BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Application of California American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates	Application A.12-04-019 (Filed April 23, 2012)

SURFRIDER FOUNDATION'S OPENING BRIEF ON THE PROPOSED SETTLEMENT AGREEMENT ON PLANT SIZE AND LEVEL OF OPERATION

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INTRODUCTION

Following the December 2, 2013 settlement hearing, Surfrider Foundation renews its objections to the proposed Settlement Agreement on Plant Size and Level of Operation ("Sizing Agreement"). The parties to the Sizing Agreement ("settling parties") bear the burden to show that the Sizing Agreement is reasonable and supported by the record.[1] Yet even after their recent opportunity to supplement the evidentiary record, the settling parties have failed to meet this burden.

The Sizing Agreement remains unreasonable in numerous respects. Its demand allocations for lots of record and tourism bounceback are unsupported, and often undermined, by the evidentiary record. Moreover, while purporting to seek water for lots of record and tourism bounceback, the Sizing Agreement leaves open the possibility that this requested water will not go to those uses. Finally, the Sizing Agreement fails to

[1] D.92-10-051, *Re Pacific Gas and Electric Company*, 46 CPUC 2d 113, 124.

actually incorporate the City of Pacific Grove's forward-looking and attainable Local Water Project into the Agreement's water supply portfolio.

As Surfrider explained in its original comments on the Sizing Agreement, desalination plants are not only costly, but also environmentally harmful, both through climate impacts and through direct impacts to the marine environment.[2] These impacts increase with the size of the plant.[3] As a result, building a project that is larger than necessary to replace water from the Carmel River is not in the public interest. The State Water Board implicitly recognized this fact by requiring conservation measures and small water projects as part of Cal-Am's replacement water supply portfolio.[4] And the settling parties themselves have recognized that the "purpose of the MPWSP is to replace a significant portion of the existing water supply from the Carmel River, as directed by the [State Board]."[5] The Commission should therefore ensure that any desalination plant on the Monterey Peninsula is appropriately sized to meet actual replacement water needs and does not produce desalinated water, and the resulting environmental impacts, out of proportion to these needs.

[2] Surfrider Foundation's Comments on the Proposed Settlement Agreement on Plant Size and Level of Operation ("Surfrider Comments") at 6-8.

[3] *Id*.

[4] State Water Resources Control Board, Order WR 2009-0060 ("Cease and Desist Order") at 10, 37, 40-45, 62.

[5] Settling Parties' Motion to Approve Settlement Agreement on Plant Size and Operation at 2.

ARGUMENT

I. The Record Does Not Support the Calculated Demand for Lots of Record.

The settling parties continue to insist that the MPWSP should include demand from future development of lots whose subdivision has been recorded but remain unimproved or that may be further improved as of right. They base this claim on the assertion that Cal-Am has a legal obligation to serve these "lots of record." But even with the benefit of additional hearings to support their lots of record demand figure, the record reveals the Sizing Agreement allocates far more water than the evidence supports.

The record contains no calculation supporting the Sizing Agreement's 1,181 acre-foot allocation for lots of record. This number is apparently derived from a 2001 Monterey Peninsula Water Management District ("MPWMD") analysis that is not in the record, preventing both the Commission and the parties from evaluating its contents.[6]

In any event, MPWMD "does not certify that the 1,181 AFY value is valid,"[7] which calls into question the reasonableness of relying on it to determine the size of the desalination plant. Instead, the settling parties primarily rely on a 2002 draft study that calculated 1,211 acre feet for vacant lots and anticipated remodels, and which "pulled forward" numbers from earlier studies in 1998 and 2001.[8] The 2002 study is also not in the record, but MPWMD has at least provided some evidence of its contents.[9]

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[6] Late Filed Exhibit WD-3, 2002 Lots of Record Breakdown at 1.

[7] Direct Testimony of David J. Stoldt ("Stoldt Testimony") at 9:15-16.

[8] Transcript Vol. 13 2172:7-13.

[9] *See* Late Filed Exhibit WD-3, 2002 Lots of Record Breakdown.

Even assuming that MPWMD has correctly conveyed the contents of these studies, they are unlikely to accurately depict the real demand attributable to the lots of record. The record shows that much has changed since the studies were generated well over a decade ago. For instance, the predicted water needs for general plan build-out have dropped almost 25 percent between 2006 and the present.[10] Any water demand for lots of record is a subset of this general plan build-out demand.[11] If overall build-out demand has dropped since 2006 then the portion attributable to the lots of record has likely declined as well. Indeed, the Water Board's Cease and Desist Order imposed numerous new conservation requirements in 2009[12] and the settling parties have frequently testified that conservation measures on the peninsula are extensive.[13]

This evidence shows that the acre-foot-per-lot demand assumptions used in the decade-old studies are no longer valid today.[14] With conservation measures in place, each lot will use less water than the 2001 and 2002 studies assume. These outdated studies cannot support the demand allocation for lots of record in the Sizing Agreement.

Not only will any existing lots of record demand less water, but the record also shows that fewer lots of record will actually be improved and demand any water at all. For instance, the 2002 study, on which the settling parties rely, finds that there are 179

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[10] Late Filed Exhibit WD-3, 2002 Lots of Record Breakdown at 6, Table 13; Transcript Vol. 13 2105:6-8.

[11] Transcript Vol. 13 2100:21-2101:8.

[12] *See* Cease and Desist Order at 10, 62.

[13] Transcript Vol. 13 2106:25-27, 2157:23-2158:17,

[14] Late Filed Exhibit WD-3, 2002 Lots of Record Breakdown at 2 ("Demand was derived by assuming water use factors of .286 acre-feet for a single-family unit, .134 acre-feet for a multi-family unit, and .755 acre-feet for a commercial/industrial unit").

lots of record in the City of Pacific Grove.[15] But in this proceeding, Pacific Grove staff have already testified that this 179 lot number is erroneous. In actuality, the City has "fewer than 100 vacant lots."[16]

Moreover, "[n]ot all legal lots are buildable."[17] At the evidentiary hearing, the settling parties testified that these legal lots are "considered buildable" because they have land use approvals.[18] But "considered buildable" is not the same as buildable in fact and only actually buildable lots represent water demand. The settling parties have indeed admitted that the Sizing Agreement overestimates the lots that are actually buildable over the next decade.[19]

Thus, the evidentiary hearing only confirmed what the record already revealed—the evidence supporting the Sizing Agreement's lot-of-record demand allocation is sparse, outdated, and unreliable. Without updated information that actually accounts for changes on the Monterey Peninsula since the late 1990s and early 2000s, the 1,181 acre-foot allocation is unreasonable.

II. The Agreement's Allocation for Tourism Bounceback Lacks Record Support.

The Sizing Agreement's "tourism bounceback" water allocation is supposedly earmarked "exclusively [for] the hospitality industry"[20] to provide for tourism recovery on the Peninsula. But as Surfrider noted in its settlement comments, the record contains

[15] Transcript Vol. 13 2170:18-2172:7.

[16] Direct Testimony of Sarah Hardgrave at 4:12-13.

[17] Stoldt Testimony at 9:7-22.

[18] Transcript Vol. 13 2169:27-2170:1.

[19] Transcript Vol. 13 2154:2-13.

[20] Transcript Vol. 13 2166:20-21.

no support whatsoever allocating 500 acre feet of demand for tourism bounceback.[21] The settlement hearing did nothing to remedy this omission. No witness at the hearing testified about how the 500 acre feet number was calculated, or how this represents a hypothetical increase in tourism-related water demand. And the record contains no evidence of the hospitality industry's current water demand, what level of demand the settling parties expect the hospitality industry to "bounceback" to, or the difference between current and expected demand. In fact, in 2000, water demand for *the entire commercial sector* was only 440 acre feet greater than a recent three year average of commercial demand.[22] Because the hospitality industry represents only a subset of commercial demand, this evidence further undermines the Sizing Agreement's demand allocation for tourism bounceback.

At times, the settling parties have argued that available water supply will limit the recovery of the hospitality industry on the Peninsula.[23] Yet, as the settling parties conceded at the hearing, the economy—not water supply—is the only current impediment to tourism recovery.[24] The best the settling parties could offer is their speculation that "there could come a time," at some unspecified date, when the hospitality industry would need additional water.[25]

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[21] Surfrider Comments at 15.

[22] Stoldt Testimony at 9.

[23] California-American Water Company's Reply Comments in Support of Motions to Approve Both the General Settlement Agreement as well as the Settlement Agreement on Plant Size and Operation ("Cal-Am Reply Comments") at 9-11; Transcript Vol. 13 2127:20-24.

[24] Transcript Vol. 13 2135:16-2136:25.

[25] Transcript Vol. 13 2136:23-24.

Even if there were evidence that water supply is hampering tourism bounceback, the record indicates that the settling parties have overstated the amount of economic recovery that would likely occur. At the hearing, the settling parties asserted that the tourism bounceback allocation is not meant to support recovery from the 2008 recession, but instead targets a return to tourism conditions at the height of the dotcom bubble.[26] For instance, a member of the Coalition for Peninsula Businesses testified that the calculated occupancy rate for 2013 was seven percentage points less than the occupancy rates in 2000.[27] But the record lacks evidence of how this occupancy rate compares to rates in the intervening twelve years,[28] or to rates in other jurisdictions with a comparable tourism industry. Nor does the record offer any justification for using occupancy rates in 2000—a time of extraordinary, and not easily repeated, economic activity—as its baseline.

Under the circumstances, the settling parties appear to have chosen the baseline that would lead to the largest "bounceback" calculation and thus the largest desalination plant. This aspiration is no substitute for evidence of a reasonable level of future hospitality activity. Lacking such information, it is unreasonable to assume that hospitality-industry growth will reach the levels that the settling parties claim.

Thus, the Commission should reject the Sizing Agreement's 500 acre-foot allocation for tourism bounceback because this number has no support in the record and

[26] Transcript Vol. 13 2174:1-5, 2175:4-9.

[27] Transcript Vol. 13 2179:23-27.

[28] Transcript Vol. 13 2180:27-2181:11.

is predicated on the unsupported assumption that additional water is needed for tourism to reach levels that were only observed at the height of an economic bubble.

III. The Sizing Agreement Should Restrict any Water Allocated for Lots of Record or Tourism Bounceback Solely to those Uses.

Even if the Commission could accept the Sizing Agreement's unsupported allocations for demand from lots of record and tourism bounceback, the Sizing Agreement is also unreasonable because it fails to guarantee that MPWSP water will actually serve those uses.

Throughout the hearing, the settling parties repeatedly attempted to justify the Sizing Agreement's asserted demand by arguing that Cal-Am has a legal obligation to serve lots of record and by stating that tourism is vital to the Monterey Peninsula.[29] But they have also undermined their commitment to these uses by refusing to actually set aside water for lots of record and tourism bounceback. Cal-Am and the settling public agencies argued strenuously against such an earmark in their reply comments on the Sizing Agreement,[30] and this argument was repeated at the hearing.[31] The settling parties' positions are irreconcilable. If, as they claim, Cal-Am is "legally obligated" to produce additional water for lots of record and tourism bounceback, the Sizing Agreement is unreasonable to the extent that it does not guarantee water for these obligations.

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[29] Transcript Vol. 13 2096:17-23, 2129:13-16, 2169:26-2170:3.

[30] Cal-Am Reply Comments at 7; Monterey Peninsula Regional Water Authority's, Monterey Peninsula Water Management District's and City of Pacific Grove's Reply Comments in Support of Motions to Approve the General Settlement Agreement and the Settlement Agreement Concerning Plant Size and Operation ("MPRWA Reply Comments") at 6-7.

[31] Transcript Vol. 13 2155:2-15.

As Surfrider has previously noted, desalinated water is both too costly and too environmentally damaging to be used for more than a replacement water supply. But without assurances in the Sizing Agreement, water allocated to tourism bounceback and lots of record can be used for intensified use on existing developments, or for new development outside of the lots of record.[32] The settling parties repeatedly testified that they are not seeking water for growth,[33] but that is exactly what that water would become.

The settling parties have attempted to avoid being bound by their representations about water needs on the Monterey Peninsula, by arguing that altering the Sizing Agreement would somehow implicate land use decisions.[34] Far from intruding on local land use decisions, however, such a requirement merely commits the settling parties to stand by the plans that they have presented to the Commission for constructing and operating the desalination plant. In granting a Certificate of Public Convenience and Necessity for a water project owned and operated by Cal-Am, the Commission has both the authority and the obligation to require such a commitment in the Sizing Agreement.[35]

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[32] *See* Surfrider Comments at 11-12.

[33] Transcript Vol. 13 2100:16-17("this is not growth and this is not optional"), 2106:20-21 ("we're not talking about growth"), 2107:4-5 ("I don't look at that as growth"), 2165:2 ("that isn't growth, isn't additional water").

[34] Cal-Am Reply Comments at 7; MPRWA Reply Comments at 6-7.

[35] *See* D.12.10.030, *Re California American Water Company*, 2013 WL 5448407 at *3-4 (holding that "the Commission has very broad and far-reaching authority over the operations and facilities of public utilities under its jurisdiction, including Cal-Am").

IV. Pacific Grove's Local Project Should Be Incorporated Into the Sizing Agreement's Supply Portfolio.

Finally, the settlement hearing further confirmed that the Sizing Agreement is unreasonable in its failure to include Pacific Grove's Local Water Project in the calculated water supply. At the hearing, Thomas Frutchey, the Pacific Grove City Manager testified that the Local Water Project is "an entirely independent water source" and is "constant throughout the year."[36] This project will produce up to 500 acre feet of non-potable water that can directly offset an identical amount of demand for MPWSP water.[37]

Cal-Am has attempted to avoid including the Local Water Project in the Sizing Agreement by arguing that the project is "speculative."[38] In fact, the opposite is true. Substantial record evidence supports the probability of the Local Water Project's success and water from the Project will be available much sooner than water from Cal-Am's desalination plant.[39] Indeed, at the settlement hearing, City Manager Frutchey confirmed the Local Water Project will be online before 2017 and that the City will likely determine the project's final size within a year.[40]

As Surfrider has previously noted, Pacific Grove proposed the Local Water Project in response to ALJ Weatherford's direction that Cal-Am "seriously consider in good

[36] Transcript Vol. 13 2107:19-21.

[37] Transcript Vol. 13 2177:6-10.

[38] Cal-Am Reply Comments at 11.

[39] Surfrider Comments at 16-18.

[40] Transcript Vol. 13 2107:25-26, 2177:15-25.

faith" public agency participation in the MPWSP.[41] But Cal-Am has failed to include this recycled water project in the MPWSP. Instead of simply dismissing the Local Water Project, Cal-Am should take this obligation seriously.

CONCLUSION

For all of these reasons, in addition to the reasons stated in Surfrider's original comments on the Sizing Agreement, the Commission should reject the Sizing Agreement as it is currently proposed.

DATED: January 21, 2013 SHUTE, MIHALY & WEINBERGER LLP

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[41] Surfrider Comments at 16.