if any, would the proposed draw by Cal-Am slant wells have upon any primary or paramount water right of Marina or MCWD?

What impact on quantity and quality of the water sourced by MCWD wells is likely?

8. Does SWRCB have an opinion as to whether
(a.) there is any legal theory upon which Cal-Am may rely to extract the proposed draw; and
(b.) the proposed Cal-Am extraction would infringe upon MCWD's appropriate rights to groundwater?

9. Preliminarily, what does SWRCB believe is a reasonable time estimate for the completion of such a report?

The Court sets a hearing for November 5, 2021 at 11:00 a.m. in Department 15 for review of a Proposed Work Plan from the SWRCB, which should include a response to question #8 above.

Dated: 10/7/21



Thomas W. Wills
Judge of the Superior Court

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CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **Order After Hearing**, for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Monterey, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

Paul Skip Spaulding III
One Maritime Plaza 18th Floor
San Francisco CA 94111

Howard Francis Wilkins III
555 Capitol Mall Ste 800
Sacramento CA 95814

Robert Rory Moore
Three Embarcadero Center 12th Floor
San Francisco CA 94111-4074

Ruth Stoner Muzzin
350 Sansome Street Suite 800
San Francisco CA 94104

Kerry Shapiro
2 Embarcadero Center 5th Floor
San Francisco CA 94111

Meredith Enns Nikkel
621 Capitol Mall 18th Fl
Sacramento CA 95814


James Lee Markman
350 South Grand Avenue 37th Floor
Los Angeles CA 90071

David Leon Osias
600 West Broadway 27th Floor
San Diego CA 92101-0903

Susan Kimberly Blich
168 West Alisal Street 3rd Floor
Salinas CA 93901-2653

Andrew Sawyer
Tina Leahy
David Rose
1001 I Street 22nd Floor
Sacramento CA 95814

Dated: October 7, 2021

Clerk of the Court
By: 
P Conder, Deputy Clerk

ATTACHMENT 3

**November 2, 2021 Memorandum from Tina Cannon Leahy,
Staff Counsel IV, Office of Chief Counsel,
to Eileen Sobeck, Executive Director**

State Water Resources Control Board

TO: Eileen Sobeck
Executive Director

FROM: Tina Cannon Leahy
Staff Counsel IV
Office of Chief Counsel

DATE: November 2, 2021

SUBJECT: Court Reference Pursuant to Water Code Section 2000
City of Marina v. RMC Lonestar
(Monterey Sup. Ct. Case No. 20CV001387)

On August 30, 2021, California-American Water Company (Cal-Am), a Cross-Defendant in the matter of *City of Marina v. RMC Lonestar*, moved to refer two discreet issues to the State Water Resources Control Board (State Water Board) pursuant to Water Code section 2000 et seq. Plaintiff City of Marina (City) and Cross-Complainant Marina Coast Water District (collectively “Marina Parties”) opposed the motion. On Wednesday, October 6, 2021, the Court held a hearing, attended by the parties and the Office of Chief Counsel (OCC) regarding the potential reference. The Court granted Cal-Am’s request and issued an Order setting out the precise questions for the reference to address (attached). The Court also scheduled a follow up hearing for Friday, November 5, 2021, for the State Water Board to inform the court and parties regarding the potential timing and process for the reference. As explained below, because the dispute involves competing technical analyses, OCC agrees with the recommendation of the Administrative Hearings Office (AHO) that this matter be assigned to the AHO for an evidentiary hearing.

Background

The reference is the latest chapter in an ongoing dispute between Cal-Am and the Marina Parties over Cal-Am’s proposed Monterey Peninsula Water Supply Project (MPWSP), a desalination facility. In 1995, the State Water Board adopted Order No. WR 95-10 finding Cal-Am was diverting 10,730 acre feet per annum from the Carmel River without a valid basis of right and later issued Order No. WR 2009-0060, a cease and desist order.¹ Meanwhile, in 2004, Cal-Am

¹ See https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1995/wro95-10.pdf and https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0060.pdf.

filed an application with the California Public Utilities Commission (CPUC) seeking a Certificate of Public Convenience and Necessity for the Coastal Water Project (CWP).² Cal-Am asserted the CWP was intended to replace existing water supplies for the Cal-Am Monterey District service area constrained by the State Water Board's cease and desist order and other legal decisions. In January 2012, Cal-Am withdrew its support for the CWP and, instead, in April 2012, filed an application for the MPWSP asking the CPUC to approve the project and authorize Cal-Am to recover all present and future costs of the MPWSP in rates.³

As described by Cal-Am, the MPWSP would be located within the City at the former CEMEX sand mining facility site and draw from ten subsurface wells that would be approximately 700 to 1,000 feet long and slant downwards towards Monterey Bay, with the end of each well approximately 200 to 220 feet below mean sea level in Monterey Bay and the Monterey Bay National Marine Sanctuary. Each well screen would be approximately 400 to 800 linear feet long at depths corresponding to both the Dune Sand Aquifer and the underlying 180/400 Foot Aquifer of the Salinas Valley Groundwater Basin. Cal-Am anticipates that eight operating wells and two redundant wells would pump 24.1 million gallons of "source water" per day to a proposed desalination plant located on approximately 25 acres of a vacant 46-acre parcel owned by Cal-AM northwest of the Monterey Regional Water Pollution Control Agency's Regional Treatment Plant and the Monterey Regional Environmental Park.⁴

Controversy

The City claims that the MPWSP would bring industrial development to an area that should be protected for coastal habitat and public access. In addition, the Marina Parties allege there is potential harm from the MPWSP to groundwater their communities rely upon for drinking water. The Marina Parties refer to a 2020 report by Stanford University scientists in the journal *Geophysics* (Stanford Study) analyzing the Dune Sand Aquifer and the 180/400 Foot Aquifer using an airborne electromagnetic method (AEM).⁵ The Stanford Study concluded that the fresh water aquifer extends further towards the coast and to the south than previously estimated using MPWSP well data and that the "increased head of the groundwater mound acts as a hydraulic barrier to saltwater intrusion."⁶ The City also asserts that the MPWSP would exceed current limitations on groundwater extractions and exports reflected in a binding agreement with CEMEX and that the Pure Water Monterey Expansion Project provides a feasible alternative.⁷

The Stanford Study contrasts with earlier findings by the State Water Board as part of the CPUC process for the MSWSP. On September 26, 2012, following Cal-Am's request to approve the project, the CPUC asked the State Water Board for assistance noting that the "positions of the parties vary widely on the issue [of the MSWSP], and taken together indicate the issue is

² See CPUC project website, Monterey Peninsula Water Supply Project, <https://ia.cpuc.ca.gov/Environment/info/esa/mpwsp/index.html>.

³ See Amended Application of California-American Water Company, A. 12-04-019 (filed April 23, 2012), https://ia.cpuc.ca.gov/Environment/info/esa/mpwsp/pdf/ammend_app_2016.pdf

⁴ *Ibid.*

⁵ Ian Gottschalk et al., *Using an Airborne Electromagnetic Method to Map Saltwater Intrusion in the Northern Salinas Valley, CA* (June 2020) 85 GEOPHYSICS B119-131, <https://library.seg.org/doi/epub/10.1190/geo2019-0272.1>.

⁶ *Id.*, at p. B129.

⁷ See <https://cityofmarina.org/935/Cal-Am-Desalination-Project>

complex.⁸ Specifically, the CPUC asked for “review of Cal-Am’s contention that it will have a credible claim to the right to extract feedwater at the rates and volume needed for the proposed project.”⁹

On July 31, 2013, the State Water Board issued the *Final Review of California American Water Company’s Monterey Peninsula Water Supply Project* (MPWSP Final Review) following release of a draft document and public comment.¹⁰ The State Water Board’s review concluded that Cal-Am could withdraw brackish water so long as the quantity was not detrimental to basin condition and other users’ water rights. In its findings, the State Water Board found “Cal-Am could legally pump from the Basin by developing a new water supply through desalination and showing the developed water was surplus to existing supply.”¹¹

The CPUC’s approval of Cal-Am’s MPWSP led to multiple subsequent legal challenges by and among the Marina Parties and Cal-Am. These include an appeal by the Marina Parties of the CPUC’s decision to the California Supreme Court,¹² a challenge by the Marina Coast Water District to the California Coastal Commission’s approval of two Coastal Development Permits for Cal-Am,¹³ a challenge by the Marina Parties to the Monterey County Groundwater Sustainability Agency’s authority pursuant to the Sustainable Groundwater Management Act (Water Code, § 10720 et seq.) to manage the 180/400 Foot Aquifer in the Marina area,¹⁴ and a reverse validation action by Cal-Am against the City of Marina’s Groundwater Sustainability Agency and Groundwater Sustainability Plan.¹⁵

Recommendation

On October 19, 2021, OCC staff assigned to the Groundwater Management Program (GMP) met with staff from the GMP, Division of Water Rights (DWR), and Administrative Hearings Office (AHO) to discuss options for responding to the reference. The fundamental issue for the reference is the need to assess the technical data in the Stanford Study and whether that information alters previous conclusions. Specifically, can Cal-Am withdraw water from the Dune Sand Aquifer and 180/400 Foot Aquifer via slant wells without harming groundwater

⁸ CPUC Executive Director Paul Clanon letter to State Water Board Executive Director Tom Howard (September 26, 2012), p. 1; https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_mpws/docs/cpucrequest092612.pdf.

⁹ *Id.*, at p. 2.

¹⁰ See MPWSP Final Review; https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_mpws/docs/cal_am_final_report.pdf.

¹¹ *Id.*, at p. 49.

¹² *City of Marina v. Public Utilities Commission* (Cal. Sup. Ct. Case No. S253585) [Petition for writ of review denied August 28, 2019].

¹³ *Marina Coast Water District v. California Coastal Commission* (Sacramento Sup. Ct. Case No. 34-2014-80001983) [Case transferred to Monterey Sup. Ct. and vacated June 16, 2015].

¹⁴ *City of Marina v. Karla Nemeth* (Monterey Sup. Ct. Case No. 19CV005270) [On August 24, 2021, the Court ruled the California Dept. of Water Resource’s action recognizing the Monterey County Groundwater Sustainability Agency as the GSA for the Marina Area was valid].

¹⁵ *California-American Water Company v. All Persons Interested in the Matter of the Validity of the City of Marina Groundwater Sustainability Agency’s Groundwater Sustainability Plan for the Marina GSA Area of the 180/400 Foot Aquifer Subbasin* (Monterey Sup. Ct. Case No. 20CV002436) [Stayed pending outcome of *City of Marina v. Karla Nemeth*, supra].

resources for drinking water in the Marina area? As GMP staff point out, the analysis is made more challenging because Stanford's use of AEM for this purpose is a somewhat novel application with protocols that are still developing.

Because this is a contested matter using a novel technology between parties who are extremely adversarial, OCC agrees with the AHO's recommendation that the matter be assigned to the AHO for an evidentiary hearing. Such a hearing would shift the burden on to the parties to come up with evidence, experts, etc., to support their points of view, including cross-examination and discovery, if necessary. Placing the burden on the parties is also helpful because, as the GMP advises, the universe of people that understand the way that AEM was applied in the Stanford Study is relatively small and it may be burdensome and time consuming for the State Water Board to try to engage its own experts, even if it is entitled to recover its costs under the reference statute.¹⁶ Following an evidentiary hearing by the AHO, the GMP could assist with reviewing and evaluating materials provided by the parties and the preparation of the reference report.

The AHO estimates it could take roughly 1 ½ to 2 years to complete the reference but advises that development of a more informed timeline would require a status conference with the parties to understand such factors as how much discovery they will seek from one another. In contrast, the GMP's rough estimate of how long it would take for it to independently review and analyze the data and develop a reference report was 4+ years if a preliminary analysis of the AEM model raised a legitimate question of potential impacts, thus necessitating the need to hire an expert consultant and perform a full analysis.

If this were assigned to the AHO, potential steps could be:

- Status conference with the parties
- Notice of hearing
- Parties provide evidentiary materials
- AHO reviews materials
- Evidentiary hearing
- Rebuttal hearing
- Analysis and drafting of report
- Comment on draft report
- Draft Final Report
- Board member briefings
- Final Report approval by either the Executive Director or the Board

As in indicated at the outset of this memorandum, the Monterey Superior Court seeks a status report from the State Water Board on Friday, November 5, 2021, regarding a potential process and timeline for the reference.

cc: Michael A.M. Lauffer, Chief Counsel, Office of Chief Counsel
Andy Sawyer, Assistant Chief Counsel, Office of Chief Counsel
Alan Lilly, Presiding Hearing Officer, Administrative Hearings Office

¹⁶ Wat. Code, § 2043.

ATTACHMENT 4

**November 17, 2021 Memorandum from Eileen Sobeck, Executive Director
to Alan Lilly, Presiding Hearing Officer, Administrative Hearings Office**

State Water Resources Control Board

TO: Alan Lilly
Presiding Hearing Officer
Administrative Hearing Office

FROM: Eileen Sobeck
Executive Officer
State Water Resources Control Board

DATE: November 17, 2021

SUBJECT: Assignment of Court Reference Pursuant to Water Code Section 2000
City of Marina v. RMC Lonestar
(Monterey Sup. Ct. Case No. 20CV001387)

The Office of Chief Counsel (OCC) has recommended assignment to the Administrative Hearings Office (AHO) of the court's reference to the State Water Resources Control Board (State Water Board) in *City of Marina v. RMC Lonestar* for an adjudicative hearing, preparation of a proposed report of referee, and related proceedings. OCC made this recommendation due to the complexity of the factual issues presented, which involve issues associated with slant wells proposed by California-American Water Company (Cal-Am) for construction in the City of Marina adjacent to the Monterey Bay. (See enclosed November 2, 2021, Memorandum from Tina Cannon Leahy.)

The court's October 7, 2021, Order referring the matter to the State Water Resources Control Board lists eight technical and legal questions. The court also asks the Board to provide a reasonable time estimate for the completion of the report of referee, which I would like to occur expeditiously.

Based upon OCC's recommendation and pursuant to Water Code section 1112, subdivisions (c)(2) and (c)(3), I assign this court reference to the Administrative Hearings Office to conduct an adjudicative hearing and any necessary related proceedings, and to prepare a proposed report of referee with answers to Questions 1-8 in the court's order, for transmittal to and consideration by the Board.

The court calendared a follow up hearing for January 25, 2021, to receive a status on this referral. The AHO also should prepare a preliminary answer to Question 9 and provide that answer to OCC for transmittal to the court before the court's next hearing.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

If you have any questions regarding this memo, please contact Tina Cannon Leahy, Senior Staff Counsel, at 916-319-8559 or by email at Tina.Leahy@waterboards.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eileen Sobeck". The signature is fluid and cursive, with a long horizontal stroke at the end.

Eileen Sobeck
Executive Director
State Water Resources Control Board

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