

February 5, 2019

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

Re: City of Marina and Marina Coast Water District v. Public Utilities
Commission of the State of California (Real Party in Interest: California-
American Water Company) Case No. S253585

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I. Introduction

Pursuant to California Rule of Court 8.500(g), LandWatch Monterey County (“LandWatch”) submits this *amicus curiae* letter in support of petitions by the City of Marina and Marina Coast Water District seeking review of the actions of the California Public Utilities Commission (the “Commission”) in certifying an Environmental Impact Report (“EIR”) under the California Environmental Quality Act (“CEQA”) for its approval of a Certificate of Public Convenience and Necessity for the California-American Water Company (“Cal-Am”) desalination facility (“Project”).

The Commission erred because it failed to consider a reasonable range of alternatives to the Project. The error was particularly egregious because the Commission was aware of at least one feasible alternative that would have avoided or substantially lessened significant impacts caused by the Project that were identified in the EIR.

II. Statement of Interest

LandWatch Monterey County (“LandWatch”) is a California non-profit public benefit corporation exempt from federal income taxation under Section 501(c)(3) of the U.S. Internal Revenue Code. LandWatch’s organizational purpose is to promote sound land use planning and legislation at the city, county, and regional levels, to combat urban sprawl, and to promote livability in the region’s cities and towns, through public policy development, advocacy, and education. LandWatch is dedicated to preserving economic vitality, high agricultural productivity, and environmental health in Monterey County by encouraging effective public participation in the land use planning process.

LandWatch intervened in the Commission's administrative proceedings for Cal-Am's application (A-12-04-019). LandWatch's overarching goal in this intervention was to ensure that the Commission carefully considered alternatives to the proposed 9.6 mgd desalination plant that would avoid or minimize significant environmental impacts, including consumption of energy, discharge of greenhouse gasses, discharge of brine to the Monterey Bay National Marine Sanctuary, and disturbance of environmentally sensitive habitat.

In order to reduce the size and environmental impacts of the proposed desalination plant from 9.6 mgd to 6.4 mgd, LandWatch and other intervenors successfully advocated that the Commission consider approving a Water Purchase Agreement between Cal-Am and two local water agencies to purchase 3,500 acre-feet per year of water from the Pure Water Monterey ("PWM") water recycling project. The Commission did consider and approve the Agreement in a distinct phase of its proceedings, and the PWM project is under construction.

III. Statement of Support

The fundamental objective of the Cal-Am application to the Commission was to obtain permission to construct a water supply project for the Cal-Am service area that would meet foreseeable demand and allow Cal-Am to cease its illegal diversions from the Carmel River. Even under Cal-Am's inflated water demand assumptions, the maximum justifiable water supply project was never greater than the 9.6 mgd desalination project initially proposed.

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

In addition, the EIR's alternatives analysis relies on an overstatement of foreseeable water demand. In particular, the EIR fails to acknowledge what is evident from more than a decade of consistently declining demand on the Monterey Peninsula: a 6.4 mgd desalination plant is not needed in the Cal-Am service territory due to permanent conservation measures and enormous increases in water prices. The EIR's presentation of water demand is informationally inadequate under CEQA because it relies on inconsistent supply and demand data and fails to reconcile conflicting data; and these

failures preclude substantial evidence. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 438-443, 447.)

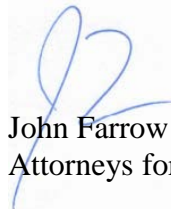
Foreseeable future demand through the life of the project could be met through an alternative project: a 2,250 acre-feet per year second phase expansion in the *already-approved* PWM project. (See Surfrider Foundation and LandWatch's Comments on Proposed Decision, [41APP568, A26267-26287].) The EIR fails to comply with CEQA because it fails to consider this feasible alternative, which meets the fundamental project objectives. (CEQA Guidelines, § 15126.6.) In addition, the Commission's rejection of this alternative as infeasible violated CEQA because it was not based on substantial evidence. (CEQA Guidelines, § 15091(b).) Indeed, the Commission refused even to *hear* evidence of this alternative project's feasibility, evidence that was repeatedly offered by two local water agencies and backed by their expenditures of hundreds of thousands of dollars for studies *and* by their demonstrated ability to implement the first phase of the PWM project. The Commission's willful blindness to the feasible PWM expansion alternative violates CEQA.

The Commission aggravated this failure by ordering Cal-Am to consider the PWM expansion alternative in the future – after the Commission has already approved the 6.4 mgd desalination plant. Delegation of the evaluation of alternatives or mitigation measures to an applicant violates CEQA's requirement for public participation and its requirement that an EIR reflect the lead agency's independent judgment, particularly if the unaccountable consideration of mitigation or alternatives occurs after project approval. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1460 [alternatives]; *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308 [mitigation]; Guidelines, §§ 15025(b), 15090(a)(3), 15084(e).)

In sum, because the Commission failed to comply with CEQA in its consideration of alternatives, LandWatch respectfully requests that the Court grant the writ of review requested by the City of Marina and Marina Coast Water District and vacate the decision by the Commission.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



John Farrow

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