

October 18, 2022

John Ainsworth
California Coastal Commission
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Re: Public hearing on the California American Water Company's ("CalAm") CDP Application
#9-20-0603

Dear Mr. Ainsworth:

I write on behalf of LandWatch Monterey County, a regional group working to combat climate change through sensible land use, transportation and water policy. The Coastal Commission should delay any action on a Coastal Development Permit (CDP) for the CalAm desalination facility because it lacks critical information about the project and its alternative, the Pure Water Monterey Expansion. If the Commission decides it cannot delay action, it must deny the CDP because it does not have the information the Coastal Act requires to make findings related to Section 30260 and 30013 of the Act.

The missing information includes the results of

- (1) The California Public Utilities Commission's (CPUC's) pending adjudication of the water supply and demand assumptions; and
- (2) The pending adjudication of water rights before the Monterey Superior Court and the State Water Resources Control Board (SWRCB).

Both of these adjudications have a strong potential to alter the project the CPUC previously authorized. A week ago, a CPUC Administrative Law Judge issued a Proposed Decision that would direct CalAm to purchase 2,250 AFY from the Pure Water Monterey Expansion. Under the CPUC's 2018 decision, this increase in water supply requires the CPUC to reassess operating restrictions for any desalination facility to protect ratepayers. Changes in supply and demand should also require the CPUC to reassess the need, timing, and size of a desalination facility. CalAm admits that the project must be changed by

proposing a new “phased” approach, which the CPUC specifically rejected in 2018 as more costly and more environmentally damaging.

The Coastal Commission does not have a procedure to adjudicate the competing claims about supply and demand, which are now being litigated before the CPUC with a decision not expected before March 2023. Nor does the Commission have a procedure to determine how changes in supply and demand affect the need, timing, size, or operating restrictions for a desalination facility or how changes in these assumptions, and changes in the desalination facility costs since 2017, will affect water rates. Yet the Coastal Commission must draw conclusions about all of these matters in order to make *required* Section 30260 findings about the availability of a feasible alternative and the relative effects of the desalination project and its alternative on public welfare and environmental justice.

To move forward now, without information about potential water charges and environmental impacts, would mean giving CalAm a blank check for an undefined future desalination project that could harm the public welfare, impede environmental justice, and thwart the intent of the Coastal Act.

And there is no reason to proceed without the CPUC’s adjudication of supply and demand and its likely reassessment of the desalination facility. The approval of the Pure Water Monterey Expansion will result in new water availability well before a desalination facility could provide new water, and it will allow the SWRCB to lift its Cease and Desist Order (CDO).

Even though the CPUC has authorized and directed CalAm to proceed with a specific project, that project is now likely to be substantially changed given new circumstances. As the agency with authority to direct CalAm to implement a project, the CPUC, not the Coastal Commission, must determine the need, timing, and rate consequences of a potential desalination project in light of changed circumstances.

The Coastal Commission has not assumed the obligation under CEQA to examine a revised desalination project, yet the change CalAm now proposes in the project approved by the CPUC will require a supplemental environmental impact report (EIR).

Accordingly, the Coastal Commission should defer action on a CDP until the CPUC, the Monterey County Superior Court, and the SWRCB resolve these outstanding issues.

A. To issue a CDP, the Coastal Commission must have an adequately analyzed project and alternative before it.

1. Because the Coastal Commission must make findings regarding alternatives and public welfare, it cannot reasonably act until presented with a stable and adequately analyzed project and alternative.

Coastal Act Section 30260 requires specific findings in order to issue a CDP for a coastal-dependent industrial facility that is inconsistent with Coastal Act Chapter 3 policies.

It is undisputed that the project is inconsistent with policies for protection of biological resources, for example, because it will destroy over 7 acres of an Environmentally Sensitive Habitat Area (ESHA), i.e., the rare coastal dune habitat.

Thus, the Coastal Commission must make Section 30260 findings that (1) there is no feasible alternative with lesser environmental impacts; (2) denial of the permit would adversely affect public welfare; and (3) environmental impacts are mitigated to the maximum extent feasible.

To find there is no feasible alternative, the Coastal Commission must have accurate information about supply and demand to assess the actual need for the project and the feasibility of the alternative.

To assess public welfare effects of the project, the Coastal Commission must have accurate and stable information about the desalination project size, its timing in relation to water supply and demand, its utilization and costs, and the resulting water rates for the project and its alternative.

2. The Coastal Commission policy to consider environmental justice also requires a stable and adequately analyzed project.

The Coastal Act requires the Commission to take environmental justice impacts into account. Coastal Act Section 30013 requires the Coastal Commission to “advance the principles of environmental justice and equality.” Applicable environmental justice considerations include ensuring “availability of a healthy environment for all people” and ensuring that “the effects of the pollution are not disproportionately borne” by communities already experiencing such impacts.¹ The Coastal Commission’s stated policy

¹ Coastal Act, § 30107.3(b)(1), (2); see also Coastal Act, § 30604(h).

is “to integrate the principles of environmental justice, equality, and social equity into all aspects of the Commission’s program and operations.”²

There are substantial environmental justice and public welfare issues with the project.

For example, the desalination facility would site another industrial facility in the already overburdened and disadvantaged City of Marina with no benefits to that city.

Or, for example, the desalination facility would result in higher water rates for disadvantaged and low income populations in the Peninsula and Seaside. Although the desalination project would provide subsidized water to the Castroville community, there are seven times more disadvantaged and lower income ratepayers in the Peninsula and Seaside than there are in Castroville, and they would pay higher rates to subsidize Castroville.³

To assess environmental justice effects of the project and its alternative, the Coastal Commission must have the same information it needs to assess the public welfare effects: accurate and stable information about the project size, its timing in relation to demand, its capacity utilization, its costs, and the resulting water rates for the project and its alternative.

B. The Coastal Commission should delay any action on a CDP for CalAm because it lacks necessary information to make required findings or a decision in the best interest of the public. The Commission should not act until the CPUC completes its current adjudications.

1. The CPUC is poised to approve the Pure Water Monterey Expansion, which four local public agencies identify as a feasible alternative to desalination.

The CPUC’s Administrative Law Judge (ALJ) has issued a Proposed Decision in Phase One of Proceeding A-21-11-024, which would direct CalAm to enter a Water Purchase Agreement (WPA) for 2,250 AFY from the Pure Water Monterey (PWM) Expansion.⁴ The CPUC may act to approve this decision as early as November 3, 2022. Based on the consensus recommendation of all parties to the CPUC proceeding, including CalAm, and based on the ALJ’s Proposed Decision, it is very likely that the CPUC will approve the WPA.

² Coastal Commission Environmental Justice Policy, March 8, 2019, available at https://documents.coastal.ca.gov/assets/env-justice/CCC_EJ_Policy_FINAL.pdf.

³ Coastal Commission Staff Report, August 25, 2020.

⁴ CPUC Proposed Decision, 9/30/22, available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M497/K343/497343610.PDF>.

According to public agencies, including the City of Marina, Marina Coast Water District (MCWD), the Monterey Peninsula Water Management District (MPWMD), and Monterey One Water (M1W), and according to other parties to the CPUC proceedings, the PWM Expansion is a feasible alternative, which has lesser environmental impacts and substantially reduces environmental justice impacts. These parties have argued and presented substantial evidence that:

- the PWM Expansion is a feasible alternative because it meets foreseeable demand for 30 years and provides a drought-proof supply by banking water in the Seaside aquifer;
- the PWM Expansion would substantially avoid environmental justice impacts because it would not site another industrial facility in Marina, which is already overburdened with such facilities, and because it would provide substantially lower water rates for the vast majority of affected disadvantaged communities; and
- the PWM Expansion would avoid impacts to ESHA biological resources and have lesser environmental impacts.

CalAm, acting as it must to maximize profits on behalf of its shareholders, has disputed the evidence offered by the public agencies, their experts, and other participants in the proceedings. However, facing penalties for non-compliance with the SWRCB's CDO, CalAm has agreed that the CPUC should authorize and direct CalAm to enter into a WPA for 2,250 AFY from the PWM Expansion.

2. The Coastal Commission cannot anticipate the results of the CPUC's current reassessment of supply and demand.

In the ongoing Phase 2 of Proceeding A-21-11-024, the CPUC is reassessing the supply and demand assumptions on which it relied when it approved the 6.4 million gallons per day (mgd) desalination facility in 2018. These CPUC proceedings must be concluded to enable the CPUC and the Coastal Commission determine (1) whether the PWM Expansion is a feasible alternative that meets foreseeable demand and (2) whether the desalination facility previously approved by the CPUC is still needed. If the desalination facility is still needed, the CPUC will need to reconsider how large it should be, when it should be constructed, and what operating restrictions are needed to protect ratepayers from an oversupply of water.

The public agency parties and their experts have submitted testimony that the Pure Water Monterey Expansion and existing supplies provide a drought-proof supply sufficient to meet foreseeable demand for decades. CalAm disputes this testimony. Because the CPUC

must still hold evidentiary hearings and accept briefing, it will not be able to resolve these issues until March 2023.

The Coastal Commission cannot authoritatively resolve, and should not attempt to resolve, these complex supply and demand issues. The Commission will not review the extensive testimony submitted by the parties to the CPUC proceeding. The Commission does not have the benefit of the CPUC's evidentiary hearings, including cross examination of witnesses, because those hearings have not yet been held. The Commission does not have the benefit of the parties' briefing to the CPUC on supply and demand, because that briefing will not be submitted until after the evidentiary hearings. The CPUC, not the Coastal Commission, is charged to resolve these matters. The Commission should defer action on the CDP until the CPUC does so.

3. In order to protect ratepayers, the CPUC's 2018 decision provides for reexamination of the desalination project if CalAm is directed to purchase water from the PWM Expansion. The Coastal Commission should not act on a CDP until the CPUC makes revisions to the size, timing, or operations of the desalination facility in light of new supply and demand information.

The CPUC's 2018 decision provides that the CPUC would act to protect ratepayers from "excessive costs" if CalAm buys water from the Pure Water Monterey Expansion:

If . . . Cal-Am seeks approval of a WPA for water from an expanded PWM project to serve customers in Cal-Am's Monterey service territory, *the Commission will consider, and would likely, impose as enforceable conditions additional operational restrictions on the desalination project approved by this decision.* These restrictions, if adopted, *would avoid excessive costs being charged to Cal-Am ratepayers* by ensuring that the total water supply available to Cal-Am customers from the desalination plant plus the PWM expansion WPA would not exceed the water that would be available by virtue of operating the desalination project alone, absent further Commission discretionary action. In any application for a PWM expansion WPA, Cal-Am shall include information concerning such water amounts and potential operational restrictions to meet this operational parameter.⁵

Since the PWM Expansion supply was not assumed in the 2018 CPUC approval of the 6.4 mgd desalination facility, even if CalAm's original demand estimates remained accurate, there would be a substantial oversupply of water if CalAm were to the 6.4 mgd project, *which is the only project CalAm is currently authorized by the CPUC to implement.*

⁵ CPUC Decision 18-09-017, p. 44, emphasis added.

The supply and demand assumptions will also change unless the CPUC disagrees with every argument made by the public agencies and their experts that projected supply will meet projected demand for decades.

In light of the change in supply assumptions with the very probable approval of the PWM Expansion WPA, and the probable change in demand assumptions if the CPUC agrees with any of the local public agency intervenors in the current proceeding, the CPUC must address critical ratepayer impact issues. The CPUC must either assure that no desalination facility is constructed before there is demand for its water supply, or must clarify that shareholders, not ratepayers, would be responsible for the costs of over-capacity, including the enormous fixed costs that will be incurred regardless how much water is produced by the facility.

The CPUC's 2018 decision does not clarify at what operating capacity level the CPUC would allow CalAm to recover these costs from ratepayers.⁶ For example, would CalAm be permitted to recover all of its costs if the desalination facility operated at only 60% or 40% of capacity? If so, what would be the impact on rates? If not, would the desalination project be viable for CalAm?

Furthermore, as noted above, the 2018 Decision provides that CalAm was supposed to provide information on operating restrictions for the desalination facility in any application to contract for PWM Expansion supply in order to "*avoid excessive costs being charged to Cal-Am ratepayers* by ensuring that the total water supply available to Cal-Am customers from the desalination plant plus the PWM expansion WPA would not exceed the water that would be available by virtue of operating the desalination project alone, absent further Commission discretionary action."⁷ CalAm's application for the WPA did not propose such operating restrictions, and the CPUC has neither scoped nor considered the issue.

Participants in the current proceedings asked that the Commission include consideration of the need, size, timing, and operating restrictions for the desalination facility as part of the second phase of the current proceedings.⁸ The CPUC limited Phase 2 to reassessment

⁶ Order Paragraph 36 provides: "Three cost factors will be considered by the Commission when reviewing the advice letters submitted pursuant to this decision. These cost factors are: 1) costs are for facilities that are used and useful; 2) costs must be reasonable; and 3) costs are for facilities that operate at an appropriate capacity to minimize costs for ratepayers." (CPUC Decision 18-09-017, p. 214.) The Decision does not clarify how these factors, which may pull in different directions, would be balanced or how the Commission would determine what operating capacity would "minimize costs for ratepayers." (CPUC Decision 18-09-017.)

⁷ CPUC Decision 18-09-017, p. 44, emphasis added.

⁸ See, e.g., CPUC, Prehearing Conference Reporter's Transcript, Vol. 1, January 25, 2022, pp. 27-40, available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M444/K124/444124005.PDF>; Motion Of The Monterey Peninsula Water Management District For Party Status, Jan. 3, 2022, p. 4 [proceeding should consider

of supply and demand. However, at the conclusion of the Phase 2, depending on its results, the CPUC may decide on additional proceedings, or a Phase 3 to the current proceedings, to consider these issues.

In sum, neither the CPUC nor the Coastal Commission has assessed the issues related to the need to protect ratepayers by altering the size, timing, or operations of the desalination facility in light of the new supply from the PWM Expansion and revised demand estimates.

The Coastal Commission is neither competent nor authorized to change the size, timing, or operations of a desalination facility, or to assess the rate impacts from such changes, which will affect the public welfare and environmental justice findings the Commission must make. The Coastal Commission should defer consideration of a CDP until the CPUC addresses these issues.

4. Desalination project costs and water rates have not been updated since 2017.

Although the CPUC's 2018 Decision establishes certain cost caps for the desalination facilities, it provides a mechanism for CalAm to seek recovery of additional costs beyond those caps. The cost caps were based on cost estimates provided in 2015 and 2017.

Construction costs have substantially increased in the past five years and are likely to continue to increase further before any construction actually commences.

Neither the CPUC nor the Coastal Commission has assessed the likely changes in project costs and how those changes would affect water rates and thus affect the public welfare and environmental justice findings the Commission must make. Again, the Coastal Commission should not act on the CDP until the CPUC has addressed this issue.

C. The Coastal Commission should defer action on a CDP until the water rights litigation between MCWD, City of Marina, and CalAm is resolved.

“whether Cal-Am’s MPWSP is needed, when it is needed, at what size, and at what cost”]; [Response Of The City Of Marina To Application 21-11-024, Jan. 3, 2022, pp. 14-16](#) [proceedings should include, inter alia, rate impacts, operating restrictions, updated costs, construction timeline, and whether desalination facility is still needed and consistent with community values and environmental justice]; [Response Of Marina Coast Water District In Support Of Approval Of Amended And Restated Water Purchase Agreement For The Pure Water Monterey Groundwater Replenishment Project](#), Jan. 3, 2022, pp. 8-9 [proceedings should consider modifications to desalination facility to ensure ratepayers are not overburdened by oversized or unnecessary facilities]; [LandWatch Monterey County’s Motion For Party Status](#), Jan. 14, 2022, p. 2, [proceedings should include assessment of continuing need for and appropriate sizing of desalination facility].

Litigation over water rights issues between Marina and CalAm, which MCWD has joined, will not be resolved until late 2023.⁹ The Superior Court has sought an opinion from State Water Resources Control Board as to whether CalAm may take groundwater from the critically overdrafted Salinas Valley Groundwater Basin.

The litigation should be completed in 2023. The Coastal Commission should not issue a CDP until the litigation is resolved because it cannot make authoritative findings on groundwater impacts on the existing record.

D. If the CPUC approves the Pure Water Expansion Water Purchase Agreement, there will be no reason to act immediately on a CDP for CalAm.

The approval of the PWM Expansion will result in new water availability well before a desalination facility could provide new water. Regardless of the conclusion regarding long term demand, the PWM Expansion water supply will certainly be sufficient for near term demand.

Water from the PWM expansion facility will be available within about two years, well before any desalination facility could begin supplying water. Indeed, CalAm admitted as much by seeking authorization to enter into the WPA in order to get out from under the SWRCB's CDO. Accordingly, the Coastal Commission need not act now on a CDP for a desalination facility

E. The Coastal Commission should not consider CalAm's newly proposed 4.8 mgd desalination project or its "phased" approach to a 6.4 mgd facility because (1) the CPUC rejected this approach as more costly and environmentally damaging and (2) the Coastal Commission has not assumed the legal obligation to environmentally review this changed project.

News reports state that CalAm is now proposing a "phased" implementation beginning with a 4.8 mgd facility and following this with an expansion to 6.4 mgd.¹⁰ The news report says that CalAm would use only 4 slant wells instead of the seven that the CPUC approved and directed CalAm to implement.

⁹ City of Marina v. RMC Lonestar, et al., Monterey Superior Court Case No. 20CV001387.

¹⁰ Businesswire, [California American Water Announces Phasing for Monterey Peninsula Water Supply Project](#), Oct. 5, 2022; Monterey Herald, Monterey Peninsula: Cal Am announces it will pursue Marina desal plant in phases, Oct. 11, 2022.

1. The CPUC rejected a phased project because it would be more costly, would not reduce or avoid any environmental impacts, and would in fact cause more environmental impacts.

The CPUC's 2018 approval of the desalination project was for a 6.4 mgd facility, i.e., Alternative 5a.¹¹ The Decision *directs CalAm to implement the 6.4 mgd facility*.¹² The CPUC specifically found that the 6.4 mgd facility is the “environmentally superior alternative” and that “no other alternatives are feasible, are capable of meeting project objectives, or would reduce significant impacts of the project.”

This decision came after six years of proceedings with 21 intervenors.¹³

The CPUC specifically rejected a 4.8 mgd facility based on its findings that there would be “little or no cost differential.”¹⁴

The Decision found that “a 4.8 mgd desalination plant would not avoid or substantially lessen any significant impacts of the project: the significant impacts that would result from construction would be the same as the plant would have the same footprint, and require the same pipelines, and while one fewer well would be drilled, it would still require five well pads at the CEMEX site.”¹⁵ Indeed, *the CPUC found that a phased implementation of a 4.8 mgd facility followed by a 6.4 mgd facility would “increase environmental impacts, face additional scrutiny in the permitting review process, and increase costs to ratepayers.”*¹⁶

Environmental impacts would be increased by the phased approach because construction impacts would occur twice; for example, “[d]rilling all wells at once will likely result in fewer environmental effects than drilling six wells now and returning in the future to disturb the area to drill the seventh well.”¹⁷ These findings were based on argument and data submitted by CalAm.

¹¹ CPUC Decision 18-09-017, pp. 72, 79, 206, 207.

¹² *Id.*, p. 207.

¹³ *Id.*, Appendix A, Procedural History.

¹⁴ *Id.*, p. 69.

¹⁵ *Id.*, pp. 69-70.

¹⁶ *Id.*

¹⁷ *Id.*, pp. 129-130.

The CPUC found that the “reduction in the size of the desalination plant from 6.4 mgd to 4.8 mgd would increase the annual Operations and Maintenance (O&M) costs by \$340,000” and that these increased O&M costs would “would offset the increased one-time capital costs for the larger 6.4 mgd plant within only a few years.” The Commission found “we cannot identify significant, if any, cost savings to ratepayers associated with construction of a 4.8 mgd size plant compared with the construction of a 6.4 mgd size plant.” Again, these findings were based on argument and data submitted by CalAm.

Also based on CalAm’s arguments and data, the CPUC found that the smaller plant would still require six slant wells, four for source water and two “for back-up and peaking capacity,” so only one well could be deferred.¹⁸ The CPUC found that “the cost savings for deferring one slant well to initially operate the facility at 4.8 mgd is small in comparison to the risks associated with eliminating the well. [footnote omitted] For example, drilling all seven wells at once reduces overall costs spent on each well (due to economies of scale) while the cost to drill only one well in the future is significantly higher. Drilling all wells at once will likely result in fewer environmental effects than drilling six wells now and returning in the future to disturb the area to drill the seventh well. Also, delay in drilling just one well increases overall project risks.”¹⁹ Thus, the CPUC concluded “[w]e therefore do not find a benefit to ratepayers in deffering [sic] the drilling of one well.”²⁰ Again, these findings were based on argument and data submitted by CalAm.

Despite CalAm’s 2018 position that the 4.8 mgd plant would require six slant wells to ensure back-up and peaking capacity, news reports indicate that CalAm is now proposing only four slant wells. This proposal is flatly inconsistent with the CPUC’s 2018 findings.

The CPUC’s CEQA findings that there would be overriding considerations that justify approving a project with unmitigated impacts were based on its finding that the 6.4 mgd facility is the environmentally superior project and that its benefits “outweigh the benefits of any of the other alternatives examined, including the alternatives deemed infeasible. . .”²¹

In sum, based on cost and CEQA considerations, the CPUC’s 2018 decision rejected both the 4.8 mgd alternative and the alternative that would commence with a 4.8 mgd facility and subsequently phase in the 6.4 mgd facility.

¹⁸ *Id.*, quoting CalAm.

¹⁹ *Id.*, p. 130.

²⁰ *Id.*

²¹ *Id.*, p. 207.

2. As a responsible agency under CEQA, the Coastal Commission cannot approve the changed project CalAm now proposes without a subsequent environmental review of the effects of the changed project.

CalAm's proposed 4.8 mgd phased project is a change to the project that the CPUC approved, and the CPUC found that it would have more severe significant impacts. If there are changes in the project or changes in circumstances, or if significant new information becomes available after the lead agency certified the EIR for the project, *the responsible agency* must prepare a subsequent or supplemental EIR before making a new discretionary approval like issuing a CDP.²²

Furthermore, the Coastal Commission may not rely on the CPUC's administrative record because the CPUC's EIR did not formally assess a 4.8 mgd facility or the phased project approach, and the CPUC findings specifically rejected the phased project approach, finding that it was not the environmentally superior project.

Where a project has significant unmitigated impacts, CEQA requires that the approving agency adopt a feasible alternative that reduces that impact.²³ Here, the record does not support adoption of a phased project as a reduced impact alternative. To the contrary, the CPUC found that it would increase significant construction-related environmental impacts and that it was not feasible.

Conclusion

We urge the Commission to fulfill its obligation to protect California's coast, resources, and communities by deferring any action on the CDP permit until pending adjudications of supply and demand and water rights are completed and the Commission can consider a stable, well defined desalination project and its alternative in meaningful detail.

Regards,



Michael DeLapa
Executive Director

Cc: Tom Luster
Wade Crowfoot

²² CEQA, § 21166; 14 Cal Code Regs §§ 15052(a)(2), 15096(e)(3), 15162.

²³ CEQA, § 21002.