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Via Email Wr\_Hearing.Unit@waterboards.ca.gov

Paul Murphey  
Division of Water Rights  
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P.O. Box 2000  
Sacramento, CA 95812-2000



Subject: SWRCB staff document entitled "Draft Review of California American Water Company's Monterey Peninsula Water Supply Project"  
Notice of Opportunity for Public Comment dated April 3, 2013

Dear Mr. Murphey:

We represent Ag Land Trust, which makes the following comments on the "Draft Review of California American Water Company's Monterey Peninsula Water Supply Project."

Interest of Ag Land Trust

Ag Land Trust is a not-for profit public benefit corporation. Its mission is the preservation of agricultural land in the Salinas Valley. Ag Land Trust has preserved more than 25,000 acres of farmland in Monterey County. Ag Land Trust owns prime agricultural land, as defined by the California Department of Conservation, in the area known as Armstrong Ranch. This productive agricultural property is adjacent to the proposed slant well site for the new Cal-Am project. Ag Land Trust has water rights in the Salinas Valley Groundwater Basin arising from its ownership of the prime agricultural land.

Over the last decade, the Ag Land Trust has commented repeatedly to the California Public Utilities Commission (CPUC) raising concerns about water rights and water quality. From the "Draft Review," it appears that the SWRCB staff may not have received all the relevant documents in the CPUC's possession. We attach some of the Ag Land Trust's written comments to the CPUC, starting in 2006.

In Superior Court, Ag Land Trust challenged the reliance upon the EIR called the "Coastal Water Project Environmental Impact Report." The Superior Court found in favor of Ag Land Trust, and found that the EIR was flawed in seven material ways, including an inadequate water rights analysis. We attach the judgment of the Superior Court.

### SWRCB authority in this matter

The SWRCB has no authority over percolating groundwater that is being put to beneficial use. (Water Code, § 1200 et seq.) The Courts of the State of California have jurisdiction over nonadjudicated percolated groundwater basins in the state. (*Los Angeles v. Pomeroy* (1899) 124 Cal. 597; *Katz v. Walkinshaw* (1903) 141 Cal. 116.)

The Salinas Valley Groundwater Basin is a percolated groundwater basin. The unadjudicated basin is in overdraft.

The SWRCB's Notice of Opportunity for Public Comment states that "The [California Public Utilities] Commission requested an assessment from the State Water Board on whether Cal-Am has the legal right to extract groundwater for the Project." Under the circumstances, including the SWRCB's lack of authority, the lack of reliable information provided to the SWRCB, and the highly controversial nature of the issues, Ag Land Trust wonders why the SWRCB would want to extend an opinion "on whether Cal-Am has the legal right to extract groundwater for the Project."

For that reason, any "assessment" by the SWRCB is an opinion. If the SWRCB pursues this effort, any SWRCB "assessment" should include a description of the SWRCB's authority and limitations. To date, the CPUC's many years of environmental and review of the Cal-Am projects have failed to adequately account for Salinas Valley water rights. Cal-Am has sought to build additional projects because of its lack of adequate water rights in the Carmel Valley (SWRCB Order 95-10) and the recently adjudicated Seaside groundwater basin. The SWRCB should reject any effort by the CPUC to set up the SWRCB for blame if this project fails, as prior Cal-Am projects have failed.

### Comments on the "Draft Review"

For ease of review, we provide excerpts of the SWRCB staff "Draft Review" document in indented quotes, followed by our comments.

"Cal-Am proposes several approaches that it claims would legally allow it to extract water from the Salinas Valley Groundwater Basin (SVGB or Basin) near or beneath Monterey Bay without violating groundwater rights or injuring other groundwater users in the Basin." (p. i.)

In an overdrafted, percolated groundwater basin, California groundwater law holds that the doctrine of correlative overlying water rights applies (*Katz v. Walkinshaw* (1903) 141 Cal. 116), whereby no surplus water is available for new groundwater appropriators, except by prescription. In an overdrafted basin, as a junior appropriator, there is no water available for Cal-Am to appropriate. (*Pasadena v. Alhambra* (1949)

33 Cal.2d 908.) Any groundwater extraction by Cal-Am would constitute a violation of the groundwater rights of existing water rights holders.

“The conditions in the aquifer where MPWSP feedwater would be extracted could be either confined or unconfined however; there is currently not enough information to determine what type of conditions exist at the location of the MPWSP wells.” (p. i.)

Ag Land Trust agrees with this statement. The statement emphasizes the need to have a comprehensive and reliable model of the basin, including the projects that have been implemented in the basin to slow or halt seawater intrusion. The model should be completed and provided for public review and analysis prior to any drilling or pumping of a test well.

“Effects from confined aquifer pumping would be observed over a larger area than if extraction occurred from an unconfined aquifer. Previous studies done in the one of [sic] proposed MPWSP well locations indicate that there would be an approximate 2-mile radius zone-of-influence if groundwater was pumped from an unconfined aquifer. It is unknown what the effects would be if water was pumped from a confined aquifer with different hydrogeologic conditions.” (p. i.)

The community of Castroville is within a 2-mile radius of the proposed well site. Castroville has a largely minority and underprivileged population. Cal-Am is proposing to pursue a project that would cause harm to the users of the potable aquifer. There is transference from the 180 to the 400 aquifer, which is why the County of Monterey has adopted well closure ordinances. The County of Monterey and the local farmers have deliberately refrained from pumping from the coastal 180-aquifer, in order to try to prevent further harm to the aquifer. Now Cal-Am is proposing to implement the same detrimental conduct that the farmers and the County have largely ceased. The environmental justice issues here are significant, and State policies prohibit the disproportionate effect upon the underprivileged populations.

“The aquifers underlying the proposed extraction locations have been intruded with seawater since at least the 1940's. The impairment means that there is little or no beneficial use of the water in the intruded area.” (p. i.)

This is not accurate. Ag Land Trust is actively using water from its onsite well. Within 100 feet of the Cemex property, the Ag Land Trust is currently using its well and well water from and on the Armstrong Ranch to grow vetch grass, rye grass, and native

dune poppy crops for the production and development of native seed stock for Ag Land Trust's dune stabilization and recovery program. The well water is pumped from the recovering aquifer.

More than one acre of Ag Land Trust property has been planted and is being irrigated with groundwater from the Ag Land Trust well. This is an existing and on-going "beneficial use" of Ag Land Trust's existing potable groundwater rights that will be directly and permanently compromised by Cal-Am's intentional contamination of the 180 foot aquifer from the proposed project. The SWRCB staff conclusion that the aquifers near the proposed Cal-Am wells are irretrievably contaminated and not usable is conclusory and unsupported. Ag Land Trust reports that from 2004 to 2010, the CPUC staff did not contact local landowners, and did not provide notice as mandated by CEQA to landowners affected by the original Cal-Am project. The SWRCB staff opinion apparently relies upon an EIR that was overturned by the Superior Court in early 2012. Existing use of the groundwater for existing and recognized beneficial uses by overlying landowners has been ignored by Cal-Am, the CPUC and the now-discredited EIR.

The existing beneficial use of the groundwater by Ag Land Trust means that the project's reduction in the quantity of available fresh water would be felt immediately on in-Basin groundwater users, contrary to the conclusory statements in the Draft Review (e.g., pp. 27-28, 37).

"To appropriate groundwater from the Basin, the burden is on Cal-Am to show injury to other users. Key facts will be the following: (1) how much fresh water Cal-Am is extracting as a proportion of the total pumped amount, to determine the amount of treated water considered as desalinated sea water, available for export as developed water . . ." (p. ii.)

The statement is not accurate. The burden is on Cal-Am to prove there will not be any injury to other users. Ag Land Trust has asserted since 2004 that the proposed wells would cause injury to Ag Land Trust and to other water rights holders in the basin.

"(3) how Cal-Am should return any fresh water it extracts to the Basin to prevent injury to others . . ." (p. ii.)

The injury of illegal appropriation occurs at extraction. The injury cannot be repaired. By virtue of taking the water out without legal right, Cal-Am would cause injury to holders of existing water rights. The extraction of fresh water from beneath an overlying property owner by a junior appropriator in an overdrafted basin would violate the law.

“Both near and long-term, a physical solution that protects legal users in the Basin from harm would permit Cal-Am to extract groundwater. Even if overdraft conditions continued in the Basin following imposition of the solution, Cal-Am could legally continue pumping brackish water so long as the quantity and method of extraction are not detrimental to the conditions in the Basin and other Basin users’ rights, taking into account replacement water provided as part of the project.” (p. ii.)

The statements are not accurate. Physical solutions to slow or halt seawater intrusion in the Salinas Valley Groundwater Basin have been approved by public elections of the voters, and have been constructed expressly for the purposes of slowing or halting seawater intrusion. Ag Land Trust and hundreds of its neighbors have paid, and continue to pay, many millions of dollars for assessments for multiple Monterey County public projects to address seawater intrusion. Perhaps the CPUC has failed to inform the SWRCB of the expenditure of the public monies and the construction and ongoing operation of the publicly owned facilities for the benefit of the public. This has created the current situation that Cal-Am hopes to exploit. Cal-Am has not paid into these public facilities.

“Cal-Am should have the opportunity to show any desalinated water it produces is surplus to the current needs of the Basin, replacement water methods are effective and feasible, and the MPWSP can operate without injury to other users.” (p. ii.)

There is no basis in case law for this conclusion, absent adjudication of the Salinas Valley Groundwater Basin. If SWRCB staff intends to recommend adjudication, which is implied by the Draft Review’s lengthy discussion in section “6.3 Physical Solution Discussion” at pages 33 to 38, SWRCB staff should do so publicly and as early as possible in the process.

“Studies are needed to determine the extent of the Dune Sand Aquifer, the water quality and quantity of the Dune Sand Aquifer, the extent and thickness of the Salinas Valley Aquitard and the extent of the 180-Foot Aquifer.” (p. iii.)

Ag Land Trust agrees. These studies, using a comprehensive hydrologic model, are needed before any test wells are drilled and the aquifers are further intruded with seawater thereby causing harm to overlying landowners.

“Specifically, a series of test boring/wells would be needed to assess the hydrogeologic conditions at the site. Aquifer

testing would also be needed to establish accurate baseline conditions to determine the pumping effects on both the Dune Sand Aquifer and the underlying 180-Foot Aquifer. Aquifer tests should mimic proposed pumping rates.” (p. iii.)

The proposed test wells will cause irreparable harm to the groundwater supply and groundwater rights of the Ag Land Trust. The proposed test wells are approximately 400 feet from Ag Land Trust property. The proposed test wells would fulfill Cal-Am’s desire to deliberately pollute the aquifer. The pollution would be detrimental to in-basin overlying land owners and water rights holders.

“The studies will form the basis for a plan that avoids injury to other groundwater users and protects beneficial uses in the Basin.” (p. iii.)

See above comments regarding adjudication. This statement presumes that it is possible to avoid injury. Under *Pasadena v. Alhambra, supra*, there is a presumption that appropriation of groundwater from an overdrafted basin by a junior appropriator with no existing rights will cause injury to senior groundwater users and existing beneficial uses in the basin.

“In a letter dated September 26, 2012, the California Public Utilities Commission (Commission) asked the State Water Resources Control Board (State Water Board) whether the California American Water Company (Cal-Am) has the legal right to extract desalination feedwater for the proposed Monterey Peninsula Water Supply Project (MPWSP). The Commission stated it is not asking for a determination of water rights, but is instead requesting an opinion as to whether Cal-Am has a credible legal claim to extract feedwater for the proposed MPWSP, in order to inform the Commission’s determination regarding the legal feasibility of the MPWSP.” (p. 1.)

The SWRCB has no jurisdiction over percolated groundwater basins. More troubling is the fact that the CPUC apparently failed to disclose to the SWRCB ten years of correspondence from senior water rights holders in the Salinas Valley advising the CPUC that Cal-Am has no groundwater rights and cannot acquire groundwater rights absent deliberate contamination of the groundwater or pursuing adjudication of the groundwater basin. (E.g., see attached correspondence from Ag Land Trust.)

“This paper will (1) examine the readily available technical information and that provided by the Commission” (p. 1.)

The term “readily available technical information” is not defined. It raises serious concerns as to the adequacy of the information that will be considered. The SWRCB should clearly state what information the SWRCB staff considers to be “readily available.” The SWRCB should investigate and pursue all needed information.

The Monterey County Water Resources Agency is not a reliable source of information, because under a 2012 settlement agreement with Cal-Am the Agency is prohibited from speaking freely about the current Cal-Am project. This settlement was made to resolve a lawsuit filed by Cal-Am against Monterey County Water Resources Agency. The lawsuit and settlement agreement are public records.

“In January 2009, the Commission issued a Draft Environmental Impact Report (EIR) for the Coastal Water Project and two project alternatives – the North Marina Project and the Monterey Regional Water Supply Project (Regional Project). In October 2009, the Commission issued the Final EIR (FEIR) and in December 2009, it certified the FEIR. In December 2010, the Commission approved implementation of the Regional Project.” (p. 2.)

“State Water Board staff analyzed the NOP and how closely the new description matched the alternatives in the December 2009 FEIR completed for the Coastal Water Project.” (p.3.)

“Of the two project alternatives in the FEIR, the North Marina Project more closely resembled the proposed MPWSP described in the NOP. For this reason, State Water Board staff assumed most of the information, including the slant well construction and operation as described in the FEIR – North Marina Project Alternative, was applicable to the proposed MPWSP.” (p. 3.)

Reliance on the EIR is not merited. The EIR was found to be inadequate by the Monterey County Superior Court. The EIR may have relied on information from the former chairman of the Monterey County Water Resources Agency board of directors, who resigned and is facing more than 30 felony counts, including two counts for conflicts of interest violations arising from his work for the Regional Desalination Project while on the Water Resources Agency board. The other counts allegedly arise from his work for one of the coastal agricultural interests.

“The new information provided to the State Water Board includes: an updated project description, changes in the location and configuration of the extraction well system, new

information about the nature of the 180-Foot Aquifer, timing of implementation for certain mitigation measures, and supplemental testimony from Richard Svindland of Cal-Am.” (p. 3.)

Please state who provided “the new information.” It appears to have come solely from Cal-Am and/or the CPUC. There has not been an opportunity for landowners to meet with SWRCB staff and express their concerns regarding the proposed project.

“The preferred alternative would consist of 7 to 9 slant wells that would draw water from under the ocean floor by way of gravity for delivery to the desalination plant.” (p. 4.)

Due to cones of depression, Cal-Am would be taking fresh water. Pumping from beneath the Monterey Bay National Marine Sanctuary would violate the 1992 Memorandum of Agreement to which the SWRCB is a signatory through the California Environmental Protection Agency. Such pumping would violate the Sanctuary rules regarding removal and exploitation of Public Trust resources within the Sanctuary, including fresh water seeps.

“A near-surface water-bearing zone comprised of dune sands, commonly referred to as the “Dune Sand Aquifer”, also exists but is considered a minor source of water due to its poor quality. The Dune Sand Aquifer is not regionally extensive and is not a recognized subbasin within the SVGB. The amount of groundwater in storage in the Dune Sand Aquifer is unknown.” (p. 8.)

There is no current pumping from the so-called Dunes aquifer. To the limited extent the aquifer exists, its sources of recharge are solely rainfall and irrigation water. The amount of storage is highly variable based on recharge. The aquifer is currently largely fresh water because it has not been pumped for years due to efforts by land owners to reverse seawater intrusion and the County prohibition on wells in the coastal area in question. The SWRCB staff conclusion that the so-called aquifer is a contaminated water source does not change the fact that the proposed project would wrongfully allow Cal-Am to intentionally induce seawater into a recovering potable water formation and compromise many years of efforts of local land owners to reverse seawater intrusion in the Salinas Valley.

At pages 8 and 18, the draft SWRCB staff document refers to the “Deep Aquifer.” The SWRCB staff may not be aware that the preferred reference is to the “Deep Aquifers” because there are more than one. The Deep Aquifers provide the sole potable water supply for the City of Marina and most of the former Fort Ord. The technical studies report that the volume of storage in the Deep Aquifers is small, the

Deep Aquifers are not sustainable, and the recharge to the Deep Aquifers is insignificant.

“The 180-Foot Aquifer is generally confined by the overlying Salinas Valley Aquitard (SVA). The SVA is a well-defined clay formation with low permeability that retards the vertical movement of water to the underlying 180-Foot Aquifer.” (p. 9.)

The draft report fails to acknowledge the existence of old, largely hand-dug wells into the shallow aquifer, which were closed some fifty or more years ago. The wells were closed with dirt, instead of with a solid impermeable material like concrete. The dirt allows seawater-intruded water in the shallow aquifer to flow down the well casing to the 180-foot aquifer. There is transference between the shallow aquifer and the 180-foot aquifer and the 400-foot aquifer. To the extent that the proposed Cal-Am wells will cause further seawater intrusion of the shallow aquifer, seawater will exacerbate seawater intrusion into the 180-foot aquifer. The 180-foot aquifer is currently widely used for potable and agricultural uses.

“Based on information from logs of two wells located approximately ½ mile south and ½ mile northeast from the proposed MPWSP slant wells, the top of the SVA is between 150 to 180 feet below msl. The well logs show the top of the underlying 180-Foot Aquifer at approximately 190 to 220 feet below msl.” (p. 9.)

Please reveal the sources of the information, so the public can comment meaningfully. To the extent that the SWRCB staff is relying on information provided by Cal-Am or in the EIR, those sources may not be accurate. The SWRCB staff should consider all necessary information. The presence of old wells and gaps in the aquitard would affect the analysis.

“Studies have shown that in some areas the SVA thins enough to create unconfined conditions in the 180-Foot Aquifer. It is unknown if these unconfined conditions exist in the proposed MPWSP well area. Determination of the existence of the SVA, and thus the conditions of the aquifer at the location of the proposed MPWSP wells will be very important in determining the area of impact of the project as discussed at greater length in Section 5 of this report.” (p.9.)

“The amount of 500 mg/L chloride water that enters the Basin was reported to be as high as 14,000 acre-feet per annum (afa) or 4.5 billion gallons.” (p. 13.)

These claims further demonstrate that comprehensive modeling must be performed to provide accurate information.

“The MRWRA and the Central Coast Regional Water Quality Control Board show impairment to the water in the intruded area for drinking and agricultural uses. Since this groundwater is impaired, it is unlikely that this water is or will be put to beneficial use.” (p. 14.)

The conclusion is not accurate. One example of this is the beneficial use to which Ag Land Trust is putting groundwater from and on its Armstrong Ranch site, adjacent to the Cemex site. Separately, we are not familiar with an agency called “MRWRA.” Please clarify if the State means MCWRA, which is the Monterey County Water Resources Agency.

“Local agencies have taken steps to reduce the rate of seawater intrusion and enhance groundwater recharge in the SVGB. To address the seawater intrusion problem, the MCWRA passed and adopted Ordinance No. 3709 in September 1993.” (p. 14.)

Cal-Am’s proposed project would violate both state statutes and the mandates of the California Constitution, and unlawfully interfere with and compromise the express intent, purpose, and financing of the Salinas Valley Water Project (including the Rubber Dam) that was voted upon by land owners of the Salinas Valley Groundwater Basin over a decade ago. The multi-million dollar “Rubber Dam” project and its voter-approved assessment district were proposed and placed on the ballot in Monterey County for the purpose of reversing and curing the seawater intrusion issues in the basin. This assessment district for this public funded capital project was placed on the ballot pursuant to article XIID of the California Constitution (Prop. 218). The purpose of the project (the property related service) was and remains the provision of potable water, in part, to reverse seawater intrusion and restore the damaged but still viable potable aquifers near the coast and throughout the lower basin.

Article XIID, section 6(b)(1), requires that “Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.” Article XIID section 6(b)(4) prohibits a fee or charge except where the property related service is actually used by the parcel owner. The SVWP Rubber Dam is a publicly owned and publicly funded capital project to which Cal-Am has contributed nothing. Cal-Am has no right or entitlement to water from the overdrafted Salinas aquifers and the SVWP Rubber Dam. The assessments levied only upon in-basin property owners and overlying water rights holders are expressly for the benefit of overlying properties (and the beneficial uses of water thereon) that receive the paid-for “service” of that project. Neither the SWRCB nor the CPUC has demonstrated the authority or right to

interfere with that provision of these constitutionally mandated services, nor may they support any action that would undermine or interfere with the repayment of the public funding sources (certificates of participation and loans) that have been used to construct these publicly owned capital facilities. Cal-Am's project would directly interfere with this multi-million dollar project intended to restore the aquifers that Cal-Am wants to pollute and exploit in violation of the SWRCB Non-Degradation Policy. The CPUC and Cal-Am have ignored this insurmountable impediment to Cal-Am's intention to illegally and wrongfully "take" water from the overdrafted Salinas basin to which Cal-Am has no claim of right.

The CPUC and Cal-Am have failed to explain how they also intend to ignore or circumvent the MCWRA statutory prohibition on the export of "any" groundwater from the Salinas Valley basin. The offer to somehow "return the fresh groundwater" that Cal-Am would be illegally and wrongfully "taking" through their slant wells ignores the injury and is legally insufficient.

In spite of repeated objections and a lawsuit by the Ag Land Trust, the CPUC and Cal-Am have failed to address how they can "whitewash" Cal-Am's proposed illegal taking of water from the aquifers of the Salinas Valley so as to cure Cal-Am's illegal taking of underflow from the Carmel River.

"The CSIP is a program operated by the Monterey County Water Pollution Control Agency that reduces groundwater pumping from seawater intruded areas and distributes recycled water to agricultural users within the SVGB."

"The program provides a form of groundwater recharge by effectively reducing groundwater extraction in those areas of the Basin that are part of the CSIP area." (p. 14.)

Using funds of the local farmers, the CSIP has recharged the Sand Dune Aquifer. Cal-Am was not the intended beneficiary of that action.

"Despite these and other efforts, seawater intrusion continues its inland trend into the Basin." (p. 14.)

The SWRCB staff conclusion is inconsistent with the position taken by the MCWRA and its legal counsel. The MCWRA position, affirmed recently, is that seawater intrusion has not worsened. Please respond, clearly state the SWRCB position, and address the inconsistency with the MCWRA position.

"Additionally the past data provides insight into future conditions which could be expected absent the MPWSP."  
(p. 14.)

The conclusion is not supported. As one example, past data does not include the results of the Salinas Valley Water Project, a Proposition 218 project funded by Salinas Valley property owners. MCWRA is the project sponsor. All components of the Salinas Valley Water Project (SVWP) only recently became operable. The MCWRA has repeatedly stated that it will take at least ten years – after full operations began – before results of the SVWP can start to be known. The SVWP may significantly change future conditions.

“Groundwater recharge in the lower portion of the Salinas Valley is largely by infiltration along the channel of the Salinas River and its tributaries. This accounts for approximately 50 percent of the total recharge within the SVGB. Approximately 40 percent of the total recharge is from irrigation return water with the remaining 10 percent due to precipitation, subsurface inflow and seawater intrusion.” (p. 16.)

The Salinas Valley Water Project may materially affect the unsupported groundwater recharge conclusions made by SWRCB staff. A comprehensive hydrologic model is needed, and would include the Salinas Valley Water Project operations.

“Based on the occurrence of large pumping depressions in inland areas, it can be reasonably assumed that there is a strong landward gradient (slope) of groundwater flow, at least within the 180-Foot Aquifer. However, because the degree of confinement of the 180-Foot Aquifer and the degree of connection between this aquifer and the overlying Dune Sand Aquifer are not known it is not possible to accurately predict what the effects of the landward gradient of groundwater flow will be for various extraction scenarios.” (p. 17.)

These statements are largely speculation. They fail to adequately account for recharge from the operation of the dams (Nacimiento and San Antonio) and publicly funded projects (Castroville Seawater Intrusion Program and Salinas Valley Water Project). The conclusions are based on outdated information that was produced prior to the Salinas Valley Water Project.

“A groundwater model that accurately reflects the hydrogeologic characteristics of the Basin is critical in providing insight to the effects the MPWSP would have on the Basin. As part of the FEIR for the Coastal Water Project, a local groundwater flow and solute transport model

(Model) was developed to determine the effects that pumping would have on groundwater levels and seawater intrusion in the area.” (p. 18.)

The EIR was found to be inadequate by the Superior Court. Among the issues raised by Ag Land Trust were assumptions made about the EIR model, including the effects of pumping, the nature of pumping, and the percentage of seawater in the water to be pumped. Ag Land Trust pointed out material inconsistencies in the EIR analysis. Ag Land Trust also raised concerns about the inconsistencies between the EIR model and the known causes of seawater intrusion.

“The gravity well design is a new alternative presented to the State Water Board for evaluation at the CEMEX owned property. State Water Board staff previously evaluated a pumping well alternative at the CEMEX site and found that the pumped wells would have an impact to groundwater users within a 2-mile radius of the wells. Since modeling has not been done for the gravity well alternative, State Water Board staff is unable to accurately predict impact to existing users from the gravity wells.” (p. 20.)

What can be accurately predicted is that the well would result in permanent contamination of Ag Land Trust’s well, the loss of groundwater rights, and the permanent loss of potable water supply.

“The potential impacts from the pumping wells at this site cannot be yet be determined since groundwater modeling has not been done. Until an accurate groundwater model is developed for this area, State Water Board staff is unable to determine the extent of impacts to existing water users.” (pp. 20-21.)

Ag Land Trust agrees that the full severity of impacts cannot be predicted without an accurate and comprehensive groundwater model. Ag Land Trust’s position is that the proposed wells would cause the permanent contamination of the Ag Land Trust well and groundwater on Ag Land Trust property adjacent to the Cemex site, and that injury can be accurately predicted now, at this stage. New slant wells being pumped continuously by Cal-Am predictably will reverse progress made toward protecting and improving the water quality of the Salinas Valley aquifers.

The Draft Review relies extensively on vague references to the EIR documents, including modeling done for the EIR, which is largely unsupported by reference to any document and page (e.g., Draft Review, p. 35). For example, the Draft Review section “5.3 Groundwater Capture Zone Delineation” (pp. 21-22) is unsupported by any

reference to specific documents and pages. The sole reference in the text is a general reference to “the FEIR groundwater modeling studies” without any specific citation. The studies were prepared by the applicant, and have not been adequately peer reviewed.

The Ag Land Trust litigation challenged assumptions made in the EIR modeling, including assumptions of continuous pumping for 56 years, and the percentages of seawater and fresh water that would be in the groundwater. The Superior Court overturned the EIR and ordered that the environmental analysis be redone. Before the SWRCB relies on the FEIR or any studies done by the applicant, the SWRCB first should require expert peer review and provide the results to the public. Separately, as the Draft Review acknowledges, the EIR modeling did not explore some proposed scenarios. (E.g., p. 27 [“Modeling in the FEIR did not predict the effects of pumping from a confined condition, so there are no estimates on the extent of potential impacts.”].) The proposed conclusions are unsupported and inconsistent with hydrogeologic evidence and with the actions of local agencies. To the extent that the conclusions are predicated on a continuing increase of the cone of depression, they are unsupported.

To the extent that Section 5.3 assumes certain gradients and what the proposed wells will or will not capture (e.g., p. 21), those assumptions are unproven and unsupported, and contradict many years of hydrologic research.

The Draft Review section “5.4 Extraction Scenarios” (pp. 22-27) is conclusory and unsupported. The section is speculative, and it fails to acknowledge the limited authority of the SWRCB in these matters. The section lacks citation to evidence, except for a couple of references to the discredited EIR, and a couple of references to a general groundwater treatise that is not helpful in light of the facts here, which include a well in an overdrafted basin immediately adjacent to an ocean, where the pressure from the ocean water exceeds the pressure from the inland fresh groundwater. This section is another example of inappropriate reliance on the discredited EIR.

“The lowering of groundwater levels approximately 2 miles from the slant wells likely would be negligible.” (p. 24)

The conclusion is not accurate or supported. The proposed pumping of some 25,000 AFA would remove a very large volume of groundwater from the aquifer. That would cause a change in the water quality and water levels. The EIR models did not adequately take the volume of water into account.

“According to information from the State Water Board’s GAMA database, approximately 14 wells are within 2 miles of the proposed MPWSP (Figure SWRCB 8). All of these wells are within the seawater-intruded portion of the Basin. The MPWSP drawdown would change the groundwater

gradient within the zone of influence causing a radial flow of groundwater toward the extraction wells. Currently, the predominant groundwater flow direction in the 180-Foot Aquifer is toward the northeast. Project pumping would likely change the flow direction to more of a southwest to westerly direction within the zone of influence. Outside the zone of influence there would be little if any change to groundwater flow direction; however, the rate of flow in the original direction (northeast) would be reduced. Therefore, the MPWSP would slow the rate of seawater intrusion in a landward direction from the wells.” (p. 24)

The Draft Review’s conclusion that pumping the slant wells “would slow the rate seawater intrusion in a landward direction” is inconsistent with the fact that pumping is what has caused seawater intrusion. It is not clear why the Draft Review thinks the Cal-Am wells would have a different result from what has been proven to be true in the Salinas Valley and elsewhere.

As a separate problem, the Draft Review does not identify the depth of the wells within a 2-mile radius. The conclusion that “All of these wells are within the seawater-intruded portion of the Basin” is not supported. Some of the wells may be in non-intruded aquifers.

As a separate problem, the Draft Review’s conclusions are inconsistent with the Monterey County Board of Supervisors’ recent adoption of revised General Plan policy PS-3.1 which provides the assumption that all development within Zone 2C has a long term sustainable water supply. Zone 2C includes much of the Salinas Valley floor, including the coastal areas that would be affected by the proposed wells. In other words, Monterey County has taken the position that the aquifers provide potable and usable water. Monterey County made that conclusion on the basis of the new Salinas Valley Water Project. Zone 2C is an assessment district to which landowners are paying millions of dollars. Zone 2C assessments fund the SVWP which is purportedly a remedy for seawater intrusion now and in the future.

“While a portion of the water flowing to the well does come from the less saline water on the shoreward side, the relative percentage of water drawn from the shoreward side of the wells will depend on various factors, including the gradient of groundwater flow toward inland pumping depressions.” (p. 26.)

Cal-Am does not have a right to this groundwater. The Draft Review’s reliance on a 87% seawater/13% fresh water proportion is not appropriate. The unreliable EIR data is from the 180-aquifer, and showed that the proportion changed over time to 60%

seawater/40% fresh water. The mention of 3,250 AFA of fresh water (assumed to be 13%) improperly minimizes the impact of that pumping. It would be a huge illegal appropriation.

“It is unlikely that pumping from an unconfined aquifer would extract fresh groundwater since the seawater intrusion front is approximately 5 miles landward from the proposed pumps.” (p. 26.)

The Draft Review’s implied conclusion that the unconfined Dunes aquifer is intruded is not supported. Other than Cemex, it is believed that the local landowners have refrained from pumping the Dunes Aquifer. The SWRCB should research the facts on the ground.

“the inland groundwater users may experience a reduction in groundwater levels in their wells, with associated increases in pumping costs.” (p. 27.)

The first paragraph of section 5.5 shows that there would be an illegal taking of groundwater. The paragraph fails to acknowledge that increased coastal pumping causes increased seawater intrusion.

“This effect would not be felt immediately and would depend on a variety of factors. Since the capture zone for the extraction well system will likely be limited to areas already heavily impacted by seawater intrusion, it would not be appropriate to inject or percolate desalinated water in this intruded area, as the water would essentially be wasted.” (pp. 27-28.)

The statements are inaccurate. The effects would be felt immediately by the nearby Ag Land Trust well, from which water is being used for overlying beneficial uses. The Ag Land Trust groundwater would be impacted, the Ag Land Trust water rights would be taken, and the Ag Land Trust storage would be taken. The Draft Review has not cited to proof that the Dunes Aquifer is heavily impacted. The increased pumping foreseeably could counteract or eliminate any benefits from the SVWP (Rubber Dam) for the assessed property owners who are paying for the SVWP. Injected water would not be wasted unless the overlying landowners had been deprived of their groundwater rights by adjudication.

“The reduction in the availability of fresh water would not be felt immediately.” (p. 28)

The statement is inaccurate. The effects would be felt immediately by the nearby Ag Land Trust well, from which water is being used for overlying beneficial uses.

“the proposed MPWSP could extract some fresh water from within the Basin.” (p. 28.)

It is misleading to say “could” when the whole point of the Cal-Am wells is to extract fresh water. The SWRCB should say “will extract” instead of “could extract.”

“To appropriate groundwater from the Basin, Cal-Am will have to demonstrate that the MPWSP will extract water that is surplus to the needs of groundwater users in the Basin and injury to those users will not result. Because the Basin is in a condition of overdraft, to appropriate water for non-overlying uses, any fresh water that Cal-Am pumps will have to be replaced.” (p. 28; similar comments at p. 33.)

The second sentence has no support, and is inconsistent with California law. As stated above, in an overdrafted basin, there is no water available for Cal-Am, as a junior appropriator, to appropriate. (*Pasadena v. Alhambra* (1949) 33 Cal.2d 908.) Any groundwater extraction by Cal-Am would constitute a violation of the groundwater rights of existing water rights holders. There is no law that allows Cal-Am to pump water illegally, and then to remedy that violation by “replacing” the water, in a post-injury effort to make other users “whole” (p. 33). Further, the sentence in question makes a distinction between groundwater and fresh water. The distinction is not appropriate and it not supported. Under the circumstances, withdrawal of water from the groundwater basin will cause further seawater intrusion that harms existing users. Replacement of only the “fresh water” portion of the withdrawn volume of water would not reverse the harm. Exportation of groundwater from the Salinas Valley Groundwater Basin is prohibited under State legislation (the MCWRA Act) and case law.

“An appropriative groundwater right is not necessary to recover water injected or otherwise used to recharge the aquifer, where the water used for recharge would not recharge the aquifer naturally.” (p. 28, fn. 31.)

The claim is not supported by citation. The claim is not accurate unless the basin is adjudicated.

“No permit is required by the State Water Board to acquire or utilize appropriative groundwater rights.” (p. 29.)

The statement is misleading. The State Water Resources Control Board has no right to require any permit for an appropriative right.

“Cal-Am’s proposed MPWSP would pump brackish water.”  
(p. 30.)

The statement is misleading. The water would only be brackish because the pumping will illegally take fresh water supplies.

“Estimates based on the North Marina Project description are that 13 percent of the total water pumped through the proposed wells could be attributed to the landward portion of the Basin and 87 percent could come from the seaward direction relative to the pump locations.” (p. 30.)

These estimates were challenged by the Ag Land Trust, because the EIR technical appendices showed that up to 40% of the water would be fresh water, which is more than three times the claimed 13%. The EIR that relied on the 13% estimate was rejected by the Superior Court.

“It is unknown whether seawater has intruded the Dune Sand Aquifer, but the reported poor water quality of the Dune Sand Aquifer likely limits beneficial uses of its water.”  
(p. 30.)

The statement is inconsistent with the statements elsewhere in the Draft Review that the water to be pumped by Cal-Am is brackish (see, e.g, p. 30). If the Dunes Aquifer is not intruded, then the proposed pumping would deliberately cause intrusion. The Draft Review should state who “reported” the “poor quality,” when, and exactly what was “reported.” The term “poor quality” should be clarified. Poor quality is not the same as marginally degraded, recovering, or unusable.

“Water an appropriator pumps that was not previously available to other legal users can be classified as developed or salvaged water.” (p. 31.)

There is no salvage water here, and the doctrines of salvage and developed water have no place here. Groundwater is being used for beneficial purposes by Ag Land Trust on the property adjacent to the proposed well site.

“if water would never reach or be used by others there can be no injury.” (pp. 31-32.)

Water is being pumped and put to beneficial use by Ag Land Trust on the property adjacent to the proposed well site. The proposed project would injure Ag Land Trust in multiple ways.

“If Cal-Am can show all users are uninjured because they are made whole by the replacement water supply and method of replacement, export of the desalinated source water would be permissible and qualify as developed water.” (p. 33.)

The statement is not accurate. Exportation of groundwater is prohibited by state law and case law. There is no provision for this “replacement and export” scheme absent adjudication.

“This could require implementation of a ‘physical solution.’” (p. 33.)

There is no “physical solution” necessary if Cal-Am does not take Salinas Valley groundwater.

“A physical solution is one that assures all water right holders have their rights protected” (p. 34.)

This is misleading. Cal-Am does not hold any water rights. There are no available groundwater rights to be appropriated in an overdrafted basin. (*Katz v. Walkinshaw* (1902) 141 Cal. 116.) A “judicially imposed resolution of conflicting claims” (p. 34) requires adjudication.

“One important characteristic of a physical solution is that it may not adversely impact a party’s existing water right. (*Mojave, supra*, 23 Cal.4th 1224, 1251.)” (p. 34.)

This is correct. Cal-Am’s project would adversely affect the water rights held by Ag Land Trust. Ag Land Trust is using its groundwater for beneficial uses on the prime agricultural land adjacent to the proposed well site.

“Under the physical solution doctrine, although the Basin continues to be in a condition of overdraft, to maximize beneficial use of the state’s waters Cal-Am may be allowed to pump a mixture of seawater and fresh water and export the desalinated water to non-overlying parcels. To avoid injury to other users and protect beneficial uses of the Basin’s waters, Cal-Am would be required to return its fresh water component to the Basin in such a way that existing users are not harmed and foreseeable uses of the Basin water are protected.” (p. 35.)

The suggested approach would require adjudication of the Basin. The first sentence is not accurate and is not supported by reference to legal authority. Please state who would “require” Cal-Am to “return” fresh water, who would enforce the requirement, and who would pay for Cal-Am’s production of fresh water that would be returned to the Salinas Valley Groundwater Basin.

“According to information from the State Water Board’s GAMA database, approximately 14 wells are within 2 miles of the proposed MPWSP (Figure SWRCB 8).” (p. 24.)

Figure SWRCB 8 (p. 25) does not appear to be accurate or complete. As one example, Figure SWRCB 8 does not show the 14 wells that Draft Review claims are within a 2-mile radius of the proposed wells. Only one well is shown within the 2-mile radius. The SWRCB should show or otherwise identify the 14 wells that the SWRCB claims are within the 2-mile radius. Without that information, the public cannot meaningfully comment on the figure or SWRCB’s discussion of the data. Ag Land Trust reports that at least three wells in the 2-mile radius, including the Ag Land Trust well, are not shown on Figure SWRCB 8. There are likely other inaccuracies in the figure. To the extent that the Geotracker GAMA database has limitations and infirmities, those should be disclosed. Similarly, the water well information in the EIR (see, e.g., p. 38 of the Draft Review) may also be materially unreliable.

To the extent that the “Draft Review” attempts to rely on seawater intrusion data from the MCWRA, as the “Draft Review” currently does throughout the document, the SWRCB should diligently research the location of the monitoring wells from which the MCWRA data is gathered, because that information affects the reliability of the claims about the intrusion in general and as to this project in particular.

The Draft Review’s reference to “the parties” (e.g., p. 36) is unclear. Please identify which “parties” the SWRCB is referring to, and in what context. The SWRCB does not have a proceeding for this Cal-Am project.

“If pumping within the Basin remains unchanged, it is projected that the MPWSP would not pump fresh water within a 56-year period if pumping occurred in an unconfined aquifer.” (p. 36.)

The statement is not accurate. The premise of the proposed project is that the wells would pump groundwater that includes fresh water. The overturned EIR stated that up to 40% fresh water would be pumped. The EIR assumptions – including the assumption that pumping would last for 56 years continuously, without stopping – are deeply flawed, and render the studies unreliable.

“but-for the MPWSP, new fresh water would not be available in the Basin,” (p. 36.)

This possible scenario contradicts the premise of the Salinas Valley Water Project Rubber Dam component, which is to make new fresh water available in the Basin. The SWRCB Draft Review’s discussion of this and other scenarios shows that the SWRCB is arguing for Cal-Am and its project, despite inadequate information and inadequate investigation of the issues.

“Based on historical uses of water in the Basin and despite efforts to reduce groundwater pumping in seawater intruded areas through enactment of Ordinance 3709 and efforts to increase recharge through the CSIP, there is no evidence to suggest that Basin conditions will improve independent of the MPWSP without a comprehensive solution to the overdraft conditions.” (p. 37)

The statement is not supported. The SWRCB staff lacks information on existing uses and activities in the Basin. This statement fails to consider the Salinas Valley Water Project (SVWP), which had as its purpose the halting of seawater intrusion. The SVWP was a Proposition 218 project funded by Salinas Valley property owners. The SVWP EIR stated that the SVWP would not have effect until all components of the SVWP were fully operational. That was achieved in approximately 2012.

“Both near- and long-term, a physical solution could ensure an adequate water supply for all legal water users in the Basin and provide an assured supply of groundwater to the Basin’s users.” (p. 39.)

How? Please explain a physical solution that meets that description.

“a conclusive showing that there is no water available for export does not appear to be the case here.” (p. 39, fn. 41)

Please provide the evidence that there is water available for export. Please explain whether it is the SWRCB’s position that intruded groundwater can be exported from the Basin in violation of the State legislation (MCWRA Act). Please explain what water the SWRCB considers “currently unusable” (p. 39, fn. 41).

As to various comments in the Draft Review about the impacts of the proposed extraction, the SWRCB may not be aware of the North County Land Use Plan, which contains policies that affect and protect the water quality and water supply. This project is within the boundaries of the North County Land Use Plan. The North County Land Use Plan is part of the Local Coastal Program certified by the California Coastal

Paul Murphey, Division of Water Rights  
State Water Resources Control Board  
May 3, 2013  
Page 22

Commission. The SWRCB should honor and consider the state-certified plan if the SWRCB seeks to proceed with the CPUC-requested "assessment."

The proposed project violates several policies of that plan. The plan designates the land use of the local property, including Ag Land Trust property, as Agricultural Preservation. Under the plan policies, such land shall be preserved for agricultural use to the fullest extent possible. Development of Agricultural Preservation lands is limited to accessory buildings for farm uses and other uses required for agricultural activities on that parcel. The lack of water rights for the proposed project may threaten the agricultural viability of the protected agricultural lands. Further, the project violates Land Use Plan policies on water supply and water quality, including policies 2.5.3.A.1 through 2.5.3.A.3, and policy 2.5.3.B.6. For example, by using coastal groundwater supplies for uses other than coastal priority agricultural uses, the project would violate policy 2.5.3.A.1. The County has failed to determine the long term safe yield of the area aquifers. We urge you to review the Coastal Commission comments on the draft EIR.

#### Conclusion

For each and every of the reasons described above, the "assessment" requested by the CPUC would be premature at this stage. At the very least, if the SWRCB staff chooses to pursue its effort to provide the CPUC with a document, the SWRCB staff should revisit the approach used in the Draft Review, and make a diligent investigation of the current facts. The EIR should not be relied upon. The Draft Review should be rewritten with more complete information due to the factual inaccuracies. The revised document should be circulated for public comment for at least 30 days.

Thank you for the opportunity to provide comments on the Draft Review.

#### Request

Please put this Office on the distribution list for future reports, letters, and notices for this project. For email distribution, please send materials to me at [Erickson@stamplaw.us](mailto:Erickson@stamplaw.us).

Very truly yours,

LAW OFFICES OF MICHAEL W. STAMP

  
Molly Erickson

Exhibits:

- A. Ag Land Trust letters to CPUC (November 6, 2006 and April 15, 2009).
- B. Herald Article (February 4, 2012).
- C. Final Judgment in *Ag Land Trust v. Marina Coast Water District* (Monterey Superior Court Case No. M105019).

# **EXHIBIT A**

**MONTEREY COUNTY AGRICULTURAL AND HISTORICAL  
LAND CONSERVANCY**

P.O. Box 1731, Salinas CA 93902

**November 6, 2006**

**Jensen Uchida  
c/o California Public Utilities Commission  
Energy and Water Division  
505 Van Ness Avenue, Room 4A  
San Francisco, Ca. 94102  
FAX 415-703-2200  
[JMU@cpuc.ca.gov](mailto:JMU@cpuc.ca.gov)**

**SUBJECT: California-American Water Company's Coastal Water Project EIR**

Dear Mr. Uchida:

I am writing to you on behalf of the Monterey County Agricultural and Historic Lands Conservancy (MCAHLC), a farmland preservation trust located in Monterey County, California. Our Conservancy, which was formed in 1984 with the assistance of funds from the California Department of Conservation, owns over 15,000 acres of prime farmlands and agricultural conservation easements, including our overlying groundwater rights, in the Salinas Valley. We have large holdings in the Moss Landing/Castroville/Marina areas. Many of these acres of land and easements, and their attendant overlying groundwater rights, have been acquired with grant funds from the State of California as part of the state's long-term program to permanently preserve our state's productive agricultural lands.

We understand that the California-American Water Company is proposing to build a desalination plant somewhere (the location is unclear) in the vicinity of Moss Landing or Marina as a proposed remedy for their illegal over-drafting of the Carmel River. On behalf of our Conservancy and the farmers and agricultural interests that we represent, I wish to express our grave concerns and objections regarding the proposal by the California-American Water Company to install and pump beach wells for the purposes of exporting groundwater from our Salinas Valley groundwater aquifers to the Monterey Peninsula, which is outside our over-drafted groundwater basin. This proposal will adversely affect and damage our groundwater rights and supplies, and worsen seawater intrusion beneath our protected farmlands. We object to any action by the California Public Utilities Commission (CPUC) to allow, authorize, or approve the use of such beach wells to take groundwater from beneath our lands and out of our basin, as this

would be an "ultra-vires" act by the CPUC because the CPUC is not authorized by any law or statute to grant water rights, and because this would constitute the wrongful approval and authorization of the illegal taking of our groundwater and overlying groundwater rights. Further, we are distressed that, since this project directly and adversely affects our property rights, the CPUC failed to mail actual notice to us, and all other superior water rights holders in the Salinas Valley that will be affected, as is required by the California Environmental Quality Act (CEQA). The CPUC must provide such actual mailed notice of the project and the preparation of the EIR to all affected water rights holders because California-American has no water rights in our basin.

Any EIR that is prepared by the CPUC on the proposed Cal-Am project must include a full analysis of the legal rights to Salinas Valley groundwater that Cal-Am claims. The Salinas Valley percolated groundwater basin has been in overdraft for over five decades according to the U.S. Army Corps of Engineers and the California Department of Water Resources. Cal-Am, by definition in California law, is an appropriator of water. No water is available to new appropriators from overdrafted groundwater basins. The law on this issue in California was established over 100 years ago in the case of Katz v. Walkinshaw (141 Calif. 116), it was repeated in Pasadena v. Alhambra (33 Calif.2nd 908), and reaffirmed in the Barstow v. Mojave Water Agency case in 2000. Cal-Am has no groundwater rights in our basin and the CPUC has no authority to grant approval of a project that relies on water that belongs to the overlying landowners of the Marina/Castroville/Moss Landing areas.

Further, the EIR must fully and completely evaluate in detail each of the following issues, or it will be flawed and subject to successful challenge:

1. Complete and detailed hydrology and hydrogeologic analyses of the impacts of "beach well" pumping on groundwater wells on adjacent farmlands and properties. This must include the installation of monitoring wells on the potentially affected lands to evaluate well "drawdown", loss of groundwater storage capacity, loss of groundwater quality, loss of farmland and coastal agricultural resources that are protected by the California Coastal Act, and the potential for increased and potentially irreversible seawater intrusion.
2. A full analysis of potential land subsidence on adjacent properties due to increased (365 days per year) pumping of groundwater for Cal-Am's desalination plant.
3. A full, detailed, and complete environmental analysis of all other proposed desalination projects in Moss Landing.

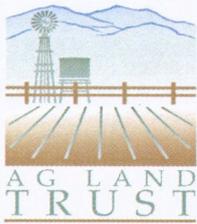
On behalf of MCAHLC, I request that the CPUC include and fully address in detail all of the issues and adverse impacts raised in this letter in the proposed Cal-Am EIR. Moreover, I request that before the EIR process is initiated that the CPUC mail actual notice to all of the potentially overlying groundwater rights holders and property owners in the areas that will be affected by Cal-Am's proposed pumping and the cones of depression that will be permanently created by Cal-Am's wells. The CPUC has an absolute obligation to property owners and the public to fully evaluate every

**reasonable alternative to identify the environmentally superior alternative that does not result in an illegal taking of third party groundwater rights. We ask that the CPUC satisfy its obligation.**

Respectfully,

*Brian Rianda*

**Brian Rianda, Managing Director**



Ag Land Trust

P.O. Box 1731  
Salinas, CA 93902  
tel. 831.422.5868  
fax. 831.758.6053

To: California Public Utilities Commission  
C/O CPUC Public Advisor  
505 Van Ness Avenue, Room 2103,  
San Francisco, CA 94102  
Fax: 415.703.1758  
Email: [public.advisor@cpuc.ca.gov](mailto:public.advisor@cpuc.ca.gov).

April 15, 2009

Comments on Coastal Water Project Draft EIR

Dear Commissioners:

On behalf of the Monterey County Ag Land Trust, we hereby submit this comment letter and criticisms of the draft EIR that your staff has prepared for the Coastal Water Project located in Monterey County. Herewith attached is our letter to your commission dated November 6<sup>th</sup>, 2006. We hereby reiterate all of our comments and assertions found in that letter as comments on the Draft Environmental Impact Report.

The Draft EIR is fatally flawed because of your staff's intentional failure to address the significant environmental and legal issues raised in our November 6<sup>th</sup> 2006 letter. The project as proposed violates and will result in a taking of our Trust's groundwater rights. Further, although we have requested that these issues be addressed, it appears that they have been ignored and it further appears that the CPUC is now advancing a project (preferred alternative) that constitutes an illegal taking of groundwater rights as well as violations of existing Monterey County General Plan policies, existing certified Local Coastal Plan policies and Monterey County Environmental Health code.

The EIR must be amended to fully address these issues that have been intentionally excluded from the draft. Further, the EIR must state that the preferred alternative as proposed violates numerous Monterey County ordinances, and California State Groundwater law. Failure to include these comments in the EIR will result in a successful challenge to the document.

Respectfully,

Virginia Jameson  
Ag Land Trust

# **EXHIBIT B**

**Monterey  
County**

A MediaNews Group NEWSPAPER

# The Herald

Saturday, February 4, 2012

[www.montereyherald.com](http://www.montereyherald.com)

**Review failed to consider  
water rights, judge rules**

## Desal EIR dealt blow

By **JIM JOHNSON**  
*Herald Staff Writer*

In an amended ruling, a Monterey County Superior Court judge found the environmental review for the failed regional desalination project neglected to properly consider a number of issues, including water rights.



The revised ruling, which amends a tentative decision issued by Judge Lydia Villarreal in December, deals a severe blow to any thoughts California American Water may have had about using the project's environmental

impact report on an alternative desal project.

It could raise questions about whether the EIR is adequate under the California Environmental Quality Act for Cal Am to go ahead with its portion of the regional project.

The revision was released Thursday, about six weeks after Villarreal ruled Marina Coast Water District should have prepared

*Please see Desal page A9*

# Desal

From page A1

the EIR as the lead agency under state environmental law. The revision did not change that stance.

Ag Land Trust sued Marina Coast in March 2010, arguing Marina Coast should have been the lead agency on the project instead of the state Public Utilities Commission.

Attorney Molly Erickson, representing Ag Land Trust, said Villarreal's amended ruling found in favor of all of the organization's environmental claims, in particular its argument the EIR contained an inadequate discussion of water rights.

"Ag Land Trust has been raising the issue of water rights since at least 2006," Erickson said. "For more than five years, the Marina Coast Water District and the Monterey County Water Resources Agency ignored Ag Land Trust. In the end, the rule of law was more powerful than the backroom deals.

"This issue is particularly important because the regional project proposed to pump water from the

overdrafted Salinas Valley groundwater basin," she said.

Cal Am spokeswoman Catherine Bowie said company officials hadn't seen the ruling and couldn't comment on it.

She said the exact nature of an alternative water supply project, and any environmental review, has yet to be determined. She said Cal Am's bid to construct its part of the regional project will be decided by the PUC, and the company will rely on the commission to decide how to comply with state environmental law.

When Cal Am announced last month that it was withdrawing support from the regional project, it pointed to a lack of progress on the work because of unresolved issues, including conflict of interest charges and permitting and financing challenges. Villarreal's tentative ruling on the EIR was considered a source of delay.

The company must find a replacement source of water for the Peninsula by 2016 because of a state order to reduce pumping from the Carmel River.

Despite its complaints, Cal Am suggested that "a lot of valuable work" was accomplished that could be

applicable to an alternative desal project.

Late last month, at a PUC conference, Cal Am announced its intention to submit an application for an alternative water supply project within 90 days. The company indicated it would seek a modification of the regional project permit to capitalize on the efforts so far, presumably including the completion and PUC approval of the environmental impact report.

In her revised ruling, Villarreal found the EIR failed to address issues surrounding availability of groundwater for the desal project and the potential environmental impact, especially after the county Water Resources Agency admitted it still needed to acquire groundwater rights for the project.

The EIR's assumption that those rights didn't need to be addressed, because they would be "perfected" in the future, was impermissible because it did not meet the goal of allowing full public review of potential consequences, according to the ruling.

The ruling found that Marina Coast, as lead agency on the EIR, would need to address water rights, a

contingency plan, the assumption of constant pumping, the exportation of groundwater from the Salinas Valley basin, brine impacts, effects on adjacent properties and water quality.

Jim Heitzman, general manager of the Marina Coast Water District, did not return a phone call from The Herald.

But the district's outside legal counsel, Mark Fogelman, argued at the PUC conference last month that Villarreal's tentative ruling in December did not represent a major impediment to moving forward with the regional project. He urged the commission to order Cal Am to meet its obligations under the project agreements.

Fogelman said the district would appeal if the final ruling remained unchanged from the tentative decision.

County Counsel Charles McKee said he hadn't seen the amended ruling and couldn't comment, but the county's outside legal counsel, Dan Carroll, cited the December ruling in arguing at the PUC conference that the project was subject to considerable uncertainty.

*Jim Johnson can be reached at [jjohnson@montereyherald.com](mailto:jjohnson@montereyherald.com) or 753-6753.*

# **EXHIBIT C**

1 Michael W. Stamp, State Bar No. 72785  
Molly E. Erickson, State Bar No. 253198  
2 LAW OFFICES OF MICHAEL W. STAMP  
479 Pacific Street, Suite One  
3 Monterey, California 93940  
Telephone: (831) 373-1214  
4 Facsimile: (831) 373-0242

5 Attorneys for Petitioner and Plaintiff  
6 Ag Land Trust

**FILED**

APR 17 2012

CONNIE MAZZEI  
CLERK OF THE SUPERIOR COURT  
DEPUTY  
CARMEN B. OROZCO

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

8 **COUNTY OF MONTEREY**

9 AG LAND TRUST,

10 Petitioner and Plaintiff,

11 v.

12 MARINA COAST WATER DISTRICT,  
13 and DOES 1 to 100,

14 Respondents and Defendants.

Case No. M105019

Filed April 5, 2010

First Amended Petition and Complaint  
filed April 6, 2010

CEQA Hearing: October 27, 2011

Intended Decision: December 19, 2011

Amended Intended Decision: February 2,  
2012

**~~PROPOSED~~**  
**JUDGMENT GRANTING FIRST  
AMENDED PETITION FOR WRIT OF  
MANDATE (CALIFORNIA  
ENVIRONMENTAL QUALITY ACT)  
AND ORDERING ISSUANCE OF  
PEREMPTORY WRIT OF MANDATE**

19 Dept: 15

20 Judge: Hon. Lydia M. Villarreal

21 The First Amended Petition for Writ of Mandate (California Environmental Quality  
22 Act) came on regularly for hearing on October 27, 2011, in Department 15 of this Court,  
23 located at 1200 Aguajito Road, Monterey, California 93940. Michael W. Stamp and  
24 Molly Erickson appeared on behalf of petitioner Ag Land Trust. Mark Fogelman and  
25 Ruth Muzzin appeared on behalf of respondent Marina Coast Water District.

26 The Court has reviewed and considered the record of proceedings in this matter,  
27 the briefs submitted by the parties, the arguments of counsel, and the post-hearing  
28 briefs of the parties. The First Amended Petition for Writ of Mandate (California

1 Environmental Quality Act) was submitted for decision on October 27, 2011. On  
2 December 19, 2011, the Court issued its Intended Decision. On February 2, 2012, the  
3 Court issued its Amended Intended Decision. On February 29, 2012, the Court issued  
4 its Order denying Marina Coast Water District's objections and adopting the Amended  
5 Intended Decision as the Statement of Decision, final for all purposes.

6 IT IS ORDERED, ADJUDGED, and DECREED that:

7 1. The First Amended Petition for Writ of Mandate (California Environmental  
8 Quality Act) brought by petitioner Ag Land Trust against respondent Marina Coast  
9 Water District is GRANTED in favor of Ag Land Trust and against Marina Coast Water  
10 District.

11 2. A peremptory writ of mandate directed to respondent shall issue under  
12 seal of this Court, in the form specified in Exhibit A. The Court FINDS AND  
13 DETERMINES that Marina Coast Water District prejudicially abused its discretion and  
14 failed to proceed in the manner required by law in making its approvals of the Regional  
15 Desalination Project on March 16, 2010 and April 5, 2010, by proceeding as a  
16 responsible agency rather than as a lead agency, by failing to properly analyze the  
17 environmental impact report as a lead agency under CEQA, and by failing to properly  
18 and adequately identify, discuss, and address the environmental impacts of the project,  
19 including but not limited to water rights, contingency plan, assumption of constant  
20 pumping, exportation of groundwater from the Salinas Valley Groundwater Basin, brine  
21 impacts, impacts on overlying and adjacent properties, and water quality, as required  
22 here for a lead agency under CEQA.

23 3. The Court's final statement of decision (the Amended Intended Decision)  
24 is attached hereto as Exhibit B and is incorporated herein.

25 4. Respondent Marina Coast Water District shall set aside its approvals of  
26 the Regional Desalination Project, and is restrained from taking further actions to  
27 approve the project until respondent fully complies with CEQA.

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5. The Court reserves jurisdiction over Ag Land Trust's claim for an award of private attorney general fees and costs pursuant to Code of Civil Procedure section 1021.5. Any motion for said fees and costs shall be filed and served within 60 days of the filing of the notice of entry of this Judgment.

6. Petitioner is awarded its costs of suit.

Dated: APR 17 2012

LYDIA M. VILLARREAL

Hon. Lydia M. Villarreal  
Judge of the Superior Court

**EXHIBIT A**

1 Michael W. Stamp, State Bar No. 72785  
Molly E. Erickson, State Bar No. 253198  
2 LAW OFFICES OF MICHAEL W. STAMP  
479 Pacific Street, Suite One  
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Telephone: (831) 373-1214  
4 Facsimile: (831) 373-0242

5 Attorneys for Petitioner and Plaintiff  
6 Ag Land Trust

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
8 **COUNTY OF MONTEREY**

9 AG LAND TRUST,

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12 MARINA COAST WATER DISTRICT,  
13 and DOES 1 to 100,

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Filed April 5, 2010

First Amended Petition and Complaint  
filed April 6, 2010

CEQA Hearing: October 27, 2011

Intended Decision: December 19, 2011

Amended Intended Decision: February 2,  
2012

**[PROPOSED]**  
**PEREMPTORY WRIT OF MANDATE**

16 \_\_\_\_\_ /  
17  
18 A Judgment Granting First Amended Petition for Writ of Mandate (California  
19 Environmental Quality Act) and Ordering Issuance of Peremptory Writ of Mandate  
20 having been entered in this proceeding, ordering that a peremptory writ of mandate be  
21 issued from this Court,

22 IT IS ORDERED that, immediately on service of this writ, respondent Marina  
23 Coast Water District shall:

24 1. Vacate and set aside its March 16, 2010 and April 5, 2010 approvals of  
25 the Regional Desalination Project, and each step approved by respondent pursuant to  
26 Public Resources Code section 21168.9, subdivision (a). Further action to approve the  
27 project beyond setting aside and vacating these approvals by respondent shall not be  
28 taken, except in accordance with the Judgment Granting First Amended Petition for



# **EXHIBIT B**

**FILED**

**FEB 02 2012**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MONTEREY

**CONNIE MAZZEI**  
**CLERK OF THE SUPERIOR COURT**  
**Sally Lopez** DEPUTY

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AG LAND TRUST,  
  
Plaintiff/Petitioner,  
  
vs.  
  
MARINA COAST WATER DISTRICT,  
  
Defendant/Respondent

Case No.: M105019  
  
Amended Intended Decision

Ag Land Trust's (Ag Land) petition for a writ of mandamus came on for court trial on October 27, 2011. All sides were represented through their respective attorneys. The matter was argued and taken under submission. This amended intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein.

***Background***

Ag Land's petition challenges respondent Marina Coast Water District's (Marina Coast) March and April 2010 actions taken on behalf of the Regional Desalination Project (Regional Project).

California American Water Company pumps water from the Carmel River and in 1995 was ordered by the State Water Resources Control Board to find an alternative source of water. In 2008, an adjudication of water rights ordered California American Water Company to reduce its pumping from the Seaside Basin.

California American Water Company applied to the California Public Utilities Commission (Cal PUC) in February 2003 for a certification of Public Convenience and Necessity for a desalination plant in Moss Landing (Moss Landing Project or Coastal Water Project), and also concurrently proposed an alternative project in an unincorporated area north of the City of Marina (North Marina Project), in response to the 1995 order.

1 The Cal PUC decided that it would be the lead agency for the two projects and would prepare an  
2 environmental impact report (EIR) in compliance with the California Environmental Quality Act  
3 (CEQA). (Public Resources Code, § 21000 et seq.) The Cal PUC released a Notice of Preparation for an  
4 EIR in September 2006 for the two projects.

5 The Regional Project was proposed in 2008 by Marina Coast and the Monterey County Water  
6 Resources Agency (Water Resources Agency). California American Water Company would distribute the  
7 water from the Regional Project.

8 The Cal PUC thereafter included the Regional Project in the EIR and on December 17, 2009,  
9 certified a Final EIR that looked at all three projects, but did not identify a preferred project.

10 Marina Coast issued a notice of intent to prepare an EIR in September 2009 to acquire and annex  
11 the East Armstrong Ranch (Ranch) property for the siting of the Regional Project, and approved and  
12 annexed the Ranch on March 16, 2010. Marina Coast filed a Notice of Determination on March 17, 2010.  
13 (California Code of Regulations, title 14, § 15094 (Guidelines).)

14 On April 5, 2010, Marina Coast approved the Regional Project relying on the Cal PUC Final EIR  
15 and an addendum dated March 24, 2010. Marina Coast's resolution included findings, a mitigation  
16 monitoring program and a statement of overriding considerations.

17 Ag Land contends that (1) Marina Coast is the CEQA lead agency for the Regional Project; (2)  
18 Marina Coast did not proceed in a manner required by law because (a) there is no discussion in the EIR of  
19 the reliability of desalination plants; (b) the EIR did not include a contingency plan; (c) the discussion of  
20 water rights is inadequate; (d) the assumption of constant pumping is unreasonable, (e) the Regional  
21 Project will illegally export groundwater from the Salinas Valley Groundwater Basin; (f) the EIR did not  
22 adequately investigate and disclose impacts to overlying and adjacent property, and (g) failed to  
23 adequately investigate and disclose the project's violation of the State Water Resources Control Board's  
24 Anti-Degradation Policy; and (3) the statement of overriding consideration is not supported by substantial  
25 evidence.

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***Administrative Record***

The administrative record (AR) was admitted into evidence.

***Judicial Notice***

Marina Coast makes reference in its opposition brief to Marina Coast's request for judicial notice that was filed with a demurrer, and asks this Court to take judicial notice of multiple documents. The Court denies the request for judicial notice of the duplicative, extra-record and irrelevant evidence. (Evid. Code, §§ 452, subd. (c), 459; Code Civ. Proc., §§ 909, 1094.5, subd. (e); *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4<sup>th</sup> 839, 863; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4<sup>th</sup> 559, 573, fn.4; *In re Zeth S.* (2003) 31 Cal.4<sup>th</sup> 396, 405.)

***Discussion***

**(I). Lead agency issue**

Ag Land contends that Marina Coast became the lead agency with the "principal responsibility for carrying out or approving a project" when Marina Coast acted to approve the Regional Project. (Pub. Resources Code, § 21067; Guidelines, § 15051; *Citizens Task Force on Sohio v. Board of Harbor Commissioners* (1979) 23 Cal.3d 812 (*Sohio*).

Marina Coast argues that the Cal PUC is the lead agency because Cal PUC (1) determined it was the lead agency; (2) prepared the Final EIR; (3) is the agency with the greatest responsibility for the Regional Project; (4) was the first agency to act; and (5) the criteria for a change in lead agency is not met.

Guidelines section 15015 provides:

"Criteria for Identifying the Lead Agency[.] Where two or more public agencies will be involved with a project, the determination of which agency will be the lead agency shall be governed by the following criteria:

- (a) If the project will be carried out by a public agency, that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency.
- (b) If the project is to be carried out by a nongovernmental person or entity, the lead agency shall

1 be the public agency with the greatest responsibility for supervising or approving the project as a  
2 whole.

3 (1) The lead agency will normally be the agency with general governmental powers, such as a  
4 city or county, rather than an agency with a single or limited purpose such as an air pollution  
5 control district or a district which will provide a public service or public utility to the project.

6 (2) Where a city prezones an area, the city will be the appropriate lead agency for any subsequent  
7 annexation of the area and should prepare the appropriate environmental document at the time of  
8 the rezoning. The local agency formation commission shall act as a responsible agency.

9 (c) Where more than one public agency equally meet the criteria in subdivision (b), the agency  
10 which will act first on the project in question shall be the lead agency.

11 (d) Where the provisions of subdivisions (a), (b), and (c) leave two or more public agencies with  
12 a substantial claim to be the lead agency, the public agencies may by agreement designate an  
13 agency as the lead agency. An agreement may also provide for cooperative efforts by two or more  
14 agencies by contract, joint exercise of powers, or similar devices.”

15 **(A. Marina Coast’s April 5, 2010 Resolution.**

16 Marina Coast’s April 5, 2010 Resolution No. 2010-20s purpose was to “conditionally” approve  
17 Marina Coast’s “participation in a Regional Desalination Project through a Water Purchase Agreement by  
18 and among” Marina Coast, the Water Resources Agency, and California American Water Company. The  
19 Resolution also would approve a Settlement Agreement in Cal PUC proceeding A.04-09-019. (AR 1.)

20 “Under the Water Purchase Agreement, [the Water Resources Agency] would construct, own,  
21 and operate a series of wells that would extract brackish water and a portion of a pipeline and appurtenant  
22 facilities [] that would convey the brackish water to a desalination plant and related facilities that would  
23 be owned and operated by [Marina Coast].” (AR 2.)

24 “The [Marina Coast] Facilities would include a pipeline and connection to discharge brine from  
25 the desalination plant to connect the regional outfall facilities owned and operated by the Monterey

1 Regional Water Pollution Control Agency [Pollution Control Agency] [], pursuant to an 'Outfall  
2 Agreement' dated January 20, 2010, between [Marina Coast and the Pollution Control Agency]." (AR 2.)

3 "In Decision D.03-09-22, the [Cal PUC] designated itself as the lead agency for environmental  
4 review of the Coastal Water Project under CEQA." (AR 4.)

5 "On January 30, 2009, the [Cal PUC], acting as Lead Agency under CEQA in A.04-09-019,  
6 issued a Draft [EIR] [] analyzing the potential environmental impacts of project designated the 'Coastal  
7 Water Project' and alternatives to it. The [Cal PUC] duly received and analyzed extensive public  
8 comment on the [Draft EIR]. [Marina Coast, the Water Resources Agency, and California American  
9 Water Company] provided comments on the [Draft EIR]." (AR 4.)

10 "On December 17, 2009, in Decision No. 09-12-017 which was issued in Application 04-09-019,  
11 the [Cal PUC], as Lead Agency, duly certified a Final [EIR] which includes a description and analyzes  
12 the environmental impacts of an alternative project variously referred to in that Final [EIR] as the  
13 'Regional Alternative' and the 'Regional Project' and 'Phase I of the Regional Project.' The principal  
14 element of that alternative project is a regional desalination water supply project, with other smaller  
15 elements." (AR 4.)

16 "On March 24, 2010, an addendum to the Final [EIR] [] was released, which responds to  
17 comment letters that had been inadvertently omitted from the Final EIR and includes an errata to the Final  
18 EIR. The term 'Final EIR' as used in this resolution includes the addendum." (AR 4.)

19 "The Final EIR designates [Marina Coast] as a responsible agency under CEQA." (AR 4.)

20 "The Directors [of Marina Coast] have reviewed and considered the Final EIR and Addendum in  
21 their entirety and the entire record of proceedings before [Marina Coast], as defined in the Findings  
22 attached hereto as Attachment A, and find that the Final EIR and Addendum are adequate for the purpose  
23 of approving [Marina Coast's] approval and implementation of the Regional Desalination Project  
24 pursuant to the Water Purchase Agreement and Settlement Agreement, and [Marina Coast] hereby relies  
25 upon the contents of those documents and the CEQA process for its CEQA compliance." (AR4-5)

1            “[Marina Coast] intends to conduct all future activities under the Water Purchase Agreement and  
2 the Settlement Agreement in accordance with the Final EIR; or alternatively, and if needed to comply  
3 with CEQA, [Marina Coast] would amend, supplement or otherwise conduct new environmental review  
4 prior to directly or indirectly committing to undertake any specific project or action involving a physical  
5 change to the environment related to the implementation of the Regional Desalination Project pursuant to  
6 the Water Purchase Agreement and the Settlement Agreement.” (AR 5.)

7            “At the direction of the Directors, [Marina Coast] has made written findings for each significant  
8 effect associated with the [Marina Coast] Facilities and prepared a Statement of Overriding  
9 Considerations, which explains that the benefits of the [Regional] Project outweigh any significant and  
10 unavoidable impacts on the environment and has prepared a Mitigation Monitoring and Reporting Plan  
11 [Mitigation Plan], which includes all mitigation measures designed to substantially lessen or eliminate the  
12 adverse impact on the environment associated with construction and operation of the [Marina Coast]  
13 Facilities, as well as a plan for reporting obligations and procedures by parties responsible for  
14 implementation of the mitigation measures. A copy of the Findings and Statement of Overriding  
15 Considerations is attached to this resolution as Attachment A. A copy of the [Mitigation Plan] is attached  
16 to the Findings.” (Boldface omitted.) (AR 5.)

17            “By this resolution, the Directors make and adopt appropriate Findings, Statement of Overriding  
18 Considerations and a Mitigation Monitoring and Reporting Plan and conditionally approve [Marina  
19 Coast’s] participation in the Regional Desalination Project pursuant to a Water Purchase Agreement  
20 between [Marina Coast, the Water Resources Agency, and California American Water Company], and a  
21 Settlement Agreement between [Marina Coast, the Water Resources Agency, and California American  
22 Water Company] and various other interested parties to settle California Public Utilities Commission  
23 Proceeding A.04-09-019, ‘In the Matter of the Application of California American Water Company (U  
24 210 W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water  
25 Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All  
Present and Future Costs in Connection Therewith in Rates.’” (AR 5-6.)

1 "NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of the Marina

2 Coast Water District adopt the foregoing findings; and

3 1. The Directors hereby certify, pursuant to CEQA Guidelines §§ 15050(b) and 15096(f), that  
4 they have reviewed and considered the Final EIR as certified by the [Cal PUC] on December 17,  
5 2009 in Decision D.09-12-017 and the Addendum that was released on March 24, 2010.

6 2. The Directors hereby approve and adopt the Findings attached hereto as Attachment A, which  
7 are incorporated herein, pursuant to CEQA Guidelines §§ 15091 and 15096(h).

8 3. The Directors hereby approve and adopt the Mitigation Monitoring and Reporting Plan  
9 identified in the Findings and attached to the Findings, pursuant to CEQA Guidelines § 15096(g).

10 4. The Directors hereby conditionally approve [Marina Coast's] participation in the Regional  
11 Desalination Project pursuant to the Water Purchase Agreement and the Settlement Agreement,  
12 contingent on final approval by the [Cal PUC].

13 5. The Directors hereby authorize the President and the General Manager and Secretary to  
14 execute the Water Purchase Agreement and the Settlement Agreement pursuant to this resolution  
15 and conditional approval substantially in the form presented to the Board at the April 5, 2010,  
16 meeting, and direct the General Manager and staff to take all other actions that may be necessary  
17 to effectuate and implement this resolution and Conditional Project Approval.

18 PASSED AND ADOPTED on April 5, 2010, by the Board of Directors of the Marina  
19 Coast Water District....” (AR 6.)

20  
21 **(B). Marina Coast's April 5, 2010 Resolution Attachment A: Findings for Marina Coast**  
22 **Facilities for Phase I of the Regional Project.**

23 “As described in the Final EIR, Phase I of the Regional Project contemplates the development,  
24 construction, and a regional desalination water supply project. The Final EIR envisions that [Marina  
25 Coast, the Water Resources Agency, and California American Water Company], would own and operate  
various project components. [Marina Coast, the Water Resources Agency, and California American

1 Water Company], have negotiated terms and conditions, as set forth in a proposed 'Water Purchase  
2 Agreement,' to implement the regional desalination project element of the project described and analyzed  
3 as Phase I of the Regional Project in the Final EIR. The other elements of Phase I, including recycled  
4 water and aquifer storage and recovery, will be coordinated with the desalination element but are not part  
5 of the Water Purchase Agreement. The project which is the subject of the Water Purchase Agreement and  
6 the focus of these findings is referred to as the 'Regional Desalination Project.' Under the Water Purchase  
7 Agreement, [the Water Resources Agency] would design, construct, own and operate, in consultation  
8 with [Marina Coast and California American Water Company], a series of wells ('Source Water Wells')  
9 that would extract brackish source water for conveyance to the desalination plant and a portion of the  
10 pipeline and appurtenant facilities (collectively, 'Intake Facilities') that would convey the brackish water  
11 to a desalination plant that would be owned and operated by [Marina Coast]. [Marina Coast] would own  
12 and operate the Brackish Source Water Receipt Point Meter and a portion of the Brackish Source Water  
13 Pipeline, the Desalination Plant, the [Marina Coast] Meter, the [California American Water Company]  
14 Meter, the [Marina Coast] pipeline, the [Marina Coast] Product Water Pipeline, the [Marina Coast]  
15 Outfall Facilities [] and any related facilities. The components of the Regional Desalination Project that  
16 would be owned and operated by [Marina Coast] are herein after referred to as the '[Marina Coast]  
17 Facilities'. The remainder of the project components would be constructed by [California American  
18 Water Company]." (AR 8-9.)

19 "The [Regional] Project Facilities include components owned by three public agencies; [Marina  
20 Coast, the Water Resources Agency, and the Pollution Control Agency]. In addition to the Project  
21 Facilities, the [California American Water Company] facilities shall serve as distribution facilities to  
22 serve the [California American Water Company] Service Area and be owned by [California American  
23 Water Company]." (AR 12.)

24 "[Marina Coast]-Owned Facilities. The [Marina Coast]-Owned Facilities include the Brackish  
25 Source Water Receipt Point Meter and a portion of the Brackish Source Water Pipeline, the Desalination  
Plant, the [Water Resources Agency] Meter, the [California American Water Company] Meter, the

1 [Marina Coast] Product Water Pipeline, the [Marina Coast] Outfall Facilities, and any related facilities.”

2 (Underscoring omitted.) (AR 13.)

3 “[California American Water Company]-Owned Facilities. The [California American Water  
4 Company] Facilities include the distribution system needed to convey the Product Water from the  
5 Delivery Point downstream of the [California American Water Company] Meter to the [California  
6 American Water Company] distribution system, plus other in-system improvements. None of the facilities  
7 owned by [California American Water Company] and downstream of the [California American Water  
8 Company] Meter are part of the Project Facilities.” (Underscoring omitted.) (AR 16-17.)

9 “As a responsible agency under the Coastal Water Project Final EIR, [Marina Coast] intends to  
10 rely upon the Final EIR in its decision whether or not to approve a Settlement Agreement and certain  
11 other agreements from the proceedings of the [Cal PUC] consideration of Application A.04-09-019.  
12 Pursuant to Section 15096 of the CEQA Guidelines, the process for a responsible agency does not require  
13 certification of the Final EIR. [Marina Coast] has chosen to rely on the Final EIR as the basis of the  
14 findings, herein.” (AR 17.)

15 “IX. Findings Regarding Alternatives [.] [Marina Coast] is a responsible agency and, as such,  
16 only has approval authority over a portion of the [Regional] Project. [Marina Coast] does not have  
17 approval authority over an aspect of the Moss Landing Power Plant or the North Marina Alternative.  
18 Thus, these Findings are limited to those aspects of the Project over which [Marina Cost] has approval  
19 authority and do not evaluate the various alternatives indentified in the Final EIR.” (Boldface and some  
20 capitalization omitted.) (AR 83.)

21 **(C). Marina Coast’s April 5, 2010 Resolution: Settlement Agreement**

22 “On April 5, 2010, [Marina Coast], and on April 6, 2010, [Water Resources Agency], each acting  
23 as a Responsible Agency under CEQA, and having fully considered all relevant environmental  
24 documents, including the [Final] EIR, approved the regional desalination project that is described in the  
25 Water Purchase Agreement (‘WPA’), which is attached hereto as Attachment 1, subject to Commission  
approval. That project is referred to as the ‘Regional Desalination Project.’” (AR 119.)

1           “The Parties to this Settlement Agreement, subject to the Approval Condition Precedent  
2 hereinafter discussed, have agreed to the development of the Regional Desalination Project. The Regional  
3 Desalination Project will consist of three primary elements. [The Water Resources Agency] will own,  
4 install, operate, and maintain wells through which brackish source water will be extracted and transported  
5 to a desalination plant. [Marina Coast] will own, construct and operate the desalination plant and transport  
6 desalinated Product Water to a delivery point, where some of the Product Water will be received by  
7 [California American Water Company] and some will be received by [Marina Coast]. [Marina Coast will  
8 utilize the Product Water delivered to it for its existing customers, and in the future may utilize some of  
9 the Product Water to serve customers in the former Ford Ord. [California American Water Company] will  
10 distribute its portion of the Product Water through facilities it owns for which the Commission should  
11 grant a CPCN. Operations of all project facilities shall be conducted so that all Legal Requirements are  
12 met, including but not limited to the requirements of the Agency Act. Greater detail regarding the design,  
13 construction, and operation of the Regional Desalination Project is found in two agreements, the [Water  
14 Purchase Agreement] and the Outfall Agreement (together referred to as the ‘Implementing Agreements’)  
15 discussed in Article 7 of this Settlement Agreement. Greater detail regarding the cost and ratemaking  
16 treatment of the Regional Desalination Project and the facilities that [California American Water  
17 Company] will own in connection with the Regional Desalination Project is contained in this Settlement  
18 Agreement and the Attachments hereto.” (Underscoring omitted.) (AR 119.)

19           “The Parties to this Settlement Agreement believe that the development, construction, and  
20 operation of the Regional Desalination Project does and will serve the present and future public  
21 convenience and necessity, and that the Commission should grant [California American Water Company]  
22 a CPCN [certificate of public convenience and necessity] to construct and operate the distribution pipeline  
23 and aquifer storage and recovery facilities portion of the Regional Desalination Project that [California  
24 American Water Company] proposes to own [.]” (AR 120.)

25           “The Parties acknowledge the legal requirement that [California American Water Company]  
customers be charged rates that are just and reasonable. In light of that acknowledgement, with respect to

1 the ratemaking treatment for the [California American Water Company] Facilities set forth in Article 9 of  
2 this Settlement Agreement, the cost recovery mechanism set forth in Article 9 represents an effort to  
3 strike a balance between minimizing costs of the [California American Water Company] Facilities and  
4 assuring [California American Water Company] ratepayers only pay for actual necessary expended  
5 capital investment....” (AR 120.)

6 **(D). Marina Coast’s April 5, 2010 Resolution: Water Purchase Agreement**

7 “On January 30, 2009, the [Cal PUC], acting as Lead Agency under CEQA, issued a Draft [EIR]  
8 analyzing the potential environmental impacts of a project designated the ‘Coastal Water Project’ and  
9 alternatives to it. The [Cal PUC] duly received and analyzed extensive public comment on the [Draft]  
10 EIR. [Marina Coast, the Water Resources Agency, and California American Water Company] provided  
11 comments on the [Draft] EIR.” (AR 140-141.)

12 “On December 17, 2009, in Decision No. 09-12-017 which was issued in Application 04-09-019,  
13 the [Cal PUC], as Lead Agency, after considering all relevant environmental documents, duly certified a  
14 Final [EIR]. The Final [EIR] described and studied three alternative projects which are being considered  
15 for approval by the Commission in the proceeding - the Moss Landing Project, the North Marina Project,  
16 and a third alternative project variously referred to as the ‘Regional Alternative’ and the ‘Regional  
17 Project’ and ‘Phase I of the Regional Project.’ The principal element of that latter alternative project is a  
18 regional desalination water supply project, with other smaller elements. This Agreement does not  
19 contemplate or address any elements other than ‘Phase I of the Regional Project.’” (AR 141.)

20 “On April 5, 2010, [Marina Coast], and on April 6, 2010, [Water Resources Agency], each acting  
21 as a Responsible Agency under CEQA, and having fully considered all relevant environmental  
22 documents, including the Final [EIR], approved this Agreement for a regional desalination project subject  
23 to [Cal PUC] approval, as more specifically described in Article 3 (the ‘Regional Desalination Project’).”  
24 (Underscoring omitted.) (AR 141.)

25 “The Regional Desalination Project contemplates the development, construction and operation of  
a regional desalination water supply project as described and analyzed in the [Final] EIR. (AR 141.)

1 [Marina Coast, the Water Resources Agency, and California American Water Company],  
2 individually and collectively, have determined and found that the Regional Desalination Project is the  
3 least costly of the proposed alternative projects, the most feasible of those projects, and is in the best  
4 interests of the customers served by each of [Marina Coast and California American Water Company] and  
5 that the Regional Desalination Project as implemented by this Agreement serves the public interest and is  
6 consistent with the Agency Act. The Parties have also determined that the Regional Desalination Project  
7 best conserves and protects public trust assets, resources and values impacted by providing a water  
8 supply.” (AR 141.)

9 [California American Water Company] has determined that purchasing Product Water from  
10 [Marina Coast] will allow [California American Water Company] to provide its customers in [California  
11 American Water Company’s] Service Area with Product Water at a significantly lower cost than by  
12 means of any of the other proposed alternative projects described in the [Final] EIR.” (AR 141.)

13 [Marina Coast, the Water Resources Agency, and California American Water Company], as part  
14 of a settlement of issues pending in Application 04-09-019, as set forth in that certain Settlement  
15 Agreement to be filed with the [Cal PUC] in Application 04-09-019 (the ‘Settlement Agreement’), have  
16 negotiated this Agreement and certain other agreements contemplated by the Settlement Agreement.”  
17 (Underscoring omitted.) (AR 141)

18 “The Parties intend that the development, construction and operation of the Regional Desalination  
19 Project occur in accordance with the [Final] EIR and that [Marina Coast and the Water Resources  
20 Agency] each act as a Responsible Agency in accordance with CEQA to implement the Regional  
21 Desalination Project.” (AR 141.)

22 **(E). Notice of Determination Filed with County Clerk on March 17, 2010**

23 “Project Title: Acquisition of 224-acres (+/-) of Armstrong Ranch Land and Appurtenant  
24 Easements relying upon the California Public Utilities Commission, California American Water  
25 Company, Coastal Water Project Final EIR (certified December 17, 2009) [.]” (Boldface omitted.) (AR  
1083.)

1 “Project Description: The project consists of the acquisition of the Site by [Marina Coast],  
2 pursuant to an agreement between [Marina Coast] and the Armstrong Family entered into in 1996 and  
3 subsequently supplemented and amended (1996 Agreement). The 1996 Agreement limits use of the Site  
4 to the production, storage, or distribution of treated water (tertiary treatment or its equivalent) or potable  
5 water. The acquisition of the Site and appurtenant easements are intended to potentially allow  
6 development of infrastructure for water production and treatment, storage and distribution in accordance  
7 with the 1996 Agreement, and for future annexation of the Site to [Marina Coast]. Only the property  
8 acquisition is proposed. Future projects at the Site proposed by [Marina Coast] for water supply and other  
9 public facility infrastructure are conditioned upon CEQA compliance. [¶] The California Public Utilities  
10 Commission certified a relevant Final EIR for the California American Water Company, Coastal Water  
11 Project on December 17, 2009; however, have (sic) not taken action on the Coastal Water Project or  
12 alternatives. [¶] This notice is to advise that on March 16, 2010, the Board of Directors of the [Marina  
13 Coast] (Board) approved Resolution No. 2010-18 to Make CEQA Findings, Approve and Adopt  
14 Addendum to the Final EIR and Approve the Acquisition of 224-acres (+/-) of Armstrong Ranch Land  
15 and Appurtenant Easements. Resolution No. 2010-18, including attachments, made the following  
16 determinations regarding the Armstrong Ranch Property Acquisition and appurtenance Easements:”  
17 (Boldface omitted.) (AR 1084.)

18 **(F). Resolution No. 2010-18**

19 “... [Marina Coast] desires to own property in the area north of the City of Marina and south of  
20 land owned by the [Pollution Control Agency] (and the Monterey Regional Waste Management District [ ]  
21 to provide land for future construction, operation and maintenance of water supply infrastructure to  
22 produce, treat, store, and distribute water; and,” (AR 1726.)

23 “WHEREAS, CEQA Guidelines Sections 15004 (b)(2)(A) provides that "agencies may designate  
24 a preferred site for CEQA review and may enter into land acquisition agreements when the agency has  
25 conditioned the agency's future use of the site on CEQA compliance," and the California Supreme Court's

1 decision in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4<sup>th</sup> 116, at 134, states that the Guidelines'  
2 exception for land purchases is a reasonable interpretation of CEQA; and,

3 “WHEREAS, this Resolution conditions the District's future use of the Site on CEQA  
4 compliance; and,

5 “WHEREAS, in accordance with CEQA Guidelines Section 15050(b) and 15096, [Marina Coast]  
6 has reviewed, considered, and relies upon the information in two existing, certified EIRs, the [Cal PUC]  
7 EIR and the [Regional Urban Water Augmentation Project] EIR as discussed in the [Cal PUC] EIR as  
8 hereinafter described, and related entitlements and approvals, to (1) thoroughly disclose and consider all  
9 relevant publicly available information on potential future activities that could occur at the Site and that  
10 may be indirectly enabled by the Acquisition, and (2) comprehensively identify all indirect environmental  
11 impacts of the Acquisition, thereby, evaluating the ‘whole of the action’ and avoiding piece-mealing or  
12 segmenting the analysis; and” (AR 1728.)

13 “ WHEREAS, the [Cal PUC] EIR identified significant impacts of the [California American  
14 Water Company] Coastal Water Project alternatives and provided mitigation to reduce most of the  
15 significant impacts to a less-than-significant level with several environmental impacts remaining  
16 significant with mitigation, as summarized in the Executive Summary in Attachment A to this resolution;  
17 and,

18 “WHEREAS, pursuant to CEQA Guidelines Sections 15096, 15162, 15164 and 15063, and in  
19 consultation with other affected agencies and entities, [Marina Coast], as a responsible agency for  
20 approval of the Coastal Water Project alternatives, has prepared an Addendum to the [Cal PUC] EIR  
21 supported by an Initial Study (the Armstrong Ranch Property Acquisition Addendum in Attachment B)  
22 and finds the following related to the required CEQA compliance for the Acquisition:

- 23 • Acquisition of the Site, in and of itself, is merely a property transfer that would not directly have  
24 any significant effects on the environment,  
25

1 • Future potential projects with components proposed to be located at the Site were described and  
2 evaluated previously in certified EIRs and those projects would result in significant  
3 environmental effects, including significant but potentially mitigable impacts,

4 • Although the decision to acquire the Site is not approval of a project under CEQA, [Marina  
5 Coast] is choosing to act as a responsible agency and to use a previously prepared and certified  
6 EIR, specifically the [Cal PUC] EIR, to support acquisition of the Site; and,

7 “WHEREAS, the action under consideration is approval of the Acquisition of the Site, which  
8 approval constitutes one of many actions necessary to implement the Coastal Water Project alternatives  
9 and would not by itself result in any significant impacts as described in the Armstrong Ranch Property  
10 Acquisition Addendum (Attachment B to this resolution); and,

11 “WHEREAS, the Directors have reviewed and considered the [Cal PUC] EIR and the Armstrong  
12 Ranch Property Acquisition Addendum (Attachment B) in their entirety and find that the [Cal PUC] EIR  
13 and the Armstrong Ranch Property Acquisition Addendum are adequate for the purpose of approving the  
14 [Marina Coast’s] Acquisition of the Site, and [Marina Coast] hereby relies upon the contents of those  
15 documents and the CEQA process for its CEQA compliance; and,

16 “WHEREAS, [Marina Coast] intends to conduct all future activities at the Site in accordance with  
17 the [Cal PUC] EIR and with the [Regional Urban Water Augmentation Project] EIR as amended as  
18 discussed in the [Cal PUC] EIR; or, alternatively, and if needed to comply with CEQA, [Marina Coast]  
19 would amend, supplement or otherwise conduct new environmental review subsequent to approval of a  
20 project and adoption of findings by the [Cal PUC] and prior to directly or indirectly committing to  
21 undertake any specific project or action involving a physical change to the environment related to the  
22 Acquisition of the Site, including but not limited to a project or action involving any element of Phase I of  
23 the [Moss Landing] Alternative or the North Marina Alternative; and,

24 “WHEREAS, [Marina Coast’s] General Manager, as [Marina Coast’s] designated negotiator,  
25 recommends that the Board approve the Acquisition for execution in the form presented to the Board in  
open session on March 16, 2010.

1 "NOW, THEREFORE, BE IT RESOLVED, that the Board of Directors of the Marina Coast  
2 Water District adopt the foregoing findings; and,

3 "BE IT FURTHER RESOLVED, that the Board of Directors of the Marina Coast Water District  
4 certify, pursuant to CEQA Guidelines §§ 15050(b) and 15096(t), that they have reviewed and considered  
5 the Final EIR as certified by the [Cal PUC] on December 17, 2009 in Decision D.09-12-017; and,

6 "BE IT FURTHER RESOLVED, that the Board of Directors of the Marina Coast Water District  
7 approve and adopt the Armstrong Ranch Property Acquisition Addendum to the [Cal PUC] EIR; and,

8 "BE IF FURTHER RESOLVED, that the Board of Directors of the Marina Coast Water District  
9 hereby approve the Acquisition and authorize the General Manager and Secretary and the President to  
10 take the actions and execute the documents necessary or appropriate to exercise [Marina Coast's] right to  
11 acquire the Site in accordance with the 1996 Agreement, as supplemented and amended, and this  
12 Resolution, and to accept the Site; and,

13 "BE IT FURTHER RESOLVED, that the General Manager is authorized and directed to prepare  
14 and file an appropriate Notice of Determination for approval of the Acquisition; and,

15 "BE IT FURTHER RESOLVED, that [Marina Coast's] use of the Site after acquisition is  
16 conditioned upon CEQA compliance and that [Marina Coast] by determining to acquire and acquiring the  
17 Site does not foreclose analysis of any alternative or any mitigation measure in considering uses of the  
18 Site.

19 "PASSED AND ADOPTED on March 16, 2010, by the Board of Directors of the Marina Coast  
20 Water District by the following roll call vote: ..." (AR 1731-1732.)

21 **(G). Cal PUC EIR**

22 "Both the Moss Landing and North Marina Projects are analyzed in Chapter 4 of the EIR.  
23 [California American Water Company] would be the owner and operator of either of these two projects,  
24 and the [Cal PUC], as the Lead Agency under [CEQA], will use this document to approve one of the two  
25 projects to be implemented in the in the [Coastal Water Project]." (AR 2788-2789.)

1 "As proposed in the Regional Project, [Marina Coast] would be the owner of the regional  
2 desalination facility and the surface water treatment plant. In order for the Regional Project to be  
3 implemented, it is assumed in this EIR that [Marina Coast] would use this EIR in considering approval of  
4 some of the Regional Project facilities." (AR 2789.)

5 "The [Cal PUC] has no jurisdiction over [Marina Coast]. Thus as discussed below, the [Cal PUC]  
6 would not have authority over any element of the [Coastal Water Project] that ultimately is undertaken by  
7 [Marina Coast]...." (AR 4532.)

8 "... [Marina Coast] would permit, construct, own and operate the regional desalination facility  
9 and would sell water to [California American Water Company]; [California American Water Company]  
10 would construct, own and operate the proposed storage and conveyance facilities. Thus, for the Regional  
11 Project, the [Cal PUC] would have jurisdiction over [California America Water Company's] portion, but  
12 not [Marina Coast]." (AR 4534-4535.)

13 "For the Regional Project to be implemented, the EIR assumes that [Marina Coast] would rely on  
14 the EIR in acting on the regional desalination facility over which it has jurisdiction ... the [Cal PUC]  
15 would rely on the EIR before approving a [Certificate of Public Convenience and Necessity] for the  
16 storage and conveyance facilities proposed by [Californian American Water Company] and before  
17 approving a rate increase to allow [California American Water Company] to recover its costs." (AR  
18 4335.)

19 "If the Phase 1 Regional Project is selected, [Marina Coast], as owner and operator of the  
20 desalination plant, would approve the plant itself (and any associated facilities that it would own) and  
21 would apply the EIR to that decision, including adopting findings and imposing mitigation measures.  
22 From a CEQA standpoint, it is immaterial which option is selected and which agency or agencies have  
23 primary authority or act first since each body must consider the EIR prior to acting on the project, adopt  
24 appropriate CEQA findings applying the EIR and impose relevant mitigation measures. Further, approval  
25 of a desalinate option by any agency would not commit that agency or any other agency to approval of  
any other component of the Phase 1 Regional Project, or of the Phase 2 Regional Project." (AR 4537.)

1           “The Regional Project examines a broad array of projects that could satisfy regional water supply  
2 needs in the near term and longer term. While this analysis will inform the [Cal PUC] decision-making  
3 process with respect to a potential desalination plant and how such plant could function in concert with  
4 other water supply components within the region, the [Cal PUC] would have jurisdiction over, and thus  
5 formally act on, only elements of the desalination plant requiring a [Certificate of Public Convenience and  
6 Necessity], and rate-making for [California American Water Company] actions. Thus, contrary to the  
7 suggestion of some commenters, the [Cal PUC] will neither consider adoption of the Regional Project in  
8 its entirety nor consider adoption of all projects composing the Phase 1 Regional Project. (AR 4537-  
9 4538.)

10           **(H). This Court’s lead agency determination**

11           Guidelines section 15051 subdivision (a): “If the project will be carried out by a public agency,  
12 that agency shall be the lead agency even if the project would be located within the jurisdiction of another  
13 public agency.”

14           From the evidence set forth above, Marina Coast choose to purchase property for siting their  
15 desalination plant, made CEQA findings concurrent with a statement of overriding considerations and  
16 including mitigation measures to carry out the Regional Project.

17           Marina Coast’s argument is that the 2010 Regional Project decision was conditional, because it  
18 was part of Resolution 2010-20 that included the Settlement Agreement and Water Purchase Agreement,  
19 and Guidelines section 15051 is not applicable.

20           “Under CEQA, when a project involves two or more public agencies, ordinarily only one agency  
21 can serve as the lead agency. (Guidelines, §§ 15050, 15051.) CEQA thus distinguishes lead agencies from  
22 responsible agencies: whereas the lead agency has “principal responsibility” for the project, a responsible  
23 agency is “a public agency, other than the lead agency, which has responsibility for carrying out or  
24 approving a project.” (Pub. Resources Code, §§ 21067, 21069.) Regarding this distinction, the CEQA  
25 guidelines provide that when a project involves two or more public agencies, the agency “carr[ying] out”  
the project “shall be the lead agency even if the project [is] located within the jurisdiction of another

1 public agency.” (Guidelines, § 15051, subd. (a).) [¶] Under these principles, courts have concluded that  
2 the public agency that shoulders primary responsibility for creating and implementing a project is the lead  
3 agency, even though other public agencies have a role in approving or realizing it. (Eller Media Co. v  
4 Community Redevelopment Agency (2003) 108 Cal.App.4th 25, 45–46 [133 Cal. Rptr. 2d 324]  
5 [community agency charged with responsibility for redevelopment measures within designated area was  
6 lead agency regarding billboard placement, even though city issued building permits for billboards];  
7 Friends of Cuyamaca Valley v. Lake Cuyumaca Recreation & Park Dist. (1994) 28 Cal.App.4th 419,  
8 426–429 [33 Cal. Rptr. 2d 635] [state agency that determined duck hunting policy, rather than wildlife  
9 district that enforced it, was lead agency regarding duck hunting policy]; City of Sacramento v. State  
10 Water Resources Control Bd. (1992) 2 Cal.App.4th 960, 971–973 [3 Cal. Rptr. 2d 643] [state agency that  
11 created pesticide pollution control plan, rather than water district that enforced it, was lead agency  
12 regarding plan].)” (Planning and Conservation League v. Castaic Lake Water Agency (2009) 180  
13 Cal.App.4th 210, 239.)

14 Cal PUC was the lead agency for the Coastal Water Project. However, the Regional Project was  
15 proposed by the various public entities and Marina Coast was the first to approve the Regional Project by  
16 its actions of March 16 and 17, 2010, and April 5, 2010, and Marina Coast became the lead agency for the  
17 Regional Project. (Sohio, supra, 23 Cal.3d 812.)

18 “‘Approval’ means the decision by a public agency which commits the agency to a definite  
19 course of action in regard to a project intended to be carried out by any person.” (Save Tara v. City of  
20 West Hollywood (2008) 45 Cal.4th 116, 129.)

21 The argument that Marina Coast could conditionally approve the Regional Project is belied by the  
22 approval of the resolution, the findings of approval with mitigation measures, a statement of overriding  
23 considerations, and the filing of a Notice of Determination. These actions clearly demonstrate that Marina  
24 Coast is responsible for carrying out the project. (Pub. Resources Code, § 21067; Guidelines, § 15352.)  
25

1 The fact is, the Cal PUC could approve a different project, or none at all, and the Regional Project  
2 could go forward with Cal PUC's limited approval of a Certificate of Public Convenience and Necessity  
3 for California American Water Company's limited role in the Regional Project.

4 CEQA does not provide for a "conditional" Notice of Determination. If Ag Land had not  
5 challenged Marina Coast's approvals, the 30-day limitations period to challenge Marina Coast's Notice of  
6 Determination would have foreclosed a challenge to the Regional Project.

7 Any CEQA compliance by Marina Coast must be done under the auspices of its role as the lead  
8 agency.

9 Ag Land contends that the EIR was deficient in its discussion of 1) water rights; 2) contingency  
10 plan; 3) the assumption of constant pumping; 4) the exportation of groundwater from the Salinas Valley  
11 Groundwater Basin; 5) brine impacts on the outfall; 6) impacts on overlying an adjacent properties; and 7)  
12 water quality.

13 As noted in *Planning and Conservation League v. Department of Water Resources* (2000) 83  
14 Cal.App.4<sup>th</sup> 892, 920, once Marina Coast has been found to be the lead agency, this Court "need not ...  
15 address [all] the other alleged deficiencies in [the] EIR[] (Pub. Resources Code, § 21005, subd. (c))[,  
16 because Marina Coast] ... may choose to address those issues in a completely different and more  
17 comprehensive manner."

18 **(II). CEQA issues**

19 Administrative mandamus is the appropriate avenue of review because the decision came after a  
20 hearing during which evidence was taken (Code Civ. Proc., § 1095.5, subd. (a).) A trial court may issue a  
21 writ of administrative mandate if: (1) the agency acted in excess of its jurisdiction; (2) the petitioner was  
22 denied a fair hearing; or (3) the agency prejudicially abused its discretion. (Code Civ. Proc., § 1094.5,  
23 subd. (b).) "A prejudicial abuse of discretion is established if the agency has not proceeded in a manner  
24 required by law, if its decision is not supported by findings, or if its findings are not supported by  
25 substantial evidence in the record. [This Court] may neither substitute [its] views for those of the agency  
whose determination is being reviewed, nor reweigh conflicting evidence presented to that body." (*San*

1 *Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4<sup>th</sup>  
2 656, 674, citations omitted.)

3 The “failure to comply with the law subverts the purposes of CEQA if it omits material necessary  
4 to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the  
5 error is prejudicial.” (*Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2012)  
6 190 Cal.App.4<sup>th</sup> 1351, 1392.)

7 **(A). Water Rights**

8 Ag Land argues that CEQA requires details of water rights, including ownership if it affects the  
9 water supply, and the EIR must address foreseeable impacts of supplying water to the project. (*Vineyard*  
10 *Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 421, 431, 434.)  
11 Ag Land contends that the Salinas Valley basin is overdrafted and California groundwater law holds that  
12 the doctrine of correlative overlying water rights applies when no surplus water is available for new  
13 appropriators except by prescription, and Marina Coast had to address this issue. (AR 2257.) Ag Land  
14 states that Monterey County admitted that it does not have water rights for the wells that are projected to  
15 be used for the Regional Project and it is possible that Monterey County may have to initiate groundwater  
16 adjudication of the entire Salinas Valley. (AR 817-819.) Ag Land contends that the Cal PUC has no  
17 authority over water rights or public water agencies and cannot grant or approve such rights and Marina  
18 Coast was required to address the claims and issues under a CEQA analysis, including the extraction of  
19 water from the basin.

20 Marina Coast argues that 1) Monterey County has never admitted it does not have water rights; 2)  
21 Mr. Weeks, Monterey County Water Resources Agency, said that the Water Agency and the County are  
22 organizations that can pump from the Salinas Basin and that every drop will stay in the Basin, and 3) as a  
23 responsible agency, Marina Coast is not required to analyze water right claims over which Marina Coast  
24 has no authority.

25 **(B). Excerpts from Administrative Record regarding water rights**

**(1). Ag Land letter, in part, to Marina Coast dated April 5, 2010.**

1           “The Regional Project would require the use of water rights which the project proponents do not  
2 own. The Salinas Valley Groundwater Basin is in very serious overdraft, and has been acknowledged to  
3 be in serious overdraft since the 1950s. The proposed Salinas Valley Water Project [SVWP] is not  
4 operational. All of the various components of the Salinas Valley Water Project must be fully operational  
5 for years before it can be effective or before its early results are known with any reliability. The SVWP is  
6 not operational. Even after its operations begin, it will take years before it would have any effect on the  
7 tens of thousands of acre feet of annual overpumping in the Salinas Valley Groundwater Basin. Further,  
8 even if in the future the Basin's recharge is ever in balance with the pumping from the Basin, which is  
9 highly in doubt and cannot be accurately measured, the seawater intrusion would remain. Technical  
10 experts agree that seawater intrusion is generally not reversed. Further, the SVWP under construction is  
11 significantly smaller than the project evaluated in the SVWP EIR. The project was significantly  
12 downsized after the cost projections from the original project came in far over budget. [¶] The County  
13 Water Resources Agency does not measure or maintain accurate or detailed records of cumulative basin  
14 pumping, cumulative basin water usage, or overpumping. At best, the Agency merely estimates amounts  
15 of recharge, pumping and seawater intrusion. The Agency records are vague on these important issues.”  
16 (AR 596-597.)

17           “The environmental review to date does not include any consideration of the potential use of  
18 eminent domain to acquire any property interests for the Regional Project. Such use is clearly  
19 contemplated by the project proponents, because, for example, the proponents do not own and have not  
20 yet obtained water rights for the project or property rights for the proposed wells. The staff report for the  
21 Monterey County Water Resources Agency Board of Supervisors' meeting of April 6, 2010, states that  
22 project proponents ‘will obtain, through purchase or other legal means, all easements or other real  
23 property interests necessary to build, operate and maintain’ the proposed wells. The contemplated use of  
24 ‘other legal means’ includes eminent domain, which is a project under CEQA and which must be  
25 evaluated in the environmental review.” (AR 601.)

1                   **(2). November 2, 2009 letter, in part, from Ag Land to Marina Coast in response to the**  
2 **Notice of Preparation of an EIR for the Armstrong Ranch acquisition and annexation.**

3                   “These comments are intended to help Marina Coast Water District determine the scope of the  
4 EIR and ensure an appropriate level of environmental review. The Ag Land Trust asks the Water District  
5 to review carefully the following potential environmental issues and impacts in the EIR.

6                   • The water rights on the project site and water rights anticipated to be used for future projects  
7 involving the project site. Water rights are correctly researched at this EIR stage. (*Save Our*  
8 *Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99,131-134.) The project site  
9 is in the overdrafted Salinas Valley groundwater basin.

10                  • The EIR should acknowledge that, under California law, no new groundwater may be  
11 appropriated legally from the overdrafted Salinas basin, except by prescription. The EIR should  
12 include a discussion and analysis of the status of water rights in the basin, and the specific water  
13 rights held by [Marina Coast] and all other entities who could or would be involved in future  
14 water supply projects.

15                  • As to each entity, the EIR should categorize the water rights as to type, identified as used or  
16 unused, the applicable seniority of the rights, and the supporting documentation for each claim  
17 should be provided.

18                  • The EIR should investigate the legal justification for any groundwater rights claimed by  
19 [Marina Coast], because in an overdrafted basin new appropriative rights cannot be acquired  
20 except through prescription, which has not occurred here.

21                  • The EIR should disregard any claimed groundwater rights held by [Monterey County Water  
22 Resources Agency], because [Monterey County Water Resources Agency], does not have such  
23 rights. If the EIR asserts otherwise, it should investigate and provide supporting documentation  
24 for its assertion.

25                  • The water rights of the Monterey County Water Resources Agency (MCWRA) should be  
carefully reviewed, because [Marina Coast] and the [Monterey County Water Resources

1 Agency], have MOUs in place that indicate that [Monterey County Water Resources Agency],  
2 involvement on the project site for water supply purposes is foreseeable. The impacts on  
3 neighboring properties of the project and the future projects that would be enabled by the project.  
4 For example, the Ag Land Trust has large holdings in the areas of Moss Landing, Castroville, and  
5 Marina which would be affected directly by the various proposed water projects and alternatives  
6 of the proposed projects. Many of Ag Land Trust's acres of land and easements, and their  
7 attendant overlying groundwater rights, have been acquired with grant funds from the State of  
8 California as part of the State's long-term program to permanently preserve our state's productive  
9 agricultural lands. The Ag Land Trust believes that the agricultural operations, the agricultural  
10 potential, the water rights, the water systems, and the viability of its property in general would be  
11 negatively impacted by the project(s) being evaluated in the EIR." (AR 895-896.)

12 **(3). Ag Land letter to Marina Coast dated March 16, 2010, in relevant part:**

13 "On November 6, 2006, and again on April 15, 2009, the Ag Land Trust notified the Public  
14 Utilities Commission of certain key flaws in the Coastal Water Project EIR. Specifically, the first full  
15 paragraph on page two of the Trust's November 6, 2006 letter (identified as 'G\_AgLTr-3' in the FEIR)  
16 states that Cal-Am, a water appropriator under California law, has no groundwater rights to appropriate  
17 water from the overdrafted Salinas Groundwater Basin. In an overdrafted, percolated groundwater basin,  
18 California groundwater law clearly and definitely holds that the doctrine of correlative overlying water  
19 rights applies (*Katz v. Walkinshaw* (1903) 141 Cal. 116), whereby no surplus water is available for new  
20 groundwater appropriators.

21 "The FEIR response claims that an analysis of water rights is not necessary because 'CalAm  
22 claims no rights to groundwater' and that 'no Salinas Valley groundwater will be exported from the  
23 Basin.' The FEIR attempts to bypass a central issue - the EIR's failure to analyze legal water rights - by  
24 claiming that the issue does not exist. On the contrary, the issue of legal water rights exists and should be  
25 analyzed.

1           “Because the extracted water would be composed of both saltwater and groundwater, Cal-Am  
2 (under the North Marina project) or Monterey County (under the Regional Project) would be extracting  
3 groundwater from the overdrafted Salinas Valley Groundwater Basin. Those actions would represent an  
4 illegal appropriation of water. The EIR claims that water can be appropriated from under privately owned  
5 land in the overdrafted basin, so long as it promises to return the same amount of pumped groundwater to  
6 the basin. That claim is not enforceable, not subject to oversight and does not change the fact that the  
7 extraction of the water would be an illegal appropriation. In essence, the Cal Am North Marina  
8 desalination project and the Regional Project would rely on illegal extraction and appropriation of  
9 groundwater from the basin. The EIR does not analyze the significant impact of an illegal taking of  
10 groundwater from overlying landowners. Instead, the FEIR accepts as unquestionably true the flawed  
11 rationale that a purported return of a portion of the water somehow allows the illegal extraction of  
12 groundwater from the overdrafted basin. This deficiency in the EIR must be addressed, and the EIR  
13 should identify mitigations for the adverse impacts and proposed illegal actions and takings.

14           “The principle is established that the water supply in a source may be augmented by artificial  
15 means. (See *Pomona Land & Water Co. v. San Antonio Water Co.* (1908) 152 Cal. 618.) We do not  
16 question that general statement of law. However, when getting to the specifics of the abilities and  
17 limitations in regard to the augmented or developed water proposed for the Project, the EIR defaults on  
18 the necessary discussion. Instead of addressing the entire doctrine of water rights applicable here, the  
19 FEIR (14.1-94, n. 4) defers entirely to the MCWD's legal counsel for the discussion of the essential  
20 factors. From page 14.1-94 to 14.1-96, MCWD's legal argument is presented without critical analysis or  
21 further comment as the FEIR's discussion. There is no independent review or investigation of the legal  
22 argument, as required under CEQA.

23           “California law on the ability of an agency to claim the right to salvage any or all of any  
24 developed water in the circumstances here, and any limits on that claim, has not yet been defined by the  
25 Courts. The citations in the FEIR overstate the situation, and do not point to any California court case  
where the analysis presented in the FEIR has been upheld by the Court. The two cases relied upon by the

1 MCWD's counsel (and therefore the FEIR) are cited in footnote 10 of FEIR page 14.1-96: *Pajaro Valley*  
2 *Water Mgt. Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1370 and *Lanai Company, Inc. v. Land Use*  
3 *Commission* (S. Ct. Ha. 2004) 97 P.2d 372,376. The citations in both cases are to portions of the  
4 introductory factual recitations in the cases, and not to Court holdings or legal analysis, and thus are not  
5 fairly considered precedents or statements of settled law. Other FEIR citations are to legal claims asserted  
6 in a staff report by the head of the Monterey County Water Resources Agency, who is not an attorney.

7 "Here, the CPUC's EIR defined the project too narrowly. The EIR never evaluated the existence  
8 or nonexistence of water rights on which the Regional Project would rely. At the very least, the FEIR was  
9 required to evaluate the claims of MCWD and MCWRA, test them analytically, and provide the  
10 decisionmakers and the public with the analysis. Without the reasoned good faith analysis, the EIR fails  
11 as an informational document. (See, e.g., *Santa Clarita Organization for Planning the Environment v.*  
12 *County of Los Angeles* (2003) 106 Cal.App.4th 715, 722.) 'It is not enough for the EIR simply to contain  
13 information submitted by the public and experts.' In particular, water 'is too important to receive such  
14 cursory treatment.' (*id.*) CEQA requires a detailed analysis of water rights issues when such rights  
15 reasonably affect the project's supply. Assumptions about supply are simply not enough. (*id.*, at p. 721;  
16 *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 131- 134, 143 [EIR  
17 inadequate when it fails to discuss pertinent water rights claims and overdraft impacts]; see also, *Cadiz*  
18 *Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 94-95 [groundwater contamination issues].) The  
19 reasoning of the Court in *Cadiz* would also apply to the proper analysis of the rights associated with the  
20 overdraft here.

21 "At the very least, the determinations of safe yield, surplus, the rights of the MCWRA, and of  
22 'persons with land in the zones of benefit for the projects' must be identified, discussed and analyzed. The  
23 analysis must be independent, and cannot simply be 'extracted' (FEIR, p. 14.1-94, n. 4) from the  
24 argument of the attorney for the MCWD, a proponent of the Regional Project and potential owner of the  
25 desalination plant component of that project. Whether the project may take salvaged or developed water  
originating from onsite supplies depends on whether injury will result to existing lawful users or those

1 who hold vested rights. The FEIR response to comments does not fairly consider or investigate the actual  
2 on-the-ground issues.

3 “Neither the MCWD nor the MCWRA has groundwater rights that would support the drilling of  
4 the proposed intake wells for the Regional Project. On March 3, 2010, this Office made a California  
5 Public Records Act request to the County of Monterey and Monterey County Water Resources Agency  
6 seeking the records that support a MCWRA claim that the MCWRA or the MCWD have water rights for  
7 the proposed Regional Project. To date, the County has not provided any documents that support those  
8 claims.” (AR 1127-1129.)

9 **(4). Salinas Valley Water Coalition letter dated April 15, 2009 addressed to Mr. Barnsdale**  
10 **regarding the Coastal Water Project.**

11 The Salinas Valley Water Coalition asked about water rights for groundwater pumping and  
12 surface diversion. (AR 4413.)

13 The EIR contains a response to these concerns. In part, the EIR refers to Master Response 13.6  
14 and states that because “[i]t is CEQAs intent to identify and analyze potential impacts of the project on  
15 the environment; water rights are not considered an environmental issue. Groundwater extracted for the  
16 Coastal Water Project would be covered under the right held by the entity that owns and operates the  
17 wells ... Details of the water rights is beyond the scope of CEQA because the acquisition of water rights  
18 does not determine the feasibility of this project.” (AR 4973, 4974.)

19 Master Response 13.6 noted that some “comments asserted that the project could not legally  
20 withdraw and export water from the [Salinas Valley Groundwater Basin] to other areas on the Monterey  
21 Peninsula.” Master Response 13.6 was “intended to clarify and enhance information brought to light in  
22 the Draft EIR regarding the quantity, use of, and replacement of water that would be drawn from the  
23 [Salinas Valley Groundwater Basin] and used by the proposed project.” (AR 4547.) The Master Response  
24 notes in passing that “hydrologic modeling analyses undertaken to date indicate that extraction of  
25 brackish water at the coast will cause no injury to the rights of overlying landowners or other water  
users.” (Footnote omitted.) (AR 4550.) The Master Response concludes that “the Regional Project would

1 extract intruded groundwater that would otherwise be of no use to municipal or agricultural users and  
2 would treat that water for potable uses. The source of this water is the 180-foot aquifer that has been  
3 intruded by seawater since the 1940s. The proposed extraction wells would be located along the coast  
4 and, depending on whether they are slant wells at the coast or vertical wells slightly inland, both  
5 configurations would withdraw ocean water with some lesser fraction of intruded groundwater from  
6 within the [Salinas Valley Groundwater Basin].... The fraction of feedwater determined to be [Salinas  
7 Valley Groundwater Basin] water, which is extracted from the wells, would not be exported out of the  
8 basin, rather, it would be conveyed for agricultural proposes (North Marina Project) or delivered to the  
9 Marina Coast Water District for municipal supply (Regional Project).” (AR 4556-7.)

10 **(5). The Open Monterey Project sent a letter to Mr. Barnsdale on April 15, 2009 with**  
11 **comments on the Draft EIR.**

12 The Open Monterey Project comments are very similar to those made by Ag Land. In general,  
13 The Open Monterey Project notes that specific water rights are not indentified or discussed, that using  
14 water without water rights has an environmental impact, and provides at length and in some detail the  
15 rational for the questions about water rights. (AR 4415.)

16 The response to these comments provided in the Final EIR provides “refer to comment rezones  
17 G\_SVWC-10 and PSMCSD-2.” (AR 4978.)

18 **(6). Pajaro/Sunny Mesa Community Services District sent a letter to the Cal PUC on April**  
19 **15, 2009 with comments on the Draft EIR.**

20 Pajaro/Sunny Mesa Community Services District noted that California American Water  
21 Company, the Cal PUC, and any potential public agency partner lacked any appropriative percolated  
22 groundwater rights in the Salinas Valley Groundwater Basin and it would be illegal to take water, and the  
23 Draft EIR’s failure to acknowledge this deficiency must be addressed. (AR 4125-4126.)

24 The specific issue of water rights is never addressed in the response to this comment. (AR 4729-  
25 4731.)

1                   **(7). Letter from David Kimbrough (Chief of Administrative Services, Finance Manager for**  
2 **Monterey County) dated March 24, 2010 to Ms. Molly Erickson.**

3                   In relevant part: "Further, [Monterey County Water Resources Agency] intends to acquire an  
4 easement, including rights to ground water, from the necessary property owner(s) to install the  
5 desalination wells. These rights have not been perfected to date, hence no records can be produced. [¶] As  
6 to [Marina Coast Water District], it was previously annexed into Zones 2 & 2A and as such has right to  
7 ground water." (AR 817.)

8                   **(C). Analysis**

9                   "It has been held that an EIR is inadequate if it fails to identify at least a potential source for  
10 water. In Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal. App. 4th 182 [55  
11 Cal. Rptr. 2d 625], for example, the failure to identify a source of water beyond the first five years of  
12 development rendered the EIR inadequate, although the developer was pursuing several possible sources.  
13 It also has been held that an EIR is inadequate if the project intends to use water from an existing source,  
14 but it is not shown that the existing source has enough water to serve the project and the current users.  
15 (Santiago County Water Dist. v. County of Orange (1981) 118 Cal. App. 3d 818 [173 Cal. Rptr. 602].)

16                   On the other hand, it has been held that an EIR is not required to engage in speculation in order to analyze  
17 a 'worst case scenario.' (Towards Responsibility in Planning v. City Council (1988) 200 Cal. App. 3d 671  
18 [246 Cal. Rptr. 317] (hereafter *TRIP*)). In that case, the court held that an EIR was not required to analyze  
19 the effects that would result from the construction of a sewage treatment facility, when (1) all indications  
20 suggested that the facility would never be needed, and (2) the facility--if it was constructed--would be  
21 subjected to its own environmental review." (Napa Citizens for Honest Government v. Board of  
22 Supervisors (2001) 92 Cal.App.4<sup>th</sup> 342, 372-373.)

23                   Not until the day of trial did Marina Coast assert that the EIR addressed the issue of water rights.

24                   There is no dispute that the water that will be pumped from the wells will contain some  
25 proportion of groundwater from the 180-foot aquifer.

1 As set forth above, the final EIR does not contain a discussion of the issues surrounding the  
2 availability of groundwater for the Regional Project and the impacts on the physical environment in light  
3 of Monterey County Water Resources Agency's admission in March 2012 that it "intends to acquire an  
4 easement, including rights to ground water, from the necessary property owner(s) to install the  
5 desalination wells [and t]hese rights have not been perfected to date."

6 The EIR assumes that groundwater rights will be perfected in the future and that such rights do  
7 not need to be addressed in an EIR.

8 "Such an assumption, however, is impermissible, as it is antithetical to the purpose of an EIR,  
9 which is to reveal to the public 'the basis on which its responsible officials either approve or reject  
10 environmentally significant action,' so that the public, 'being duly informed, can respond accordingly to  
11 action with which it disagrees.' (*Laurel Heights, supra*, 47 Cal.3d at p. 392.) As another court observed,  
12 '[t]o be adequate, the EIR must include sufficient detail to enable those who did not participate in its  
13 preparation to understand and 'meaningfully' consider the issues raised by the proposed project.' (  
14 *SCOPE, supra*, 106 Cal.App.4th at p. 721; see also *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist.*  
15 *Agricultural Assn.* (1986) 42 Cal.3d 929, 935 [231 Cal. Rptr. 748, 727 P.2d 1029] (*Concerned Citizens*)  
16 ['[t]o facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's  
17 bare conclusions or opinions'.]) This standard is not met in the absence of a forthright discussion of a  
18 significant factor that could affect water supplies. The EIR is devoid of any such discussion." (*California*  
19 *Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1237.)

20 As the lead agency, Marina Coast will need to address this prejudicial abuse of discretion  
21 including, but not limited to, 1) water rights; 2) contingency plan; 3) the assumption of constant pumping;  
22 4) the exportation of groundwater from the Salinas Valley Groundwater Basin; 5) brine impacts on the  
23 outfall; 6) impacts on overlying an adjacent properties; and 7) water quality.

24 **(III). Marina Coast's defenses**  
25

1 Marina Coast raises a number of defenses that are predicated, in part, on the issue of lead agency  
2 which was resolved above.

3 Marina Coast contends that this Court is without jurisdiction because (1) the relief sought by Ag  
4 Land is preempted by the Public Utilities and Public Resources Codes; (2) the Petition is not ripe; (3) Ag  
5 Land has not exhausted its administrative remedies before the Cal PUC; and (4) Ag Land is precluded  
6 from challenging Cal PUC's orders because of res judicata. At trial, the Court permitted Marina Coast to  
7 amend its answer to include an affirmative defense of failure to join indispensable parties.

8 Marina Coast also argues that this Court lacks primary jurisdiction and must apply the three-part  
9 test set out in *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4<sup>th</sup> 893 (*Covalt*).

10 **(A). Preemption**

11 There is no preemption issue. The issue is one of jurisdiction and is addressed below.

12 **(B). Ripeness**

13 The Court has found that the Petition is ripe for review to the extent that Marina Coast is the lead  
14 agency. (*Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4<sup>th</sup> 402, 418.)

15 The fact that the Cal PUC might or might not approve the Regional Project does not change the  
16 fact that Marina Coast acted first and filed a Notice of Determination. Marina Coast must now comply  
17 with CEQA in its role as the lead agency for the Regional Project.

18 **(C). Exhaustion**

19 The Cal PUC is not a party to this action and Ag Land raised the lead agency issue, amongst  
20 others, in its letter with attached exhibits dated March 16, 2010 that was directed to Marina Coast. (AR  
21 1106-1134.) Ag Land also sent a letter with numerous exhibits to Marina Coast on April 5, 2010, and  
22 spoke at the April 5, 2010 public hearing. (AR 595-601, 591-592.) (Pub. Resources Code, §21177.)

23 Ag Land has exhausted its administrative remedies before Marina Coast.  
24  
25

1                   **(D). Res judicata**

2                   There is no final litigated prior decision on the merits regarding what public entity is the lead  
3 agency for the Regional Project and res judicata does not apply. (*Mycogen Corp. v. Monsanto Co.* (2002)  
4 28 Cal.4th 888, 896-897.)

5                   Res judicata applies if “(1) the decision in the prior proceeding is final and on the merits; (2) the  
6 present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the  
7 present proceeding or parties in privity with them were parties in the prior proceeding.” (*Federation of*  
8 *Hillside Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202.)

9                   **(E). Covalt – Jurisdiction**

10                  Public Utilities Code section 1759 provides: “Jurisdiction of courts to review orders or decisions  
11 of commission; Writ of mandamus[.] [¶] (a) No court of this state, except the Supreme Court and the  
12 Court of Appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct,  
13 or annul any order or decision of the commission or to suspend or delay the execution or operation  
14 thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as  
15 provided by law and the rules of court. [¶] (b) The writ of mandamus shall lie from the Supreme Court  
16 and from the Court of Appeal to the commission in all proper cases as prescribed in Section 1085 of the  
17 Code of Civil Procedure.”

18                  The *Covalt* “decision set forth a three-part inquiry for determining whether the action would  
19 interfere with the [Cal] PUC in the performance of its duties and thus was precluded by [Public Utilities  
20 Code] section 1759(a): (1) whether the [Cal] PUC possessed the authority to formulate a policy regarding  
21 any public health risk related to electric and magnetic fields arising from the powerlines of regulated  
22 utilities, or a policy regarding what actions, if any, the utilities should have taken to minimize any such  
23 risk; (2) whether the [Cal] PUC had exercised that authority to adopt such policies; and (3) whether the  
24 superior court action filed by private persons against the utility would hinder or interfere with those  
25 policies.” (*People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1145.)

1 Here, the Cal PUC has authority to regulate California American Water Company. It has no  
2 authority to regulate or dictate to Marina Coast, or any other public agency, regarding the approval and  
3 development of the Regional Project. This action does not hinder the Cal PUC's ability to regulate  
4 California American Water Company, and this Court has jurisdiction.

5 **(F). Indispensible parties**

6 Marina Coast contends that Ag Land had to name the Water Resources Agency and California  
7 American Water Company as real parties in interest because they were parties to the Water Purchase  
8 Agreement and the Settlement Agreement.

9 The Water Purchase Agreement requires that the Water Resources Agency pump water that will  
10 be delivered to the Regional Project and after desalination at the Marina Coast facilities, the water will be  
11 distributed by California American Water Company to its customers. The Settlement Agreement  
12 determined the ownership of certain facilities, and the parties to the Settlement Agreement agreed to  
13 protect the Salinas Valley Groundwater Basin.

14 This action and the Court's decision do not interfere with either agreement, and if it could be  
15 construed that the decision touches on either agreement, the Court finds that the Water Resources Agency  
16 and California American Water Company do not qualify as indispensable parties.

17 "The determination of whether a party is indispensable is governed by Code of Civil Procedure  
18 section 389, which first sets out, in subdivision (a), a definition of persons who ought to be joined [in an  
19 action] if possible (sometimes referred to as 'necessary' parties). Then, subdivision (b) sets forth the  
20 factors to follow if such a person cannot be made a party in order to determine whether in equity and good  
21 conscience the action should proceed among the parties before it, or should be dismissed without  
22 prejudice, the absent person being thus regarded as *indispensable*. [] The subdivision (b) factors are not  
23 arranged in a hierarchical order, and no factor is determinative or necessarily more important than  
24 another. (*County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144,  
25 1149.) [¶] In a CEQA action like the one before us, Public Resources Code section 21167.6.5 provides  
that any recipient of an approval that is the subject of [the] action must be named as a real party in

1 interest. (Pub. Resources Code, § 21167.6.5, subd. (a) (section 21167.6.5(a)).) Thus, section  
2 21167.6.5(a) makes any such recipient a necessary party in a CEQA action, just as those persons  
3 described in subdivision (a) of Code of Civil Procedure section 389 are necessary parties. But a recipient  
4 of an approval, while a necessary party, is not necessarily an indispensable party, such that the CEQA  
5 action must be dismissed in the absence of that party. Instead, if a court finds that unnamed parties  
6 received approvals, [the court must] then consider whether under Code of Civil Procedure section 389,  
7 subdivision (b) [the unnamed parties] qualify as indispensable parties, requiring dismissal of the action.  
8 (*County of Imperial v. Superior Court, supra*, 152 Cal.App.4th at p. 31.)” (*Quantification Settlement*  
9 *Agreement Cases* (2011) 201 Cal.App.4th 758, 848, some quotation marks omitted, italics in original.)

10 The Court has found Marina Coast to be the lead agency and that finding does not “impair or  
11 impede” the Water Resources Agency or California American Water Company’s ability to protect their  
12 interests, nor will either entity suffer prejudice by the Court’s lead agency determination and any  
13 resolution of CEQA issues (see Section III below), the judgment here is adequate, and Ag Land would not  
14 have an adequate remedy if the action were dismissed. (Code Civ. Proc., § 389 subd. (a) and (b); Pub.  
15 Res. Code, § 21167.6.5 subd. (a).)

16 *Disposition*

17 Ag Land’s request for relief is granted as set forth above.<sup>1</sup>

18  
19 Lydia M. Villarreal

20 Dated: FEB 02 2012

21 HON. LYDIA M. VILLARREAL

22 Judge of the Superior Court  
23  
24

25 <sup>1</sup> Marina Coast counsel has argued the importance and dire need of procuring a reliable water source for the Monterey Peninsula. The Court wishes to point out to counsel that the Court’s authority is limited to reviewing compliance with CEQA by those agencies responsible for procuring a reliable water source.

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**CERTIFICATE OF MAILING**

**C.C.P. SEC. 1013A**

I do hereby certify that I am not a party to the within stated cause and that on **FEB 0 2 2012** I deposited true and correct copies of the following documents: ORDER in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses, as hereinafter set forth:

Michael Stamp, Esq.  
479 Pacific Street Suite 1  
Monterey, CA 93940

Mark Fogelman, Esq.  
33 New Montgomery Street Suite 290  
San Francisco, CA 94105

Michael Masuda, Esq.  
P.O. Box 2510  
Salinas, CA 93902-2510

Dated: **FEB 0 2 2012**

CONNIE MAZZEI Clerk of the  
Monterey County Superior Court

**Sally Lopez**  
By \_\_\_\_\_, Deputy Clerk