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June 30, 2020

VIA EMAIL AND FEDEX

Mr. Tom Luster
California Coastal Commission
Energy and Ocean Resources Unit
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Responses to October 28, 2019 Staff Report for the Monterey Peninsula Water Supply Project, Coastal Development Permit Application No. 9-19-0918, and Appeal No. A-3-MRA-19-0034

Dear Mr. Luster:

On behalf of California-American Water Company ("Cal-Am"), this letter responds to the Coastal Commission's ("Commission") October 28, 2019, Staff Report regarding the coastal development permit ("CDP") application for and appeal regarding the Monterey Peninsula Water Supply Project ("Project"), which was considered in an informational hearing on Agenda Items Th8a and 9a at the Commission's November 2019 meeting.

While we appreciate Commission staff's efforts in preparing the Staff Report, as noted in our testimony at the Commission's November 2019 meeting, we believe the Staff Report contains a number of inaccuracies about the Project, its potential impacts, and potential water supply alternatives. To ensure that staff has an accurate record upon which to assess the Project and prepare an updated Staff Report in advance of the planned August 20, 2020, hearing on the Project, a fulsome response to the Staff Report and certain opponent submittals is provided in **Attachment A** to this letter. We also have provided responses to questions that the Commissioners raised at the end of the Project's informational hearing in **Attachment B**.

Our most significant concern with the Staff Report's analysis is staff's consistent, misplaced reliance on the proposed expansion of the Pure Water Monterey recycled water project ("PWM Expansion") as an alternative to desalination and a reason to deny the Project's CDPs. Not only does the Commission lack the authority under either the Coastal Act or the California Environmental Quality Act to evaluate the PWM Expansion as a Project alternative, but the PWM Expansion is wholly infeasible. Since the Commission's November 2019 meeting, the Monterey One Water ("M1W") Board of Directors has denied certification of the PWM Expansion's Final Supplemental Environmental Impact Report ("SEIR") and did not approve the PWM Expansion. As a result, the PWM Expansion is not moving forward and cannot serve as the alternative water supply project that staff previously envisioned. Moreover, the original Pure

Water Monterey recycled water project that was supposed to come online in January 2020, and supply Cal-Am's customers with 3,500 acre-feet per year ("afy") of recycled water has run into significant technological and feasibility issues, is not currently providing Cal-Am with any water, and the current annual injection volume is only 2,030 afy – ***just 58% of its commitment***. Further, M1W now estimates that the original Pure Water Monterey project will not come online until late August or early September. This information calls into question all of the supply and demand analyses submitted to the Commission by various Project opponents – each of which relies on the full 3,500 afy from the original Pure Water Monterey project plus a full 2,250 afy from the PWM Expansion to claim Cal-Am's Project is not needed. The Peninsula will need a water supply source to make up for the Pure Water Monterey project's shortfalls—the Project remains the only reliable water supply to make up these water shortfalls and satisfy the Peninsula's water demands.

Reliability of available water supplies was one of the most significant issues the California Public Utilities Commission considered when it approved Cal-Am's Project and concluded the PWM Expansion was not a feasible alternative to desalination. (See CPUC Decision D.18-09-017, Appx. C, p. C-17.) The current inability of the original Pure Water Monterey project to provide its promised amount of water also raises similar technical concerns about the PWM Expansion. In addition, and as raised by numerous stakeholders in the M1W Board proceedings, the PWM Expansion is further flawed because M1W has failed to secure adequate source waters for that project, has not disclosed all of that project's potential environmental impacts, and cannot commit to provide a certain quantity of product water. Simply put, the PWM Expansion cannot provide a drought-proof water supply sufficient to meet current and future demands of the Monterey Peninsula, and cannot be considered a feasible alternative to the Project.

In addition, the Staff Report reaches several incorrect conclusions regarding the Project's impacts and consistency with the Coastal Act and the City of Marina LCP. Those issues are addressed in detail in **Attachment A**, and summarized below.

- **ESHA**: The Staff Report concluded that the Project could impact 35 acres of ESHA. Based on a more detailed impact assessment, AECOM has confirmed Project construction and maintenance will permanently impact only 2.181 acres of ESHA and temporarily impact 15.306 acres of ESHA. Cal-Am has submitted a proposed Habitat Mitigation and Monitoring Plan to the Commission through which it proposes to restore approximately 14.6 acres on the CEMEX site to mitigate these impacts, including 1.8 acres beyond the amount required, which will ensure the Project will not result in a substantial adverse impact to sensitive habitats.

- **Coastal Hazards**: Technical analyses by AECOM confirm the Project's slant wells will not be impacted by coastal erosion until near the 2120 planning horizon, contrary to the Staff Reports assertions. Accordingly, the Project is entirely consistent with coastal hazard policies.

- **Coastal Waters and Marine Resources**: The Staff Report claims that it is unclear what effects the Project would have on water quality and marine life. However, the

Project's potential impacts to ocean water quality and marine life were analyzed in detail in the Project's Final Environmental Impact Report/Environmental Impact Statement ("EIR/EIS"), which concluded that the Project would not result in a significant impact with the implementation of feasible and enforceable mitigation measures.

- **Groundwater**: The Staff Report requests additional groundwater data, however, experts and the State Water Resources Control Board have confirmed additional groundwater data collection and modeling is unnecessary. The modeling in the EIR/EIS represents the culmination of a multi-year, peer-reviewed effort, and any additional modeling would not change the Final EIR/EIS's conclusions that the Project's potential impacts to groundwater supplies in the Salinas Valley Groundwater Basin would be less than significant.

- **Public Access**: The Staff Report alleges that Project operation could result in adverse effects to public access and recreation, but the Project footprint will be *de minimis* and would not impede beach use or access at any time. Specifically, under regular operations, Project infrastructure within fenced areas will occupy only about 0.06 percent (approximately 0.24 acres) of the CEMEX site (approximately 400+ acres) and during yearly maintenance activities (commencing in year five of operations) an additional approximately 0.25 acres would be occupied for a 9 to 18 week period.

- **Environmental Justice**: Staff contends that the Project would disproportionately burden communities of concern through higher water rates and that a feasible alternative could provide water without such impacts (the PWM Expansion). Staff inappropriately disregards many Project benefits to low income communities – including the severely disadvantaged community of Castroville – and fails to consider the infeasibility and drawbacks of the PWM Expansion. Moreover, staff does not consider Cal-Am's low income ratepayer assistance program or that the CPUC carefully evaluated Cal-Am's water rates and determined them to be just and reasonable

- **Water Supply and Demand**: The Staff Report asserts that an "updated analysis" of Monterey Peninsula water supply and demand provided by the Monterey Peninsula Water Management District's General Manager, David Stoldt, demonstrates a decrease in water demand in the area, such that the PWM Expansion has become a feasible alternative to the Project. This ignores extensive critiques of Mr. Stoldt's analysis from Cal-Am and other interested parties, and fails to recognize that the CPUC has already determined appropriate levels of supply and demand for the Cal-Am service area, consistent with its statutory mandate. Contrary to Mr. Stoldt's conclusions, implementation of the PWM Expansion instead of the Project would only lead to significant water supply shortfalls along with corresponding economic hardship on the Monterey Peninsula and impacts to the steelhead trout because of additional water diversions from the Carmel River.

- **PWM Expansion Environmental Impacts**: Staff's determination that the PWM Expansion will have fewer adverse environmental effects than the Project largely ignores the CPUC's analysis of the Project's environmental impacts in the Final EIR/EIS, and severely understates the PWM Expansion's own potential environmental effects. Notably, the M1W Board denied certification of the PWM Expansion's SEIR based on inadequate analysis of that project's environmental impacts.

Notwithstanding any potential inconsistencies with the City of Marina LCP or Coastal Act policies, the Commission can approve the Project under Coastal Act section 30260. The Project is a coastal-dependent industrial facility and, as demonstrated in **Attachment A**, (1) alternative locations of the Project are infeasible or more environmentally damaging; (2) to not permit the Project would adversely affect the public welfare; and (3) the Project's environmental impacts have been mitigated to the maximum extent feasible. Further, **Attachment C** hereto provides a series of special conditions proposed by Cal-Am, in an effort to help address several of Commission staff's stated concerns regarding the Project and its consistency with the Coastal Act. Cal-Am also remains willing to discuss with staff these and other additional special conditions that staff may deem appropriate.

Cal-Am appreciates staff's ongoing efforts in review of the Project, and hopes that the information provided herein will assist in staff's preparation of a Staff Report for the upcoming August 20 hearing. Cal-Am has endeavored to work cooperatively with staff on all aspects of Cal-Am's Project, both in responding to staff's informational requests and in authorizing supplemental studies that staff has requested. Accordingly, Cal-Am hopes to continue that cooperation and respectfully requests that staff review Cal-Am's application, the appeals, and the information in the record objectively and recommend approval of Cal-Am's CDPs. Thank you for your consideration in this matter.

Very truly yours,

Duncan Joseph Moore
of LATHAM & WATKINS LLP

Attachments

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ATTACHMENT A

RESPONSE TO STAFF REPORT AND COMMENTS ON STAFF REPORT FOR APPLICATION 9-19-0918 AND APPEAL A-3-MRA-19-0034

A. Environmentally Sensitive Habitat Areas

Consistent with the analysis provided in the Project's Final EIR/EIS, the Project would not result in a substantial adverse impact to sensitive habitats during Project construction or operation with the implementation of all feasible and enforceable mitigation measures. (Final EIR/EIS at pp. 4.6-198, 4.6-201, 4.6-204 to 4.6-205, 4.6-215, 4.6-258 to 4.6-259.) As requested by Commission staff, Cal-Am has prepared a comprehensive Habitat Mitigation and Monitoring Plan ("HMMP") addressing all potential ESHA impacts within the Coastal Zone.[1] In particular, for the 2.181 acres of potential permanent impacts to ESHA, the HMMP provides for approximately 6.6 acres of restoration (3:1 mitigation ratio) and for the approximately 15.306 acres of potential temporary impacts to ESHA the HMMP would mitigate in-kind and in-place at a 1:1 mitigation ratio. (See HMMP, p. 3-10.) In addition, while not required, Cal-Am proposes to remove an additional 1.825 acres of iceplant and the area would be restored with native vegetation to help ensure the overall success of the restoration program. Thus, as demonstrated below, the Project would conform to the Habitat Protection Policies in the City of Marina's Local Coastal Program ("LCP"), as supplemented by its consistency with the Coastal Dependent Development priorities in the LCP and Coastal Act section 30260, which allows for coastal-dependent industrial facilities like the Project to be approved despite any potential LCP inconsistencies.

Staff Report Contention #1: Staff repeatedly mischaracterizes the scope of the Project's ESHA impacts and estimated timing for restoration. (See Staff Report, pp. 34-37, 42-44.)

> Cal-Am Response: Commission staff overestimates the amount of ESHA the Project will impact and the length of time it would take to restore the ESHA impacted. The Staff Report references a 35 acre area, however, that area reflects the approximate footprint of the entire Project in the Coastal Zone, and not those specific areas that contain ESHA. As detailed in the HMMP, the Project would only permanently impact 2.181 acres of ESHA and temporarily impact 15.306 acres of ESHA. (See HMMP, p. 3-10.) These figures were determined utilizing the definitions of ESHA found in the LCP, Monterey County's North County Land Use Plan, and the City of Seaside Local Coastal Land Use Plan. Based on these definitions AECOM created detailed mapping using GIS accuracy, which is provided at Appendix A to the HMMP.
>
> In addition, as provided in the HMMP, in areas of temporary impacts, restoration work will consist of in-place and in-kind restoration of the same special-status biological resources to their pre-construction condition and as one area of the Project is completed, restoration in that area will begin concurrent with Project construction in other areas of the site. Sequencing work to begin as soon as possible will ensure that the impacts

[1] Cal-Am submitted the HMMP to staff on June 18, 2020.

remain temporary and therefore the impacts should not be considered permanent. (See HMMP, p. 4-11.)

The HMMP was prepared consistent with the requirements of the Final EIR/EIS which, concluded, based on substantial evidence, that the Project would not result in substantial adverse effects on sensitive natural communities, including ESHA, during Project construction or operations with the implementation of feasible and enforceable mitigation measures. (Final EIR/EIS at pp. 4.6-198, 4.6-201, 4.6-204 to 4.6-205, 4.6-215, 4.6-258 to 4.6-259.) As discussed below in Section J, because the Project would not result in a substantial adverse impact on sensitive habitats, the Project may be sited in an area defined as primary habitat without violating the City of Marina's LCP and the Coastal Act.

Staff Report Contention #2: Staff contends that, although the Project's well field will be located on a portion of the CEMEX site that has been disturbed by sand mining activities, those activities are scheduled to end by December 31, 2020, and the site will be restricted to restoration and passive recreation activities pursuant to Settlement Agreement and Cease and Desist Order CCC-17-CD-02 ("Settlement Agreement"). (Staff Report, p. 39.) Public Water Now similarly raises concerns about the Project's impacts to the restoration of the CEMEX site "to its natural state for public access and recreation." (PWN Letter (Nov. 11, 2019), p. 2.)

Cal-Am Response: Staff and Public Water Now misinterpret the Settlement Agreement, which allows for *both* Cal-Am's Project and habitat, public access, *and* low-impact passive recreation to occur on the CEMEX site. (Settlement Agreement, §§ 6.1, 6.2(D)(3), attached hereto as **Exhibit 1**; Final EIR/EIS, p. 8.2-123.) Specifically, the Settlement Agreement memorializes the agreement between the CCC and CEMEX regarding the future allowable uses of the CEMEX site and expressly protects Cal-Am's rights related to the CEMEX Site as follows:

> [N]o development . . . shall occur . . . , provided that improvements to provide low-impact passive recreation, public access, public education, removal activities, activities to restore native habitat, ***and activities consistent with existing easements or other rights of record identified by CEMEX . . . , including those noted in Section 23.2, will not be prohibited.***

(See Ex. 1, Settlement Agreement, § 6.2.D.1 [emphasis added].)[2] Settlement Agreement Section 23.2 further acknowledges Cal-Am's rights to develop the Project on the

[2] The Settlement Agreement's effectiveness was conditioned on the City of Marina's approval of its own agreement with CEMEX regarding Marina's claim that CEMEX's sand mining operations were a public nuisance (the "Mutual Release"). By entering into the Mutual Release, Marina waived any argument that Cal-Am lacks a property right to use the CEMEX site for the express purposes allowed by the easements consistent with the Settlement Agreement. (See Ex. 1, Settlement Agreement, § 9 & Ex. 2.)

CEMEX site, explicitly providing that the Settlement Agreement "is not intended to and ***shall not be construed or deemed to supersede or interfere with any existing rights or obligations of California-American Water Company . . . related to the [CEMEX Site], including but not limited to, the recorded easement and related option.***" (*Id*., § 23.2 [emphasis added].)

Cal-Am acquired from CEMEX an option to purchase permanent easements at the CEMEX site on November 4, 2014, which Cal-Am recorded with the Monterey County Recorder on November 25, 2014. (See Grant of Temporary Easement (Nov. 4, 2014), attached hereto as **Exhibit 2**.) On February 27, 2018, Cal-Am exercised its option to acquire the permanent easements, and, on May 23, 2018, CEMEX, through its subsidiary RMC Pacific Materials, LLC, granted to Cal-Am a permanent easement and an access easement over and across the CEMEX Site for the express purpose of accessing, constructing, installing, operating, and maintaining slant wells and related pipelines and utilities for the Project. (See Recorded Grant of Permanent Easement (May 23, 2018), attached hereto as **Exhibit 3**.) Cal-Am's property interest in the permanent easement at the CEMEX site relates back to the date the option was first made in 2014, two-and-a-half years before CEMEX and the Commission executed the Settlement Agreement. (See *Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1050 [citing cases]; *Anthony v. Enzler* (1976) 61 Cal.App.3d 872, 876 ["option vests in the grantee *the right of acquiring an interest in the land and when the right is exercised it necessarily relates back to the time of giving the option*."] [emphasis in original].)

Further, Section 6.1 of the Settlement Agreement requires CEMEX to transfer title in the property to either manage the property for conservation uses, or use the property for other allowable activities. ***The Settlement Agreement does not require the purchaser to use and manage the property for ESHA restoration.***

> Subject to Section 23.2, Respondent shall transfer fee title to all of the Property to a non-profit or governmental entity or consortium approved by the Commission, in consultation with the City of Marina, . . . such approval not to be unreasonably withheld, that commits to hold and manage the property primarily for conservation purposes, with the only other allowable uses being for low-impact, passive recreation purposes or activities, public access, public education, removal activities, activities to restore native habitat, and activities consistent with existing easements identified by Cemex prior to the Effective Date.

(Ex. 1, Settlement Agreement, § 6.1.A.)

Thus, the Settlement Agreement expressly provides that allowable uses of the CEMEX site include "activities consistent with existing easements identified by Cemex prior to the Effective Date," including Cal-Am's permanent easement for the subsurface slant well network and a non-exclusive access easement to access and use the site for construction and maintenance. (*Id*., § 6.1.) Because Cal-Am is proposing to use the

easement to facilitate Project construction and operation, the Project is consistent with the Settlement Agreement's restrictions on the use of the CEMEX site.

Nonetheless, Cal-Am has proposed to further the Settlement Agreement's intent through the proposed HMMP it has delivered to the Commission, which requires the restoration of approximately 14.6 acres at the CEMEX site (6.6 acres for permanent impacts, 6.2 acres for temporary impacts, and an additional 1.8 acres that is not required but is proposed to benefit the overall restoration of the CEMEX site). Pursuant to the HMMP, restoration at the CEMEX site would include re-establishment, rehabilitation and enhancement of habitats through removal of existing sizeable invasive species populations, and reintroduction of native species indigenous to the dune habitat. The HMMP also requires long-term management activities to remove newly emerging invasive vegetation and protect and preserve the restored and existing native habitats. Therefore, Cal-Am's proposed use is entirely consistent with the Settlement Agreement's intent.

Moreover, although the Settlement Agreement does not require restoration of the entire CEMEX site, Cal-Am's proposed HMMP ensures that any impacts on the CEMEX site as a result of Project construction and operation will be mitigated to the maximum extent feasible. Implementation of the HMMP will result in the restoration of approximately 14.6 acres on the CEMEX site to its natural condition, the funding for which would not be secured in the absence of Cal-Am's Project and the proposed HMMP.

In addition, the Staff Report improperly relies on a baseline for the CEMEX site that includes restored conditions *after* implementation of CEMEX's proposed Reclamation Plan. (See Staff Report, pp. 36-37.) The proper baseline is existing conditions. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.* (2013) 57 Cal.4th 439, 447; CEQA Guidelines, § 15125.) Staff's post-restoration baseline is improper because final removal of CEMEX buildings and facilities is not required until December 31, 2024, with an additional year—until December 31, 2025—to complete grading and seeding. (Final EIR/EIS, p. 8.2-122.) Staff provides no support for its reliance on conditions five years in the future as a baseline for Cal-Am's CDP. Indeed, staff conducts biological surveys based on *existing* conditions in order to evaluate potential impacts. Therefore, the appropriate baseline to measure biological impacts is against existing conditions (i.e., degraded or disturbed dunes), not against possible restoration years in the future.

Staff Report Contention #3: Staff suggests that Cal-Am will perform slant well construction and maintenance work, as well as work on the Monterey One Water outfall, during western snowy plover breeding season in order to meet project deadlines. (Staff Report, pp. 40, 44-45.)

Cal-Am Response: Contrary to staff's suggestion that Project construction will coincide with western snowy plover breeding season and adversely impact plover habitat, the CPUC's Mitigation Monitoring and Reporting Program ("MMRP") limits both when and how Cal-Am can perform Project work to minimize potential impacts to western snowy plover.

First, staff ignores that Cal-Am cannot perform work during western snowy plover breeding season without first obtaining approval from the U.S. Fish and Wildlife Service ("USFWS") and subject to conditions. The MMRP requires that "[c]onstruction work at the slant well heads and along the segment of the Source Water Pipeline located west of the CEMEX processing plant [] ***occur during the western snowy plover non-breeding season*** . . . unless otherwise approved by the USFWS." (Final EIR/EIS, p. 4.6-175 [emphasis added]; CPUC Decision D.18-09-017, Appx. C, p. C-18; *id*., Appx. D, pp. D-19 to D-21.) Similarly, the MMRP requires that slant well maintenance be conducted "between October and February to avoid the western snowy plover nesting season" without prior approval from USFWS. (Final EIR/EIS, p. 4.6-247.) If Cal-Am applies for, and obtains, such approval, it is anticipated that USFWS would condition the construction or maintenance work to avoid or minimize impacts to western snowy plover.

In fact, the Commission approved a similar Special Condition for Cal-Am's test slant well. The test well CDP did not prohibit construction during western snowy plover breeding season, but rather imposed pre-construction and pre-disturbance survey requirements and protections for any work performed between February 28 and October 1. (See Final Adopted Findings, CDP App. No. 9-14-1735, Appeal No. A-3-MRA-14-0050 (Nov. 12, 2014), pp. 8, 13-15, attached hereto as **Exhibit 4**.) The MMRP provides these very same protections, in addition to requiring USFWS approval as a condition to any work that might be required to be performed during plover breeding season.

Further, regardless of whether construction occurs during plover breeding season, slant well construction has been designed to "occur ***outside*** of western snowy plover critical habitat and ***would not result in direct impacts on critical habitat***." (Final EIR/EIS, p. 4.6-197 [emphasis added].) The MMRP also imposes measures to mitigate any potential indirect impacts to snowy plover. (See Final EIR/EIS, pp. 4.6-175 to 4.6-176.) The Final EIR/EIS concluded that, based on substantial evidence, "after mitigation, the permanent loss of snowy plover habitat attributable to the proposed project would be less than significant." (*Id*., p. 4.6-269.) Thus, even if Cal-Am obtains authorization from USFWS to conduct construction or maintenance work during western snowy plover breeding and nesting season, Cal-Am has designed the Project and the CPUC has imposed mitigation to minimize or avoid impacts to western snowy plover. (*Id*., p. 4.6-175.)

In addition, as detailed in the HMMP, temporary impacts to western snowy plover habitat will be mitigated in-place and in-kind and as mitigation for the 2.12 acres of permanent impacts to western snowy plover breeding and foraging habitat, 6.359 acres of new habitat will be established, re-established, rehabilitated, enhanced, and permanently preserved on the CEMEX site. (See HMMP, p. 3-9 to 3-12.) Accordingly, all impacts to western snowy plover will be fully mitigated.

As for potential work on the M1W outfall, the M1W outfall work is a wholly separate project that may be separately conditioned when M1W applies for a CDP for that work. Cal-Am is currently working with M1W to determine how best to implement the outfall work contemplated in the EIR/EIS and is also evaluating potential alternatives to the outfall liner. For purposes of this CDP, however, Cal-Am proposes a Special Condition

(see Attachment C) that would require approval of the outfall work prior to the commencement of Project operations.

Staff Report Contention #4: Staff contends that Cal-Am plans to remove 1,600 cubic yards ("CY") of spoils from well drilling and proposes to spread the spoils evenly in an approximately two-inch think layer across eight acres of ESHA on the CEMEX site. (Staff Report, p. 40.) The salinity of these spoils will adversely affect plant species and could bury the plants or seedlings. (Ibid.) *Although the Final EIR/EIS includes mitigation measures requiring Cal-Am to restore these areas, that restoration could take up to five years, "which would represent a significant diminution of that habitat and its ecological function." (Ibid.) Additionally, spoils spreading would disrupt the western snowy plover's use of this habitat. (Id., p. 41.)*

Cal-Am Response: As an initial matter, the 1,600 CY of spoils referenced by staff assumes that the Project would be constructed with nine new slant wells (on seven concrete well pads), which was the original scope of the Project when it was proposed to be a 9.6 mgd desalination facility. (See Final EIR/EIS, p. 4.6-150.) Because the CPUC adopted Alternative 5a—a 6.4 mgd desalination project—Project construction will involve only the development of six new slant wells (on five well pads), which will result in a reduced amount of approximately 1,003 CY of spoils. (See AECOM Technical Memorandum, Response to CCC Comments on MPWSP Slant Well Drilling Spoils Spreading (June 19, 2020), attached hereto as **Exhibit 5**.) Thus, any impacts to ESHA resulting from the spreading of spoils at the CEMEX site would be less than the Staff Report anticipates.

Nonetheless, Cal-Am agrees with staff's suggestion that spoils be disposed of off-site at an appropriate location to avoid potential impacts to the dunes. Accordingly, Cal-Am will dispose of the well drilling spoils at the Monterey Peninsula Landfill.

As AECOM's Technical Memorandum demonstrates, the disposal of 1,003 CY of spoils offsite at the Monterey Peninsula Landfill would not result in new or more severe impacts beyond those already evaluated in the Final EIR/EIS. (Ex. 5, pp. 2-3.) For instance, the 1,003 CY of spoils represents "less than two one-thousands of one percent of the remaining capacity at the landfill," and thus, disposal of the spoils would not change the EIR/EIS's conclusion that Project impacts to landfill capacity would be less than significant with mitigation. (See *id*., p. 4; see also Final EIR/EIS, pp. 4.13-19 to 4.13-20.) Further, spoils disposal would require only a single truck trip every two to three days during the anticipated seven-month construction period. "[T]he anticipated increase in traffic volumes on public roads would be negligible," and would not create any new or more severe impacts to traffic beyond those identified in the EIR/EIS. (See Ex. 5, p. 4.) In addition, "[g]iven the limited number of 4-mile round trips generated [by off-site disposal], no substantive increase in mobile air emissions would result." (*Id*., p. 5.)

In sum, to avoid potential impacts to ESHA resulting from the spread of well drilling spoils across the CEMEX site, Cal-Am will dispose of the spoils off-site. Any impacts resulting from off-site disposal are negligible and do not create any new or more severe impacts in addition to those identified and mitigated in the Final EIR/EIS.

Staff Report Contention #5: Staff asserts that additional ESHA impacts would result "from the need for Cal-Am to protect or relocate its well sites due to the effects of sea level rise and coastal erosion." (Staff Report, p. 41.) According to staff, "[e]ither of these approaches – protection or relocation – would . . . cause additional and longer-term, though unquantified, disturbance of ESHA." (Ibid.)

> Cal-Am Response: Staff's assertion that the Project's slant well network will need to be relocated due to sea level rise, and that well relocation will cause additional impacts to ESHA, is wholly speculative. As explained in detail in Section B below, there is no evidence that the Project's slant wells will be impacted by coastal erosion until near the 2120 planning horizon. This timing is well beyond the slant wells' useful life. Although two wells may be at risk from wind-blown sand burial within their useful life, it is expected that this risk would be eliminated by implementation of "soft measures" such as revegetation, monitoring, and maintenance. These soft measures will not cause any new ESHA impacts. In the unlikely event that monitoring efforts reveal that the soft measures would be unsuccessful at eliminating potential wind-blown sand hazards at the slant wells, a number of structural "hard" adaptive measures could be implemented including sand fencing, barriers, or relocating or raising well heads. The need for any such hard measures is speculative at this time. Further, hard measures such as raising well heads could be accomplished within the existing permanent impact areas on site, without causing additional ESHA impacts. Therefore, in the unlikely event that hard measures might be needed, the specific measures that may be required and any potential impacts would need to be evaluated through a CDP amendment process. See Section B *infra* for additional discussion regarding coastal erosion and sea level rise and any need for Cal-Am to protect the wells from potential dune migration.

Staff Report Contention #6: Staff recognizes that the Final EIR/EIS identifies "a number of mitigation measures" to avoid or reduce ESHA impacts. (Staff Report, p. 45.) However, staff contends that the mitigation identified in the Final EIR/EIS and adopted by the CPUC is not enough because it "would not result in mitigation 'to the greatest extent possible,' as required by [the City's] LCP." (Staff Report, p. 45.) In particular, staff appears concerned that the measures are "commonly-required" or "not consistent with Commission guidance and past approvals as to what is required to provide adequate mitigation." (Id., pp. 45-46.) *Yet, instead of requiring additional mitigation to address any inadequacies, staff simply claims that "there is no need to identify special conditions" to alleviate staff's concerns because the Project would still be inconsistent with the City's LCP as to other environmental resource areas. (Id., p. 47.)*

> Cal-Am Response: That certain of the measures required by the Final EIR/EIS might be "commonly-required" does not negate the CPUC's determination, supported by substantial evidence, that such mitigation would be effective. (See Final EIR/EIS, pp. 4.6-128 to 4.6-267; *id*., Appx. C, pp. C-20 to C-22; see also *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d at 1011, 1027 [attacks to the adequacy of mitigation measures rejected "where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective"].) The CPUC adopted a robust MMRP to ensure the Project's potential impacts are mitigated to the greatest extent possible. (See Final EIR/EIS, Appx. D, pp. D-1 to D-58.)

Moreover, in compliance with the MMRP and in response to requests from Commission staff and the Commission, Cal-Am has prepared a comprehensive HMMP addressing impacts to habitat within the Coastal Zone. This HMMP expands on the "Mitigation Strategy Overview for CalAm Monterey Peninsula Water Supply Project" (the "Mitigation Strategy") included as Exhibit 5 to the Staff Report, describes all restoration and compensatory mitigation requirements for the Project in the Coastal Zone, and identifies performance standards and success criteria for restoration, long-term monitoring methods, adaptive management and corrective action, reporting requirements, and specific forms of compensatory mitigation. As such, Cal-Am's compliance with the MMRP and HMMP will mitigate potential impacts to ESHA "to the greatest extent possible," as required by the LCP.

Further, staff indicated that additional mitigation imposed through Special Conditions could resolve its concerns regarding the Project's ESHA impacts and consistency with the LCP and the Coastal Act. Cal-Am remains willing to work with staff to develop Special Conditions applicable to the Project to address potential impacts to habitat should staff have continuing concerns regarding LCP and Coastal Act consistency following its review of the attached HMMP.

Staff Report Contention #7: Staff identifies several concerns with the Mitigation Strategy included as Exhibit 5 to the Staff Report. In particular, staff claims that the Mitigation Strategy: (1) inappropriately proposes an in-lieu fee approach as its primary mitigation strategy; (2) focuses solely on impacts within the CEMEX site; (3) identifies areas for proposed mitigation that are already slated for preservation; and (4) fails to account for all permanent or "greater than temporary" ESHA impacts. (Staff Report, p. 46.) MCWD echoes these concerns in its November 13, 2019 letter to staff. (See MCWD Letter (Nov. 13, 2019), p. 6.)

Cal-Am Response: As an initial matter, Cal-Am appropriately tailored its Mitigation Strategy to the mitigation proposed for the CEMEX site based on the Commission's August 22, 2019, Notice of Incomplete Application. In the Notice, the Commission stated: "The proposed project would result in adverse effects within an area the Commission previously determined to be [ESHA] at the CEMEX site in the City of Marina. We recommend you provide a proposed mitigation plan that identifies all steps Cal-Am would implement to address the project's expected ESHA impacts." Consistent with the Commission's request in the Notice, the Mitigation Strategy provided an overview of the mitigation proposed for the CEMEX site.[3] The Mitigation Strategy was not intended to be a comprehensive, exhaustive recitation of all mitigation measures for the entire Project.

Nonetheless, as discussed above, Cal-Am has prepared a comprehensive HMMP for the Coastal Zone that addresses staff's and MCWD's concerns.

[3] Moreover, Commission staff did not respond to Cal-Am's Notice of Incomplete response and identify that there was any deficiency or that or need for a mitigation proposal that involved Project components outside of the CEMEX site.

- **In-Lieu Fee Mitigation.** As explained in the HMMP, Cal-Am proposes to mitigate permanent impacts to ESHA through on-site restoration and conservation at the CEMEX site. Because the CEMEX site is subject to the Settlement Agreement and has not yet been purchased by an approved entity, Cal-Am proposes the following options for HMMP implementation:

    1. Cal-Am could develop, implement, and fund HMMP implementation prior to the transfer of the CEMEX site to a Commission-approved entity. Once the CEMEX site is transferred to the Commission-approved entity, Cal-Am would establish an endowment to fund any remaining restoration and monitoring work, as well as long-term mitigation efforts;

    2. Cal-Am could fund HMMP implementation, but the actual implementation would be undertaken by a Commission-approved entity subject to any requirements imposed through Special Conditions in Cal-Am's CDP; or

    3. Cal-Am could fund an endowment, equal to the cost of HMMP implementation, to contribute toward the purchase of the CEMEX site by a Commission-approved entity. Implementation of the HMMP would be a requirement of the purchase.

    As described in the HMMP, restoration would be implemented through the establishment and re-establishment of habitats, including the removal of existing sizeable invasive species populations and re-introduction of native species indigenous to the dune habitat. Long-term management activities would focus on diligent removal of newly emerging invasive vegetation, and the protection and preservation of restored and existing native habitats.

- **Impacts within the Coastal Zone.** To address staff's concerns about the geographical scope of the Mitigation Strategy, Cal-Am prepared an HMMP that covers Project components throughout the entire Coastal Zone. The HMMP identifies mitigation for all potential ESHA impacts, not just those on the CEMEX site. (See HMMP, p. 3-10.)

- **Restoration on the CEMEX Site.** Staff claims that because the CEMEX site is already slated for preservation, Cal-Am's proposed mitigation is insufficient "to make up for the loss of ESHA acreage." (Staff Report, p. 46.) Contrary to staff's contention, the CEMEX site is not currently "slated for preservation." (*Ibid*.) Rather, the Settlement Agreement requires CEMEX to transfer title to a Commission-approved entity to either manage the property for conservation uses, or use the property for other allowable activities—including the Project. The Settlement Agreement does not require the purchaser to use and manage the property for ESHA preservation or restoration. Further, the areas that the HMMP proposes for restoration at the CEMEX site are not areas that have already been identified for restoration under the Settlement Agreement or the Reclamation Plan for the CEMEX site. (See Ex. 1]; see also Reclamation Plan, attached hereto as

Exhibit 6.) Moreover, Project construction will impact only approximately 8.4 acres (2.181 acres of permanent impacts and 6.2 acres of temporary impacts) of ESHA at the CEMEX site, for which a mitigation ratio of 3:1 will be provided for permanent impacts and 1:1 will be provided for temporary impacts. In addition, while not required, Cal-Am proposes to remove an additional 1.825 acres of iceplant at the CEMEX site and restore the area with native vegetation to benefit the overall restoration of the CEMEX site. This results in a restoration of approximately 14.6 acres at the CEMEX site.

- **Scope of Potential ESHA Impacts.** As demonstrated earlier in this Section A, the Project will only permanently impact 2.181 acres of ESHA and will temporarily impact approximately 15.306 acres of ESHA (for a total acreage of 17.487) as compared to the "up to about 35 acres" identified by staff. (Compare HMMP, p. 3-10, with Staff Report, p. 46.) Thus, the scope and extent of potential ESHA impacts are less than those included in the Staff Report, and the HMMP provides measures and standards to mitigate potential ESHA impacts "to the greatest extent possible," as required by the LCP.

Further, and as discussed above, Cal-Am remains willing to work with Staff to develop Special Conditions to address any of staff's outstanding concerns to the extent those concerns are not addressed through the proposed HMMP.

B. Coastal Hazards

The Project is consistent with the LCP's requirement that projects be unaffected by coastal hazards for their economic life. The only components of the Project with the potential to be impacted by coastal hazards are the slant wells, which have useful lives of approximately 20 to 25 years. Under extremely conservative assumptions, the slant wells would not be impacted by coastal erosion until long after their useful lives—likely not until near the 2120 planning horizon. While there may be some minimal risk to the well heads from sand burial due to wind-blown sand at the end of their useful lives, those risks can be minimized and/or eliminated by "soft measures" such as revegetation, maintenance, and monitoring. Moreover, the slant wells fit within the LCP's exception for an essential support facility to a coastal-dependent industry, as they are part of a seawater desalination project. (See, e.g., Staff Report, p. 53.) Accordingly, the Project, including the test slant well, is consistent with the LCP's coastal hazards policies for development.

Staff Report Contention #8: The Staff Report alleges that the test well site could be at risk from coastal erosion by 2060, and that both the test well site and other well sites would likely be at risk by 2120. (Staff Report, p. 52.)

Cal-Am Response: Cal-Am agrees with the Staff Report's finding that exposure of the majority of the slant well sites is not anticipated to occur until the 2120 planning horizon, well after the Project's operational life. (AECOM Coastal Erosion Hazard Analysis, attached as Exhibit A to Cal-Am's October 2, 2019, Response to Commission Staff's August 22, 2019, Notice of Incomplete Application, pp. 5-6; Staff Report, p. 52.)

However, the Staff Report finds that the test well (and only the test well) has the potential to be exposed to coastal hazards by 2060 and that this creates tension with the Local Coastal Land Use Plan ("LUP") and Local Coastal Implementation Plan ("LIP") policies generally requiring setbacks that will protect new development from coastal hazards for the economic life of a project (at least 50 years). This is incorrect. Exposure of the test well to coastal hazards is not projected to occur until near the 2120 planning horizon, long after its anticipated useful life of 20 to 25 years and the 50 year period provided in LUP and LIP. (AECOM Coastal Erosion Hazard Analysis, pp. 5-6.) Therefore, the Project does not result in tension between the LUP and LIP policies and the risk for the test slant well to be impacted by coastal erosion.

Staff's claim that the test slant well could be at risk by 2060 relies on unreasonable and excessive coastal retreat assumptions. (Staff Report, p. 52.) Staff's reliance on these assumptions and rejection of AECOM's reasonable and supported analysis is wrong—the test slant well is unlikely to be impacted until the 2120 planning horizon, long after 2060. AECOM's analysis is extremely conservative. AECOM considered three sea level rise scenarios to conservatively assess the potential for coastal erosion impacts on the Project:[4] (1) a low-risk aversion scenario, which has a 17% chance of being exceeded; (2) a medium-high risk aversion scenario, which has a ***0.5%*** chance of being exceeded; and (3) an extreme risk aversion scenario which does not even have an associated probability because it is so speculative. (AECOM Coastal Erosion Hazard Analysis, pp. 5-6.) Further, as staff notes, the analysis of coastal hazards "includes the high GHG emission scenario for each [planning horizon of 2040, 2060, and 2120] to provide a more conservative assessment of expected effects" and "also considers the effects of both a 100-year and 500-year storm event on site erosion to provide additional conservatism." (Staff Report, p. 51.) Using the extreme risk aversion scenario and the 500-year storm event, the most conservative option, AECOM concluded that the slant wells (including the test slant well) would not be at risk from coastal erosion until near the 2120 planning horizon. (AECOM Coastal Erosion Hazard Analysis, pp. 5-6.)

In conducting this analysis, AECOM applied a reasonable and conservative 60 percent reduction in the historic coastal retreat rate to account for the cessation of sand mining activities, based on prior analysis of retreat reductions at other sand mine closure sites along the southern Monterey Bay coastline earlier in the 20th century, combined with a site-specific sand budget analysis. (AECOM Coastal Erosion Hazard Analysis, pp. 6-7; see also Staff Report, p. 51, fn. 47.) This reduction is based in part on a study commissioned by the Office of Naval Research that assessed sand mining impacts on long-term dune erosion in southern Monterey Bay.[5] Moreover, when the Commission

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[4] These are the same scenarios advised by the Commission's guidance documents. (California Coastal Commission, Sea Level Rise Policy Guidance (2018) Projected Sea Level Rise: Monterey, Table G-6, p. 298, available at https://documents.coastal.ca.gov/assets/slr/guidance/2018/0_Full_2018AdoptedSLRGuidanceUpdate.pdf.)

[5] E.B. Thornton, et al., *Sand mining impacts on long-term dune erosion in southern Monterey Bay* (February 2006), available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a464654.pdf.

was considering the CEMEX Settlement Agreement in 2017, its own staff prepared a technical report stating, "[i]f sand mining from the CEMEX Pond were to stop, the rate of shoreline retreat and dune erosion within the SMB Littoral Cell would likely ***reduce significantly***." (See Exhibit 5 to Commission Staff Recommendations and Findings for CEMEX Closure, p. 2, attached hereto as **Exhibit 7**, [emphasis added].) Here, staff acknowledges that the closure of the CEMEX sand mine is anticipated to result in "improvements to shoreline change and reductions in dune retreat" (Staff Report, Exhibit 6, p. 3), but fails to apply ***any*** reduction in the coastal retreat rate to the CEMEX site resulting from closure of mining operations.[6] Staff states only that "the 60% assumption might be high" and without providing a basis for rejecting the assumption, instead applies ***no*** reduction as an "upper bound" on potential coastal retreat. (Staff Report, Exhibit 6, pp. 2-3.) Applying no reduction of coastal retreat rate due to cessation of sand mining conflicts with the available literature on coastal retreat, as well as staff's own prior conclusions, and is not supported by any evidence. (See, e.g., Staff Report, p. 51, fn. 47.) The Staff Report itself acknowledges that AECOM's analysis was not only using extreme scenarios, but considered 100- and 500-year storm scenarios "to provide additional conservatism." (Staff Report, p. 51.) Staff's refusal to assume any reduction of coastal retreat is not a reasonable approach, and staff does not provide any modeling or data to support its assumption.[7] As a result, the Staff Report's projections of sea level rise and coastal erosion do not take into account the actual physical conditions on the CEMEX site and should not be relied upon for planning purposes.

Even though the test slant well is not projected to be exposed to coastal hazards until well after the 2060 date claimed by staff and likely near the 2120 planning horizon, Mitigation Measure 4.2-10 conservatively requires Cal-Am to monitor and report the rate of coastal retreat to the Commission annually. (Final EIR/EIS, p. 4.2-72.) Beginning at least five years prior to anticipated slant well exposure, Cal-Am must take steps to remove the wells from service and abandon them. (*Ibid.*) Thus, even in the extremely unlikely event that the coastal retreat far exceeds any probable scenario, impacts would be less than significant with mitigation and would remain consistent with Coastal Act and LCP policies regarding coastal hazards.

Further, it is important to note that the Project has seven wells for reliability purposes, but does not need all seven to be operating in order to maintain the Project's permitted water deliveries. Operation of five is sufficient. Thus, in the very unlikely event that the test

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[6] The improvements to shoreline change and reductions in erosion were precisely some of the factors contemplated in seeking the closure of the CEMEX sand mining operations. (See, e.g., Ex. 7, Commission Staff Recommendations and Findings For CEMEX Closure, pp. 3, 21-23 ["once CEMEX stops dredging the pond, erosion and dune retreat should be much lower due to the increased volume of sand that will stay in the system"]; see also Ex. 1, Settlement Agreement, p. 1; City of Marina Resolution No. 2017-57 Finding the CEMEX Mine in Violation of the Municipal Code, pp. 1-2, attached hereto as **Exhibit 8**.)

[7] Even under staff's approach, eliminating any and all reductions to coastal retreat from the cessation of sand mining, the Staff Report only identifies a potential impact at 2060, years after the useful life of the test slant well has passed. (Staff Report, p. 52.)

slant well needs to be decommissioned early due to coastal hazards, the Project could continue to supply water to the Monterey Peninsula.

Staff Report Contention #9: The Staff Report alleges that foredune recession could bury the slant well heads with dune sand by 2040 and that no significant analysis was provided of the potential for sand burial of the slant well from wind erosion. (Staff Report, p. 52-53; Exhibit 6, p. 4.)

Cal-Am Response: In response to the Staff Report's suggestion that additional analysis of foredune recession be conducted, AECOM has evaluated the possibility for sand burial based on observations of historical dune behavior and application of conceptual models. AECOM's analysis is attached here to as **Exhibit 9**. In its analysis, AECOM determined that the primary mechanism for landward dune migration is through dune blowouts—windblown sand processes that are funneled through dune formations. (*Ibid.*) Specifically, blowouts from existing trough formations in the dunes pose the largest risk for landward sand migration, while new trough and saucer formations present less risk. (*Ibid.*) Consistent with the Staff Report, AECOM concluded that under conservative assumptions, dune migration could potentially expose two of the seven well head sites to wind-blown sand near the end of their useful lives of 20 to 25 years. (See Ex. 9, AECOM Coastal Dune Analysis.) However, AECOM's analysis also determined that impacts to those two well head sites could be effectively eliminated with implementation of certain measures. (*Ibid.*) The other well head sites are not projected to be impacted by dune migration within their useful lives. (*Ibid.*)

AECOM's analysis found that the slant well sites could be protected from risk of sand burial through the implementation of "soft measures" such as a simple maintenance and monitoring program, removal of invasive non-native plant species, and reestablishment of native dune species that would stabilize the dunes and prevent landward migration of sand. (See Ex. 9, AECOM Coastal Dune Analysis.) Monitoring of the dunes could be combined with the shoreline change monitoring that will already occur as part of Mitigation Measure 4.2-10. (*Ibid.*; see also Cal-Am Response to Staff Contention #8, *supra*.) Contrary to the Staff Report's conclusion, these proposed soft measures would not result in any additional adverse impacts to ESHA because the measures are restorative in nature and would work to stabilize the existing dune habitat. (*Ibid.*; Staff Report, p. 53.) Dune stabilization is well-recognized as an important tool in coastal management. The dune restoration and stabilization efforts proposed by AECOM are also recommended by the Commission's Sea Level Rise Policy Guidance and are being used throughout the state, including regionally. (See Ex. 9, AECOM Coastal Dune Analysis.) Indeed, the removal of invasive plant species and revegetation with native dune species would likely enhance ESHA value in the area. (*Ibid*.) Accordingly, it is expected that the risk of sand burial can be avoided with soft measures that will result in no additional ESHA impacts during the useful lives of the slant wells, and likely for much longer.

In the unlikely event that these soft measures do not fully stop landward migration of sand toward the two at-risk well heads, AECOM's analysis determined that other mitigation options are available. (See Ex. 9, AECOM Coastal Dune Analysis.) For

example, measures could include raising a potentially impacted well head at its current location or constructing physical protective barriers. (*Ibid.*) Staff noted that such simple measures likely would be effective. (Staff Report, p. 53.) Because raising the well heads or constructing protective barriers would occur within the permanent impact area of the well head sites, those measures would result in no new impacts to ESHA. (See Ex. 9, AECOM Coastal Dune Analysis.) Additionally, sand fencing could be installed to further reduce the risk of burial and would have the added benefit of providing important dune stabilization. (*Ibid.*) However, depending on its placement, sand fencing installed outside of the Project footprint could have the potential to affect small areas of ESHA. (*Ibid.*) If any of these "hard measures" become necessary, they would need to be proposed to the Commission under a permit amendment at a later date given that the specific measures needed would be dependent on future, unknown conditions.

Moreover, as discussed above, decommissioning two wells would not prevent the Project from maintaining its permitted water deliveries, because the Project only requires five of its seven wells to provide 6.4 mgd as authorized by the CPUC. Accordingly, as an available option, the Commission could consider decommissioning up to two well heads depending on the observed risks of sand burial and the efficacy of the proposed soft measures through ongoing monitoring.

Cal-Am proposes a Special Condition (see Attachment C) regarding the potential risks to the wellheads from sand burial and associated measures to eliminate such risks.

Staff Report Contention #10: The Staff Report contends that Mitigation Measure 4.2-10 would be ineffective to mitigate impacts related to coastal hazards because relocation of the well field "may be infeasible due to property ownership issues," "would result in substantially greater adverse effects on ESHA," and "would likely interfere with habitat restoration efforts expected to occur inland of the well sites." (Staff Report, pp. 52-53.) MCWD also submitted a comment letter to the Coastal Commission on November 13, 2019, which restates the Staff Report allegations regarding Cal-Am's inability to mitigate coastal hazards.

Cal-Am Response: Mitigation Measure 4.2-10 requires Cal-Am to monitor and annually report the rate of coastal retreat to the Commission. (Final EIR/EIS, p. 4.2-72.) The data shall be used to establish an erosion rate to estimate the year at which the wells and associated pipelines have five years left before exposure to coastal hazards. (*Ibid.*) To ensure the rate is conservative, it will assume that at least one 100-year storm event will occur within that timeframe. (*Ibid.*) Beginning at least five years prior to the anticipated exposure of any slant well, Cal-Am will begin to remove the slant wells from service. (*Ibid.*) Contrary to staff's assertions, this measure is effective to mitigate any potential coastal hazard impacts resulting from coastal erosion.

First, as discussed above, even under extremely conservative assumptions, the slant well field, including the test slant well, are not projected to be impacted by coastal erosion until near the 2120 planning horizon—long after their useful lives. (AECOM Coastal Erosion Hazard Analysis, pp. 5-6.) In the unlikely event Mitigation Measure 4.2-10 does require Cal-Am to remove a slant well that is at risk of exposure due to coastal hazards, relocation of that well may be unnecessary because Cal-Am does not need all seven of

the wells to be operating in order to maintain the Project's permitted water deliveries. Specifically, even if two slant wells are impacted and need to be removed from service, Project operations may continue without well relocation. As explained in AECOM's Coastal Erosion Hazard Analysis, to ensure water supply reliability for the Monterey Peninsula, two of the slant wells constructed for the Project are backup wells to be utilized in the event that an active well cannot be used. Thus, even under an extreme scenario where coastal hazards do affect one or two wells, those wells could be removed without affecting Project capacity or operations. (AECOM Coastal Erosion Hazard Analysis, p. 7, fn. 10; Final EIR/EIS, p. 5.4-51.)

Further, and as noted above, although a well head may be exposed to burial from wind-blown sand at the end of their useful lives, it is expected that burial impacts could be avoided using "soft measures" such as removal of non-native/invasive plants, restoration of the dunes, revegetation of native dune species, and basic monitoring and maintenance. (See Ex. 9, AECOM Coastal Dune Analysis.) These measures will further reduce the likelihood that well relocation would be necessary.

Second, if well relocation is required, the Settlement Agreement does not preclude relocating the slant wells or modifying the boundaries of Cal-Am's permanent easement. The CEMEX Settlement Agreement expressly provides that Cal-Am retains all of its existing rights associated with its recorded easement and related option. (See Ex. 1, Settlement Agreement, § 23.2.) Further, the CEMEX Settlement Agreement provides for conveyances of additional rights of ownership or use, if approved by the Executive Director. (*Id*., § 6.2(B).) Thus, the Executive Director retains the discretion to permit changes to the easement to accommodate relocation of the slant wells, subject to a CDP amendment process, if needed.[8]

Third, impacts associated with well abandonment would not be any greater than already analyzed by the CPUC. As noted in the Staff Report, Mitigation Measure 4.2-10 requires Cal-Am to monitor and decommission the slant wells should they be threatened by coastal hazards. This includes sand burial. The measure would ensure that the slant wells are decommissioned and abandoned prior to being buried in the event that the "soft measures" described above are ineffective.[9] Mitigation Measure 4.2-10 also includes protections for environmentally sensitive habitat and species by restricting abandonment activities to the snowy plover non-nesting season. Any further analysis of impacts to ESHA is unnecessary given the entirely speculative nature of the need to relocate the wells and the fact that the EIR/EIS already includes all feasible mitigation. Further, relocation would be the subject of a future CDP amendment application and could be separately conditioned to address potential impacts, if necessary.

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[8] Relocation may require consent of the CEMEX property owner at that time.

[9] The secondary effects of slant well abandonment were analyzed in the EIR (see Final EIR/EIS pp. 4.2-72 to 4.2-74) and were found to be less-than-significant with mitigation.

Staff Report Contention #11: The Staff Report argues that the Project's proposed well locations are inconsistent with the LCP provisions for locating development near the shore. (Staff Report, p. 53.) MCWD submitted a comment letter to the Coastal Commission on November 13, 2019, which reiterates the Staff Report's concern that the Project may conflict with LCP. (MCWD Letter, p. 5.)

> Cal-Am Response: The Project's slant well locations are consistent with applicable LCP policies. The LUP requires that "structural development" shall not be allowed "on the ocean-side of the dunes, in the area subject to wave erosion in the next 50 years, or in the tsunami run-up zone" unless the development is an "essential support facilit[y] to a coastally-dependent industry." (Staff Report, p. 48.) Similarly, the LIP provides that future development should be set back to "protect the economic life of the proposed development (at least 50 years)." (*Id*., p. 49.) Here, none of the wells are located on the ocean side of the dunes or in a tsunami run-up zone. (*Id*., p. 50 [acknowledging that the wells are located beyond the tsunami run-up zone].) Further, as discussed in the responses above, the wells are not projected to be exposed to coastal erosion from waves, storms, or sea level rise until near the 2120 planning horizon, even under the most extreme assumptions—long after the slant wells' 20 to 25 year anticipated useful life. (AECOM Coastal Erosion Hazard Analysis, pp. 5-6.) Finally, as staff acknowledges, the Project is a coastal-dependent industrial facility. (Staff Report, p. 53.) Indeed, the Project's components must be located near the coast so that the Project's Source Water Pipeline can convey feedwater to the inland destination facility and use the existing M1W outfall to convey the facility's brine discharges into coastal waters. (See Section J, *infra*.) As such, although Cal-Am believes the Project to be consistent with the LUP and LIP's coastal hazards policies, the Commission is authorized to apply Coastal Act section 30260 to approve the Project notwithstanding any potential inconsistencies with LUP or LIP policies.

C. Protection of Coastal Waters and Marine Resources

The Project would not result in a substantial adverse impact to coastal waters or marine resources during Project construction or operation with the implementation of all feasible and enforceable mitigation measures. (Final EIR/EIS at pp. 4.3-60, 4.3-63, 4.3-66, 4.3-68, 4.3-91 to 4.3-93, 4.3-104 to 4.3-106, 4.3-115, 4.3-117, 4.3-122 to 4.3-130.) Additionally, while potential structural changes to the M1W outfall are not part of this application, impacts to the outfall were reviewed as part of the Final EIR/EIS and determined to be less than significant. (*Id*., p. 4.3-109.) Further, the Project would not involve the placement of "fill" in coastal waters, so as to trigger the requirements of Coastal Act section 30233.

Staff Report Contention #12: The Staff Report alleges that it is "unclear at this time as to what effects the proposed desalination facility would have on water quality and marine life and what structural or operational changes would be needed to ensure Cal-Am's discharge would meet the relevant Ocean Plan objectives, and thereby minimize its potential adverse effects." (Staff Report, p. 56.) The Staff Report notes that one potential structural change would be a modification of the diffuser on the existing M1W outfall. (Ibid.)

Cal-Am Response: The Project's potential effects on ocean water quality and marine life were analyzed in detail in the Final EIR/EIS. Specifically, Impact 4.3-5 assessed whether the Project's operational brine discharge would violate water quality standards or waste discharge requirements, or degrade ocean water quality. (Final EIR/EIS, pp. 4.3-95 to 4.3-113.) As discussed therein, the Final EIR/EIS concluded that implementation of the Project could potentially cause exceedances of Ocean Plan water quality objectives for the ammonia and cyanide under certain operational conditions when wastewater volumes co-mingled with the brine are low. For an additional thirteen constituents, the Final EIR/EIS determined that there is not enough information to assess concentrations at the edge of the zone of initial dilution. Therefore, the Final EIR/EIS conservatively concluded that Ocean Plan water quality objectives could potentially be exceeded during operations for some operational discharge scenarios.

However, the Final EIR/EIS determined that Impact 4.3-5 would be less than significant with implementation of Mitigation Measure 4.3-5 (Implement Protocols to Avoid Exceeding Water Quality Objectives), which requires Cal-Am to perform an extensive water quality assessment prior to Project implementation. (Final EIR/EIS, p. 4.3-104.) Operational discharges that cannot be demonstrated to conform to the Ocean Plan water quality objectives may only be released following implementation of additional design features, engineering solutions, and/or operational measures that ensure compliance with these objectives.[10] (*Id*, p. 4.5-64.) In other words, no exceedance of Ocean Plan objectives will occur because no discharges will be permitted unless the water quality assessment confirms that the discharges comply with the Ocean Plan. The Commission did not comment on or object to Mitigation Measure 4.3-5 in its comments on the EIR/EIS.

With respect to the potential structural changes to the M1W outfall, the work is a wholly separate project that is not part of this application. Structural changes to the M1W outfall may be separately conditioned when M1W applies for a CDP for that work. For purposes of this CDP, Cal-Am proposes a Special Condition (see Attachment C) that would require approval of the outfall work prior to the commencement of Project operations.

Nevertheless, the impacts associated with the potential structural changes to the outfall were described and analyzed in the Final EIR/EIS. (Final EIR/EIS, pp. 4.3-109 to 4.3-110. *See Id.*, Appx. D1 (Roberts 2017); *Id.* Appx. D3 (Trussel Tech).) As described therein, retrofitting the existing M1W diffuser would be achieved by installing inclined nozzles on the existing diffuser check valves and/or replacing the end gate opening with a minimum of one 6-inch Tideflex (or similar) check valve. (*Id*., p. 4.3-109; *Id.* Appx. D1

[10] The Final EIR/EIS also described the potential design features and operational measures that could be employed, such as retrofitting the existing outfall diffuser, additional pre-treatment of source water to the Desalination Plant component of the Project, treatment of discharge, flow augmentation, and end gate modification. (Final EIR/EIS, pp. 4.3-106 to 4.3-108.) The Final EIR/EIS also analyzed the potential secondary impacts of these potential design features and operational measures, and determined that those secondary impacts would be less than significant. (*Id*., pp. 4.3-109 to 4.3-113.)

(Roberts 2016), pp. 41-46).) The construction impacts would be minor and temporary, likely consisting primarily of minor construction-related sea-bed disturbance and water quality degradation in the form of increased turbidity and disturbance on and adjacent to the outfall diffuser, and would occur over several hours to a day or two. (Final EIR/EIS, pp. 4.3-109.) Work would be conducted by divers and support craft for staging equipment and construction supplies or to facilitate the removal of built up sediment from the terminus of the diffuser pipe. (*Ibid*.) Prior to implementation of the retrofit, the Monterey Bay National Marine Sanctuary would review and approve design specifications and construction plans to ensure that disturbances to benthic communities are minimized or avoided. (*Ibid*.) The disturbance would be short in duration and of low intensity and benthic communities would be expected to recover to baseline conditions. (*Ibid*.) Accordingly, the Final EIR/EIS determined that the secondary impacts associated with the potential diffuser retrofit would be less than significant. (*Ibid*.) The Staff Report ignores this detailed analysis and instead states that it is "unclear at this time as to what effects the [Project] would have on water quality and marine life." (Staff Report, p. 56.) The Final EIR/EIS, which is supported by expert technical analysis, is clear that impacts would be minimal. Moreover, Cal-Am has not proposed any changes to the diffuser retrofit beyond what the Final EIR/EIS analyzed.

Staff Report Contention #13: The Staff Report alleges that structural changes to the M1W outfall could affect ocean water quality or marine resources. (Staff Report, p. 56.)

Cal-Am Response: Potential modifications to the M1W outfall are not part of Cal-Am's CDP application, and may be separately conditioned when M1W applies for a CDP for that work.

Nevertheless, the impacts associated with the potential structural changes to the outfall were described and analyzed in the Final EIR/EIS. (Final EIR/EIS, pp. 4.3-109 to 4.3-110.) Retrofitting the outfall's existing M1W diffuser would be achieved by installing inclined nozzles on the existing diffuser check valves and/or replacing the end gate opening. (*Id*., p. 4.3-109.) The construction impacts would be minor and temporary, likely consisting primarily of minor construction-related sea-bed disturbance and water quality degradation in the form of increased turbidity and disturbance on and adjacent to the outfall diffuser, and would occur over several hours to a day or two. Work would be conducted by divers and support craft. The Monterey Bay National Marine Sanctuary would review and approve design specifications and construction plans to ensure that disturbances to benthic communities are minimized or avoided. The disturbance would be short in duration and of low intensity and benthic communities would be expected to recover to baseline conditions. Accordingly, the Final EIR/EIS determined that the secondary impacts associated with the potential diffuser retrofit for the outfall would be less than significant.

Staff Report Contention #14: The Staff Report alleges that the Project will require the placement of fill in coastal waters, either due to potential modifications to the M1W diffuser, or through the use of monitoring equipment and buoys to collect water quality data, triggering Coastal Act section 30233. (Staff Report, p. 57.)

Cal-Am Response: With respect to any fill associated with potential modifications to the M1W diffuser, as described above, the potential modifications to the M1W outfall are not part of Cal-Am's CDP application, and may be separately conditioned when M1W applies for a CDP for that work.

With respect to the monitoring equipment and buoys, the Staff Report does not identify any "fill" related to these components, which consist of temporary anchors or moorings that will be removed at the completion of monitoring. (See AECOM, Monterey Peninsula Water Supply Project (MPWSP) Components in Commission's Original Jurisdiction (Sept. 19, 2019), pp. 2-5, which was attached as Exhibit M to Cal-Am's September 19, 2019, response to Commission Staff's August 22, 2019, Notice of Incomplete Application.)

Public Resources Code section 30108.2 defines "fill" as "earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area." In applying section 30233, the Commission typically considers projects installing permanent structures or placement of sediment or similar material on the seafloor, not temporary anchors, and assesses whether those structures can be modified or arranged differently to avoid impacts on the chosen project site.[11]

Indeed, when considering the use of temporary anchors for the recommissioning of the Charles E. Meyer Desalination Facility in Santa Barbara, staff did not invoke Coastal Act section 30233 at all.[12] There, the project involved " two main categories of activities—reinstallation of equipment, and ongoing maintenance and repair." (Staff Report, Application No. 9-14-1781 (Jan. 30, 2015), p. 12.) Since "[e]ach of the project components that the City would place within Commission jurisdiction[, including the temporary anchors,] are components of a desalination facility that generally require regular repair and maintenance… the proposed activities are considered 'repair and maintenance' pursuant to Coastal Act Section 30610." (*Id.* at 14.) Pursuant to Coastal Act section 30610, a CDP is not required for repair activities that "do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities." (Coastal Act, § 30610(d).) However, because the activities would involve the use of mechanized equipment and the placement of materials within coastal waters, staff concluded that the activities required a CDP pursuant to section 13252(a) of the Commission's regulations. (Staff Report, Application No. 9-14-1781 (Jan. 30, 2015), p.

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[11] See, e.g., Staff Report, Application No. 5-10-293, available at https://documents.coastal.ca.gov/reports/2011/6/W10b-6-2011.pdf [applying Section 30233 to installation of new piles, pier, gangway, and platform and assessing alternative configurations of the piles]; Staff Report, Consistency Certification No. CC-0006-14, available at https://documents.coastal.ca.gov/reports/2014/12/F11b-12-2014.pdf [applying Section 30233 to the placement of riprap and excavated sediments and assessing alternative dredging and structural improvements at the proposed project site].

[12] See Staff Report, Application No. 9-14-1781 (Jan. 30, 2015), available at https://documents.coastal.ca.gov/reports/2015/2/f12b-2-2015.pdf.

14.) Importantly, staff did not treat any aspect of the project, including the temporary anchoring, as "fill" material.

Likewise, here, the proposed monitoring equipment and buoys are not "fill" as contemplated by the Coastal Act. "The proposed monitoring equipment and telemetry buoy . . . would be temporarily attached to the sea floor" by an anchor. (See Monterey Peninsula Water Supply Project (MPWSP) Components in Commission's Original Jurisdiction (Sept. 19, 2019), p. 5.) The temporary attachments are not "pilings" or other materials that would be permanently installed or constructed in the ocean floor. The impacts associated with this monitoring equipment will be minimal—each buoy's anchor will temporarily impact four square feet, and the monitoring sondes' anchors will impact one square-foot each. (*Id.*, p. 5.) "The proposed temporary equipment anchoring systems are static and would be less impactful to benthic resources than a typical fishing or research vessel mooring anchor." (*Ibid.*) Installation will be complete in a matter of hours, and impacts would be limited to temporary seabed disturbance. (*Ibid.*) Accordingly, this minor temporary anchoring does not constitute "fill" and does not trigger Coastal Act section 30233.[13]

Nonetheless, as the Staff Report acknowledges, the Commission could consider adopting Special Conditions to ensure the Project complies with applicable Coastal Act policies. Cal-Am remains willing to coordinate with staff to develop appropriate Special Conditions to ensure the Project's compliance with the Coastal Act should staff determine that additional protective measures are required. (See e.g. Attachment C, which includes Cal-Am proposed Special Conditions.)

D. Groundwater Resources

Contrary to staff's determination, the Commission has sufficient information regarding the Project's potential impacts to groundwater supplies in the Salinas Valley Groundwater Basin ("SGVB" or "Basin") to determine that the Project conforms to the groundwater protection provision of Coastal Act Section 30231. (See Staff Report Addendum, p. 3.) Through the CPUC's administrative process, the EIR/EIS consultant team performed over six years of fieldwork, data analysis, and groundwater modeling. The modeling and its results were subject to peer review and public comment. Based on the extensive data and peer-reviewed modeling, the Final EIR/EIS conservatively analyzed the Project's potential impacts to groundwater supplies in the SVGB, finding that such impacts would be less than significant. Staff claims that additional modeling is needed to address existing data gaps, but as Cal-Am has maintained all

[13] By analogy, for purposes of the federal Clean Water Act (33 U.S.C. § 1251 et seq.), fill material is defined under applicable regulations as material that has the effect of "(i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States." (33 C.F.R. § 323.2(e).) The regulations list examples of fill material, which include "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure." (*Ibid.*) In light of the examples listed, which consist primarily of settling materials and components used to "create" structures, the Clean Water Act does not regulate the temporary placement of anchors used to maintain buoys.

along, additional, non-peer reviewed modeling is unnecessary and would not change the Final EIR/EIS's conclusions. Accordingly, staff has sufficient evidence to find that the Project is consistent with the groundwater protection provision of Coastal Act Section 30231.

Staff Report Contention #15: The prior groundwater modeling for the Final EIR/EIS did not adequately capture some of the aquifer characteristics and may have underestimated the amount of non-seawater that the slant wells would extract. (Staff Report Addendum, p. 3.) Staff recommended that the groundwater model be adjusted and run with new parameters. (Id. at pp. 3, 5.) On November 13, 2019, MCWD submitted a letter to Coastal Commission staff asserting that any new groundwater analysis should address the data from its airborne electromagnetic ("AEM") surveys. (See MCWD Letter (Nov. 13, 2019), p. 3.)

> Cal-Am Response: Cal-Am understands that the Commission's consultant, Weiss Associates, is conducting limited additional modeling work. Nonetheless, Cal-Am maintains that additional groundwater modeling is unnecessary and duplicative of the extensive work performed as part of the Final EIR/EIS and would not change the Final EIR/EIS's conclusions regarding the Project's groundwater impacts. Not only did the CPUC rely on its own independent consultant team[14] in evaluating the Project's potential groundwater impacts, but the CPUC also reviewed groundwater analyses and data prepared by the Hydrogeologic Working Group ("HWG"), a group of hydrogeologists representing multiple stakeholders and government agencies. The EIR/EIS process involved years of field work and data collection, technical and field data analysis, groundwater modeling, peer review and the receipt of thousands of pages of comments that required evaluation, public presentation of results and public review of draft documents, and public meetings to present analyses and receive comments. Any additional modeling to re-analyze the extensive peer-reviewed technical record developed before the CPUC and in the Final EIR/EIS would not incorporate a similar public and peer review process. As the State Water Resources Control Board ("State Water Board") expressed in its May 8, 2020, letter to the Commission, the Project's groundwater impacts "have already been resolved by the Public Utilities Commission, after extensive environmental review and consideration of evidence and testimony over a multi-year adjudicative proceeding." (See Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), at p. 3.)
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> Further, as acknowledged by the Commission's consultant, Weiss Associates, in its November 2019 Report ("Weiss Report"), the Final EIR/EIS's modeling was conservative. (See Staff Report Addendum, Ex. 7, pp. 19-20.) The Final EIR/EIS evaluated a broad range of potential groundwater impacts and scenarios, utilizing a set of conservative assumptions that bookend the range of anticipated impacts. (See Final EIR/EIS, pp. 8.2-86, 8.2-97, 4.4-65.) Based on these conservative modeling scenarios, the Final EIR/EIS overestimated the extent of groundwater drawdown and capture

[14] As explained in the Final EIR/EIS, the EIR/EIS' analyses and conclusions "were prepared by the consultants on behalf of the Lead Agencies and were independently evaluated, reviewed, and revised by Lead Agency staff." (Final EIR/EIS, p. 8.2-1.) In other words, the CPUC and its consultant team operated independently of Cal-Am in preparing and evaluating the EIR/EIS.

zones.[15] (*Id*., pp. 8.2-45, 4.4-90 to 4.4-92.) The Weiss Report recognizes that any predictions from its modeling will likely be in the range already evaluated in the Final EIR/EIS. (Weiss Report, p. 19-20.)

Indeed, the State Water Board has reviewed the existing groundwater record and the Weiss Report, and concluded that the modeling "already conducted, revised, and relied upon by the Public Utilities Commission . . . provides a conservative overprediction of the volume of shallow, inland water that the Project would capture during full operation." (See Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), at p. 3.) Weiss' proposed modeling also focuses on approximately 1% of the area covered by the existing groundwater modeling, such that refining the existing model in this small area will not result in significant differences in model output. (*Id*., p. 4.) As a result, "State Water Board staff's opinion remains that the groundwater impacts of the Project will not be any greater than those stated, analyzed, and mitigated under the Public Utilities Commission's certified Final EIR," even after additional modeling. (*Id*., p. 3.) The Commission should defer to the State Water Board on matters of water quality, consistent Coastal Act section 30412.

This understanding has been further confirmed by the HWG in its April 6, 2020, comments on Weiss' Scope of Work (attached hereto as **Exhibit 10**). The HWG explained that "[t]he results of Weiss' proposed scope of work would essentially replace the entire groundwater impacts section of the [EIR/EIS] with technical work done by one consultant that would not be required to undergo extensive public review, peer review, and response to comments." (*Id*., p. 5.) Further, "Weiss' November 2019 Report essentially stated that the [EIR/EIS'] analysis of groundwater impacts was conservative (i.e., overpredicted project impacts) and provided bookend (lowest possible and highest possible) values for ocean water percentage expected for the [Project] . . . that already agree with [the EIR/EIS]." (*Id*., p. 4.) The HWG even noted that "Weiss has already concluded . . . that [Project] impacts will not be greater even if groundwater gradients in the shallow aquifer have changed from what occurred in 2015 and 2016," when originally modeled. (*Ibid*.)

Therefore, although Cal-Am has consented to additional modeling work by Weiss Associates for purposes of moving the Project forward through the Commission process, Cal-Am still believes additional modeling will not identify any new impacts.

Finally, staff need not consider MCWD's airborne electromagnetic ("AEM") surveys[16] because the CPUC already considered and rejected the AEM surveys as flawed. The

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[15] The capture zone is the localized region that would contribute source or feedwater to the Project's slant wells. (Final EIR/EIS, p. 4.4-452.)

[16] MCWD submitted a preliminary AEM study after the CPUC released the Draft EIR/EIS and submitted a "final" AEM to the CPUC after publication of the Final EIR/EIS. The AEM surveys purport to identify seawater intrusion, but a comparison of groundwater monitoring well data and the AEM data shows that the "fresh" water that the surveys claim exist is, in fact, unfit for

CPUC rejected the AEM surveys because "[t]he organization, presentation of data, and discussion of findings in the final report of the Stanford AEM study . . . does not appear to be on par with the technical rigor displayed in the previous peer-reviewed academic works . . . prepared through Stanford University." (CPUC Decision D.18-09-017, Appx. J, p. 19.) "The lack of adherence to standard protocols for the presentation, data analysis, and technical peer review calls into question whether the report can be used as a reliable, unbiased technical source." (*Ibid*.) As such, the AEM reports are unreliable technical sources that do not warrant further consideration.

Because additional modeling will not lead to an improved understanding of the Project's potential impacts on groundwater conditions or change the Final EIR/EIS's conclusions, staff's proposed modeling is not necessary.

Staff Report Contention #16: Some groundwater studies have used a 3,000 mg/L total dissolved solids ("TDS") threshold to determine the expected amount of non-seawater that the Project's slant wells would withdraw. These studies have concluded that the Project would extract "substantially greater volumes of 'non-seawater' than Cal-Am's models have shown." (Staff Report Addendum, p. 4.)

Cal-Am Response: The use of a 3,000 mg/L TDS threshold to delineate the extent of seawater intrusion and determine whether water is "fresh" or potable, as opposed to "non-seawater" is inappropriate because water with 3,000 mg/L TDS is not suitable for human consumption or irrigation without treatment.[17]

The applicable standards for suitable drinking water are set forth in regulations promulgated under the California Safe Drinking Water Act, Health & Safety Code sections 116270 et seq. The California Secondary Drinking Water Standard for TDS is 500 mg/L. (Cal. Code Regs., tit. 22, § 64449.) Water with 1,000 mg/L TDS is acceptable for a community water system to supply to the public only if "it is neither reasonable nor feasible to provide more suitable waters." (Cal. Code Regs., tit. 22, § 64449, subds. (a), (d)(2).) Water with 1,500 mg/L TDS is acceptable "only for existing community water systems on a temporary basis pending construction of treatment facilities or development of acceptable new water sources." (*Id*., subds. (a), (d)(3).) Thus, water with 3,000 mg/L TDS—over twice the limit for temporary community water

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human consumption or agricultural use because it exceeds applicable water quality standards. (Final EIR/EIS, p. 8.2-61; CPUC Decision D.18-09-017, Appx. J, pp. 15, 19-21.)

[17] The 3,000 mg/L TDS level is a threshold set forth in State Water Board Resolution 88-63, a policy document used by regional water quality control boards to make beneficial use designations for receiving waters in order to evaluate water quality impacts from discharges of pollution into those waters. Resolution 88-63 is not a water quality objective, nor does it provide any guidance on TDS levels that are suitable for human consumption. Resolution 88-63 merely defines those water bodies that are suitable, *or potentially suitable*, for municipal or domestic water supply uses. Because Resolution 88-63 makes no distinction between water bodies that are suitable or potentially suitable as a municipal or domestic water supply, it is irrelevant for determining whether a water body contains "fresh" or potable water suitable for human consumption without prior treatment.

supply—is unfit for human consumption or irrigation without treatment, and should not be used as the threshold to determine the expected amount of non-seawater that the Project's slant wells would withdraw. Indeed, the Final EIR/EIS properly evaluated the Project's potential impacts to groundwater supplies using the 500 mg/L standard, and this approach was affirmed by the California Supreme Court when it rejected MCWD's and Marina's challenges to the EIR/EIS. (See Order Denying Petitions for Writ of Review, *Marina Coast Water District, et al. v. Public Utilities Commission*, Case No. S253585 (Aug. 28, 2019).)

Regardless, the use of a 3,000 mg/L TDS standard would not affect the Final EIR/EIS's overall conclusion regarding groundwater impacts given the existing salinity levels in the Project capture zone or change the Project's ocean water percentage ("OWP") for purposes of Cal-Am's compliance with the Monterey County Water Resources Agency Act ("Agency Act").[18] Existing groundwater data shows TDS concentrations in the Project's capture zone ranging between 23,000 mg/L to 30,900 mg/L—***orders of magnitude above acceptable levels for potable groundwater supplies or the 3,000 mg/L standard suggested by staff***. (Final EIR/EIS, pp. 8.5-729, 4.4-31, 4.4-69.) Thus, as the Final EIR/EIS explains, TDS levels in the 180-Foot Aquifer near the Project closely resemble the TDS levels of seawater (33,500 mg/L TDS) as opposed to "fresh" water. (*Id*., pp. 4.4-27, 8.2-20.) Further, assuming ocean water contains 33,500 mg/L TDS, and the slant wells capture water with up to 30,900 mg/L TDS, then the ocean water percentage in the feedwater is roughly 92% (30,900/33,500 x 100)—regardless of whether the standard for delineating fresh water is 500 or 3,000 mg/L TDS. (See Final EIR/EIS, p. 8.2-20.) Because 92% falls within the OWP range estimated in the Final EIR/EIS of 87-99% (see Final EIR/EIS, p. 4.4-69), the use of a 3,000 mg/L TDS standard does not result in the Project withdrawing more "fresh" water from the SVGB.

Further, the EIR/EIS did not rely solely on TDS levels alone to evaluate groundwater quality. (See, e.g., Final EIR/EIS, pp. 4.4-27, 8.5-735.) The EIR/EIS explained that the existing groundwater data showed elevated concentrations of chloride and nitrate, in addition to elevated TDS levels, and explained that TDS, alone, does not delineate the extent of seawater intrusion or otherwise "fresh" water. (See *id*., pp. 8.5-734 to 8.5-735; see also *id*., Appx. E3, Table 1, pp. 3, 12, 21, 29, 38, 46-47, 61-62, 186, 221, 242.) In fact, the data showed that the areas with relatively low TDS levels have high nitrate or chloride levels that exceed the Drinking Water Standards for those constituents. (See Ex. 10, HWG Comments on Weiss SOW, pp. 2, 5-6.)

For instance, MCWRA defines the leading edge of inland seawater intrusion as groundwater containing chloride of 500 mg/L or more. (See Final EIR/EIS, p. 4.4-31; see also CPUC Decision D.18-09-017, p. 19.) "A chloride concentration of 500 mg/L represents a level that is ***twice*** the National Secondary Drinking Water Regulation (250 mg/L) and that exceeds the concentration for water to be considered of 'Class III –

[18] The Agency Act prohibits the exportation of groundwater for any use outside the SVGB. (See Final EIR/EIS, p. 8.2-17.) The Commission has no jurisdiction over MCWRA's enforcement of and Cal-Am's compliance with the Agency Act.

injurious or unsatisfactory' quality for agricultural irrigation (350 mg/L)." (CPUC Decision D.18-09-017, Appx. J, p. 20.) Groundwater quality data from the test slant well indicates that groundwater in the Project area contains between 11,680 mg/L to 16,037 mg/L—over 45 times the National Secondary Drinking Water Regulation. (*Id.*, p. 8.5-877.)

In addition, the drinking water standard for nitrate is 10 mg/L. (Cal. Code Regs., tit. 22, § 64431 [Table 64431-A].) Nitrate levels far in excess of this standard have been detected at the test slant well's monitoring wells, precluding untreated consumption of groundwater extracted from these areas, irrespective of their TDS and chloride levels. (See Final EIR/EIS, Appx. E3, Table 1, pp. 186, 221, 242.) The test slant well monitoring data measured nitrate as NO_3 concentrations and found levels of nitrate as NO_3 at 258 mg/L at MW-5S, 198 mg/L at MW-7S, and 116 mg/L at MW-8S. (*Ibid.*) Nitrate as NO_3 concentrations can be converted to nitrate as N concentrations by dividing the nitrate as NO_3 levels by 4.5. As a result, the Project's monitoring wells have nitrate as N levels of 57 mg/L at MW-5S, 44 mg/L at MW-7S, and 26 mg/L at MW-8S—all of which significantly exceed the drinking water standard of 10 mg/L.

TABLE 8.2.8-1
TOTAL DISSOLVED SOLIDS CONCENTRATIONS IN MPWSP MONITORING WELLS LOCATED WITHIN THE SLANT WELL CAPTURE ZONE

Well Number	Sample Date	Aquifer	Total Dissolved Solids (TDS) (mg/L)	Chloride (mg/L)
			California Drinking Water Standard: 500 mg/L[a]	California Drinking Water Standard: 250 mg/L[a]
MW-1S	2/13/15	Dune Sand	26,600	14,504
MW-1M	2/14/15	180-FTE	30,900	16,037
MW-3S	2/25/15	Dune Sand	23,400	11,680
MW-3M	2/24/15	180-FTE	28,500	14,686
MW-4S	3/7/15	Dune Sand	11,900	5,497
MW-4M	3/6/15	180 FTE	17,900	9,751

NOTES:
[a] California Secondary Maximum Contaminant Level (Cal. Code Regs., tit. 22, § 64449)

SOURCE: Geoscience, 2015

Because the water in the Project's capture zone exceeds Drinking Water Standards for several constituents (see Final EIR/EIS, p. 8.2-48 [Table 8.2.8-1, copied above]), TDS alone is an insufficient measure for whether any groundwater extracted by the Project is "fresh" or potable water.

Nevertheless, and as explained above, a 3,000 mg/L TDS threshold to define "fresh" water is not supported in applicable state law and is not an appropriate threshold for staff to apply to the Project.

Staff Report Contention #17: Cal-Am will need to obtain appropriative rights for all or some of the "non-seawater" it extracts and exports from the Salinas Valley Groundwater Basin. This is an issue for the State Water Resources Control Board to decide. (Staff Report Addendum, p. 4.) Margaret-Anne Coppernoll similarly argued that Cal-Am does not have the necessary "water rights" to develop water from the SVGB. (Coppernoll Letter (Nov. 11, 2019), p. 1.)

Cal-Am Response: As a preliminary matter, Cal-Am generally agrees with staff that the issue of water rights is not for the Commission to decide. Cal-Am's water rights for the Project are wholly separate from the Project's potential impacts to groundwater resources and, thus, are not relevant to the Project's consistency with the Coastal Act's groundwater protection policies.

The EIR/EIS analyzed Cal-Am's potential water rights for the Project to determine whether the Project would be feasible, and based on substantial evidence in the record, the EIR/EIS and CPUC concluded that the Project can be deemed feasible. (Final EIR/EIS, pp. 8.2-5, 2-31 to 2-32; CPUC Decision D.18-09-017, p. 80.) As the EIR/EIS explained, the "SVGB is not an adjudicated groundwater basin, so use of the groundwater in the Basin is not subject to existing court decree, written agreements or oversight by an impartial watermaster." (Final EIR/EIS, p. 2-32.) Because Cal-Am has no prescriptive rights in the Basin, Cal-Am would be required to obtain appropriative rights for water extracted from the Basin.[19] (*Ibid*.) If Cal-Am extracts unusable or contaminated Basin groundwater without harm to existing lawful water users—and any fresh groundwater is returned to the Basin—then Cal-Am could develop appropriative rights to that portion of the Project feedwater. (See Final EIR/EIS, p. 2-34.) Here, the technical record confirms that there is surplus (unused) groundwater in the SVGB that is contaminated and, thus, available for Cal-Am to appropriate.

Indeed, the State Water Board—the state agency with primary responsibility for the regulatory and adjudicatory functions of the state regarding water resources (Water Code, § 174; Pub. Resources Code, § 30412)—determined that Cal-Am could develop the necessary water rights to operate the Project. (See CPUC Decision D.18-09-017, p. 80.) In 2013, the State Water Board issued a report that explained that Cal-Am may extract brackish groundwater from the SVGB, and thus appropriate and obtain rights to that water, so long as Cal-Am can extract the water without negatively impacting the SVGB or existing groundwater users. The State Water Board explained that "extracting

[19] "There are three relevant types of groundwater rights: (1) overlying rights whereby those who own land atop the Basin may make reasonable use of groundwater on such overlying land; (2) prescriptive rights whereby a water user has acquired another's rights to use water via an open, adverse and sustained use under a claim of right that such user would otherwise not be entitled to; and (3) appropriative rights whereby groundwater may be used outside the Basin or for municipal purposes." (Final EIR/EIS, p. 2-32.)

seawater from the ocean does not require water rights," and given landward gradients in the Project area, the project wells will primarily extract seawater.[20] (*Ibid*.)

With this in mind, the CPUC evaluated the Project's potential to impact the SVGB and groundwater users, and determined that substantial evidence in the record demonstrates that any impacts would be less than significant.[21] (CPUC Decision D.18-09-017, pp. 81, 174-175.) The California Supreme Court rejected Marina's and MCWD's challenges to the CPUC's Decision and EIR/EIS' discussion of and determinations regarding water rights. (See Order Denying Petitions for Writ of Review, *Marina Coast Water District, et al. v. Public Utilities Commission*, Case No. S253585 (Aug. 28, 2019).) Thus, there are no legal impediments to Cal-Am's ability to develop rights to this contaminated groundwater in the SVGB.

Further, contrary to staff's contention that Cal-Am will "export" the "non-seawater" that the Project extracts, any "non-seawater" extracted from the SVGB will be returned to the Basin as part of Cal-Am's obligations under the Agency Act. (See CPUC Decision D.18-09-017, pp. 103-112.) To comply with the Agency Act, Cal-Am has agreed to calculate annually the percentage of Project feedwater that originated in the SVGB as "fresh" water and "return" that water to the SVGB by providing desalinated product water to the Castroville Community Services District and Castroville Seawater Intrusion Project. (Final EIR/EIS, p. 8.2-17; see also CPUC Decision D.18-09-017, pp. 104-105, 110.) The CPUC approved this "Return Water Settlement Agreement," agreeing with the parties to the Agreement—including MCWRA, the agency vested with authority to implement and enforce the Agency Act—"that the provisions establish a return water delivery arrangement that is in the public interest, consistent with the record, and in compliance with the law." (See CPUC Decision D.18-09-017, p. 110.) Similarly, the State Water Board has confirmed that the Project is consistent with the Agency Act, even though the Project would withdraw some usable groundwater (i.e., fresh water) from the SVGB, because Cal-Am will return any usable groundwater withdrawn to the Basin. (See Final EIR/EIS, Appx. B2, pp. 39-40; see also Final EIR/EIS, p. 8.2-18.)

Staff Report Contention #18: The Project's groundwater extraction is likely to have limited to negligible impacts on the rate of seawater intrusion in the area, but a change in the groundwater gradient in the Dune Sand Aquifer "suggests that Cal-Am's wells would extract greater volumes of non-seawater than identified in [the Final EIR/EIS's] models." (Staff Report Addendum, pp. 4-5; see also MCWD Letter (Nov. 13, 2019), p. 5.)

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[20] The issue of water rights was briefed extensively before the California Supreme Court as part of Marina's and MCWD's challenges to the CPUC's approval of the Project. The Supreme Court affirmed the CPUC's determinations. (See Order Denying Petitions for Writ of Review, *Marina Coast Water District, et al. v. Public Utilities Commission*, Case No. S253585 (Aug. 28, 2019).)

[21] Although not required, Cal-Am proposed Applicant Proposed Measure 4.4-3, which requires Cal-Am to monitor groundwater level changes to ensure that existing groundwater supply wells suffer no harm as a result of Project pumping. (See Final EIR/EIS, pp. 4.4-87 to 4.4-89.)

Cal-Am Response: The Staff Report underestimates the Project's benefit to the SVGB from halting further seawater intrusion into the Basin, and incorrectly characterizes groundwater gradients in the SVGB aquifers.

As explained in the Final EIR/EIS, the Project's slant wells will inhibit further seawater intrusion beyond the Project's capture zone. (See Final EIR/EIS, p. 4.4-92; HWG Response to Coastal Commission (Feb. 20, 2020), p. 2.) As a result of extensive overpumping of groundwater from the SVGB since the 1940s, the Basin has experienced substantial seawater intrusion and groundwater gradients that flow inland.[22] (Final EIR/EIS, p. 4.4-16.) However, Project pumping will draw contaminated groundwater from the SVGB, creating a seaward gradient that will halt or reverse the current landward movement of seawater intrusion into the SVGB. (*Id*., pp. 4.4-92, 8.5-561.)

Further, there is no basis for staff to assume that the existing landward groundwater gradients have changed or will change. The Dune Sand Aquifer recharges predominantly from saline water at the coast and beneath the ocean due to the direct hydraulic connectively between the Aquifer and the ocean, and the large volume of ocean water available to recharge, or refill, the Aquifer. (Final EIR/EIS, pp. 4.4-19, 4.4-31, 4.4-70.) As a result, it is very difficult for the existing landward groundwater gradients to reverse and become seaward. (CPUC Decision D.18-09-017, Appx. J, p. 16.)

Even if groundwater gradients in the SVGB were reversed, the Project's slant wells would continue to draw in primarily seawater as a result of the ocean recharge. (*Id*., p. 17.) However, as the CPUC explained, there is no credible evidence that existing landward groundwater gradients would reverse and begin to flow seaward. (See *id*., pp. 16-17 ["What is important to consider here is that there is very little likelihood, and it would be total speculation to believe, that the existing groundwater gradient . . . could be reversed within the life of the project"].) Therefore, staff's assertion that the Project will extract greater volumes of inland freshwater upon a change in groundwater gradient is both speculative and unsupported by the existing record.

In addition, the Weiss Report confirms that the amount of seawater withdrawn by the Project, or OWP, would likely range from 90 to 99%, consistent with the range identified in the Final EIR/EIS. (See Weiss Report, pp. 19-20.) Using a large capture zone, the Weiss Report conservatively determined that the low end of the OWP estimates would be 85 to 90%. (*Ibid*.) Nonetheless, the Weiss Report explained that this low bookend "is likely to be an ***underestimate of the true OWP***" and is a "***worst-case scenario***." (*Ibid* [emphasis added].) Further, the Weiss Report concluded that changes in groundwater gradients would not likely result in an OWP outside of the 90-99% range. (*Id*., p. 20.) Thus, even Commission staff's own consultant has determined that the Project will not extract "greater amounts of non-seawater than identified in [prior] modeling." (Staff Report Addendum, pp. 4-5.)

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[22] Groundwater gradients are expressed as the ratio of the vertical change to lateral distance. "For example, if groundwater levels decrease 5 feet over a horizontal distance of 10,000 feet, the gradient is expressed as 0.0005 feet per foot." (Final EIR/EIS, p. 8.2-44.)

Moreover, even if the Project withdraws "greater volumes of non-seawater" than identified in the EIR/EIS (Staff Report Addendum, p. 5), there is no resulting environmental impact to the SVGB that implicates Coastal Act section 30231. As explained above, any "non-seawater" withdrawn by the Project will be returned to the SVGB pursuant to Cal-Am's obligations under the Agency Act and Return Water Settlement Agreement. These obligations are not mitigation measures to reduce or avoid any environmental impact. (See Final EIR/EIS, p. 8.2-13 ["The purpose of the return water element of the project is not to alleviate or address any environmental effects."].)

Therefore, while staff's consultant and Cal-Am agree that the Project will not extract greater volumes of "non-seawater" than identified and evaluated in the Final EIR/EIS, in the highly unlikely event that greater "non-seawater" volumes were extracted, no impact would occur because Cal-Am is obligated to return such water under the Agency Act and Return Water Settlement Agreement.

Staff Report Contention #19: The modeling in the Final EIR/EIS is flawed because it does not account for potential "fresh water" capture beyond the identified capture zone. (Staff Report Addendum, p. 5.)

Cal-Am Response: The Project's capture zone is located in a coastal area of the SVGB ***already intruded with seawater*** that is not usable for human consumption or irrigation without treatment. (Final EIR/EIS, pp. 4.4-69 to 4.4-70.) The capture zone will also be supplied by an unlimited source of ocean water recharge from the Monterey Bay. (*Id*., p. 4.4-70.) As a result, the Project will withdraw primarily seawater from the SVGB. (*Id*., p. 4.4-56.) Indeed, Project modeling showed—consistent with test slant well monitoring data—that as Project pumping continues, the OWP increases over time to reach 99%. (See Final EIR/EIS, p. 4.4-56; see also *id*., Appx. E3.) "As pumping continues, the wells would extract increasing proportions of infiltrating recharge from the ocean," because "[t]he steady ocean recharge would gradually replace ambient groundwater within the capture zone." (See *id*., p. 8.2-9.)

As the HWG has explained in multiple submittals to Commission staff , the vast majority of potential "fresh water" pockets noted by staff occur in areas hydraulically disconnected from the aquifers from which the Project's wells will extract water. (See HWG Aug. 15, 2018 Tech. Response, p. 5; see also Ex. 10, HWG Comments on Weiss SOW, pp. 6-7.) "[T]here is a very important distinction being missed by many hydrogeologists (including Weiss . . .) that the coastal Dune Sand Aquifer is a distinct hydraulic gradient zone" from the pockets of freshwater in the "Perched/Mounded Aquifer." (*Id*., p. 6.) "This hydraulic discontinuity . . . means that pumping at the coast in the coastal Dune Sand Aquifer cannot impact groundwater levels in the Perched/Mounded Aquifer." (*Ibid*.) Nor can the Project's capture zone extend into the Perched/Mounded Aquifer to access the purported "fresh water" pockets. (*Ibid*.) In fact, the Project's capture zone and any groundwater drawdown cannot access these pockets "regardless of the direction and magnitude of the groundwater gradient." (*Id*., p. 7.)

Since Project pumping is limited to the capture zone, and the Aquifers from which the Project will withdraw water are hydraulically disconnected from the identified areas of

potential "fresh" water, there is no need to perform additional data collection and modeling to determine whether the Project will impact any "fresh water" pockets outside of the capture zone. Moreover, as discussed above, the TDS level of 3,000 mg/L advocated by MCWD as "fresh water" is by no means fresh or potable and cannot be used for human consumption or agricultural use without treatment, such as desalination.

Staff Report Contention #20: Staff is uncertain about how much additional "fresh water" would be captured, but believes that that some of this uncertainty would be reduced if the slant wells were able to extend further seaward at a lower angle so as to shorten the flow path between the well intakes and the seafloor. (Staff Report Addendum, p. 5.)

Cal-Am Response: In reviewing the Project, the CPUC evaluated different configurations of the slant well network, but determined that slant wells developed at the proposed angle of approximately fourteen degrees were the environmentally superior alternative. (See Final EIR/EIS, pp. 3-18, 8.5-730.)

For instance, the EIR/EIS evaluated horizontal wells, which would extend further seaward at a lower angle than the slant wells. (See Final EIR/EIS, Appx. I1, pp. I1-5 to I1-7.) However, the CPUC determined horizontal wells are infeasible because: "(1) the amount of pipeline that would be pushed under the seafloor (upwards of 2,500 feet) would be challenging in terms of physical limitations; and (2) [the horizontal well technology] would not avoid or minimize any of the impacts associated with the proposed [Project]." (Final EIR/EIS, Appx. I1, p. I1-7; see also Final EIR/EIS, p. 8.5-771.) The Final EIR/EIS also explained the technical limitations of horizontal wells, which have "yet to be demonstrated successfully for an intake well," such as tendency to clog and decreased or loss of productivity over time. (*Id*., p. 8.5-770 to 8.5-771.) Therefore, the use of wells at a "lower angle" is not feasible or environmentally superior to the Project's proposed slant wells.

In addition, extending the slant wells further seaward as proposed by staff would not make a material difference to the percentage of ocean water extracted by the Project. Any slant well ranging from completely beneath the beach (landward of the shoreline) to completely under the ocean will effectively extract the same OWP given that the coastal aquifers are recharged significantly by ocean water. (See Final EIR/EIS, pp. 8.5-638, 8.5-730.) As the HWG explained in its Hydrogeologic Investigation Technical Report (Final EIR/EIS, Appendix E3):

> [W]hile placement of production well screens closer to or under the ocean may result in a quicker ramping-up to maximum ocean water percentage (OWP) in the first few months and a very slight increase in the medium-term OWP, a difference of a few hundred feet in [well] screen placement relative to the ocean boundary will have minimal overall effect on the OWP.

(Final EIR/EIS, Appx. E3, p. 23.) The ocean provides a significant volume of seawater at the recharge boundary in the Dune Sand Aquifer, rendering wells screened just beneath

the beach as effective in extracting a high percentage of seawater as wells screened a couple of hundred feet further under the seafloor. (See Final EIR/EIS, p. 8.5-730.)

Therefore, extending the slant wells further seaward at a lower angle would not impact the amount of "fresh water" captured, and as the CPUC determined, the current location and configuration of the Project's slant well network is the environmentally superior design to capture groundwater contaminated by seawater intrusion and prevent the further inland migration of seawater. (See, e.g., Final EIR/EIS, pp. 8.5-580 to 8.5-581; CPUC Decision D.18-09-017, p. 173.)

Staff Report Contention #21: Staff asserts that the Project's uncertainties regarding groundwater impacts raise public welfare concerns because "if it turns out that Cal-Am would be pumping larger quantities of non-seawater than previously thought, it would need to send larger quantities of desalinated water to Castroville Community Services District." (Staff Report Addendum, p. 5.) As a result, "the rest of Cal-Am's water [would be] more expensive, thereby raising customers' rates and affecting the public welfare findings." (Ibid.)

Cal-Am Response: Staff's public welfare assertion is pure speculation and contradicts Weiss' determinations. Both Weiss and the EIR/EIS are consistent in their calculations of how much water Cal-Am would be required to provide to the Castroville Community Services District ("CCSD") as part of Cal-Am's return water obligations. Staff's assertion that Cal-Am would be required to send more water to CCSD, which in turn would cause higher rates for Cal-Am customers, is unsupported by the CPUC's and Commission's record.

As explained above, Cal-Am's return water obligations depend on how much ocean water comprises the slant well feedwater, or the OWP. The Final EIR/EIS conservatively estimated a return water percentage between 0-12% based on an OWP of 88 to 99%. (See Final EIR/EIS, pp. 4.4-56, 8.2-21 to 8.2-22.) As the Weiss Report confirmed, the "worst-case scenario" for the Project's OWP would be 85%, and this low bookend "is likely to be an underestimate of the true OWP." (Weiss Report, pp. 19-20.) According to the Weiss Report, the Project's OWP will likely fall within the range of 90-99%. (*Id.*, p. 20.) In other words, the Weiss Report contemplates ocean water and return water percentages consistent with the range evaluated in the Final EIR/EIS and by the CPUC in approving the Project. There is no basis for staff to assume that Cal-Am's return water obligations would be larger than those identified in the EIR/EIS and Weiss Report.

Further, as part of its Project approval, the CPUC considered issues such as the reasonableness of Cal-Am's rates and the public convenience and necessity for the Project. (See CPUC Decision D.18-09-017, pp. 178, 184, 193.) These determinations are all within the CPUC's purview as the state agency charged with exclusive jurisdiction to ensure that investor-owned water utilities deliver water at reasonable rates. (See Pub. Util. Code, § 451, 454, 728.) The CPUC's review of the Project included exercising its ratesetting authority wherein the CPUC was statutorily "charged with the responsibility of ensuring that all rates demanded or received by a public utility [such as Cal-Am] are just and reasonable." (See CPUC Decision D.18-09-017, pp. 19-20.) Based on its robust record developed over six years, the CPUC determined the Project "achieves an

appropriate balance between supplying a sufficient amount of safe, reliable, potable water and maintaining just and reasonable rates." (*Id*., p. 178.)

The CPUC also determined that Cal-Am would incur the costs for meeting its return water obligation if that obligation "is increased due to a greater OWP than that estimated in the FEIR/EIS." (*Id*., p. 192.) Thus, the record does not support staff's determination that any increased costs from Cal-Am's return water obligations would be passed onto consumers.

In sum, the CPUC—not the Commission—has authority over determining the reasonableness of Cal-Am's rates, and the CPUC determined following its multi-year ratesetting process that Cal-Am's rates are just and reasonable.

E. Energy Consumption & Climate Change

The Staff Report concludes that the Project appropriately minimizes energy consumption and is consistent with the LCP and Coastal Act policies regarding energy consumption and climate change. (Staff Report, p. 61.) Cal-Am agrees with Staff's determinations.

However, the Staff Report bases its conclusion by citing to the data for the larger project that was analyzed in the EIR/EIS, not Alternative 5a, which was the reduced project approved by the CPUC. To clarify the record, Alternative 5a (the Project for which Cal-Am has applied to the Commission) would reduce the GHG emissions and energy use as follows:

- Annualized construction emissions reduced from 357 tonnes CO_2e per year to 342 tonnes CO_2e per year. (See Final EIR/EIS, pp. 4.11-16, 5.5-244.)

- Operational emissions reduced from 8,008 tonnes CO_2e per year to 5,188 tonnes CO_2e per year. (See Final EIR/EIS, pp. 4.11-17, 5.5-244.)

- Operational electricity use for the intake and desalination plant reduced from approximately 57,000 megawatt hours of electricity per year to approximately 38,000 megawatt hours of electricity per year. (See Final EIR/EIS, pp. 4.11-12, 5.5-341.)

In addition, as noted in the Staff Report, the Project includes Mitigation Measure 4.11-1, which would reduce the carbon footprint of the Project's electricity consumption to zero; the electricity would be generated from renewable energy sources, and/or would otherwise be offset through the procurement of Renewable Energy Certificates and/or retirement of Carbon Offsets.

Nevertheless, staff also asserts that the Pure Water Monterey Groundwater Replenishment Project ("PWM Expansion") constitutes a feasible alternative that would reduce energy consumption as compared to the Project. Public Water Now makes a similar argument in their letter. (Public Water Now Letter, p. 2.) However these statements do not take into account Mitigation Measure 4.11-1, which ensures the Project would result in net zero operational emissions from electricity consumption. Cal-Am is not aware of the PWM Expansion making a similar commitment to net zero operational emissions from electricity consumption. In addition, as explained in Section I, *infra*, PWM Expansion is infeasible, and should not be considered as

an alternative to the Project. Accordingly, comparing the Project's energy consumption to the PWM Expansion is unnecessary.

F. Public Access and Recreation

Cal-Am agrees with the Staff Report's conclusion that the Project's construction-related activities would be consistent with LUP and Coastal Act policies related to public access. However, staff's concern that public access may be reduced after construction due to Project operations is unfounded. The Project will occupy 0.06 percent of the 400+ acre CEMEX site. (Staff Report, p. 23.) Beginning in year five of operations, yearly maintenance activities would occupy an additional approximately 0.25 acre of the CEMEX site for a period of 9 to 18 weeks at a time. None of the area impacted by the Project's construction or operation, including maintenance activities, would impede beach use or access. (Final EIR/EIS, pp. 3-59, 4.8-33; Staff Report, p. 65.) Accordingly, the Project's impact on public access is de minimis. Nevertheless, to ensure that public access will not be impeded by future Project operations, Cal-Am is proposing a Special Condition requiring development and approval of a Public Access Plan. Proposed language for that condition is included at Attachment C, hereto.

Staff Report Contention #22: The Staff Report states that the outfall liner has not been evaluated, and because as currently described, installation would require heavy equipment operating on the beach, placement of barriers, and protective work zones, there may be temporary adverse effects on public access. The Staff Report states that there is not yet sufficient information to determine the full extent of the outfall liner impacts. (Staff Report, p. 64.)

Cal-Am Response: The outfall liner is not part of Cal-Am's CDP application. It may be appropriate to separately evaluate and condition construction and operation of the outfall liner when M1W applies for a CDP for that work, depending on its scope. That scope has yet to be determined and is in M1W's control. In addition, potential alternatives to installation of the outfall liner are being evaluated, including implementation of a spray liner that could avoid ground disturbance and potential ESHA impacts that were evaluated and disclosed in the EIR/EIS. Further, M1W is also evaluating as a separate project the relocation of the outfall, which may be necessary to address sea level rise. As part of that project, a pre-lined outfall could be installed and thus avoid the need for ground disturbance and ESHA impacts associated solely with outfall lining activities. The final approach to the outfall liner with be determined by M1W. Nevertheless, for purposes of this CDP, Cal-Am proposes a Special Condition (see Attachment C) that would require approval of the outfall work prior to the commencement of Project operations. *Staff Report Contention #23: The Staff Report alleges that during operations, the Project could result in adverse effects to public access and recreation, depending on the eventual restoration and access plan that emerges from implementation of the CEMEX Settlement Agreement. (Staff Report, p. 64.) Public Water Now submitted a comment letter on November 12, 2019, similarly stating that the Project could limit public access and recreation. (PWN Letter, p. 2.)*

> Cal-Am Response: Staff's concerns that the Project could result in adverse effects to public access and recreation depending upon implementation of the CEMEX Settlement Agreement are misplaced. As an initial matter, the Commission already contemplated that the Project could be built on the CEMEX site when it approved the CEMEX

Settlement Agreement subject to Cal-Am's existing rights. (Settlement Agreement, § 23.2 ["this Agreement is not intended to and shall not be construed or deemed to supersede or interfere with any existing rights or obligations of California-American Water Company . . . related to the Property"].) To now use the Settlement Agreement as the basis for asserting a public access impact is improper and plainly contradicts the Commission's earlier determination.

Further, neither construction nor operation of the Project will impede coastal access or recreation, as the area occupied by the slant wells will be relatively small—only 0.24 acres. Further, the Project will not impede beach access because the Project does not involve construction of any structure or operations on the beach—no barrier to lateral beach access has ever been contemplated or suggested. The slant wells will occupy minimal space and not impede vertical beach access. (See, e.g., Final EIR/EIS, p. 4.8-35 ["The wells would be constructed approximately 500 feet landward of the back of the beach. No work on the beach is proposed."]; p. 6-54 ["The subsurface slant wells would be set back from the beach at a distance that would not preclude public access on the beach. No other proposed components would interfere with vertical or lateral public access to the shoreline or coastal waters."]; 4.8-17 ["most MPWSP components in proximity to the coastal zone . . . would be buried underground and would not substantially affect long-term public access to or along the coast."].)

Notably, vertical access to the beach is not even possible until closure of the CEMEX sand mine in 2022 and as stated in the Staff Report "construction would likely be complete before public access is developed." (Staff Report, p. 64.) After construction, the total fenced area as proposed by Cal-Am would occupy less than one-quarter of an acre of the 400+ acre CEMEX site. (See, e.g., Staff Report, p. 23 [referencing Cal-Am's proposal to fence 10,389 square feet or approximately 0.24 acres].) Specifically, Cal-Am proposes to fence six well sites (the largest of which is 56' by 38') and two surge tank sites (the largest of which is 22' by 53'). (See Proposed Fence Perimeters, included with Cal-Am's local CDP application to the City of Marina.) All fencing will be 8-feet tall and have PVC coating with tan (sand) colored privacy slats. Accordingly, the fenced area represents only 0.06 percent of the CEMEX site. This de minimis presence cannot be construed as limiting public access to the beach or other coastal resources.

Staff also raises concerns that the ongoing maintenance of the slant wells will occupy an area of up to about six acres. (Staff Report, p. 65.) Commencing in year five of operations, yearly maintenance activities would occupy an additional approximately 0.25 acre of the CEMEX site for a period of 9 to 18 weeks. The six acre figure cited by staff represents the total maintenance area that could be utilized over the course of the Project. However, the six acre area would not be utilized all at once—instead, on a yearly basis the additional area necessary for maintenance would be significantly smaller at approximately 0.25 acre, which represents the area surrounding individual pieces of infrastructure or well pads on the site that would be maintained. In addition, the Final EIR/EIS found that potential impacts associated with use of the entire six acre area would be less than significant with mitigation. (Final EIR/EIS, pp. 3-59, 4.6-247 to 4.6-257.) Among other mitigation measures, "[m]aintenance activities would occur between October and February to avoid the nesting season for snowy plover" and "[m]aintenance

workers would access the slant wells via the existing CEMEX access road." (Final EIR/EIS, pp. 3-59; see also *id.*, pp. 4.6-249, 4.6-254 to 4.6-257 [listing no less than twelve mitigation measures for maintenance related impacts].) Thus, commencing in year five of operations, yearly maintenance activities would occupy only a very small portion of the CEMEX site and these temporary impacts will be less than significant with mitigation.

The Staff Report states that if not for its rejection of the override provided in Section 30260, "the Commission could require special conditions requiring Cal-Am to implement measures needed to ensure its proposed project would be consistent with the . . . Coastal Act and LCP provisions related to public access and recreation." (Staff Report, p. 65.) As noted above, Cal-Am believes that Project construction and operations will present de minimis interference with public access to the beach. Nevertheless, to ensure that there will be no impacts, Cal-Am is proposing a Special Condition requiring the development and approval of a Public Access Plan. The proposed language is included at Attachment C, hereto.

G. Visual Resources

The Staff Report concludes that Project components within the Coastal Zone would be largely hidden from public view, and that ongoing Project maintenance would be limited and would not conflict with the LCP's policies regarding visual resources. (Staff Report, p. 67.) Staff further concludes that the Project's impacts on visual resources could conform with LCP and Coastal Act visual resources policies if the Commission were to impose special conditions on the Project. (*Ibid.*) Cal-Am agrees with staff's conclusion that Project development would be primarily concealed from public view, and that Project maintenance activities would not conflict with LCP policies intended to limit development above dune ridgelines.

Nevertheless, staff also asserts that, because the Project does not conform with other LCP and Coastal Act policies unrelated to visual resources, and also does not qualify for a Coastal Act section 30260 exemption as a coastal-dependent industrial use, "there is no need to identify special conditions that may be needed to ensure conformity" with visual resources policies. (Staff Report, p. 67.) As explained in Sections I.A, B, and C, the Project is consistent with LCP and Coastal Act policies regarding ESHA, coastal hazards, and protection of coastal waters. The Project is further consistent with policies regarding visual resources because: (1) the Project will not be visible from any entrance to the City of Marina; (2) above-ground components of the Project would not be visible from areas outside of the CEMEX site; and (3) as explained in the Final EIR/EIS, any necessary fencing will be designed to be minimally intrusive and to complement the architectural character of the community. (See Final EIR/EIS, p. 4.14-43.) While staff has not identified with which visual resources policies it contends the Project may conflict, Cal-Am remains willing to coordinate with staff to develop appropriate Special Conditions regarding visual resources to address staff's concerns.

H. Environmental Justice

The Project is consistent with Coastal Act Section 30604(h), including substantive and procedural elements of environmental justice. The Staff Report errs in finding that the Project's

overall effect would be to burden communities of concern and overlooks many important Project benefits. For example, the Project will support economic growth in the area by providing a reliable and much-needed supply of water to the Monterey Peninsula. The Project will

> ensure[] long-term water supply in the Monterey Peninsula area[, and] will boost the region's economic vitality, particularly the County's 'four pillars' – agriculture, tourism, education, and research, by substantially enhancing the reliability of water resources and water infrastructure. The Project will allow residential, commercial (including tourism) and industrial activities to continue to exist and flourish within the greater Monterey area, benefitting those who live and work throughout the greater Monterey area (and not merely in the CalAm Monterey service territory).

(CPUC Decision D.18-09-017, Appx. C, pp. C-74 to C-75.) Accordingly, the CPUC determined that implementation of the Project would provide local and regional economic benefits, both from construction and operation. (*Ibid.*)

The Staff Report also downplays the importance of the Project's return water component to CCSD, which will prevent CCSD from undertaking costly new well development and groundwater treatment. Castroville, by staff's own analysis, is a community of concern with a higher proportion of low-income residents than any of the other communities that staff evaluated and the Project's benefits to Castroville must be considered. (Staff Report, pp. 70-71.) Castroville "currently relies on about 780 afy of groundwater from the SVGB to meet Castroville's water demands, and increasingly has experienced water supply challenges because the water is getting saltier." (CPUC Decision D.18-09-017, Appx. C, p. C-75.) The Project will resolve those challenges. (*Ibid.*) The CCSD Manager has called the Project "an essential element of CCSD's long-term water supply" and stated that "halting construction of the MPWSP will severely prejudice CCSD and the disadvantaged community of Castroville that desperately needs a new, reliable long-term water supply." (Declaration of Eric Tynan in Case No. 19CV003305, p. 4, attached hereto as **Exhibit 11**.)

Finally, the CPUC also found that the Project would provide many other benefits, including:

- A reliable water supply for CalAm's Monterey District (CPUC Decision D.18-09-017, Appx. C, p. C-74);
- An alternative water supply that adheres to Cal-Am's obligations under the Water Board's CDO (*ibid.*);
- The protection and promotion of the Monterey regional economy by providing a permanent solution for Monterey Peninsula's water supply, supporting economic recovery of the Monterey area tourism industry (*id.*, pp. C-74 to C-75); and
- Environmental benefits to habitat and wildlife and marine species in the Carmel River and would "be expected to retard future inland migration of the seawater

intrusion front, by intercepting and capturing some of the seawater that currently migrates inland across the coastline" (*id.*, p. C-75; see also Section D).

Therefore, the Project provides substantial benefits to the disadvantaged communities both on the Monterey Peninsula and in the larger region that heavily relies on the Peninsula's jobs and economic activity,[23] and is consistent with the Commission's environmental justice policies. In addition to the responses below, Cal-Am will provide the Commission with an Environmental Justice technical analysis under separate cover at a later date.

Staff Report Contention #24: The Staff Report contends, based on a Food & Water Watch survey, that Cal-Am's water rates are among the highest in the country. (Staff Report, p. 73.)

Cal-Am Response: The Staff Report's reliance on the Food & Water Watch survey regarding Cal-Am's water rates is misplaced. The average water use of a single-family residential household in Monterey is 44,400 gallons of water per year rather than the 60,000 gallons per year cited by the Staff Report. (See Informational Flyer, attached hereto as **Exhibit 12**, , p. 1; see also Update to General Rate Case Application, Central Division, attached hereto as **Exhibit 13**, Table 3.7 [showing single-family residential water consumption well below 60,000 gallons per year].) This is an important distinction, because like many water utilities in the state, Cal-Am's "conservation pricing" has higher tiered rates assigned to higher than average levels of water use in order to encourage water conservation. Accordingly, basing estimated payments on 60,000 gallons per year skews the average cost of water to seem more severe than it actually is. (*Ibid.*) If you apply the correct usage model into a monthly estimate utilizing a 5/8-inch meter, you get a monthly bill of about $78—not the $100 that is claimed in the Food & Water Watch survey for 2017. (*Ibid.*)

Moreover, the Food & Water Watch survey cites three separate papers that each explicitly warn against the sort of rate comparison practice that the survey employs.[24] The Food & Water Watch survey also ignores the fact that water rates are a reflection of water utility investment, and that a utility that is properly maintaining its infrastructure and planning for the future will necessarily have higher rates than a utility that defers investment or provides inadequate solutions in favor of lower rates. For these reasons,

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[23] "The Project will allow residential, commercial (including tourism) and industrial activities to continue to exist and flourish within the ***greater Monterey area***, benefiting those who live and work throughout the greater Monterey area (and not merely in the CalAm Monterey Service territory)." (CPUC Decision D.18-09-017, Appx. C, pp. C-74 to C-75 [emphasis added].)

[24] Truth from the Tap Blog, available at https://truthfromthetap.com/two-key-reasons-to-dismiss-latest-food-water-watch-report/. For example, one of the papers explains that "costs and rates charged for water services differ in many respects between public and investor-owned purveyors. . . . [P]ublic purveyors have tax payer sources of capital and revenue that are assumed by the tax payers but are not reflected in water rates." (*Ibid.*) Differences between public and investor-owned utilities as well as "[f]actors such as geographic location, demand, political climate, water source, level of treatment, and age of system" all impact rates, and "casual comparisons of or generalizations about rates are strongly discouraged." (*Ibid.*)

comparison between water rates is often an unhelpful exercise. Nevertheless, the CPUC – which is the state agency charged with determining water rates—has determined Cal-Am's rates to be just and reasonable. (See CPUC Decision D.18-09-017, pp. 19-20, 123-24; Pub. Util. Code, §§ 451, 454.)

Staff Report Contention #25: The Staff Report alleges that communities of concern would be disproportionately affected by increased water rates resulting from the Project's construction and operation and that a feasible alternative would not exacerbate or increase burdens to these communities. (Staff Report, pp. 73-74.)

Cal-Am Response: The CPUC has exclusive jurisdiction to ensure that investor-owned water utilities deliver water at reasonable rates, based on factors such as fixed costs and variable use charges. (See, e.g., Pub. Util. Code, §§ 451, 454, 728.) The CPUC's review of the Project included exercising its ratesetting authority wherein, under Public Utilities Code sections 451 and 728, the CPUC was "charged with the responsibility of ensuring that all rates demanded or received by a public utility [such as Cal-Am] are just and reasonable." (See CPUC Decision D.18-09-017, pp. 19-20.) The CPUC stated:

> In approving the MPWSP we recognize that desalinated water is relatively expensive, both in terms of capital costs and ongoing operations and maintenance costs. In reaching our decision here, the [CPUC] must balance potential benefits against the cost burden to CalAm's ratepayers from the construction of the MPWSP, and consider the relative benefits and costs of reasonable alternatives. . . . The [CPUC] must decide what is a reasonable cost burden for ratepayers to bear, under what conditions such a cost can be justified, and how the cost increase can be minimized and controlled to achieve an appropriate balance between supplying a sufficient amount of safe, reliable, potable water and maintaining just and reasonable rates. . . . We must determine what is reasonable in this context. At the same time we must not burden ratepayers with such a high cost that it becomes prohibitive.

(*Id.*, pp. 123-24.) After extensive briefing and input from the community, the CPUC approved the Project and Cal-Am's rate recovery. (*Ibid*.) Indeed, the rates ultimately approved by the CPUC were based on extensive collaboration: "Sixteen parties (a sub-set of parties, including the applicant, ratepayer advocates, environmental groups, and public water agencies) submitted a proposed Comprehensive Settlement Agreement (Comprehensive Settlement) that addresses O&M expenses, cost caps, financing and ratemaking for the MPWSP." (*Id.*, p. 88.) This Comprehensive Settlement formed the basis for the CPUC's ratemaking decision. Although the CPUC did not adopt the Comprehensive Settlement in full it stated that "substantial testimony and materials have been submitted into the record as to many of the proposed components of the agreement. This allow[ed CPUC] to adopt the framework (with additional conditions) and key elements as to O&M costs, financing, ratemaking, and contingency provisions[.]"

(CPUC Decision, D.18-09-017, p 99.) Ultimately, the CPUC "adopted the framework set out in the Comprehensive Settlement with ***additional protections***." (*Id.*, pp. 124-125 [emphasis added].)

The CPUC gave "great weight to the City of Marina's community values, and also considers the community values expressed by others, such as The Latino Water Coalition, Latino Seaside Merchants, and Communidad en Accion, Coalition for Peninsula Businesses, Cal-Am ratepayers, Salinas Valley Water Coalition, the County of Monterey, and others." (CPUC Decision D.18-09-017, p. 158.) The CPUC "[a]ddressed the probable rate increases for ratepayers . . . including identified low-income populations in Sand City, Seaside, and downtown Monterey." (*Id.*, p. 164.) As a result, the CPUC added additional ratepayer protections as advised by the California Public Advocates Office (*id.*, pp. 184-85) and retained "continuing jurisdiction over Cal-Am to ensure that rates are just and reasonable" (*id.*, p. 204).

The CPUC exercised its exclusive jurisdiction and special expertise in determining the future rates associated with construction and operation of the Project. It did so while specifically considering and weighing the impacts on ratepayers, such as those in identified low income communities, against the need for a reliable source of water on the Monterey Peninsula.[25] It is not the Commission's role to use alleged environmental justice concerns as a backdoor to independently review utility rates or second-guess the CPUC's ratesetting determinations.

The projected costs of Project water are far below the approximately $6,000 per acre foot claimed in the Staff Report. (Staff Report, p. 73.) The CPUC decision states that the "cost per acre-foot (AF) for the 6.4 mgd plant 'under the Tier 2 and PTM caps (inclusive of the 3,500 AF of GWR water) is $4,265 per AF and $4,472 per AF respectively." (CPUC Decision D.18-09-017, p. 123, fn. 332; see also Rebuttal Testimony of Jeffrey Linam, attached hereto as **Exhibit 14**.)

Additionally, for low income ratepayers within Cal-Am's service area, including Seaside, Cal-Am offers a low income ratepayer assistance ("LIRA") program that discounts rates for qualifying customers by up to 30%.[26] (See **Exhibit 15** [Regular and LIRA Rates].) In addition, to the extent that the Staff Report suggests that the City of Marina will experience an increase in water rates, this is entirely wrong. Marina is not within Cal-Am's service territory and its water rates will not change regardless of whether the Project is built. Marina's claims of environmental justice impacts on its citizens simply have no merit.

Staff contends that the PWM Expansion represents a feasible alternative that would not exacerbate or increase burdens to communities of concern. However, as explained in

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[25] As discussed in Section I.2, CPUC found that PWM Expansion was not a feasible alternative to the Project.

[26] The LIRA program does not discount water usage in excess of 17,200 gallons in a single month.

Section I, *infra*, the PWM Expansion is infeasible, and should not be assessed as an alternative to the Project.

Staff Report Contention #26: The Staff Report contends that its mandate to ensure "coastal access" broadly includes ensuring the affordability of cost of living in coastal communities. (Staff Report, p. 74.)

Cal-Am Response: Staff interprets "coastal access" to mean "ensuring the affordability of cost of living" and accordingly staff asserts that it reviews water rates to evaluate the affordability of living in coastal communities. Cal-Am's rates were assessed by the CPUC and found to be both just and reasonable after considering the potential impacts on low-income populations. (CPUC Decision D.18-09-017, p. 164, 184-85, 204.) In addition, as discussed above, the Staff Report relied on inaccurate rate information and did not take into account Cal-Am's robust LIRA program. Moreover, without the Project there will be insufficient water for essential affordable housing in the region . (See Section I.3.g [discussing PWM Expansion's inability to supply sufficient water to meet housing demand].) Therefore, the Project ensures coastal access by being consistent with ensuring affordability of cost of living in coastal communities.

Staff Report Contention #27: The Staff Report argues that if not for the Project, seven acres of beach and dune habitat would be available in the near future for public access, habitat restoration, and passive public recreational use. The Staff Report also states that some members of the community worry about losing some of the negotiated access at the site due to limitations Cal-Am may impose around its well field. (Staff Report, pp. 74-75.)

Cal-Am Response: As discussed in Section F, the Commission already considered the Project's presence at the CEMEX site and approved the CEMEX Settlement Agreement so as "not to be construed or deemed to supersede or interfere with any [of Cal-Am's] existing rights or obligations[.]" (Ex. 1, Settlement Agreement, § 23.2.) Additionally, a government agency or non-profit entity must purchase the property before it may become available for public access. (See *id.*, § 6.1.) There is no guarantee when or if the property will actually be purchased, and how much of the land will be opened for public access. Thus, analyzing whether public access will be impeded is premature and speculative.

In any case, the environmental and public recreational effects of Project components are expected to be extremely minimal and Cal-Am has not proposed any limitations around the well field other than its fencing. After construction, less than one acre will be occupied by fenced well pads. (See, e.g., Staff Report, pp. 23, 39.) This represents an impact of less than one percent of the 400+ acre CEMEX site. Staff's reference to "seven acres of beach and dune habitat" includes the projected six acres needed for heavy equipment and materials during maintenance periods. (*Ibid.*) As discussed in Section F, the six acre figure cited by staff represents the total maintenance area that could be utilized over the course of the Project, all six acres would not be utilized at once. Instead, commencing in year five of operations, yearly maintenance activities would occupy an additional approximately 0.25 acre area for a period of between 9 to 18 weeks and would be scheduled in the late Fall and Winter specifically to avoid snowy plover nesting

season. (Final EIR/EIS, p. 3-59.) Including all six acres results in an impact of approximately 1.5 percent to the 400+ acre CEMEX site. These impacts would not limit any public access or entrance to the beach or coastal resources. (See Section F for further discussion.)

Staff Report Contention #28: The Staff Report states that there is a "credible assertion" that the Project could compromise aquifers via saltwater intrusion and deplete the City of Marina's groundwater supplies. (Staff Report, Addendum, p. 8.) Letters from Victoria Bañales and Margaret-Anne Coppernoll among other commenters also stated or implied that the Project would "steal" Marina's groundwater. (Bañales Letter (Nov. 16, 2019); Coppernoll Letter (Nov. 11, 2019), p. 1.)

Cal-Am Response: Contrary to staff's assertion, the Project will not pump any water from aquifers that supply Marina's municipal wells, which are over 2 miles outside of the Project's capture zone. (See Final EIR/EIS, p. 4.4-75.) Rather, the Project will extract contaminated groundwater from the Dune Sands Aquifer and the 180-Foot Aquifer of the SVGB, whereas Marina's municipal wells are screened in the Deeper Aquifer. (*Ibid.*) The CPUC specifically evaluated the Project's potential to impact the SVGB and groundwater users, and determined that substantial evidence demonstrates that any impacts would be less than significant. (CPUC Decision D.18-09-017, pp. 81, 174-175.)

Further, Cal-Am is not "stealing" Marina's groundwater. As explained in Section D, the "SVGB is not an adjudicated groundwater basin, so use of the groundwater in the Basin is not subject to existing court decree, written agreements or oversight by an impartial watermaster." (Final EIR/EIS, p. 2-32.) As such, Cal-Am is able to obtain appropriative rights for water extracted from the basin. (*Ibid.*; see Section D, *infra*.) Marina has no rights in the groundwater unless it too acquires appropriative rights, and the Project's use will not take anything belonging to Marina or otherwise affect Marina's ability to draw water from its municipal wells in the Deeper Aquifer. If the water the Project will extract was viable for municipal use, Marina already would have developed wells in the vicinity for its own supplies—but it has not.

Moreover, contrary to staff's claims, the Project will prevent rather than exacerbate further seawater intrusion beyond the Project's capture zone. (See Final EIR/EIS, pp. 4.4-92, 8.5-561; HWG Response to Coastal Commission (Feb. 20, 2020), at p. 2; see also Section D, *supra*.) These conclusions were confirmed by the Commission's own consultants. (See, e.g., Weiss Report, p. 2, 7.) Neither staff nor commenters have presented any "credible assertions" that the Project could negatively affect the City of Marina's groundwater supplies or exacerbate saltwater intrusion.[27] Accordingly, there are no environmental justice implications associated with the Project's effects on groundwater.

[27] A robust discussion of the Project's consistency with the groundwater protection provision of Coastal Act section 30231 is provided at Section D, *supra*.

Staff Report Contention #29: The Staff Report alleges that residents of the City of Marina were not fully engaged by the CPUC because they were not ratepayers and therefore suffered procedural prejudice. (Staff Report, p. 75.)

Cal-Am Response: The CPUC proceedings included a robust public process for the City of Marina and its residents. Attached to its decision, the CPUC provided a detailed chronology of the extensive communications between the City of Marina as a Responsible Agency and the CPUC as Lead Agency. (See CPUC Decision D.18-09-017, Appx. C, Ex. A.) Marina's contact began in October 10, 2012, and was maintained throughout the entire life of the CPUC's review of the Project, which lasted through September 13, 2018. (*Ibid.*) Marina and its residents, as members of organizations such as Citizens for Just Water, Water Plus, and Public Water Now, were also active members throughout the CPUC's administrative proceedings, submitting hundreds of comment letters on the EIR/EIS over a lengthy public comment period. (See Final EIR/EIS, §§ 8.6-8.8; see also *id.*, p. ES-4 to ES-5 [discussing public involvement and public meetings in Marina, Seaside, and Carmel-by-the-Sea].) For years, Citizens for Just Water has sought to prevent the Project from being constructed and consists primarily of Marina residents and public officials, including Marina Mayor Bruce Delgado, as well as Marina City Councilmembers and Planning Commissioners, among others.[28] Citizens for Just Water actively opposed the Project in CPUC hearings, submitted opposition comments letters to the CPUC during the EIR/EIS process, and organized numerous public forums to criticize the Project and advise its members on how to advocate against the Project during the administrative process.[29] After the Final EIR/EIS was released, the City of Marina, Citizens for Just Water, Water Plus, Public Water Now, and several other organizations submitted hundreds of pages of materials during multiple stages of briefing that were reviewed by both the CPUC and the California Supreme Court.

CPUC hearings were accessible to residents, who appeared both in support and in opposition to the Project. The CPUC also held public meetings in a variety of locations to hear concerns from the public on topics such as the "needs of low income ratepayers, . . . [the] role of the [CPUC] in protecting ratepayers, . . . high rates" and other matters. (CPUC Decision D.18-09-017, Appx. A, p. 14.)

It is undisputable that residents from the City of Marina were afforded significant opportunities to provide input to the CPUC. That certain members of the community

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[28] Monterey County Weekly, *Marina residents gather in opposition to Cal Am's proposed desal project* (April 18, 2018) (*Opposition to Desal Project*), available at http://www.montereycountyweekly.com/blogs/news_blog/marina-residents-gather-in-opposition-to-cal-am-s-proposed/article_d269c294-435d-11e8-932e-87158f342af9.html; see also https://www.facebook.com/justice4water/.

[29] See https://www.citizensforjustwater.org/what-has-citizens-for-just-water-done.html (summarizing Citizen for Just Water's extensive opposition efforts); Citizens for Just Water Public Forum in City Council Chambers (April 11, 2018) 2m25s, https://www.youtube.com/watch?v=xJ3YrkG-CoE (Marina City Councilmember coaching Marina residents on how to effectively advocate against the Project).

disagree with the CPUC's decision does not render the process inadequate or demonstrate prejudice. Some portion of the community will disagree with actions taken by the CPUC, particularly related to water. As the CPUC noted, "[t]he water supply problems on the Monterey Peninsula are long-standing, contentious, and bitterly disputed by many parties and interests. The results of this continuing conflict have rendered some prior proposed solutions unachievable." (CPUC Decision D.18-09-017, p. 125.) Members of the community were provided with ample opportunities to participate in the administrative process. Finding a solution that satisfies all parties has proved impossible and attempting to do so will merely prevent the Monterey Peninsula from obtaining a practical solution to its water needs, a result that will most severely impact the very communities of concern the Commission seeks to protect.

MCWD Contention: Approval of Cal-Am's CDP would make it more difficult or financially infeasible for MPWMD to implement Measure J and therefore be inconsistent with the Commission's environmental justice policies.

Cal-Am Response: In 2018, voters in the MPWMD approved Measure J which requires MPWMD to assess the feasibility of a public takeover of Cal-Am's Monterey water system. Measure J only mandates that such a takeover actually occur if it is financially feasible. Nothing in the measure precludes Cal-Am from applying for and obtaining permits it needs for the Project. MPWMD has not issued any final findings indicating whether a public buyout of Cal-Am's water delivery system would be financially feasible with or without the Project. Preliminary findings were issued at a workshop last year, on November 12, 2019, which explicitly included the cost of the "whole desalination plant" in its valuation of Cal-Am's system and there was no analysis indicating that the Project would impede the financial feasibility of a public buyout. The Measure J Draft EIR released by MPWMD on June 18, 2020, similarly states that the acquisition of the water system "includes planned facilities associated with the Monterey Peninsula Water Supply Project (MPWSP) including the 6.4 million gallons per day Desalination Plant with sub-surface intake wells and related infrastructure improvements[.]"[30] Therefore, it is not clear why obtaining a permit in furtherance of the Project would prevent MPWMD's implementation of Measure J.[31] Moreover, MPWMD's preliminary findings regarding the valuation of Cal-Am's water delivery system are disputed by Cal-Am's independent consultants who have valued Cal-Am's water delivery system in Monterey at over $1 billion. As a result, a public buyout of Cal-Am's system, combined with follow-on

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[30] MPWMD, Potential Acquisition of Monterey Water System and District Boundary Adjustment, Draft EIR, p. 1-2 (June 2020), available at https://www.mpwmd.net/wp-content/uploads/MPWMD-Potential-Acquisition-of-MWS-and-District-Boundary-Adjustment-Draft-EIR-June-2020.pdf; see also *id.*, p. 2-12, fn. 5 [acknowledging that "CalAm is still in the process of acquiring all necessary permits. If all the required permits are received and the MPWSP is proceeding at the time the potential acquisition is performed, the District intends to acquire the 6.4 MGD Desalination Plant and all pertinent contracts, lands, and easements"].)

[31] MPWMD, Measure J Feasibility Study, Frequently Asked Questions (November 12, 2019), available at https://www.mpwmd.net/wp-content/uploads/FAQs-from-11-12-19-Feasibililty-Study-Workshop.pdf.

litigation costs would likely result in significantly increased water costs for the average Monterey Peninsula customer. Due to those substantial costs, public ownership is unlikely to move forward and would not support the environmental justice policies as MCWD claims. Any future findings or decisions related to MPWMD's implementation of Measure J are unrelated to this CDP and, in any case, would not impact the Coastal Act environmental justice policies.

I. Assessment of Alternatives

The Staff Report bases its recommendation that the CDPs should be denied on a conclusion that the PWM Expansion is a feasible and less environmentally damaging alternative to the Project. The Staff Report's analysis of the PWM Expansion as an alternative is deeply flawed. To begin, the proponents of the PWM Expansion never intended the PWM Expansion as an alternative, it was only ever intended as a back-up that would serve as a stop-gap measure in the event that the Project is delayed. (See Monterey One Water Resolution 2019-19, attached hereto as **Exhibit 16**); Final Supplemental EIR for the PWM Expansion, pp. 1-1, 3-6, 3-8, 3-24.)[32] Further, as discussed in additional detail below, the Commission does not have the authority, under either the Coastal Act or CEQA, to evaluate the PWM Expansion as a wholesale alternative for the Project. (See Coastal Act sections 30233 and 30260; Pub. Res. Code, § 21002.1, subd. (d).)

Nevertheless, the Staff Report evaluated the PWM Expansion as a Project alternative in four main ways: (1) feasibility; (2) analysis of water supply and demand; (3) consistency with Project objectives and criteria; (4) and comparison of adverse environmental effects, and concluded that the PWM Expansion is a feasible, less environmentally damaging Project alternative. (Staff Report, p. 80.) Contrary to the Staff Report conclusion, the PWM Expansion does not satisfy these stated requirements for a feasible Project alternative.

First, the Staff Report's conclusion that the PWM Expansion is a "feasible" alternative to the Project is not supported by substantial evidence. Contrary to the Staff Report's assertions, there is no evidence that the PWM Expansion can be accomplished in a successful manner, within a reasonable period of time, or with fewer environmental impacts than the Project. Notably, as demonstrated in comments submitted by Cal-Am and numerous other interested parties, the Final Supplemental EIR ("SEIR") for the PWM Expansion is deeply flawed. Recognizing these flaws, on April 27, 2020, the Monterey One Water ("M1W") Board of Directors denied certification of the SEIR for the PWM Expansion. (See M1W June 8, 2020 Letter to Cal-Am, p. 1, attached hereto as **Exhibit 17**.) As a result, the PWM Expansion is no longer moving forward. Moreover, the CPUC has already rejected the PWM Expansion as an alternative to the Project "for myriad independent reasons." A complete discussion of the infeasibility of the PWM Expansion is provided below in Section I.2.

Second, the Staff Report's analysis of water supply and demand was based largely on speculation and an improper and inaccurate September 2019 analysis of supply and demand for the Monterey Peninsula prepared by Monterey Peninsula Water Management District

[32] M1W, Final Supplemental EIR for the Pure Water Monterey Expansion (April 13, 2020), available at https://purewatermonterey.org/wp/wp-content/uploads/Final-SEIR-Proposed-Modifications-PWM-GWR-Project-April-2020.pdf.

("MPWMD") General Manager David Stoldt (the "Stoldt Memo"). The Staff Report failed to address or acknowledge Cal-Am's October 2019 response to the Stoldt Memo, which was provided to Commission staff and demonstrated that the analysis in the Stoldt Memo is deficient for numerous reasons and could not be relied upon by the Commission. After the release of the Staff Report and last November's informational hearing before the Commission, water supply and demand have been evaluated in additional reports, which include reports prepared by Stoldt, Hazen and Sawyer, Cal-Am and others. In addition to the responses to the Staff Report's analysis of supply and demand provided below in Section I.3, Cal-Am will provide the Commission with a separate response that accounts for the additional information provided in these new reports.

Third, given uncertainties in the PWM Expansion's ability to provide a reliable water supply to the Monterey Peninsula, and the M1W Board of Directors' recent decision to not certify the Final SEIR for the PWM Expansion, the PWM Expansion simply cannot meet and is not consistent with the Project's objectives and criteria. A complete discussion of the PWM Expansion's inconsistency with Project objectives and criteria is provided below in Section I.4.

Fourth, the Staff Report's conclusion that the PWM Expansion would be less environmentally harmful than the Project wholly ignores the CPUC's analysis of the Project in the Final EIR/EIS and conflicts with the significant flaws identified in the environmental analyses for the PWM Expansion.[33] A complete discussion regarding the environmental impacts of the PWM Expansion and Project is provided below in Section I.5.

In sum, the Staff Report's analysis of the PWM Expansion as an alternative to the Project is flawed. Implementation of the PWM Expansion instead of the Project would lead to significant water supply shortfalls along with corresponding economic hardship on the Monterey Peninsula, and could require additional water diversions from the Carmel River causing further impacts to the endangered steelhead trout.

1. Interpretation of Coastal Act Sections 30233 and 30260

Staff Report Contention #30: The Staff Report asserts that Coastal Act sections 30233 and 30260 require the Coastal Commission to assess alternatives to projects for which the Commission is asked to grant Coastal Development Permits. (Staff Report, p. 77.) As a result, staff, and MCWD, argue that the Commission now has an independent obligation to assess alternatives to the Project based on current information, including the PWM Expansion. (Id., p. 79; MCWD Letter, p. 9.)

> Cal-Am Response: The Staff Report misapplies sections 30233 and 30260 and errs in concluding that either section permits the Commission to engage in the type of assessment of Project alternatives provided in the Staff Report. Section 30233 provides that diking, dredging, or filling shall not be permitted in coastal waters except: (1) where there is no feasible less environmentally damaging alternative; (2) where feasible

[33] The PWM Expansion Draft SEIR was released on November 7, 2019, shortly before the Commission's November 14 hearing on the Project. The Final SEIR was released on April 13, 2020.

mitigation measures have been provided to minimize adverse environmental effects; and (3) where limited to certain categories of projects. (Pub. Resources Code, § 30233, subd. (a).) Public Resources Code section 30108.2 defines "fill" as "earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area." As discussed in Section C, *supra*, none of the Project construction proposed under these applications involve fill. As the Project does not involve any diking, dredging, or filling in coastal waters, section 30233 does not provide the Commission with the authority to consider whether there is a "feasible less environmentally damaging alternative" to the Project. Moreover, even if the Project components that are the subject of these applications did involve fill, which they do not, the Commission's authority under Section 30233 would be limited to review of alternatives to those Project components within the Commission's jurisdiction that do involve fill, rather than wholesale alternatives to the entire Project.

Section 30260 separately provides that new or expanded coastal-dependent facilities that are otherwise inconsistent with Coastal Act Chapter 3 policies may nonetheless be permitted where: (1) alternative locations are infeasible or more environmentally damaging; (2) permit denial would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible. The plain language of Section 30260 grants the Commission the authority to consider only "***alternative locations***" for coastal-dependent facilities, ***not alternative projects***. This interpretation is confirmed by numerous prior Coastal Commission staff reports, which have consistently interpreted section 30260 as only permitting consideration of alternative locations for the project before the Commission. Cal-Am is not aware of prior instances where the Commission has interpreted section 30260 to mean an alternative to the ***entire*** project before the Commission.[34] Here, the Final EIR/EIS thoroughly analyzed alternative locations for the Project's slant well intake infrastructure—that assessment made clear that the CEMEX site is the least environmentally damaging location feasible for the Project. (See Section J, *infra*; see also Final EIR/EIS, §§ 5.1-5.6.) Where there are no feasible alternative locations, the Commission does not consider whether the project is

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[34] See, e.g., Th14a-12-2018, p. 135, available at https://documents.coastal.ca.gov/reports/2018/12/Th14a/Th14a-12-2018-report.pdf (in considering a CDP application for new oil production and wetlands restoration projects, stating that, "[t]he first test of 30260 requires a finding that ***alternative project locations*** are 'infeasible or more environmentally damaging.'") (emphasis added); Th6a-9-2005, p. 36, available at https://documents.coastal.ca.gov/reports/2005/9/Th6a-9-2005.pdf (in assessing a CDP application for a nuclear fuel storage facility, stating that, "there are no other offsite locations available to store the spent fuel and there is considerable doubt as to when, if ever, alternative sites might become available. Additionally, none of the onsite alternative locations at the power plant would be less environmentally damaging, since they are lower in elevation or less stable geologically."); W6c-11-1995, p. 16, available at https://documents.coastal.ca.gov/reports/1995/11/W6c-11-1995.pdf (in analyzing a pipeline project, concluding that, "The purpose of this project is to replace sections of two existing pipelines. … Since the new pipeline sections are to be installed for the purpose of reconnecting the existing pipelines, any alternative locations are infeasible.").

sited in the least environmentally damaging location. (See W6c-11-1995, p. 16.) As such, section 30260 does not provide the Commission with the authority to determine whether there are any feasible alternatives to the entire Project.

Further, the Commission, as a CEQA responsible agency, is limited to considering alternatives within its jurisdiction. The PWM Expansion, which is not located within the Coastal Zone, is outside of the Commission's jurisdiction. (See, e.g., Pub. Res. Code, § 21002.1, subd. (d); Cal. Code Regs., Tit. 14, Div. 6, Ch. 3 ("CEQA Guidelines"), §§ 15042, 15096, subd. (g)(1) ["When considering alternatives and mitigation measures, a responsible agency is more limited than a lead agency. A responsible agency has responsibility for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve."]; *RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1207 ["If the responsible agency finds that any alternatives or mitigation measures ***within its powers*** are feasible and would substantially lessen or avoid a significant effect of the project, the responsible agency may not approve the project as proposed, but must adopt the feasible mitigation measures or alternatives."] [emphasis added]; *Sierra Club v. Cal. Coastal Com.* (2005) 35 Cal.4th 839, 860 [holding that neither the Coastal Act nor CEQA allow the Commission to consider impacts of projects located outside the Coastal Zone]; *Schneider v. Cal. Coastal. Com.* (2006) 140 Cal.App.4th 1339, 1347 [concluding that the Coastal Act did not permit the Commission to consider ocean boaters' right to view coastline from the ocean].)

Therefore, as an initial matter, the Staff Report should not have considered the PWM Expansion as a Project alternative because the Commission does not have authority under the Coastal Act or CEQA to consider the PWM Expansion as an alternative.

2. Feasibility

Staff Report Contention #31: The Staff Report states that the PWM Expansion conforms to the criteria of the Coastal Act Section 30108 definition of feasibility. Staff argues that the PWM Expansion may be "accomplished in a successful manner," can be constructed within a reasonable period of time, will be more economically efficient than the Project, will have fewer environmental impacts, has fewer environmental justice impacts, and relies on proven technology for treating and distributing water. (Staff Report, pp. 80-81.) Similarly, MCWD asserts that the PWM Expansion must be assessed as a feasible alternative to the Project under both CEQA and the Coastal Act, thus requiring preparation of a supplemental EIR for the Project, and that Cal-Am's critiques of the PWM Expansion are financially motivated. (MCWD Letter, pp. 7-9.)

Cal-Am Response: The Staff Report's determination, and MCWD's assertion, that the PWM Expansion is a feasible alternative to the Project is not based on the actual status of the PWM Expansion. On April 27, 2020, the M1W Board denied certification of the SEIR for the PWM Expansion. (See M1W Board of Directors Staff Report, May 20, 2020, attached hereto as **Exhibit 18;** M1W Board of Directors Agenda, May 21, 2020, attached hereto as **Exhibit 19**.) ***As such, the PWM Expansion is no longer moving forward.***

The M1W Board rejected certification of the SEIR as a result of substantial deficiencies in the environmental analysis related to: source water for the PWM Expansion; water supply and demand; impacts to agricultural water supplies; and, importantly for the Commission's review of the Project, because ***the SEIR failed to evaluate the PWM Expansion either as an alternative to or a cumulative project with Cal-Am's Project***. (Ex. 18, M1W Board of Directors Staff Report.) Cal-Am and numerous other entities, including the Monterey County Water Resources Agency, the State Water Board, and the Seaside Basin Watermaster, submitted comments to M1W expressing significant concerns regarding the many deficiencies in the SEIR and the infeasibility of the PWM Expansion. (See April 24, 2020 Cal-Am Comments on PWM Expansion Final SEIR and May 9, 2020 Cal-Am Comments on Cost, Operational Performance and Status of PWM Expansion attached hereto as **Exhibits 20 & 21**; see also January 30, 2020 Cal-Am Comments on PWM Expansion Draft SEIR; January 31, 2020 MCWRA Comments on PWM Expansion Draft SEIR; January 31, 2020 State Water Board Comments on PWM Expansion Draft SEIR; and January 8, 2020 Seaside Basin Watermaster Comments on PWM Expansion Draft SEIR, which were separately submitted to staff on April 9, 2020, by the Coalition of Peninsula Businesses.) Accordingly, even if the PWM Expansion were to move forward, its timeline is unknown because the significant deficiencies in the SEIR would need to be corrected prior to the M1W Board moving forward with the Project. Notably, M1W "[s]taff has noted that ***the [M1W] does not have additional budget funds at this time for dealing with any additional deficiencies that have been identified*** . . . or could be identified in the future. ***[M1W] has suspended all of the remaining contracts on these matters to prevent further consultant expenditures***." (Ex. 18, M1W Board of Directors Staff Report [emphasis added].) As the M1W Board is not undertaking efforts to move forward with the PWM Expansion because of the deficiencies in the SEIR and a lack of funding, the PWM Expansion cannot be considered a feasible alternative to the Project.

Moreover, while the Staff Report acknowledges that the CPUC did consider the PWM Expansion as an alternative to the Project, staff and MCWD fail to recognize that the CPUC rejected the PWM Expansion as infeasible for "***myriad independent reasons***." (See CPUC Decision D.18-09-017, Appx. C, p. C-17 [emphasis added].) The CPUC noted that by September 2018, PWM Expansion was already far behind schedule and there was not "sufficient certainty concerning short- and long-term availability of source water supplies for the PWM Expansion." (*Id.*, p. C-71.) The issuance of the PWM Expansion SEIR, which has not been approved by M1W, has not changed the validity of the CPUC's conclusions, and instead highlights many of the feasibility concerns discussed by the CPUC. (See Ex. 20, Cal-Am Comments on PWM Expansion Final SEIR; see also January 30, 2020 Cal-Am Comments on PWM Expansion Draft SEIR, separately submitted to staff on April 9, 2020 by the Coalition of Peninsula Businesses.) Contrary to MCWD's assertions, there is no evidence to suggest that the proposed PWM Expansion is "considerably different" from the PWM Expansion proposal that was analyzed and rejected as an alternative by the CPUC, such that the PWM Expansion has suddenly become a feasible Project alternative that must be re-analyzed in a supplemental

EIR for the Project. (See MCWD Letter, p. 7; CEQA Guidelines, § 15162, subd. (a)(3)(C).)[35]

Each of the feasibility factors discussed in the Staff Report are discussed further below.

a. *"Capable of Being Accomplished in a Successful Manner"*

***First*,** in concluding that the PWM Expansion is capable of being accomplished in a successful manner, the Staff Report cites to the "proven" technology of the first phase of the PWM (the "Original PWM Project"). Staff's claim that the technology of the Original PWM Project is "proven" is not supported by the actual events that have occurred with respect to that project. More specifically, there are serious concerns regarding the technology associated with the Original PWM Project. (See Ex. 21, pp. 3-4.) As examples, sinkholes or subsidence are affecting the shallow injection wells that may not be repairable, certain deep wells are experiencing injection refusal and are functioning at rates of 60% or less, and some of the source waters identified and intended for treatment by the Original PWM Project have not been utilized since startup. (*Ibid.*; see also Staff Report for May 14, 2020 M1W Recycled Water Committee Meeting, attached hereto as **Exhibit 22**; Staff Report for April 16, 2020 M1W Recycled Water Committee Meeting, attached hereto as **Exhibit 23**; Final Minutes from March 16, 2020 MPWMD Regular Board Meeting, p. 3, attached hereto as **Exhibit 24** [noting that Original PWM Project production wells were only running at two-thirds capacity].) Indeed, M1W estimates that the current annual injection volume for the Original PWM Project is only 2,030 afy—this equates to less than 58% of the 3,500 afy allocated for Cal-Am, and only 36% of the 5,600 afy design capacity for the Original PWM Project. (See PWM Status Update Presentation from June 18, 2020 PWM Meeting, attached hereto as **Exhibit 25**.)

Moreover, M1W's consultants recently confirmed that current injection rates for the Original PWM Project are only half of the planned capacity rate for the Original PWM Project injection wells. (See Ex. 25.) Indeed, the Original PWM Project's vadose zone wells are not currently injecting any water. (*Ibid.*) As a result, M1W is proposing to add a new deep injection well to the Original PWM Project, which will further increase costs of the Original PWM Project, possibly by as much as $11 million, resulting in an additional increase in product water prices. ("When will Pure Water Monterey start providing water?", Monterey Herald, June 20, 2020, attached hereto as **Exhibit 26**.) M1W's consultants estimate that construction on this additional well will not begin until November, further delaying the Original PWM Project. (See Ex. 25.)

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[35] Moreover, even if the PWM Expansion were to be considered a feasible alternative, which it is not, a supplemental EIR would not be required here because Public Resources Code section 21080.5 "exempts the Coastal Commission's regulatory program from CEQA requirements for preparation of an [EIR]." (See *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 852; see also *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 819.)

Accordingly, currently the Original PWM Project is not on track to be able to deliver 3,500 afy to Cal-Am – and it is unclear whether such delivery amount will ever be achieved given the issues the project is facing. The problems with the Original PWM Project raise significant uncertainty regarding the technological feasibility of the PWM Expansion and its ability to provide the claimed 2,250 afy. Accordingly, at this time, the PWM Expansion does not satisfy the test of being "capable of being accomplished in a successful manner."

Second, there remains significant uncertainty surrounding the availability of source waters for the PWM Expansion, which raises doubts that the PWM Expansion can be accomplished in a successful manner. Without secure source waters, the PWM Expansion is not feasible. The following are examples of issues that have been identified regarding the adequacy and sufficiency of source waters for the PWM Expansion:

- **ARWRA Source Waters**. The Amended and Restated Water Recycling Agreement ("ARWRA") between M1W and MCWRA sets forth the responsibilities for construction, operation, and financing of new source water for the Original PWM Project. (January 30, 2020 Cal-Am Comments on PWM Expansion Draft SEIR, p. 26.) Multiple outstanding conditions are required to be completed before the ARWRA can become effective. (PWM Expansion Draft SEIR, p. 4.18-5.)[36] Therefore, the reliability of certain ARWRA source waters is speculative due to the significant conditions precedent that must be met for the sources of water to become fully secured. (See Ex. 20, pp. A-16 to A-17.)

- **Questionable Modifications of Source Waters**. Source waters identified for the PWM Expansion have been modified throughout the environmental review process without adequate analysis or justification, raising doubts as to their reliability and ultimately the feasibility of the PWM Expansion. (Ex. 20, p. A-16.) For instance, though the Draft SEIR initially identified Tembladero Slough as a reliable water source, M1W later conceded that the source was unreliable and it has since been removed from the Final SEIR's source water analysis. (PWM Expansion Final SEIR, Responses to Comments VV-85 to VV-86.) Further, the Final SEIR increasingly relies upon the availability of certain municipal wastewater flows even though it acknowledges that such flows have not been previously metered and that the estimates are based in part upon assumptions. (*Id.*, pp. 24-25 [Master Response #3, pp. 3-11 to 3-12].) When confronted with comments regarding the reliability of water from agricultural produce wash, Lake El Estero, or the Salinas Storm Water Collection System, M1W elected to evaluate source water scenarios where such sources are not used by the PWM Expansion, rather than demonstrate their reliability. (*Id.*, Responses to Comments VV-93 to VV-94 and VV-96 to VV-99.) M1W's inability to establish a consistent list of source waters for the PWM Expansion confirms that the project

[36] M1W, PWM Expansion Draft SEIR (November 7, 2019), available at https://purewatermonterey.org/wp/wp-content/uploads/Main-Body-of-M1W-Draft-Supplemental-EIR-Nov-7-2019.pdf.

lacks an adequate source water supply and raises serious questions about the PWM Expansion's feasibility. (Ex. 20, p. A-21.)

- **Disputed Agricultural Source Waters**. The City of Salinas has disputed M1W's rights to use the City's agricultural produce wash water for the PWM Expansion and asserts that the ARWRA only permits M1W to use agricultural produce wash water for the Original PWM Project, and not for the PWM Expansion. (City of Salinas Letter to M1W, April 27, 2020, attached hereto as **Exhibit 27**.) The City also explains that these water sources will not be available for the PWM Expansion because "the City fully intends to use available Agricultural Wash Water for its own purposes, including to support farmers, ranchers and the City's agriculture industry, as determined by the City in its sole and absolute discretion." (*Id.*, p. 2.) Therefore, agricultural produce wash water from the City of Salinas cannot be considered a reliable water source for the PWM Expansion.

- **Source Water Quality Issues**. Agricultural wash water, upon which both the Original PWM Project and the PWM Expansion heavily rely, does not appear to be a reliable source water for the PWM. The treatment technologies currently used by the Original PWM Project, and proposed for use in the PWM Expansion, may be incapable of treating agricultural wash waters to safe levels. (See Ex. 26; see also Hazen and Sawyer, Peer Review of Supply and Demand for Water on the Monterey Peninsula (Jan. 22, 2020) ("Hzen Memo"), p. 9, attached hereto as **Exhibit 28**.) Indeed, M1W staff has admitted that no agricultural wash water has been treated by the Original PWM Project to this point. (See Ex. 26.)

- **Overestimation of Water Supplies During Drought Years**. Source water availability for the PWM Expansion has not been analyzed during multi-year drought conditions. (CEQA Guidelines, Appx. G, § XIX(b); Ex. 20, p. A-20.) Therefore, it is unclear whether PWM Expansion can serve as a viable alternative to the Project during such conditions.

Overall, the PWM Expansion's haphazard and incomplete source water analysis raises serious doubts as to the security and adequacy of source waters and whether the PWM Expansion is capable of being accomplished in a successful manner such that it can be considered a feasible alternative to the Project.

b. *"Within A Reasonable Period of Time"*

The Staff Report claims that the PWM Expansion is anticipated to be completed in sufficient time to meet the CDO's December 2021 deadline. However, as explained above, the PWM Expansion is no longer moving forward because the M1W Board denied certification of the PWM Expansion Final SEIR, and M1W does not have funds to remedy the inadequacies in the SEIR. (See Ex. 18, M1W Board of Directors Staff Report; Ex. 17, June 8, 2020 M1W Letter to Cal-Am, p. 1.) In addition, M1W is currently estimating a nearly eight-month delay in implementation of the Original PWM Project. (See Ex. 21, p. 1).) It is likely that the PWM Expansion, if it were ever approved by the M1W Board, would face similar delays—indeed, the PWM Expansion

would likely face further delays caused by the additional approvals, including the need to secure certain water rights and a Water Purchase Agreement, that are still necessary for the PWM Expansion to operate. (See Section I.4, *infra*.) As noted by the State Water Board in a recent letter to the Commission, the timeline for implementation of the PWM Expansion has been delayed well beyond the CDO deadline, and the PWM Expansion requires "approvals and funding for which the details are uncertain and the timeline is indefinite." (See May 8, 2020 State Water Board Letter to John Ainsworth, Coastal Commission, p. 4.) Therefore, "[i]t is uncertain whether or when the proposed [PWM Expansion] may proceed beyond its currently pending environmental review . . ." (*Id.*, pp. 4-5.) Accordingly, there is insufficient evidence to conclude that the PWM Expansion can be completed "within a reasonable period of time" such that it can be considered a feasible alternative to the Project.

c. *"Taking Into Account Economic, Environmental, Social, and Technological Factors"*

- **Economic**. *The Staff Report claims that expected costs associated with the Project are much higher than the PWM Expansion, asserting that construction, operation and maintenance, and water rate costs for the Project would all be higher than for the PWM Expansion. (Staff Report, p. 81.)*

    - The Staff Report's attempt to compare Project costs with costs associated with the PWM Expansion is inaccurate, as the PWM Expansion costs quoted by the Staff Report likely do not reflect realistic projections of construction, operation and maintenance, and water rate costs for the PWM Expansion. In reality, there is significant uncertainty regarding the costs of PWM Expansion, given that the Original PWM Project is already facing major cost overruns and resulting increases in projected water rates. During the CPUC proceedings on the Project, Cal-Am, M1W, and MPWMD submitted testimony projecting a year 1 water rate of $1,720 per acre-foot for Original PWM Project product water. In June 2020, M1W staff and consultants presented revised cost estimates for Original PWM Project water based on recent construction and operational issues, projecting an increase in year 1 Original PWM Project water rates up to $3,678 per acre-foot, representing a 114% increase in costs. (See Ex. 25, PWM Status Update Presentation.) Costs for PWM Project water are therefore continuing to increase. (See June 12, 2020 Cal-Am Advice Letter No. 1298 to the CPUC, attached hereto as **Exhibit 29**.) It is highly likely that the PWM Expansion would face similar cost increases, rendering the Staff Report's cost comparisons meaningless.

- **Environmental**. *The Staff Report asserts that the Project would result in significant adverse effects on coastal resources, while the PWM Expansion, which would be constructed outside the coastal zone, would have few environmental impacts in comparison. (Staff Report, p. 81.)*

    - As explained in Section I.5, *infra*, the Staff Report's conclusion that the PWM Expansion would have fewer environmental impacts than the Project is not

based on substantial evidence, and does not account for either the PWM Expansion SEIR or the numerous comment letters pointing out flaws in the SEIR's environmental analysis. Moreover, staff's conclusion that the Project would have significant adverse effects on coastal resources is belied by the EIR/EIS, which concluded that, with implementation of all feasible and enforceable mitigation measures, the Project would not result in substantial adverse impacts to sensitive habitats or marine life and water quality. (See Sections I.A and I.C, *supra*.) Further, as explained in Cal-Am's comments on the PWM Expansion Draft SEIR, M1W has thus far failed to evaluate potential impacts to the SVGB related to seawater intrusion, if the PWM Expansion is constructed in lieu of the Project. (See January 30, 2020 Cal-Am Comments on PWM Expansion Draft SEIR, pp. 17-18, separately submitted to staff on April 9, 2020 by the Coalition of Peninsula Businesses; Ex. 20, pp. A-9 to A-10.) As such, the Staff Report does not demonstrate that the PWM Expansion would have fewer environmental impacts than the Project.

- **Social**. *The Staff Report argues that while both projects would provide sufficient water to Cal-Am's service area, the Project would have greater environmental justice impacts on low-income ratepayers and other vulnerable communities. (Staff Report, p. 81.*)

    - As explained above, the conclusion that the PWM Expansion can provide a sufficient water supply for the Monterey Peninsula is not based on substantial evidence. In reality, only the Project, not the PWM Expansion has been proven to be capable of providing a reliable, drought-proof water supply for the Peninsula's most vulnerable communities. Notably, the PWM Expansion would involve taking additional waters from the disadvantaged community of Salinas in order to treat and provide that source water to the wealthier communities on the Monterey Peninsula. (See City of Salinas Comment Letter on PWM Expansion Draft SEIR, attached hereto as **Exhibit 30**; see also Letter from Chris Lopez, Monterey County Supervisor to Commission, attached hereto as **Exhibit 31**; SB 535 Disadvantaged Communities, Cal. Office of Environmental Health Hazard Assessment, https://oehha.ca.gov/calenviroscreen/sb535 [providing a map of SB 535 disadvantaged communities in California].) The Staff Report does not evaluate this potential impact on the vulnerable agricultural communities in Salinas. (See Section H, *supra*.)

- **Technological**. *The Staff Report claims that both the PWM Expansion and the Project will rely on proven technology. (Staff Report, p. 81.*)

    - While the Staff Report is correct that the Project will utilize proven slant well intake and ASR technology, it dramatically misrepresents the reliability of the technology proposed for use in the PWM Expansion. As discussed above, the Original PWM Project has faced significant technological roadblocks since its inception, including failures in injection and extraction wells and the

unavailability of certain water sources. (See Section I.2.a, *supra*.) The PWM Expansion would rely upon the same technology as the Original PWM Project—as such, there is every reason to suspect that the PWM Expansion would face similar technical issues. The numerous technical flaws in both the Original PWM Project and the PWM Expansion make clear that in reality, the Project is by far the more technologically feasible water supply solution.

In sum, the Staff Report fails to demonstrate that the PWM Expansion constitutes a feasible alternative to the reliable, drought-proof water supply to be provided by the Project.

MCWD Contention: MCWD asserts that Cal-Am's criticisms of the PWM Expansion are financially motivated, in the interest of obtaining a return on capital costs expended in constructing the Project. (MCWD Letter, p. 9.)

Cal-Am Response: MCWD is incorrect. Cal-Am's interest in constructing the Project is to ensure that it complies with the State Water Board's CDO and develops an alternative water supply to replace unauthorized Carmel River diversions, to ensure that the Monterey Peninsula has a long-term, reliable, and drought-proof water supply. Cal-Am is a regulated public utility whose rates are set by the CPUC. Cal-Am's critiques of the PWM Expansion are focused on ensuring that the Monterey Peninsula is not saddled with an inadequate and unreliable water supply in the face of continued mandatory reductions in Cal-Am's Carmel River withdrawals.

Moreover, MCWD fails to acknowledge that the CPUC has placed a cap on capital costs that Cal-Am can expect to recover from ratepayers for the Project. (See CPUC Decision D.18.09.017, p. 210.) In addition, in accordance with a settlement reached among Cal-Am, MPWMD, M1W, Surfrider Foundation, LandWatch Monterey County, Sierra Club, Monterey County, Planning and Conservation League, and Monterey County Farm Bureau, among others, the CPUC specifically authorized four financing elements: a construction funding charge, state revolving fund debt, securitized debt, and equity, and limited Cal-Am's equity investment to 27% with the use of securitized debt.

Staff Report Contention #32: The Staff Report asserts that Cal-Am currently lacks approval to use a shared key pipeline component owned by MCWD. (Staff Report, p. 81.) MCWD submitted a letter on November 13, 2019, similarly arguing that the existing agreements between Cal-Am and MCWD do not permit Cal-Am to use the pipeline. (MCWD Letter, p. 6.)

Cal-Am Response: On March 10, 2009, Cal-Am and MCWD entered into a Potable Water Wheeling Agreement ("Wheeling Agreement") for the construction and shared use of a pipeline and related appurtenances ("Shared Pipeline") to convey potable water along and within General Jim Moore Boulevard, from Coe Avenue in the City of Seaside to the border of the City of Del Rey Oaks near Plumas Avenue, approximately 1.85 miles south. The Wheeling Agreement allows Cal-Am to use any unused capacity in the Shared Pipeline to convey potable water that meets statutory and regulatory quality standards for domestic use and consumption, at a monthly wheeling charge of $2,000.

(See September 19, 2019 Cal-Am Response to August 22, 2019, Notice of Incomplete Application, pp. 1-4.)

The Shared Pipeline is not before the Commission as the Staff Report and MCWD fail to recognize that the Shared Pipeline is outside of the Coastal Zone and therefore is beyond the Commission's jurisdiction. (See, e.g., *Sierra Club*, *supra*, 35 Cal.4th at p. 860.) Further, as explained in Cal-Am's response to the Commission's August 22, 2019 Notice of Incomplete Application, the Wheeling Agreement and Water Code sections 1810-1814 provide Cal-Am with the legal right to use the Shared Pipeline while there is sufficient capacity available in the Shared Pipeline. (See September 19, 2019 Cal-Am Response to August 22, 2019, Notice of Incomplete Application, pp. 1-4.) Moreover, MCWD is obligated to adhere to the terms of the Wheeling Agreement and to "act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water[.]" (*Central San Joaquin Water Conservation Dist. v. Stockton East Water Dist.* (2016) 7 Cal.App.5th 1041, 1047.) Further, the Shared Pipeline has adequate capacity to serve CalAm's uses given that the Project will produce 6.4 mgd of desalinated water and the capacity in the Shared Pipeline is 15.9 mgd on an average day and 14.3 mgd at peak hour. (See September 19, 2019 Cal-Am Response to August 22, 2019, Notice of Incomplete Application, pp. 3-4.) MCWD's arguments to the contrary have been rejected by the CPUC and the California Supreme Court. (See Order Denying Petitions for Writ of Review, *Marina Coast Water District, et al. v. Public Utilities Commission*, Case No. S253585 (Aug. 28, 2019).)

MCWD made similar assertions regarding Cal-Am's pipeline use in a Staff Report where it recommended adoption of a resolution concluding that there is not sufficient unused capacity available in MCWD's pipeline to accommodate shared use for Project water. (See Staff Report for October 21, 2019 MCWD Agenda Item 11-A, pp. 5-6, attached hereto as **Exhibit 32**.) MCWD staff asserted then, as they do now, that the existing Wheeling Agreement between MCWD and Cal-Am does not permit Cal-Am to use the Shared Pipeline for transportation of Project product water. (*Id.*, p. 1.) As explained by Cal-Am in an October 21, 2019, response to the MCWD Staff Report, the only limitation in the Wheeling Agreement is that the pipeline be used to convey potable water meeting all statutory and regulatory quality requirements for human domestic use and consumption. (October 21, 2019 Cal-Am Letter to MCWD, p. 2, attached hereto as **Exhibit 33**.) The only relevant limitation in the California Water Code is that Cal-Am use the Shared Pipeline to convey potable water based on water quality standards, which will be achieved by Project water. (*Ibid.*) Moreover, Cal-Am explained that as MCWD does not currently use the pipeline at all, there is currently excess capacity in the pipeline, regardless of any capacity restraints that could possibly occur in the future. (*Ibid.*)

Nevertheless, if necessary, Cal-Am could construct a product water pipeline running parallel to the MCWD pipeline, within the same area and outside the Coastal Zone. Therefore, the Commission should not consider the MCWD pipeline as an issue of Project feasibility.

MCWD Contention: Cal-Am's use of the Shared Pipeline for the transportation of Project water would conflict with State Water Board's requirement that ASR water flow south to north in the

winter to be injected at the same time desalinated water would need to flow north to south in the same pipeline. (MCWD Letter, p. 6.)

Cal-Am Response: MCWD is simply incorrect in asserting that the State Water Board has imposed some regulatory requirement on directional flows within the Shared Pipeline. Instead, directional flow within the Shared Pipeline is dictated by water supply planning and a determination of when the Shared Pipeline will be used to convey desalinated Project water versus ASR flows. While numerous factors must be taken into account in determining which water source while be utilized at any given time, the State Water Board does not play any role in determining when the Shared Pipeline may be used for ASR water or Project product water.

3. Supply and Demand

Staff Report Contention #33: The Staff Report asserts that an "updated analysis" of Peninsula water supply and demand, set forth in the Stoldt Memo, demonstrates a decrease in customer demand in Cal-Am's service area, such that the PWM Expansion is a feasible alternative to the Project. (Staff Report, p. 82.) Based on updated data from 2018, the Stoldt Memo projects that current demand in the Monterey District service area is between 12,299 and 12,656 afy, rather than the 14,000 afy set forth in the CPUC's decision. (Id., pp. 87-89.) Stoldt cuts demand based on assumed reductions in existing demand, Pebble Beach water entitlements, water demand for hospitality industry rebounds, and allocations for legal lots of record. (Id., p. 87.) The Staff Report adopts these projections without any further analysis, and applies them to conclude that PWM Expansion is a feasible alternative to the Project, capable of meeting water demands on the Monterey Peninsula. Similarly, Public Water Now argues that the Stoldt Memo supports the implementation of the PWM Expansion. (See Public Water Now Letter, p. 1.)

Cal-Am Response: In addition to the responses to the Staff Report's analysis of supply and demand provided below, Cal-Am will provide the Commission with a separate response that accounts for additional reports prepared by Stoldt and other project opponents, including MCWD, since the release of the Staff Report. Nonetheless, Cal-Am provides initial responses below to the water supply and demand contentions in the Staff Report, which uses the Stoldt Memo and its modified supply and demand figures to support its conclusion that the PWM Expansion is a feasible Project alternative. As explained below, this conclusion is wholly improper and is unsupported by substantial evidence.

a. *The CPUC Made Binding Determinations of Supply and Demand*

The Staff Report's conclusions regarding supply and demand and its complete reliance on the Stoldt Memo ignore the conclusions of the CPUC, the agency that is charged by statute with exclusive jurisdiction to determine utility supply and demand. "[T]he jurisdiction to determine the adequacy of service actually being rendered by a public utility under its franchise is vested exclusively in the [CPUC] when it has elected to determine whether the service is inadequate." (See *Citizens Utilities Company of California v. Super. Ct.* (1976) 56 Cal.App.3d 399, 408; see also *City of Oakland v. Key System* (1944) 64 Cal.App.2d 427, 435 [exclusive jurisdiction vested in CPUC to

determine adequacy of service rendered by public utility].) Therefore, neither the Commission, nor MPWMD, has the authority to reverse course and make binding determinations as to the levels of supply and demand within Cal-Am's service area—that authority rests solely with the CPUC. (See CPUC Decision D.18-09-017, pp. 167-171, 194-195.)

Moreover, numerous parties, including MPWMD, participated in the supply and demand process before the CPUC and were given the opportunity to testify and present evidence ***under oath*** before the CPUC arrived at its decision. The CPUC considered all of this testimony to determine that Cal-Am's future customer demand is 14,000 afy. This determination from the CPUC constitutes the only unbiased analysis of Peninsula water supply and demand—by contrast, the analyses put forward by MCWD, MPWMD, and others, are the work of entities with specific motivations seeking to have the Project fail. As noted in the EIR/EIS, "[t]he [water] demand estimates provided by CalAm and others throughout this CEQA/NEPA process have been independently reviewed and assessed by the Lead Agencies." (Final EIR/EIS, p. 8.5-726.) More recently, the State Water Board explicitly stated that it "does not have a basis to conclude that the Public Utilities Commission's prior analysis and determinations regarding the water demand, sizing, reliability, or diversity of supply were unreasonable, invalid, or outdated." (See May 8, 2020 State Water Board Letter to John Ainsworth, Coastal Commission, p. 4.) Accordingly, it is the CPUC supply and demand levels that should be utilized by staff, not those proposed by the Stoldt Memo.

b. *The Staff Report Fails to Account for Critiques of the Stoldt Memo*

The Staff Report fails to acknowledge other letters received prior to publication of the Staff Report that refute key assumptions in the Stoldt Memo. Specifically, Cal-Am submitted a letter to the Commission, dated October 15, 2019, responding to the Stoldt Memo, which does not appear to have been included in the administrative record. As such, Cal-Am's October 15 letter is attached hereto as **Exhibit 34** and is hereby incorporated by reference. The Coalition of Peninsula Businesses also submitted a letter to MPWMD refuting key assumptions in the Stoldt Memo,[37] while Pebble Beach Company submitted correspondence to the Commission refuting Stoldt's claims. Neither of these letters from key stakeholders were mentioned in the Staff Report.

Moreover, since the release of the Staff Report, the engineering firm of Hazen & Sawyer, worldwide experts in drinking water and water supply, has conducted a thorough peer review of the Stoldt Memo (the "Hazen Memo"), refuting the flawed positions set forth by the Stoldt Memo—the Hazen Memo is also attached hereto as Exhibit 28. The Hazen Memo concluded that Stoldt's water supply assessments do not meet engineering practices of reliability and resiliency necessary to provide a reliable and adequate water supply under California law, and that the Project is necessary to provide a safe and reliable water supply to meet Peninsula demand, regardless of whether the PWM Expansion is ever developed. Further, a group of City Managers, representing the

[37] A copy of the Coalition for Peninsula Businesses' September 24, 2019, letter to MPWMD is attached hereto as **Exhibit 35**.

Monterey Peninsula cities of Monterey, Carmel, Del Rey Oaks, Sand City, and Pacific Grove, have voiced significant concerns to MPWMD regarding the supply and demand estimates put forth in the Stoldt Memo, pointing out that use of Stoldt's estimates and implementation of the PWM Expansion will result in "fewer economic opportunities for our residents and our children, increased rents, lower quality of life for our entire region and loss of basic rights for local governments to make majority based decisions." (See City Managers' May 14, 2020 letter to MPWMD is attached hereto as **Exhibit 36**.)

c. *The Stoldt Memo's Supply and Demand Estimates Are Flawed*

A summary of the Stoldt Memo's positions, and responses provided by Cal-Am, the Hazen Memo, and others, is provided below:

- **Current Demand**. Stoldt asserts that, based on updated data from 2018, existing customer demand in Cal-Am's service area should be reduced from the 12,000 afy decided upon by the CPUC, to 11,232 afy. (Staff Report, p. 87.) However, Stoldt's methodology for projecting existing demand based upon ten-year, five-year, and three-year averages is flawed and relies on projections that are inconsistent with the California Waterworks Standard and CPUC General Order 103-A, which require that demand be determined based on the maximum month demand in a ten-year period, rather than by simply taking the average of the maximum months over any given period. (See Ex. 34, p. 12; California Waterworks Standards, Cal. Code Regs., tit. 22, § 64554, subd. (b)(2)(A); see also CPUC Decision D.18-09-017, pp. 21-23.) Moreover, any argument that the addition of data from 2018 results in a decrease in average demand is undercut by Stoldt's own figures, which show an increase in demand in 2017 and 2018. (See Staff Report, p. 90.) The CPUC also has specifically rejected any projection of existing customer demand that assumes downward trends in water use on the Monterey Peninsula. (See CPUC Decision D.18-09-017, pp. 169-170.) The California Supreme Court also rejected these same arguments from the City of Marina in its denial of Marina's challenge to the CPUC's Decision. (See City of Marina Amended Petition for Writ of Review, p. 153, attached hereto as **Exhibit 37**; see also Order Denying Petitions for Writ of Review, *Marina Coast Water District, et al. v. Public Utilities Commission*, Case No. S253585 (Aug. 28, 2019).)

- **Pebble Beach Build-Out**. The Stoldt Memo also projects a decrease in the water allocated for build-out in the Pebble Beach area, from 325 afy to between 103 and 160 afy. (Staff Report, pp. 87-88.) Stoldt asserts that Pebble Beach demand is actually lower, around 299 afy, and is split between two categories—145 afy for expected build-out, which Stoldt argues was overstated by the CPUC, and 154 afy in "other entitlement demand," which Stoldt asserts will "go away" when a new water supply comes online. (*Ibid*.) However, the 154 afy in "other entitlement demand" will not simply "go away" when a new water supply comes online—rather, pursuant to MPWMD's Ordinance 109, that entitlement may be used by Pebble Beach for any lawful use. (See Ex. 34, p. 14.) Moreover, estimated demand for buildout cannot be reduced further, as long-term supply planning requires Cal-Am to ignore temporary reductions through conservation measures and part time use of homes, and instead plan for pending projects like the Spyglass Hotel. (*Ibid.*; see also Pebble Beach

Company Letter to CCC.) Indeed, Pebble Beach Company has expressly rejected the assumptions set forth in the Stoldt Memo, and has stated that they intend to "fully utilize" the entirety of their entitlement. (Pebble Beach Company Letter to CCC, p. 2.)

- **Economic Recovery**. Stoldt also asserts that Project demand to accommodate economic recovery and tourism bounce back on the Monterey Peninsula should be reduced from 500 afy to between 100 and 250 afy, arguing that tourism and occupancy rates have returned to pre-2001 levels without any increase in water use, thanks in large part to the implementation of conservation measures. (Staff Report, p. 88.) Both the Stoldt Memo and the Staff Report ignore the fact that MPWMD made nearly identical arguments before the CPUC, which the CPUC rejected in adopting 500 afy as the appropriate demand level for economic recovery. (See Ex. 34, p. 13.) Moreover, as explained by the Coalition for Peninsula Businesses, the occupancy statistics relied upon by the Stoldt Memo are county-wide, not Peninsula-specific. (See Ex. 35, p. 4).) Additionally, the 500 afy for economic recovery is not intended to include only a return to prior levels of occupancy on the Peninsula, but to also accommodate additional water increases as the rest of the Peninsula economy recovers, including a number of new lodging facilities that will be constructed in the next few years. (*Ibid.*)

- **Legal Lots of Record**. Stoldt argues that demand allocated for existing legal lots of record should be reduced from 1,180 afy to between 864 and 1,014 afy, which Stoldt alleges is due to implementation of conservation programs, and the possibility that some lots have already been built, are unbuildable, have been remodeled, or that general plans and housing elements have been revised. (Staff Report, p. 89.) However, Stoldt's assertions are based solely on speculation and are contradicted by MPWMD's own arguments before the CPUC. Specifically, during the CPUC process, MPWMD argued that 1,180 afy was a reasonable estimate of future water demand for legal lots of record but Stoldt fails to provide any reason for MPWMD now changing its position. (See Ex. 34, pp. 12-13.) Indeed, the opposite conclusion is much more likely—once the CDO is lifted and mandatory conservation measures are no longer in place, pent-up demand for housing on the Peninsula will drive up demand for water. The City of Monterey made arguments to this effect in a letter to MPWMD commenting on the Stoldt Memo, stating that demand for housing in Monterey, and related demand for additional water supplies, exceeds the Stoldt Memo's projections. (See February 4, 2020 Letter from City of Monterey to MPWMD, attached hereto as **Exhibit 38**.) The CPUC agreed with Cal-Am's positions regarding pent-up demand, stating that Cal-Am's projection for demand for legal lots of record at 1,180 afy was "reasonable" and that "development is halted pending adequate water." (See CPUC Decision D.18-09-017, p. 50.)

- **Future Demand**. As discussed above, the Stoldt Memo and the Staff Report's use of three-year, five-year, and ten-year demand averages to project present and future water demand is inconsistent with the California Waterworks Standards and CPUC General Order 103-A. (See Staff Report, pp. 86-87, 90-91; see also Ex. 34, p. 12; California Waterworks Standards, Cal. Code Regs., tit. 22, § 64554, subd. (b)(2)(A);

CPUC Decision D.18-09-017, pp. 21-23.) Further, the CPUC specifically rejected MPWMD's method of projecting demand based on the most recent five-year average, given the fluctuations in monthly and annual demand in the area over the last decade. (See CPUC Decision D.18-09-017, pp. 57-58.) If the Stoldt Memo instead used the maximum demand year to project demand, as is required, the Monterey Peninsula water supply in 2020 without desalination, but with PWM Expansion, would already be at a deficit of more than 200 afy, according to Stoldt's own tables. (See Ex. 34, p. 15.) Even assuming Stoldt's depressed demand figures, Peninsula water supply with the PWM Expansion, but without the Project, would only be able to meet Peninsula five-year demand for a maximum of three years before falling short. (See Ex. 28, pp. 10-11.) Without implementation of the Project, the gap between available water supplies and total Peninsula demand only will continue to widen over time, leading to ongoing moratoria on non-essential water uses.

d. *The Stoldt Memo is Contradicted by Stoldt's Prior Statements*

Many of the positions taken in the Stoldt Memo directly contradict arguments put forward by Stoldt during earlier proceedings related to the Project before the State Water Board. Specifically, the Stoldt Memo asserts that Monterey Peninsula demand estimates should be reduced due to implementation of various water conservation efforts, which Stoldt argues represent a permanent reduction in demand. (Staff Report, pp. 88-89.) However, in a December 14, 2015 letter to the State Water Board regarding proposed modifications to Cal-Am's diversion limits from the Carmel River, Stoldt explicitly argues that recent decreases in demand should not be used to justify reductions in Cal-Am's diversion limits, as such reductions were likely due to extensive water conservation campaigns carried out by Cal-Am and MPWMD. (See December 14, 2015 MPWMD Letter to State Water Board, p. 2, attached hereto as **Exhibit 39**.) Stoldt goes on to argue that it cannot be assumed that such reductions in demand are permanent. (*Ibid.*) Stoldt also notes that following periods of drought, such as the drought conditions currently seen on the Monterey Peninsula, demand for water typically rebounds as irrigation uses increase and conservation behaviors relax. (*Ibid.*) Moreover, as another example of Stoldt taking inconsistent positions, in a series of emails to Cal-Am employees and other interested parties regarding the State Water Board proceedings, Stoldt argues that depressed demand levels seen in recent years cannot be used to justify reductions in Cal-Am's diversions from the Carmel River, as: (1) drought awareness and corresponding cuts in water use are likely to fade; (2) economic activity on the Peninsula has been cut due to implementation of the CDO; and (3) demand rebounds are likely once drought conditions abate. (See March 20, 2016 Email from D. Stoldt to R. MacLean, attached hereto as **Exhibit 40**; see also March 17, 2016 Email from D. Stoldt to J. Burnett, as **Exhibit 41**.) Stoldt therefore has taken contrary positions on many of the assumptions used to justify the Stoldt Memo and, by extension, the Staff Report conclusion that the PWM Expansion is a feasible Project alternative. As a result, it is inappropriate for staff to rely on the Stoldt Memo's assumptions, particularly where supply and demand already has been evaluated and determined through an unbiased, public evidentiary process before the CPUC—the state agency charged with making utility supply and demand determinations.

e. *There Is No Evidence to Suggest PWM Expansion Can Meet Maximum Month Demand*

After describing Stoldt's "updated" demand figures, the Staff Report asserts that the PWM Expansion can serve as an alternative to the Project because the PWM Expansion can meet Cal-Am's maximum daily demand ("MDD") and peak hour demand ("PHD"). (Staff Report, p. 93; see also Exhibit 9, p. 1.) To reach this conclusion, staff relies on a one-page analysis of 10-year MDD and PHD prepared by Stoldt and included as Exhibit 9 to the Staff Report. (*Ibid.*) However, Stoldt's analysis does not demonstrate that the PWM Expansion can meet maximum month demand ("MMD") as required by the California Waterworks Standards (Cal. Code Regs., tit. 22, § 64554, subds. (a), (b)(2)). Rather, Stoldt only uses calculations based on the MMD from July 2012 to show that the PWM Expansion could meet the projected MDD and PHD from that one month. (See Staff Report, Exhibit 9.) As explained in the testimony of Ian Crooks and Richard Svindland before the CPUC, using only MDD and PHD to project demand is inappropriate in this case because public water systems must be able to "deliver water supplies at near MDD levels during dry years over a few maximum months of demands." (See September 27, 2017 Crooks Direct Testimony, pp. 6, 15-16, excerpts attached hereto as **Exhibit 42**.) The only way to ensure this capacity is by calculating demand based on MMD. (*Ibid.*) Failure to accommodate MMD, and thereby failing to accommodate uncertainty in water supply due to natural pressures such as climate change and drought, will mean that "water supplies will fall short over the duration of maximum month demands." (See October 13, 2017 Crooks Rebuttal Testimony, p. 9, excerpts attached hereto as **Exhibit 43**.)

Stoldt's conclusion that the PWM Expansion can meet MDD and PHD also relies on the availability of drought reserves to meet such demand—however, Stoldt also assumes that no drought conditions will occur on the Monterey Peninsula between now and 2034, allowing for the buildup of such reserves. (See Staff Report, Ex. 9 9, p. 2; see also *id*., Ex. 10, p. 3.) As explained below, the assumption that the Peninsula will not experience drought conditions over any significant period is wholly untenable, given that California has experienced a multi-year drought in nearly every decade since 1917, and recharge of groundwater reserves is essentially unavailable under drought conditions. (See Section I.3.f, h, *infra*.)

f. *Supplies of ASR Water Assumed by Staff Are Not Guaranteed*

The Staff Report asserts that PWM Expansion is capable of providing a drought-proof supply to the Monterey Peninsula because of the potential for the PWM Expansion to provide additional aquifer storage and recovery ("ASR") water. The Staff Report assumes that ASR water supply is available each year, such that the Peninsula can build up a reserve of ASR water to compensate for extended drought conditions. (Staff Report, pp. 93-94; see also Exhibit 10.) However, the Staff Report ignores the fact that ASR recharge is unreliable and takes place intermittently, at best. Currently, ASR has the capacity to reinject roughly 1,300 afy, under ideal conditions— however, between 1997 and 2019, annual ASR reinjection only reached the 1,300 afy assumed by the Staff Report twice, averaging only 450 afy over a 22 year period. (See Table of ASR Injection

and Recovery Totals, attached hereto as **Exhibit 44**.) In fact, in 2014, 0 afy in ASR water was injected for storage. (*Ibid.*) As explained in the Hazen Memo, ASR water availability is reduced to 63% in a single dry year, and even further reduced to 4% following three dry years. (See Ex. 28, pp. 6-7.) During drought conditions, ASR water is essentially unavailable. (*Id.*, p. 8.) There is simply no guarantee that sufficient water is available for ASR reinjection in any given year. Further, assuming constant, maximum ASR water availability is inconsistent with the requirement that projections of supply must be based on an assessment of available water in dry and multiple dry water years, and must include the source's lowest anticipated daily yield. (See Wat. Code, § 10635, subd. (a); Cal. Code Regs., tit. 22, § 64554, subd. (k).) Without ASR, the PWM Expansion would yield only 9,994 afy in reliable supplies, below both the Stoldt Memo's 10-year and 5-year annual averages, when considering projected growth.

g. *PWM Expansion Cannot Supply Water to Meet Peninsula Regional Housing Goals*

Because the PWM Expansion would fail to provide a water supply sufficient to accommodate increased demand and population growth on the Monterey Peninsula, it also would depress the buildout of necessary affordable housing on the Peninsula, as dictated by the Regional Needs Housing Assessment ("RHNA") for the Monterey Bay Area.[38] At the December 17, 2019, meeting of the MPWMD Water Demand Committee, Stoldt provided a memorandum quantifying the RHNA goals for each jurisdiction on the Monterey Peninsula, and estimating the water supply required to meet these goals. A copy of Stoldt's memorandum regarding Monterey Peninsula RHNA goals and estimated water required to meet such goals is attached hereto as **Exhibit 45**. In that document, Stoldt estimated that a water supply of 190 afy will be needed to meet the Peninsula's RHNA goals. However, as explained in the Hazen Memo, Peninsula water supply with the PWM Expansion, but without the Project, will only be able to meet Peninsula demand, even assuming Stoldt's depressed five-year average demand estimates, for a maximum of three years. (See Ex. 28, pp. 10-11.) Based on projections in the Stoldt Memo, by 2024, demand for water will exceed the 10,000 afy supply that will be available with the PWM Expansion, leaving the Peninsula without any excess water supply to accommodate development of legal lots of record and regional housing growth. (*Ibid.*) Moreover, even assuming Stoldt's estimates, the PWM Expansion would not supply sufficient water to meet the RHNA goals as of 2020. Specifically, Stoldt's five-year average demand estimates project a 2020 demand of 9,825 afy and Stoldt finds that water supply with the PWM Expansion, but without the Project, would provide 9,994 afy. This leaves only 169 afy (9,994 – 9,825 = 169) to meet RHNA goals in 2020, but this is already less than the 190 afy set forth by Stoldt in his December 2019 memorandum. (See *id.*, pp. 9-10.) Therefore, even assuming the demand estimates set forth in the Stoldt Memo and the Staff Report, the PWM Expansion will not supply sufficient water to meet even the RHNA needs set forth in Stoldt's December 2019 memorandum.

[38] The 2014-2023 RHNA Plan for the Monterey Bay area is available here: https://ambag.org/sites/default/files/documents/RHNP%202014-2023_Final_revised_PDFA.pdf.

h. *The Staff Report Relies on a Memorandum Doctored by Stoldt*

Finally, the Staff Report's assumptions regarding ASR supply are based entirely upon Exhibit 10 to the Staff Report, which is an excerpt from a draft technical memorandum prepared as an exhibit to the Draft SEIR for the PWM Expansion, which was released to the public on November 7, 2019. As explained in Cal-Am's November 11, 2019, letter to the boards of M1W and MPWMD, attached hereto as **Exhibit 46**, it appears that Stoldt intentionally manipulated Exhibit 10 to make it appear that the technical memorandum's authors had concluded the ASR reserve will be sufficient to meet a 4-year drought by 2034—possibly in an effort to influence the Commission's consideration of the Project. (See Staff Report, Ex. 10, p. 3.) As reported by Rob Wellington, legal counsel to M1W, in his November 7, 2019, memo to the M1W Board Chair and Board Members, Stoldt not only cut and pasted portions of the technical memorandum to create Exhibit 10, he also included the following concluding sentence that was not contained in the technical memorandum: "This shows that the built-up reservoir of ASR in storage is sufficient to meet a 4-year drought, and likely longer, as shown beginning in 2034."

Stoldt's added conclusion sentence is improper for a number of reasons. First, the purpose of the technical memorandum was to evaluate the PWM Expansion's impacts on groundwater, not to evaluate PWM Expansion's ability to meet Cal-Am's annual or monthly demands under drought conditions. Second, Figure 7 in the technical memorandum, which Stoldt used to support his conclusion in Exhibit 10, is based on the unrealistic assumption that no drought will take place between now and 2034. Such an assumption is contradicted by plain history—there has been a multi-year drought in California in virtually every decade since 1917. Finally, Stoldt's conclusion in Exhibit 10 is based on his own unverified calculations of demand in the Stoldt Memo, which, as explained herein, are entirely unsupportable. While Stoldt manipulated Exhibit 10 to make it appear as if the technical memorandum's authors had reached this conclusion regarding drought storage, the authors never reached such a conclusion, and apparently never authorized Stoldt to manipulate the memorandum in this way.

* * *

Given the foregoing, the supply and demand estimates set forth in the Stoldt Memo, and in turn, in the Staff Report, cannot constitute substantial evidence to conclude that the PWM Expansion could serve as a feasible alternative to the Project.

4. PWM Expansion Conformity to Project Objectives

Staff Report Contention #34: The Staff Report concludes that PWM Expansion is capable of meeting all twelve primary and secondary objectives set forth by the CPUC in the Final EIR/EIS and Decision. (Staff Report, pp. 94-96.)

Cal-Am Response: The Staff Report's conclusion that the PWM Expansion can satisfy all twelve Project objectives as provided by the CPUC is not supported by substantial evidence. Because the PWM Expansion is not capable of satisfying the Project

objectives, it cannot be a feasible alternative to the Project. Each Project objective is discussed below.

- **Primary Objective 1**: Develop water supplies for the Cal-Am Monterey District service area to replace existing Carmel River diversions in excess of Cal-Am's legal entitlement of 3,376 afy, in accordance with SWRCB Orders 95-10 and 2016-0016.

    - Staff's conclusion that implementation of the PWM Expansion is sufficient to replace Carmel River diversions in excess of Cal-Am's entitlement is unsupported by the evidence. As explained above, in Cal-Am's October 15, 2019 letter, and in Hazen's January 2020 report, the PWM Expansion does not provide enough water to meet the demands of Cal-Am's Monterey District service area. Because PWM Expansion will not provide enough water to meet demand it therefore cannot, by definition, meet this Project objective. As explained by the CPUC:

> [T]he PWM Expansion Progress Report indicates that the PWM Expansion would satisfy the basic and key purposes of the Project (i.e., sufficient and reliable water supply) ***only in conjunction with construction of a desalination plant of some size within five to fifteen years***. Thus, the PWM Expansion would not substitute for a desalination plant, but would merely delay it and possibly (but not certainly) enable it to be smaller or to be operated differently.

(See CPUC Decision D.18-09-017, Appx. C, p. C-71 [emphasis added].) As the agency vested with the sole authority to determine proper levels of supply and demand for Cal-Am as a regulated public utility, the CPUC already has determined that PWM Expansion would not satisfy the water supply required by Cal-Am customers, and should only be examined as an "additional or supplemental source water supply" to the Project. (See CPUC Decision D.18-09-017, pp. 42-43.) Even under the Stoldt Memo's estimated demand numbers, and assuming continued strict water conservation, the water supply with the PWM Expansion, but without the Project, is barely sufficient to meet existing demand. (See Section I.3.c, *supra*.) As such, in the absence of the Project, PWM Expansion would not provide a sufficient, reliable water supply that would allow Cal-Am to replace its Carmel River diversions.

Moreover, the Staff Report drastically oversimplifies the process by which Cal-Am may be deemed to have satisfied the CDO. The 2016 State Water Board CDO provides that the conditions thereto, as well as conditions set forth in previous iterations of the CDO, "shall remain in effect until (a) Cal-Am certifies, with supporting documentation, that it has obtained a

permanent supply of water that has been substituted for the water illegally diverted from the Carmel River and (b) the Deputy Director for Water Rights concurs, in writing, with the certification." (See State Water Board Order WR 2016-0016, p. 27, attached hereto as **Exhibit 47**; see also May 8, 2020 Letter from State Water Board to John Ainsworth, Coastal Commission, p. 2.) Given the substantial uncertainties in the supply that could potentially be provided by the PWM Expansion, it is unlikely that without the Project, Cal-Am would be able to certify that a permanent water supply has been secured or obtain the required certifications from the State Water Board such that the CDO will be lifted.

- **Primary Objective 2**: Develop water supplies to enable Cal-Am to reduce pumping from the Seaside Groundwater Basin from approximately 4,000 to 1,474 afy, consistent with the adjudication of the groundwater basin, with natural yield, and with the improvement of groundwater quality.

    - The CPUC has previously determined that the PWM Expansion, without implementation of the Project, would not satisfy demand requirements in Cal-Am's service area. (See CPUC Decision D.18-09-017, p. 40.) As a result, the PWM Expansion, by definition, would put at risk Cal-Am's ability to reduce its pumping from the Seaside Groundwater Basin. As such, the CPUC has already determined that the PWM Expansion, without the Project, is incapable of ensuring this objective can be met.

- **Primary Objective 3**: Provide water supplies to allow Cal-Am to meet its obligation to pay back the Seaside Groundwater Basin by approximately 700 afy over 25 years as established by the Seaside Groundwater Basin Watermaster.

    - The Staff Report fails to provide any evidence that the PWM Expansion can provide water supplies sufficient for Cal-Am to pay back its extractions from the Seaside Groundwater Basin. (Staff Report, p. 94.) Moreover, the CPUC has already determined that the PWM Expansion could not "provide supply to allow for replenishment of water that Cal-Am previously pumped from the Seaside Basin in excess of Cal-Am's adjudicated right . . ." (See CPUC Decision D.18-09-017, p. 40.) As explained above, the PWM Expansion is incapable of supplying water sufficient to meet demand in Cal-Am's service area—given this supply shortfall, there is a significant risk that the PWM Expansion would not produce a water supply sufficient to allow Cal-Am cut its Seaside Groundwater Basin withdrawals to a level that permits Basin recharge. (See Section I.3.c, *supra*.)

- **Primary Objective 4**: Develop a reliable water supply for the Cal-Am Monterey District service area, accounting for the peak month demand of existing customers.

- As explained above, there is no evidence to suggest that the PWM Expansion, without the Project, can supply water sufficient to meet the Peninsula's MMD, in accordance with the California Waterworks Standards. (See Cal. Code Regs., tit. 22, § 64554, subds. (a), (b)(2); see also Section I.3.e, *supra*.) Moreover, M1W has failed to secure sufficient source water for the PWM Expansion—as such, the PWM Expansion simply cannot constitute a "reliable water supply" for the Monterey District service area and fails to satisfy this Project objective. (See Section I.2, *supra*.)

- **Primary Objective 5**: Develop a reliable water supply that meets fire flow requirements for public safety.

  - The Staff Report asserts that PWM Expansion can satisfy this Project objective because it is designed to meet both MDD and peak hour demands. However, as explained above, this conclusion is based solely on the Stoldt Memo's calculation of MDD and PHD, which fails to accommodate MMD, as required by the California Waterworks Standards. (See Cal. Code Regs., tit. 22, § 64554, subds. (a), (b)(2); see also Section I.3.e.) As such, there is no evidence to demonstrate that the PWM Expansion can provide a reliable water supply that meets relevant fire flow requirements.

- **Primary Objective 6**: Provide sufficient water supplies to serve existing vacant legal lots of record.

  - The Staff Report's conclusion that the PWM Expansion can provide sufficient water supplies to serve existing legal lots of record is based solely on the Stoldt Memo—as explained above, the Stoldt Memo uses an improperly depressed demand figure for legal lots of record, which, as recognized by the CPUC, fails to account for rebounds in development and corresponding increases in demand upon the easing of water restrictions on the Peninsula. (See Section I.3.c; see also CPUC Decision D.18-09-017, p. 50.) Moreover, in addition to the failure to account for the legal lots of record the PWM Expansion would not be able to satisfy the housing demand projections set forth by the City of Monterey. (See Ex. 38, February 4, 2020 City of Monterey Letter.) Therefore, the PWM Expansion does not meet this Project objective.

- **Primary Objective 7**: Accommodate tourism demand under recovered economic conditions.

  - The Staff Report's conclusion that the PWM Expansion could produce water sufficient to accommodate expected increases in tourism over the next two decades is based solely on the Stoldt Memo's depressed demand figures. The Stoldt Memo's estimates fail to account for the fact that hotel occupancy rates and tourism on the Monterey Peninsula have yet to return

to pre-2008 levels, and fail to consider additional water that will be needed for growth in tourism in the near future. (See Section I.3.c; Ex. 34, p. 13; Ex. 35, p. 4.) As such, the Staff Report has not provided sufficient evidence that the PWM Expansion can supply water required to accommodate increased tourism demand once the CDO is lifted.

- **Primary Objective 8**: Minimize energy requirements and greenhouse gas emissions per unit of water delivered.

    - The Staff Report concludes that PWM Expansion "more strongly conforms" to this objective than the Project, because the PWM Expansion would utilize 45 megawatts of electricity per year produced by landfill gas, while the Project would use around 38,000 megawatts of grid-based electricity per year. (Staff Report, p. 96.) However, as explained above, this comparison fails to take into account the Project's Mitigation Measure 4.11-1, implementation of which would result in the Project having net zero operational emissions from electricity consumption. (See Section E, *supra*.)

      Moreover, the PWM Expansion's proposal to utilize landfill gas as a power source is uncertain at this time. As discussed at the May 14, 2020, meeting of the M1W Recycled Water Committee, M1W is currently working to secure construction bids to build infrastructure that would allow M1W to convert landfill gas to electricity for the PWM project. (See Ex. 22, p. 1.) M1W has so far received construction bids that were twice as high as M1W's estimates and as a result, M1W was forced to reject these bids over budget concerns. (*Ibid.*) If M1W is unable to secure reduced bids or obtain additional funding for this infrastructure, it will be unable to implement the landfill gas power system. (*Ibid.*) Therefore, the Staff Report should not assume that the PWM Expansion would utilize landfill gas because that proposal is speculative at this time.

- **Primary Objective 9**: Minimize project costs and associated water rate increases.

    - The Staff Report's conclusion that PWM Expansion would better conform to this objective by minimizing project costs and water rate increases is unsupported by substantial evidence. In reality, the Original PWM Project has been plagued by significant cost overruns, resulting in drastic increases of up to 114% in projected costs per acre-foot of water. (See Section I.2.c, *supra*; Ex. 25, PWM Status Update Presentation.) The Original PWM Project is on track to deliver only 58% of the 3,500 afy allocated to Cal-Am's customers, and costs for Original PWM Project water will only continue to rise if M1W is unable to provide the promised allocation. (Section I.2.a, *supra*; Ex. 25, PWM Status Update Presentation.) There is every reason to believe that the PWM Expansion would face similar cost overrun issues, resulting in further increases in

water rates. Moreover, the PWM Expansion has not secured all necessary water rights, which could further increase project costs. Given the current state of the PWM Expansion, there is simply no certainty regarding its cost. Therefore, any comparison of PWM Expansion costs against costs associated with the Project are entirely speculative and cannot be made at this time.

- **Secondary Objective 1**: Locate key project facilities in areas that are protected against predicted future sea-level rise in a manner that maximizes efficiency for construction and operation and minimizes environmental impacts.

    - The Staff Report concludes that the Project slant well intake field "would likely be affected directly by sea level rise and the accompanying erosion of the shoreline," while stating that the PWM Expansion would take place inland, outside of the coastal zone. (Staff Report, p. 95.) However, as disused in Section B, the Project is not expected to face any impact from coastal erosion or rising sea levels during the economic life of the Project's slant wells and is entirely consistent with this Secondary Objective. (See Section B; see also AECOM Coastal Erosion Hazard Analysis.)

- **Secondary Objective 2**: Provide sufficient conveyance capacity to accommodate supplemental water supplies that may be developed at some point in the future to meet build out demand in accordance with adopted General Plans.

    - The Staff Report's conclusion that the PWM Expansion can satisfy this Project objective appears to be based solely on Exhibit 10 to the Staff Report, which is a doctored draft technical memorandum prepared as an exhibit to the Draft SEIR for the PWM Expansion. (Staff Report, pp. 95-96.) As explained above, reliance upon this doctored memo is wholly improper, and Exhibit 10 does not constitute substantial evidence to demonstrate that the PWM Expansion can meet this objective. (See Section I.3.h.) Moreover, Exhibit 10 does not speak to conveyance capacity.

- **Secondary Objective 3**: Improve the ability to convey water to the Monterey Peninsula cities by improving the existing interconnections at satellite water systems and by providing additional pressure to move water over the Segunda Grade.

    - The Staff Report fails to provide ***any*** evidence that the PWM Expansion will provide any improvements to existing water system connections or provide additional pressure to move water over the Segunda Grade.

Accordingly, because the PWM Expansion is not capable of satisfying the primary and secondary objectives set forth for the Project by the CPUC, it cannot be concluded to be a feasible alternative to the Project.

Staff Report Contention #35: The Staff Report evaluates the PWM Expansion against the criteria that the CPUC applied to evaluate the viability of the Original PWM Project as a viable Project alternative. (Staff Report, pp. 96-99.)

Cal-Am Response: As with other portions of the Staff Report, the conclusion that the PWM Expansion can meet all the criteria used to evaluate the viability of the Original PWM Project rests on a series of unsupported assumptions and in many cases simply ignores that significant questions remain regarding the feasibility of the PWM Expansion. The uncertainty surrounding the Staff Report's assessment of the PWM Expansion has become all the more pronounced in the wake of the M1W Board of Directors' decision to not certify the PWM Expansion Final SEIR. Moreover, the CPUC itself has stated that the PWM Expansion does not satisfy all of these criteria. (CPUC Decision D.18-09-017, Appx. C, p. C-70.) Each criterion is discussed separately below.

- **Criterion 1 – Final EIR**. *The Staff Report evaluates whether PWM Expansion has an approved EIR, is subject to a CEQA lawsuit, or is subject to a judicial stay. Staff concluded that although the PWM Expansion did not yet have a completed EIR, the EIR was unlikely to be lengthy or complex, given that it would be tiered off of the EIR for the Original PWM Project, and therefore would be unlikely to face legal challenge. (Staff Report, p. 96.)*

    - Contrary to the Staff Report's conclusion, the fact that the PWM Expansion did not have an approved EIR is a significant issue. The Draft SEIR for the PWM Expansion was issued on November 7, 2019, just a few days before the Commission's informational public hearing regarding the Project in Half Moon Bay. The comment period on the Draft SEIR ran until January 31, 2020, and on April 13, 2020, M1W released a Final SEIR. Many commenters submitted substantial concerns to M1W during the public comment period, pointing out numerous flaws in M1W's analysis of the potential environmental impacts of the PWM Expansion. Taking these comments in to account, the M1W Board of Directors denied certification of the Final SEIR on the PWM Expansion at the Board's April 27, 2020 meeting. (See Ex. 17, p. 1.) As such, CEQA approval for the PWM Expansion has not occurred and so PWM Expansion does not meet this feasibility criteria.

- **Criterion 2 - Permits**. *The Staff Report states that, like the Original PWM Project during the CPUC proceeding, the PWM Expansion has not obtained all of its needed permits. However, staff asserts that these permits will likely be new or amended versions of existing permits for the Original PWM Project and that the PWM Expansion sponsors expect to receive the permits in time to operate the facility near the CDO's December 2021 deadline. (Staff Report, pp. 96-97.)*

    - Contrary to the Staff Report conclusion, there have been no permits issued for PWM Expansion. Since the M1W Board rejected the SEIR, no discretionary permits for the PWM Expansion can be legally issued. Therefore, the PWM Expansion does not meet this criteria for consideration as a feasible alternative.

- **Criterion 3 – Source Water**. *The Staff Report claims that the PWM Expansion has sufficient legal certainty as to source waters because the PWM Expansion would use the same source waters as the Original PWM Project. (Staff Report, p. 97.)*

    - Contrary to the Staff Report, the source waters for the PWM Expansion are anything but secure, and the PWM Expansion cannot use the same source waters as the Original PWM Project. As explained above, M1W has yet to satisfy several conditions required for the PWM Expansion to utilize ARWRA source waters, there are significant disputes over source waters that M1W claims may be used by the PWM Expansion, and there is no evidence that PWM Expansion source water would be available during multiple drought years. (See Section I.2, *supra*.) Moreover, the City of Salinas has confirmed that its existing agreements with M1W limit M1W's use of the City's agricultural wash water to the Original PWM Project and that in the absence of further agreements, the City intends to use all available agricultural wash water for its own purposes. (See Ex. 27, p. 2.) The Staff Report fails to recognize these issues and—as such, there is not substantial evidence to demonstrate that the PWM Expansion can satisfy this feasibility criteria.

- **Criterion 4 - Water Quality and Regulatory Approvals**. *The Staff Report asserts that because the Original PWM Project and PWM Expansion will use the same treatment methods, the PWM Expansion will be able to treat wastewater to meet the standards set by the California Department of Health and the Regional Water Quality Control Board ("Regional Board"). As such, the Staff Report claims that the PWM Expansion will be able to obtain the corresponding water quality permits and begin operation by December 2021. (Staff Report, p. 97.)*

    - As noted above, as an initial matter, the M1W Board denied certification of the SEIR, and the PWM Expansion is not currently moving forward. Accordingly, it is not anticipated that the PWM Expansion will be able to seek approvals from the Department of Health or the Regional Board. In addition, even if the PWM Expansion were to move forward, there are significant concerns about the quality of PWM Expansion product water, specifically with respect to the inclusion of agricultural water runoff as source water and, therefore, whether approvals from the Department of Health or the Regional Board could ever be obtained. The inclusion of this source water may result in lingering pesticides or other chemical constituents in the PWM Expansion product water. (See Water Plus Conditional Joinder to Motion to Open a Phase 3 CPCN Proceeding, pp. 2-3 (attached hereto as **Exhibit 48**.) No agency has ever prepared an environmental analysis of the impacts from using wastewater contaminated with pesticides or other chemicals as source water for the PWM Expansion. As explained by the CPUC, "[w]hile the PWM Expansion Progress Report states that, after treatment, the water would meet or exceed drinking water standards, there has yet been no environmental analysis of this key technical feasibility issue." (See D.18-09-017, Appx. C, p. C-71.) While the PWM Expansion would utilize the same treatment technology as the Original PWM Project, there is no evidence that the PWM

Expansion would be able to treat wastewater to the standards imposed by the Department of Health and the Regional Board, and thereafter obtain the corresponding permits. As such, the PWM Expansion cannot satisfy this key feasibility criteria.

- **Criterion 5 – PWM Expansion Project Schedule Compared to Desalination Schedule**. *The Staff Report analyzed the ability of the PWM Expansion to comply with the construction schedule set forth for the Project, so as to meet the December 2021 CDO deadline. (Staff Report, pp. 97-98.) The Staff Report also stated that while there is some doubt about whether the PWM Expansion can meet the CDO deadline, there is "greater doubt" about whether the Project can meet the CDO deadline.*

    - As noted above, the M1W Board denied certification of the SEIR, and the PWM Expansion is not moving forward. Accordingly, based on the current status of the PWM Expansion, and considering the many delays experienced by the Original PWM project, the PWM Expansion cannot meet the December 2021 CDO deadline.

      The Original PWM Project has yet to produce a single drop of water and is behind schedule to begin water deliveries. (See Ex. 21, p. 3; see also Ex. 25.) Even if the PWM Expansion were to move forward in the future, it could experience even greater delays than the Original PWM Project, given the number of outstanding permits and agreements required for the Expansion. At this time, there is simply no evidence to support any schedule associated with the PWM Expansion moving forward.

      Finally, the assertion that there is "doubt" about the Project's schedule because of issues with the MCWD pipeline, the outfall line, and potential future litigation is misplaced. As discussed above, Cal-Am is already entitled to utilize the MCWD conveyance pipeline under an existing agreement—therefore, there will be no delays associated with Cal-Am's use of the pipeline. (See Section I.2, *supra*.) Further, the required Project outfall liner is not a part of this application before the Commission, and any potential delay associated with the CDP application for the liner is speculative. (See Section F, *supra*.) Moreover, the Staff Report's assumption that any Commission decision approving the Project would be subject to litigation is speculative and should not be used to justify a recommendation of denial. Based on the current status of the PWM Expansion as compared to the Project, it is clear that the Project is closer to achieving the CDO timeline, and the PWM Expansion does not meet this criterion.

- **Criterion 6 – Status of PWM Expansion Project Engineering**. *The Staff Report states that the PWM Expansion is well beyond the 10% design threshold, and thus satisfied this criteria. (Staff Report, p. 98.)*

- The status of the PWM Expansion's engineering and design is irrelevant to the feasibility of the PWM Expansion as an alternative because the M1W Board of Directors has denied certification of the SEIR for the project, and it is speculative to assume that M1W will move forward with the PWM Expansion because, as stated by M1W staff, funds are not available to address the multiple deficiencies with the analysis in the SEIR. (See Ex. 18; Ex. 17, p. 1.)

- **Criterion 7 – PWM Expansion Project Funding**. *The Staff Report evaluates PWM Expansion for its ability to obtain sufficient project funding via government loans. Staff notes that PWM Expansion would rely in part on a commitment from Cal-Am to purchase product water as well as a government loan through the U.S. EPA. (Staff Report, p. 98.)*

    - As noted above, the M1W Board denied certification of the SEIR and the PWM Expansion is no longer moving forward. Accordingly, there are no commitments for project funding. Further, if the PWM Expansion were to ever move forward, it would require a Water Purchase Agreement between Cal-Am and M1W, which would require CPUC approval, as was required for the purchase of Original PWM Project water. The Staff Report failed to account for that timing or process. Further, the Water Purchase Agreement between Cal-Am and M1W would need to be revised to include additional terms, such as more stringent performance guarantees to provide greater assurances to Cal-Am and its customers that the recycled water would be produced as promised, and greater protections in the event that recycled water is not or cannot be produced. (See November 3, 2019 Letter from Cal-Am to M1W Board of Directors, attached hereto as **Exhibit 49**.) The M1W Board has not confirmed that they are willing to take on the liability that would be required by those performance guarantees. In addition, the CPUC highlighted a lack of secure funding in its wholesale rejection of PWM Expansion as a Project alternative. (See CPUC Decision D.18-09-017, Appx. C, pp. C-71 to C-72.) Therefore, even if the PWM Expansion were to move forward, numerous questions remain about the viability of funding such that this criterion cannot be satisfied.

- **Criterion 8 – Reasonableness of Water Purchase Agreement Terms**. *The Staff Report notes that the CPUC found the 2016 Water Purchase Agreement between Cal-Am and the PWM sponsors for Original PWM Project water met this criteria, and asserts that PWM Expansion water would cost less than water produced by the Project. (Staff Report, p. 98.)*

    - The Staff Report does not reach any conclusion regarding PWM Expansion conformance with this criterion, and indeed cannot do so, given that Cal-Am and the PWM Expansion project sponsors have not reached any agreement regarding the purchase of PWM Expansion water. Indeed, as discussed above, before Cal-Am purchases a drop of water from a possible PWM Expansion, the parties would need to agree to additional performance

guarantees to ensure a continued water supply in the event that the PWM Expansion cannot fulfill its promised water supply or otherwise meet Peninsula demands. Accordingly, this criterion cannot be used to support the feasibility of the PWM Expansion.

- **Criterion 9 – Reasonableness of the PWM Expansion Project Revenue Requirement**. *The Staff Report asserts that greater certainty regarding PWM Expansion project costs exists at this point than at the time of the CPUC's Decision, providing certainty as to the reasonableness of expected revenue requirements. (Staff Report, p. 99.)*

    - Contrary to the Staff Report's assertion, there is even less certainty regarding PWM Expansion costs than in 2017. The Original PWM Project has incurred significant cost overruns, and continues to face numerous technical and construction obstacles, resulting in substantially increased water rates from what was projected. (See Ex. 25.) It is therefore likely that the PWM Expansion could face similar cost overruns and corresponding water rate increases. (See Sections H, I.2.c, *supra*; see also Ex. 25.) It is not currently possible to speculate as to the reasonableness of the PWM Expansion's project revenue requirements. Therefore, the PWM Expansion does not meet this feasibility criteria.

5. Overall Adverse Project Effects

Staff Report Contention #36: The Staff Report asserts that the PWM Expansion would have fewer overall adverse environmental effects than the Project, given that the PWM Expansion will be located outside the coastal zone, and given the PWM Expansion's use of electricity generated by landfill gases. (Staff Report, p. 99.)

Cal-Am Response: The Staff Report's conclusion that the PWM Expansion would have fewer environmental effects than the Project is unsupported and did not have the benefit of the environmental analysis prepared for the PWM Expansion that was released just prior to the Commission's November 2019 informational hearing concerning the Project. The environmental analysis conducted for the PWM Expansion, as discussed in various comment letters on the PWM Expansion Draft and Final SEIRs, has significant flaws and requires substantial additional analysis. (See Ex. 20, Cal-Am Comments on PWM Expansion Final SEIR; see also January 30, 2020 Cal-Am Comments on PWM Expansion Draft SEIR, provided separately to Commission staff.) In fact, based on these significant flaws, the M1W Board denied certification of the SEIR. (See Ex. 18, M1W Board of Directors Staff Report.) Consequently, the full scope of the PWM Expansion's environmental impacts remains unknown.

In addition, staff's statements do not accurately reflect the Project's environmental impacts, as discussed herein. First, contrary to the Staff Report's conclusion, the Project would not result in a substantial adverse impact to sensitive habitats during Project construction or operation with the implementation of all feasible and enforceable mitigation measures. (See Section A, *supra*.) Second, the Project is not anticipated to be

impacted by sea level rise of coastal erosion until near the 2120 planning horizon, well beyond the economic lifespan of the Project's wells. (See Section B, *supra*.) Third, the assertion that the Project's potential impacts on marine life and ocean water quality "have not yet been determined" is inaccurate—the CPUC, as lead agency, has already determined that the Project will not result in substantial adverse impacts to coastal waters or marine resources during Project construction or operation with the implementation of all feasible and enforceable mitigation measures. (See Section C, *supra*.) Fourth, as explained in Section E, *supra*, staff fails to account for the Project's incorporation of Mitigation Measure 4.11-1, which would result in net zero operational emissions from electricity consumption.

Therefore, the Staff Report's conclusion that the PWM Expansion would have fewer adverse environmental effects is not supported by substantial evidence.

Staff Report Contention #37: The Staff Report acknowledges that "an underlying environmental concern applicable to both projects is the potential effect of Cal-Am not having an adequate water supply project in place by December 2021," so as to allow the CDO to be lifted. Staff admits that missing that deadline, or interim deadlines, would result in reductions in Cal-Am's legal diversion limits from the Carmel River. Staff states that if this occurs, Cal-Am would have to seek an extension from the State Water Board to permit continued Carmel River withdrawals, which may cause further environmental harms to the River. However, the Staff Report dismisses that concern by alleging that "the Cal-Am project appears to have a higher risk of delay than does the PWM Expansion." (Staff Report, p. 99.)

Cal-Am Response: Contrary to the Staff Report, the PWM Expansion has a high risk of delay. In comparison, Cal-Am's Project already has received numerous approvals, including a Certificate of Public Convenience and Necessity from the CPUC and a Combined Development Permit from Monterey County. While the Project has received those approvals and is currently pending before the Coastal Commission, the PWM Expansion has obtained no approvals and is no longer moving forward as a result of the M1W Board's decision to deny certification of the PWM Expansion Final SEIR. In addition, given the current delays seen in implementation of the Original PWM Project, there are questions about how long it could take the Original PWM Project to achieve its water delivery obligations. Currently the Original PWM Project is expected to deliver only 58% of its 3,500 afy delivery target. (See Ex. 25, PWM Status Update Presentation; Section I.2.a, *supra*.) Given this information, there is substantial uncertainty about whether the PWM Expansion could achieve its water delivery targets, or how quickly it could come on line even if it were to move forward. It is virtually impossible that the PWM Expansion would meet the 2020 interim milestone or the CDO 2021 deadline. Accordingly, the assertion that the Project has a higher risk of delay than the PWM Expansion is not supported by the available facts.

6. "No Action" Alternative

Staff Report Contention #38: The Staff Report asserts that under a "no action" scenario, wherein the Commission does not approve the Project, the "most likely scenario" is that Cal-Am

would pursue the PWM Expansion, and the PWM Expansion could provide an adequate water supply to Cal-Am's service area. (Staff Report, p. 100.)

Cal-Am Response: Since the issuance of the State Water Board's 1995 order reducing Cal-Am's allowable withdrawal from the Carmel River by 10,730 afy, Cal-Am has been working to implement an alternative water supply to provide a reliable and sustainable water supply to the Monterey Peninsula, as well as to lift the State Water Board CDO. In the past 25 years, Cal-Am's efforts have included working on the possibility of a new dam and reservoir, as well as a different desalination project that was proposed in conjunction with MCWD and MCWRA. Cal-Am was forced to abandon the prior desalination project when a MCWD consultant violated conflict of interest laws. In order to fulfill its obligations under the CDO and provide a long-term solution to the Peninsula's water supply problems, Cal-Am moved forward with designing the Project on its own, and applied to the CPUC for its approval in 2012. In the course of reviewing the Project over six years, the CPUC analyzed, and rejected, eleven different alternatives to the Project, including the PWM Expansion. With the M1W Board of Directors' decision to deny the certification of the PWM Expansion Final SEIR, the PWM Expansion also can no longer be considered as an alternative option. The Project therefore remains the only possible option to satisfy the CDO's requirements and provide much-needed water to the Peninsula.

Moreover, if Cal-Am were to proceed with the PWM Expansion in lieu of the Project, given the significant shortfalls in production from the Original PWM Project (see Section I.2.a, *supra*), and the potential for the PWM Expansion to similarly fail to meet expected deliveries, there is a significant likelihood that Cal-Am would not be able to cease its withdrawals from the Carmel River in order to make up for shortfalls in supplies from the PWM project as a whole. As such, the Staff Report must consider as the "no action" alternative the reasonably foreseeable scenario in which Cal-Am is forced to continue pumping from the Carmel River to meet regional water demands or otherwise implement severe water rationing measures, along with any associated environmental, economic and environmental justice impacts.

J. Coastal Act Section 30260 Override for Coastal-Dependent Facility

As explained throughout this Attachment A, and contrary to the Staff Report's determinations, the Project is not inconsistent with the Coastal Act or LCP policies regarding ESHA, coastal hazards, coastal waters, or groundwater. (See Sections A through D *supra*.) Nonetheless, as the Commission found with the test slant well (CDP Nos. 9-14-1735 and A-3-MRA-14-0050), the Project satisfies the three requirements of Coastal Act section 30260, which allows the Coastal Commission to approve certain uses notwithstanding potential inconsistencies with applicable LCP policies. The Project is a coastal-dependent industrial facility and 1) alternative locations of the Project are infeasible or more environmentally damaging; 2) to not permit the Project would adversely affect the public welfare; and 3) the Project's environmental impacts have been mitigated to the maximum extent feasible. Staff's primary reason for determining that the Project does not satisfy Section 30260 is that the PWM Expansion is a feasible alternative to desalination, but as explained above in Section I, PWM Expansion is not feasible. Therefore, the

Commission is authorized under Coastal Act, section 30260 to approve the Project despite any potential inconsistency with LCP.

Staff Contention #39: Staff has determined that the Project qualifies as a coastal-dependent industrial facility under Coastal Act sections 30260 and 30101. (Staff Report, pp. 102-103.)

> Cal-Am Response: Cal-Am agrees with staff that the Project is a coastal-dependent industrial facility. As the Staff Report explains, the Project is "coastal-dependent" because it must be located adjacent to Monterey Bay to extract primarily seawater from beneath the seafloor. (Staff Report, p. 102.) Further, the Project's Source Water Pipeline is necessary to convey that feedwater to the inland desalination facility. (*Ibid*.) Finally, the Project will use the existing M1W outfall to convey the facility's brine discharges into coastal waters. (*Ibid*.) Moreover, staff correctly determined that the Project is "industrial" because it is a water supply infrastructure project implemented by Cal-Am, a publicly regulated utility. (*Id*., p. 103.)
>
> Because the Project constitutes a coastal-dependent industrial facility, the Commission can apply Section 30260 to approve the Project notwithstanding any potential inconsistencies with LCP and Chapter 3 of the Coastal Act.

Staff Contention #40: Staff contends that the PWM Expansion is a feasible, less environmentally damaging alternative to the Project. According to staff, the PWM Expansion "fully meets the criteria of the Coastal Act's definition of feasibility." (Staff Report, p. 104.) Therefore, staff finds that the Project does not meet the first test of Section 30260.

> Cal-Am Response: As a preliminary matter, Section 30260's plain language focuses on "***alternative locations***," ***not alternatives to an entire project***. (See Pub. Resources Code, § 30260 [emphasis added].) Staff's current interpretation of Section 30260 goes against the Commission's long-standing interpretation of "alternative locations" as alternative sites to the proposed project, not completely separate and distinct alternative projects. (See, e.g., Staff Report for Test Slant Well, App. No. 9-14-1735, A-3-MRA-14-0050, pp. 3, 57 [evaluating on- and off-site alternative locations for the test slant well].) Here, the PWM Expansion is not an alternative location to the Project; it is a wholly separate project. Staff's misinterpretation and incorrect application of Coastal Act section 30260 is not entitled to deference. (See *S. Cal. Edison Co. v. Pub. Util. Com.* (2000) 85 Cal.App.4th 1086, 1105 [finding that "an agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision"]; *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 42 [holding no deference warranted for agency's change from its "settled course of behavior"].)
>
> The Final EIR/EIS thoroughly analyzed alternative locations for the Project's subsurface intake slant wells and associated Project infrastructure, concluding that the Project's proposed location offers environmental advantages to alternative sites, such as use of an existing outfall, no construction on the seafloor, avoiding impingement and entrainment of an open water intake, and less than significant impacts to groundwater resources, surface water resources and marine biological resources. (Final EIR/EIS, §§ 5.1-5.6.) As

the Staff Report acknowledges, "Cal-Am selected a site where it could obtain its source water using subsurface intakes, ***which is the state's preferred method for seawater desalination facilities, due to their limited or non-existent adverse effects on marine life***." (Staff Report, p. 104 [emphasis added].) Cal-Am also selected to site the slant well network on the previously disturbed CEMEX site, "rather than a completely undeveloped coastal location where it may have caused additional adverse effects."[39] (*Ibid*.) Thus, the CEMEX site is the least environmentally damaging location feasible for the Project.

Moreover, staff cites Coastal Act section 30233 regarding fill in coastal waters as a basis for evaluating whether alternative projects are less environmentally damaging. (See Staff Report, p. 104.) However, as explained above in Section C, staff's interpretation of Coastal Act section 30233 is incorrect. Coastal Act section 30233 allows diking, filling, or dredging of open coastal waters only "where there is no feasible less environmentally damaging alternative." The Project does not involve the "diking, filling, or dredging" of coastal waters. (See Pub. Resources Code, § 30233.) The Project's underwater monitoring equipment and single buoy do not constitute "fill" as contemplated by section 30233 because the equipment uses anchors placed on the seafloor. The equipment does not involve the installation of permanent structures in the seafloor or the fill the ocean with sediment, earth, or similar substance.

Finally, as explained above in Section I.2, the PWM Expansion is not feasible. Significant questions remain regarding the adequacy of the PWM Expansion's environmental review, economic feasibility, and ability to secure sufficient water supplies and provide a certain quantity of product water.

Because the PWM Expansion is not feasible, and the CEMEX site is the best available location for the Project, the Project satisfies the first test of Coastal Act section 30260.

Staff Contention #41: Staff asserts that the Project would not promote the public welfare for three reasons: (1) the Project would impact ESHA, public access, and groundwater supplies; (2) the PWM Expansion can provide a water supply adequate for current demand and future growth and will allow Cal-Am to meet its CDO obligations; and (3) the Project would create economic hardships for communities of concerns due to high water rates. (Staff Report, p. 105; see also Addendum, pp. 7, 9.) Therefore, staff finds that the Project does not meet the second test of Section 30260.

Cal-Am Response: "Public welfare" is not defined in the Coastal Act, but it generally includes "the economic welfare, public convenience and general prosperity of the

[39] In fact, the Project's slant wells will be sited at the exact same location on the CEMEX site as the proposed wellfield for the Regional Desalination Project—the Project's predecessor. The Regional Desalination Project would have been jointly implemented by Cal-Am, MCWRA, and MCWD, with MCWD owning the desalination facility and infrastructure. (See CPUC Decision D.10-12-016, 2010 Cal. PUC LEXIS 548, at *2.) As such, any claims by MCWD—or even Marina—the Project is inappropriately located at the CEMEX site is belied by their prior support of the former Regional Desalination Project at this location. (See MCWD presentation regarding the Regional Desalination Project, attached hereto as **Exhibit 50**, pp. 4, 25.)

community.'" (*Miller v. Bd. of Pub. Works* (1925) 195 Cal. 477, 487.) Under Coastal Act section 30260, the evaluation of what would adversely affect the public welfare requires a balancing of interests: "[the] protection and preservation of coastal natural resources and the need for some coastal development." (*Gherini v. Cal. Coastal Com.* (1988) 204 Cal.App.3d 699, 708; see also *Marina Coast Water Dist. v. Cal. Coastal Com.* (2016) 2016 WL 6267909, at *12, *23.) Not permitting the Project would adversely affect the public welfare for several reasons.

As a preliminary matter, the Staff Report acknowledges that Cal-Am must obtain a new water supply under the CDO. (Staff Report, p. 104.) The Staff Report fails to appreciate, however, that without the Project, a deficit between available water supplies and total demand will result and worsen over time, potentially leading to prohibitions on all or specified non-essential water uses. (See Section I.3.c *supra*.) Without the Project, Cal-Am would fail to meet the CDO milestones, which could have harmful consequences for Cal-Am, its customers, the community, and the regional economy. (Final EIR/EIS, pp. 5.4-10 to 5.4-11 [potential rationing of and restrictions on water usage].) The Project would provide a water supply to replace that obtained from the Carmel River, benefiting the river watershed (Final EIR/EIS, p. 4.6-126); would prevent further seawater intrusion into the SVGB (*id*., p. 4.4-92; D.18-09-017, Appx. C, p. C-75); and would provide sufficient water to enable cities on the Monterey Peninsula to accommodate planned growth and existing legal lots of record. (See Section I.3.)

Moreover, the Project will not impact public or beach access following any restoration at the CEMEX site, as described above in Section F. Similarly, the Project will not significantly impact ESHA following the implementation of all feasible and enforceable mitigation measures. (See Section A *supra*.) Nor will the Project adversely affect groundwater supplies in the SVGB, as described above in Section D.

Further, as explained throughout this Attachment A, the PWM Expansion is not a feasible alternative to the Project. (See Sections I.2.) The CDO requires that Cal-Am "certif[y], with supporting documentation, that is has obtained a permanent supply of water that has been substituted for the water illegally diverted from the Carmel River." (See Ex. 49, p. 27.) The PWM Expansion is neither an adequate nor permanent water supply sufficient to meet the Peninsula's water needs, and M1W has not demonstrated permanent water rights necessary for PWM Expansion operation. Therefore, absent another source from which Cal-Am can obtain water—such as the Project—Cal-Am cannot meet its CDO obligations or supply sufficient water to its service district.

Finally, as explained above in Section H, the Final EIR/EIS evaluated whether the Project would result in a disproportionately high and adverse impact on minority or low-income populations. (Final EIR/EIS, pp. 4.20-16 to 4.20-19.) As discussed above and in the Final EIR/EIS, Cal-Am has a rate assistance program for qualifying water consumers that will help defray increased water costs associated with the Project. "These programs would reduce the burden of increased prices on low-income households in the Monterey District." (*Id*., p. 4.20-18.) Based on substantial evidence in the record, the Final EIR/EIS concluded the Project would not result in significant environmental justice impacts. (*Ibid*.) In fact, the Final EIR/EIS identified benefits to CCSD, a disadvantaged

community, in the form of high quality water for the same price that pumping degraded water would otherwise cost. (*Id*., p. 4.20-19.)

Because not permitting the Project would adversely affect the public welfare, contrary to the Staff Report conclusion, the Project satisfies the second test of Coastal Act section 30260.

Staff Report Contention #42: Staff claims that impacts from "several project components are not yet fully mitigated." (Staff Report, p. 105.) In particular, staff contends that the Project's ESHA, groundwater, and coastal hazard impacts have not been "fully mitigated," and that Cal-Am's CDP application fails to identify necessary work to the outfall liner, which will result in environmental impacts. (Ibid.) Therefore, staff finds that the Project does not meet the third test of Section 30260.

Cal-Am Response: The Coastal Act and its regulations do not require that impacts be "fully mitigated," as staff represents, but rather requires that impacts are mitigated to the "***maximum extent feasible***."[40] (See, e.g., 14 Cal. Code Regs., § 13053.5, subd. (a); see also *id*., §§ 13328.1, 13356, subd. (b)(2), 13540, 13666.4.) Similarly, the LIP—which the Commission certified in 1982—states that, for CDPs, the City's Planning Commission shall consider "feasible mitigation measures which substantially reduce significant impacts of the projects as described in any applicable EIR." (LIP, p. 24.) Here, and as explained throughout this Attachment A, the Project's impacts have been mitigated to the maximum extent feasible.

For instance, the MMRP imposes a wide range of robust mitigation measures designed to mitigate the Project's environmental impacts to terrestrial biological resources in the coastal zone to the maximum extent feasible. (See Final EIR/EIS, pp. 4.6-170 to 4.6-195, 4.6-216 to 4.6-220, 4.12-37 to 4.12-38, 4.14-38; see also *id*., Appx. D.) The Final EIR fully analyzed impacts to ESHA and determined that, ***with mitigation, there would be no significant physical impacts to ESHA***. (See Final EIR/EIS, § 4.6.) Consistent with the MMRP, Cal-Am prepared the HMMP, which describes all the Project's mitigation requirements in the Coastal Zone and identifies performance standards and success criteria for restoration, long-term monitoring methods, adaptive management and corrective action. (See Section A *supra*.)

In addition, as explained above, in May 2020, AECOM provided a technical response to staff's coastal hazards concerns, attached hereto as **Exhibit 5**. AECOM's analysis demonstrates that the Project conforms to the LCP policies regarding coastal hazards by mitigating potential impacts caused by sea level rise and coastal erosion. (See Section B *supra*.)

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[40] As explained above, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (See Pub. Resources Code, § 30108.) The City's Zoning Ordinance definition of "feasible" is substantively identical to the Coastal Act's definition. (Marina Municipal Code, § 17.41.110.)

Moreover, as described above in Section D, the Project will have a less than significant impact to groundwater supplies in the SVGB. Not only is mitigation not required for less than significant impacts (CEQA Guidelines, § 15124.6, subd. (a)(3)), but additional modeling is not expected to change the Final EIR/EIS's conclusions. (See Section D *supra*.) The consultant retained by Commission staff, Weiss Associates, even acknowledges that the Final EIR/EIS's modeling was conservative. (See Weiss Report, pp. 19-20.) Thus, staff's assertions that mitigation may be required—or that additional modeling will change the Final EIR/EIS's conclusions—are unsupported.

Finally, the M1W outfall work is a wholly separate project that may be separately conditioned when M1W applies for a CDP for that work. Although Cal-Am is currently in discussions with M1W to determine how best to implement the outfall work contemplated in the EIR/EIS, M1W owns and controls the outfall; Cal-Am cannot compel M1W to apply for the outfall work in conjunction with this pending CDP application. Thus, Cal-Am appropriately did not include the outfall work in its CDP application.

Nevertheless, Cal-Am remains willing to work with staff on developing measures and special conditions that would ensure consistency with applicable Coastal Act policies if staff identifies specific concerns it believes need to be addressed further.

ATTACHMENT B

RESPONSES TO COMMISSIONER QUESTIONS FROM NOVEMBER 14, 2019, HEARING

A. Scope of Commission's Authority

Questions from Commissioner Rice: We know there are other agencies involved in permitting the Project who have authority that is different from the Commission's. What is the scope of the Commission's authority for this Project? For instance, which issues (particularly those raised in public comment) are irrelevant or outside the scope of the Commission's evaluation of the Project? (Transcript of Nov. 14, 2019, Commission Hearing,[41] pp. 325:24-327:1.)

Cal-Am Response: The Commission's jurisdiction is limited to the Project components located in the Coastal Zone, which are specifically identified in the Staff Report.[42] Further, the Commission is only responsible for assessing the Project's consistency with the Coastal Act and applicable LCPs in determining whether to approve or deny Cal-Am's CDP application. (See Pub. Resources Code, § 30200; see also *Charles A. Pratt Construction Co. v. Cal. Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075.) Thus, the Commission's review is limited to Project components within the Coastal Zone and potential impacts to Coastal Zone resources.

The Commission does not have jurisdiction to consider the reasonableness of Cal-Am's water rates or the public need for the Project—both of which fall squarely within the CPUC's statutory jurisdiction to regulate public utilities. (See Pub. Util. Code, § 701 ["The [CPUC] may supervise and regulate every public utility in the State and may do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction."].) The CPUC evaluated the Project's potential impacts on Cal-Am's water rates and the appropriate water supply and demand figures for Cal-Am's Monterey District service area over a six-year administrative process, during which it received evidence and testimony submitted under oath. (See also Attachment A, Sections H, I.)

Moreover, the issue of water rights is not for the Commission to decide. Cal-Am's water rights for the Project are wholly separate from the Project's potential impacts to groundwater resources and, thus are not relevant to the Project's consistency with the Coastal Act's groundwater protection policies. The State Water Board—not the Commission—is the state agency with primary responsibility for the regulatory and adjudicatory functions of the state regarding water resources. (Water Code, § 174; Pub. Resources Code, § 30412.) The State Water Board determined that Cal-Am could

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[41] The transcript is attached hereto as **Exhibit 51**.)

[42] Specifically, the Commission has jurisdiction over those Project components in the Coastal Zones of the City of Seaside, County of Monterey, and the Commission's retained jurisdiction in an area of deferred certification within the County. (Staff Report, p. 4.) Further, the Commission has appellate jurisdiction over the City of Marina's decision to deny a local coastal development permit for those Project components in the Marina Coastal Zone. (*Ibid*.)

develop the necessary water rights to operate the Project. (See CPUC Decision D.18-09-017, p. 80.)

The Commission also should defer to the State Water Board on matters of water quality, consistent with Coastal Act section 30412. (See Pub. Resources Code, § 30412 ["The commission shall not . . . take any action in conflict with any determination by the State Water Resources Control Board or any California regional water quality control board in matters relating to water quality or the administration of water rights."].) The State Water Board has reviewed the existing groundwater record for the Project, and concluded that the modeling "already conducted, revised, and relied upon by the Public Utilities Commission . . . provides a conservative overprediction of the volume of shallow, inland water that the Project would capture during full operation." (See Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), p. 3.) As a result, "State Water Board staff's opinion remains that the groundwater impacts of the Project will not be any greater than those stated, analyzed, and mitigated under the Public Utilities Commission's certified Final EIR," even if additional modeling is conducted. (*Id*., p. 3.)

Finally, because the Commission's jurisdiction does not extend outside of the Coastal Zone, the Commission is limited to considering alternatives within its jurisdiction. (See Pub. Resources Code, §§ 21002.1, subd. (d), 30260; see also Attachment A, Section I.) Under Coastal Act section 30260, the Commission has the authority to consider only "alternative ***locations***" for coastal-dependent facilities, not alternative projects. (See Pub. Resources Code, § 30260 [emphasis added].) The PWM Expansion project is not located within the Coastal Zone, and thus, is outside of the Commission's jurisdiction. (See, e.g., Pub. Resources Code, § 21002.1, subd. (d); CEQA Guidelines, §§ 15042, 15096, subd. (g)(1) ["When considering alternatives and mitigation measures, a responsible agency is more limited than a lead agency. A responsible agency has responsibility for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve."]; *RiverWatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1207 ["If the responsible agency finds that any alternatives or mitigation measures within its powers are feasible and would substantially lessen or avoid a significant effect of the project, the responsible agency may not approve the project as proposed, but must adopt the feasible mitigation measures or alternatives."] [emphasis added]; *Sierra Club v. Cal. Coastal Com.* (2005) 35 Cal.4th 839, 860 [holding that neither the Coastal Act nor CEQA allow the Commission to consider impacts of projects located outside the Coastal Zone]; *Schneider v. Cal. Coastal. Com.* (2006) 140 Cal.App.4th 1339, 1347 [concluding that the Coastal Act did not permit the Commission to consider ocean boaters' right to view coastline from the ocean].)

In sum, the scope of the Commission's authority in determining whether to approve or deny the coastal development permits extends to evaluating those Project components located within the Coastal Zone and whether they will impact Coastal Zone resources.

B. Role of Other Agencies

Questions from Commissioners Rice and Groom: What role is the CPUC playing? What is the status of the CPUC's approval? (Transcript, pp. 325:24-327:1, 329:24-330:19.)

Cal-Am Response: The CPUC is the constitutionally established state agency charged with regulating investor-owned utilities, like Cal-Am, and reviewed the Project as the lead agency under CEQA for over six years. (See Final EIR/EIS, p. 1-3.) The CPUC, in conjunction with the Monterey Bay National Marine Sanctuary, prepared the EIR/EIS to evaluate the Project's environmental impacts and potential Project alternatives. Based on the EIR/EIS' analysis and conclusions, the CPUC approved a Certificate of Public Convenience and Necessity ("CPCN") for the Project and certified the EIR/EIS in September 2018. Following its approval of the Project, as the lead agency the CPUC oversees Cal-Am's compliance with the MMRP. (CPUC Decision D.18-09-017, p. 161.)

Further, the CPUC is charged by statute with exclusive jurisdiction to oversee Cal-Am's ratesetting and determine utility supply and demand. "[T]he jurisdiction to determine the adequacy of service actually being rendered by a public utility under its franchise is vested exclusively in the [CPUC] when it has elected to determine whether the service is inadequate." (See *Citizens Utilities Company of California v. Super. Ct*. (1976) 56 Cal.App.3d 399, 408; see also *City of Oakland v. Key System* (1944) 64 Cal.App.2d 427, 435 [exclusive jurisdiction vested in CPUC to determine adequacy of service rendered by public utility].) Therefore, only the CPUC has the authority to make binding determinations as to the levels of supply and demand within Cal-Am's service area. (See CPUC Decision D.18-09-017, pp. 167-171, 194-195.)

See Section C below for a discussion of the CPUC's role vis-à-vis the PWM Expansion.

Questions from Commissioners Rice and Groom: What role is the State Water Board playing? (Transcript, pp. 325:24-327:1, 329:24-330:19.)

Cal-Am Response: The State Water Board regulates Cal-Am's water withdrawals from the Carmel River. In 1995, the State Water Board issued an order finding that Cal-Am was diverting more water from the Carmel River than it was legally allowed. (See Ex. 52, State Water Board, Order WR 2009-0060, pp. 1-2.) Recognizing Cal-Am's obligation to provide water to the people and businesses on the Monterey Peninsula to protect public health and safety, the State Water Board ordered Cal-Am to immediately limit its diversions of water from the Carmel River system, and to diligently implement various actions to address the situation and develop water from other sources of supply. (See *id*., pp. 36-37.)

In 2009, the State Water Board adopted a CDO in which it set a compliance schedule requiring Cal-Am to take actions necessary to reduce its diversions from the Carmel River and ultimately terminate the withdrawals by December 31, 2016. (See *id*., p. 57.) The CDO also imposed a moratorium on new service connections and certain increases in use until Cal-Am obtained sufficient alternative water supplies. (See *id*., p. 59.) In 2016, the State Water Board approved an amended CDO that would maintain Cal-Am's effective

diversion limit from the Carmel River from the start of water year 2015-2016 until December 31, 2021, as long as Cal-Am meets defined Project approval and construction milestones. (See Ex. 47, State Water Board, Order WR 2016-0016, p. 19.)

Currently, the State Water Board oversees Cal-Am's compliance with the CDO's milestones. (*Id*., pp. 20-21.) Indeed, the State Water Board has the power to lift the current moratorium on new water service connections and increases in use provided that Cal-Am certifies that it has secured sufficient permanent water supplies for its Monterey service district. (See *id*., p. 27.)

Further, the State Water Board oversees issues of water quality and preservation of water resources. (See Section A *supra*.)

See Section C below for a discussion of the State Water Board's role vis-à-vis the PWM Expansion.

C. Alternatives

Questions from Commissioner Mann: What alternative locations were evaluated for the Project's slant wells? Why are alternative locations of the slant wells infeasible? Why is the CEMEX site the environmentally superior alternative location? (Transcript, p. 322:14 – 322:19.)

Cal-Am Response: In analyzing the Project as proposed, the Final EIR/EIS assessed the feasibility of a series of alternatives at two different locations, each of which would avoid the need to construct the slant well system at the CEMEX site. These two alternatives involved the construction of intake systems at a site on Potrero Road site and a site at Moss Landing. (See Final EIR/EIS, pp. 5.4-2 to 5.4-3.)

First, the Potrero Road alternative, as evaluated in the Final EIR/EIS, involved construction of the same type of slant well system as proposed for the CEMEX site, but located instead at a site at the western end of Potrero Road in northern Monterey County. (See Final EIR/EIS, pp. 5.3-13, 5.4-12, 5.4-59.) Under this alternative, the desalination plant, brine discharge, product water pipelines, and ASR components would be identical to the proposed Project. (*Id.*, p. 5.4-12.)

The Final EIR/EIS found that a Project utilizing a slant well system located at Potrero Road would be infeasible because it would draw a greater volume of water from the SVGB than the proposed Project, given the unique hydrology of the Potrero Road area. (Final EIR/EIS, pp. 5.4-14, 5.4-59.) Under the Return Water Settlement Agreement Cal-Am is required to return product water to the SVGB based on the amount of water drawn from the SVGB. Given the increased draw from the SVGB that would result from slant wells at Potrero Road, the amount of water that Cal-Am would be obligated to return to the SVGB would result in a remaining water supply that would be insufficient to meet recovered tourism demand or serve vacant legal lots of record, as required by the Project objectives set forth by the CPUC. (*Ibid.*) Moreover, slant wells at Potrero Road would capture groundwater that would otherwise flow into Elkhorn Slough—resulting in

significant and unavoidable impacts on marine and terrestrial biological resources. (*Id.*, p. 5.6-6.)

Second, the Final EIR/EIS analyzed a series of alternatives involving construction of open ocean intake systems at a site located to the southwest of the Moss Landing Harbor, including: (1) an alternative that would retain most Project components but would utilize open ocean intakes that would be located at the Moss Landing site; (2) the Monterey Bay Regional Water Project, a desalination facility proposed by DeepWater Desal, LLC that would produce over three times more product water than the Project; and (3) the People's Moss Landing Water Desalination Project, a desalination project proposed by Moss Landing Green Commercial Park, LLC. (See Final EIR/EIS, pp. 5.4-17, 5.4-21, 5.4-40.)

The Final EIR/EIS found that a proposed intake alternative at Moss Landing would involve "additional permitting complexity associated with the construction and operation of an open-water intake due to entrainment and impingement of marine organisms," which would hinder Cal-Am's ability to implement the alternative before the CDO deadline. (Final EIR/EIS, pp. 5.4-21, 5.4-39, 5.4-50.) The Final EIR/EIS also concluded that open ocean intakes at the Moss Landing Site would involve the following increased impacts as compared to the Project: (1) significant and unavoidable impacts to marine habitat and biological resources associated with construction and operation of the intakes; (2) potentially significant impacts related to the open ocean intakes' potential to cause underwater landslides and interfere with oceanic processes; and (3) significant and unavoidable impacts to marine biological resources caused by intake and entrainment of marine life. (*Id.*, p. 5.6-4.)

In comparing the above alternative locations to the proposed Project, the Final EIR/EIS concluded that siting intake systems at either Potrero Road or the Moss Landing site would not "offer an overall environmental advantage over the proposed project," due to the impacts described above. (See Final EIR/EIS, p. 5.6-6.) The Final EIR/EIS noted that siting the slant well system at the CEMEX site would avoid the groundwater impacts associated with siting a similar intake system at the Potrero Road site. (*Ibid.*) Specifically, unlike the aquifers underlying the Potrero Road site, the 180-FTE and 400-Foot Aquifers below the CEMEX site are heavily intruded by seawater (*Id.*, p. 4.4-34.) Siting the slant wells at the CEMEX site therefore ensures that the Project slant wells will extract seawater-intruded groundwater that is otherwise unusable. As such, the Final EIR/EIS selected the Project, with slant wells located at the CEMEX site, as the environmentally superior alternative. (*Id.*, p. 5.6-8.) The CPUC later affirmed this decision, concluding that no other alternatives are feasible, capable of meeting Project objectives, or reducing significant impacts of the Project. (See CPUC Decision D.18-09-017, pp. 79-80.)

Finally, as explained in Attachment A *supra*, the CEMEX site is the least environmentally damaging location feasible for the Project, as siting the slant wells at the CEMEX site enables Cal-Am to obtain Project source water using subsurface intakes, thereby preventing impingement or entrainment of marine life, and also allows Cal-Am to construct the slant wells in areas previously disturbed by sand mining operations,

rather than in undeveloped locations on the coast. (See Attachment A, Sections A, B, J; see also Staff Report, p. 104.)

Questions from Commissioner O'Malley: Is staff's finding regarding the feasibility of the PWM Expansion driven by the CDO deadline? (Transcript, p. 325:10-325:16.)

Cal-Am Response: The Staff Report claims that the PWM Expansion can be operational in sufficient time to meet the CDO's December 2021 deadline and used that conclusion to support a finding that the PWM Expansion is a feasible project alternative. (See Staff Report, p. 80.) However, the PWM Expansion is not feasible because the M1W Board has since denied certification of the project's Final SEIR and did not approve the project, and M1W has confirmed that it does not have the funds to remedy the faults in the SEIR. (See Ex. 17, M1W Letter to Cal-Am re: Pure Water Monterey Project – Cost, Operational Performance and Status (June 8, 2020), p. 1; Ex. 18, M1W Board of Directors Staff Report (May 20, 2020).) Moreover, M1W currently estimates a roughly eight month delay in implementation of the first phase of the PWM (the "Original PWM Project"), which both imposes additional delays on the PWM Expansion and indicates it likely will face similar delays. (See Ex. 21, Cal-Am Comments on Cost, Operational Performance and Status of PWM Expansion (May 9, 2020), p. 1.) Indeed, the Original PWM Project is currently plagued by a number of technical issues, including sinkholes or subsidence around the shallow injection wells, injection wells running at less than half of their planned capacity, and an inability to utilize planned source waters, all of which are resulting in significant increases in projected PWM water rates. (See Attachment A, Section I.2.a.) It is likely that the PWM Expansion could experience even greater delays than the Original PWM Project, given the additional permits and source water agreements needed for the Expansion. The State Water Board recently expressed concern in a letter to the Commission that the timeline for implementation of the PWM Expansion has been delayed well beyond the CDO deadline. (See Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), at pp. 4-5.) Therefore, staff's conclusion that the PWM Expansion can be completed by the CDO is not substantiated by the available evidence and cannot support a finding of feasibility. (See Attachment A, Section I.2.b.)

Questions from Commissioner Rice: What are the next steps with respect to the PWM Expansion SEIR and what is the timeline for finalization of that document? Does it impact the CPUC's decision going forward? Does it impact the State Water Board's role going forward? (Transcript, pp. 326:17-327:1.)

Cal-Am Response: The PWM Expansion is no longer moving forward, as the M1W Board has denied certification of the Final SEIR. (See Ex. 18, M1W Board of Directors Staff Report (May 20, 2020).) The M1W Board rejected certification of the Final SEIR due to deficiencies in the environmental analysis of: source water for the PWM Expansion; water supply and demand; impacts to agricultural water supplies; and because the SEIR failed to evaluate the PWM Expansion either as an alternative to or a cumulative project with the Project. (*Ibid.*) The M1W Board has stated that these deficiencies will need to be corrected before the Board decides to move forward with the Project. However, M1W "[s]taff has noted that the [M1W] does not have additional

budget funds at this time for dealing with any additional deficiencies that have been identified . . . or could be identified in the future. [M1W] has suspended all of the remaining contracts on these matters to prevent further consultant expenditures." (*Ibid.*; see also Attachment A, Section I.2.) Moreover, there remains significant doubt regarding the availability of source waters for the PWM Expansion—so long as M1W fails to obtain secure and adequate source waters, the PWM Expansion remains infeasible. (See Attachment A, Section I.2.a.)

Should the M1W Board ever secure the funds needed to correct the substantial inadequacies in the PWM Expansion SEIR, and obtain all necessary source water rights, the Expansion would require the implementation of a Water Purchase Agreement between Cal-Am and M1W. (See Attachment A, Section I.2.) As with purchase of Original PWM Project water, this Water Purchase Agreement would require CPUC approval. (*Ibid.*) Moreover, to account for the numerous uncertainties surrounding the proposed PWM Expansion, the Water Purchase Agreement would need to include additional terms beyond those included in the Original PWM Project agreement, including more stringent performance guarantees to provide greater assurances to Cal-Am and its customers that the recycled water would be produced in specified amounts, and greater protections in the event that recycled water is not or cannot be produced. (*Ibid.*) Again, these terms would all be subject to CPUC approval, assuming the M1W Board ever decides to move forward with the PWM Expansion after correcting the Final SEIR. Such protections are even more critical given that the Original PWM Project is on track to produce only 2,030 afy, or only 58% of the 3,500 afy that was planned and allocated for Cal-Am's customers. (See Ex. 25, Pure Water Monterey: Injection Wells Facilities Status Presentation, M1W Recycled Water Committee Meeting (June 18, 2020).) There are no additional water supplies that can make up for that shortfall, apart from the Project.

Further, unlike the PWM Expansion, the CPUC has already certified the Final EIR/EIS and issued a CPCN for the Project. In issuing that decision, the CPUC explicitly determined that the PWM Expansion "would satisfy the basic and key purposes of Project (i.e., sufficient and reliable water supply) ***only in conjunction with construction of a desalination plant of some size within five to fifteen years***," and therefore ordered that the PWM Expansion be considered as an ***addition***, to the Project, not as an alternative. (See CPUC Decision D.18-09-017, Appx. C, p. C-71 [emphasis added].) The CPUC's decision has been upheld by the California Supreme Court and is now final. Neither the Commission's decisions with respect to the Project, nor any decision on the part of M1W to move forward with the PWM Expansion, has ***any*** impact on the Project's approval status before the CPUC.

With respect to the State Water Board—should the PWM Expansion move forward instead of the Project, the PWM Expansion would need to satisfy the requirements of the 2016 State Water Board CDO for a new permanent water supply before Cal-Am may be deemed to have satisfied the CDO. (See Attachment A, Section I.4.) Specifically, the 2016 State Water Board CDO states that the conditions thereto, as well as conditions set forth in previous iterations of the CDO, "shall remain in effect until (a) Cal-Am certifies, with supporting documentation, that it has obtained a permanent supply of water that has

been substituted for the water illegally diverted from the Carmel River and (b) the Deputy Director for Water Rights concurs, in writing, with the certification." (See Ex. 47, State Water Resources Control Board, Order WR 2016-0016 (July 19, 2016), p. 27; see also Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), at p. 2.)

As discussed above, there are significant uncertainties regarding the feasibility of the PWM Expansion and its ability to serve as an adequate water supply for Cal-Am's service area. Indeed, the PWM Expansion is not capable of providing a sufficient water supply to meet Monterey Peninsula water demand. Even assuming the depressed demand figures utilized by the Staff Report, Peninsula water supplies with the PWM Expansion, but without the Project, would only be able to meet Peninsula demand for a maximum of five years before falling short. (See Attachment A, Section I.3.c; see also Ex. 28, Hazen Memo, pp. 10-11.) That analysis also assumes that the Original PWM Project would provide a full 3,500 afy. As demonstrated in M1W staff's June 18, 2020 presentation to the M1W Recycled Water Committee, the Original PWM Project is only providing 2,030 afy, which means even existing demand cannot be met without desalination. Moreover, neither the Staff Report nor M1W has demonstrated that existing Peninsula water supplies plus PWM Expansion can meet maximum month demand (MMD) as required by the California Waterworks Standards (Cal. Code Regs., tit. 22, § 64554, subds. (a), (b)(2)). (See Attachment A, Section I.3.e.) Given these substantial issues, it is highly unlikely that Cal-Am could obtain the required certifications from the State Water Board needed to lift the CDO without the Project. (See Attachment A, Section I.4.)

Questions from Commissioner Brownsey: What is going to be the source of the water recycling? Are there drought conditions that could stress the system? How would that impact the Salinas Aquifer? (Transcript, p. 328:9-328:15.)

Cal-Am Response: The sources of water available for the PWM Expansion are discussed in more detail in Attachment A, Section I.2.a. As discussed therein, there remains significant uncertainty surrounding the availability of source waters for the PWM Expansion, which raises serious doubts that the PWM Expansion can be accomplished in a successful manner. First, M1W has failed to commit to a consistent list of source waters for the PWM Expansion, so the certainty of source waters is very difficult to ascertain. (Ex. 20, Cal-Am Letter to Monterey One Water re: PWM Expansion Final SEIR (Apr. 24, 2020), pp. A-16, A-21.) These issues were raised by multiple commenters on the PWM Expansion's SEIR, including from the City of Salinas, which controls the use of the City's agriculture produce wash water. (PWM Expansion Final SEIR, Comments F1-1 to F-3.) The City of Salinas has publicly confirmed it has not granted M1W the rights or approvals necessary for the PWM Expansion to utilize the City's agriculture produce wash water beyond the scope of the Original PWM Project and "the City intends to use available agriculture wash water for its own purposes[.]" (*Id.* at F1.) Other significant concerns surround the availability of source waters for the PWM Expansion, including the reliability of certain source waters under an existing agreement between M1W and the MCWRA referred to as the ARWRA. This agreement sets forth the responsibilities for construction, operation, and financing of new source water for the Original PWM Project. (PWM Expansion Final SEIR, Comment H-3.)

However, M1W has yet to satisfy several conditions required to utilize ARWRA source waters and its ability to do so is uncertain. (Ex. 20, pp. A-16 to A-17.) Thus, M1W's reliance on disputed rights to agricultural produce wash waters and ARWRA source waters results in an overestimation of available water supplies.

Though each of these issues is individually important, Commissioner Brownsey's concern regarding water supply availability during drought years is particularly critical because multiple dry years are very common in California. It is certain that California will experience another drought in the coming years, but the PWM Expansion's SEIR does not analyze that project during multi-year drought conditions, as required by the CEQA Guidelines, and has not established that the PWM Expansion is drought resilient. (CEQA Guidelines, Appx. G, § XIX(b); Ex. 20, Cal-Am Letter to Monterey One Water re: PWM Expansion Final SEIR (Apr. 24, 2020), p. A-20.) Therefore, serious questions remain as to the feasibility of the PWM Expansion as a viable alternative to the Project during extended drought conditions and the extent to which PWM Expansion would impact the SVGB under such constraints. The M1W Board acknowledged the substantial deficiencies with the SEIR's analysis of source waters and included this issue as one of its reasons for denying certification of the Final SEIR. (Ex. 19, M1W Board of Directors Agenda (May 21, 2020); see Ex. 18, M1W Board of Directors Staff Report (May 20, 2020).)

The PWM Expansion also has the potential to result in seawater intrusion in the SVGB, however these impacts have not been fully evaluated by M1W in the Final EIR for the PWM Expansion. (January 30, 2020 Cal-Am Comments on PWM Expansion Draft SEIR , p. 17; Ex. 20, Cal-Am Letter to Monterey One Water re: PWM Expansion Final SEIR (Apr. 24, 2020), p. A-9.) The EIR for the PWM Expansion evaluated impacts to groundwater resources without considering the impact the PWM Expansion would have if the Project is not built. The Project would benefit the SVGB by reducing existing and preventing additional seawater intrusion. If the PWM Expansion Project is seen as a replacement for the Project—and the Project is not built—then the Project's benefits to the SVGB will not occur and further seawater intrusion of the coastal aquifers can be expected.

Questions from Commissioner Hart: Will the PWM Expansion be able to provide the water that staff assumes will be available? (Transcript, pp. 331:4-332:2.)

Cal-Am Response: Based on the available evidence, the PWM Expansion is not capable of producing the 2,250 afy that staff has assumed. As discussed in detail below, there have been significant complications in development of the Original PWM Project that have resulted in a much lower water production than initially estimated, which raise substantial questions regarding the technology to be used by the PWM Expansion. In addition, there are substantial concerns about the availability of PWM Expansion source waters as discussed above. These issues raise significant doubt as to the PWM Expansion's ability to provide 2,250 afy. (See Attachment A, Section I.2.)

For example, while PWM Expansion will utilize the same technologies that are currently being implemented in the Original PWM Project, there are serious concerns with that

project's ability to produce the water it has agreed to provide. (See Attachment A, Section I.2.a.) Indeed, sinkholes or subsidence are affecting the Original PWM Project's shallow injection wells, which may not be repairable, certain deep wells are experiencing injection refusal and are functioning at rates of 60% or less, and some of the source waters identified and intended for treatment by the Original PWM Project have not been utilized since startup. (See Ex. 21, Cal-Am Comments on Cost, Operational Performance and Status of PWM Expansion (May 9, 2020), pp. 3-4; Ex. 22 Staff Report for May 14, 2020 M1W Recycled Water Committee Meeting, Agenda Item #5; Ex. 23 Staff Report for April 16, 2020 M1W Recycled Water Committee Meeting, Agenda Item #5; Ex. 24, Final Minutes from March 16, 2020 MPWMD Regular Board Meeting, p. 3.) Moreover, M1W recently confirmed that current injection rates for the Original PWM Project are only half of the planned capacity rate for the Original PWM Project injection wells. As a result, M1W may propose to add a new deep injection well to the project, further delaying implementation of the Original PWM Project and causing additional increases to water rates. (See Ex. 25, Pure Water Monterey: Injection Wells Facilities Status Presentation, M1W Recycled Water Committee Meeting (June 18, 2020).) Given these significant obstacles, the Original PWM Project is currently capable of producing only 2,030 afy of the planned 3,500 afy allocated for Cal-Am's customers. (*Ibid.*) These issues raise significant uncertainties regarding the use of this same technological approaches for the PWM Expansion.

Further, as discussed above, there is significant uncertainty regarding the availability of source water for the PWM Expansion—without such source waters, the PWM Expansion cannot, by definition, provide a sufficient water supply. (See Attachment A, Section I.2.a.) Moreover, even if the PWM Expansion could produce the water supplies discussed in the Staff Report, such supplies are inadequate to meet demand on the Monterey Peninsula, as assessed by the CPUC. (See *id.*, Section I.3-4.) Only the Project, not the PWM Expansion, has been proven capable of providing a reliable, drought-proof water supply. (See CPUC Decision D.18-09-017, Appx. C, p. C-71 [concluding that the PWM Expansion would only satisfy Project objectives "in conjunction with construction of a desalination plant of some size within five to fifteen years."].)

Questions from Commissioner Gold: What is the reliability of the PWM Expansion source water? How is the region's wastewater accounted for? Does it all go to M1W? Or is some additional wastewater available as source water for the Expansion? (Transcript at 335:7-335:16.)

Cal-Am Response: Source water reliability for the PWM Expansion is discussed in detail in Attachment A, Section I.2.a. As discussed above, there is significant uncertainty surrounding the availability of source waters for the PWM Expansion, including the reliability of certain source waters under the ARWRA between M1W and MCWRA, M1W's inability to commit to a consistent list of source waters for the PWM Expansion, disputed rights to agricultural produce wash waters and overestimation of water supplies during drought years. The extent that wastewater flows are available for the PWM Expansion is not readily apparent or proven. For instance, as discussed in Attachment A, Section I.2.a, M1W's ability to use a portion of such water is governed by the ARWRA, under which M1W previously contractually granted certain rights to municipal

wastewater to MCWRA. Under the ARWRA, certain wastewater flows from outside of M1W's 2001 service area boundary are to be evenly divided between M1W and MCWRA. (PWM Expansion Final Supplemental EIR/EIS, Appendix M, p. 3-10.) Though the PWM Expansion relies on the use of such water for recycling, M1W has admitted that "[t]hese flows have not previously been individually metered" and therefore the associated quantities cannot be reasonably relied upon for a specific quantity. (*Id.* at p. 3-10.) Moreover, multiple outstanding conditions are required to be completed before the ARWRA can become effective. (Draft SEIR, p. 4.18-5.) Therefore, the reliability of certain ARWRA source waters is speculative due to the significant conditions precedent that must be met for the sources of water to become fully secured. (Ex. 20, Cal-Am Letter to Monterey One Water re: PWM Expansion Final SEIR (Apr. 24, 2020) , pp. A-16 to A-17.)

Further, the source waters identified for the PWM Expansion remain uncertain since they have been modified by MIW throughout the environmental review process without adequate analysis or justification, raising doubts as to their reliability and ultimately the feasibility of the PWM Expansion. For instance, the Final SEIR for the PWM Expansion increasingly relies upon the availability of certain municipal wastewater flows even though it acknowledges that such flows have not been previously metered and that the estimates are based in part upon assumptions. (Final Supplemental EIR for the PWM Expansion, pp. 3-11 to 3-12.) When questioned about the reliability of such water supplies, M1W elected to evaluate source water scenarios where such sources are not used by the PWM Expansion, rather than demonstrate their reliability. (*Id.*, Responses to Comments VV-93 to VV-94 and VV-96 to VV-99.) M1W's inability to establish and rely on a stable, consistent set of source waters confirms that the project lacks a definite source water supply and raises serious questions about the PWM Expansion's feasibility and M1W's ability to accomplish the project in a successful manner. In part because of concerns associated with the reliability and availability of source waters, the M1W Board denied certification of the SEIR for the PWM Expansion. (See Ex. 18, M1W Board of Directors Staff Report (May 20, 2020); Ex. 17, M1W Letter to Cal-Am re: Pure Water Monterey Project – Cost, Operational Performance and Status (June 8, 2020), p. 1.)

Regarding how the region's wastewater is accounted for, according to the Final SEIR for the PWM Expansion, "[r]elative contributions of municipal wastewaters from M1W's geographic areas that enters the M1W headworks and is metered there include: 51% from the Salinas urban area, 3% from Moss Landing and Castroville, 45% from the Monterey Peninsula, Marina, and Fort Ord areas." (PWM Expansion Final Supplemental EIR/EIS, Appendix M, p. 2.) While the majority of these municipal flows are from areas within M1W's service area, some are received from beyond that boundary.

In response to the question concerning the availability of "some additional wastewater" for the PWM Expansion, M1W has not demonstrated the availability of additional sources of wastewater for the PWM Expansion, much less the availability and reliability of the water sources evaluated in the SEIR for the PWM Expansion.

D. Environmental Justice

Question from Commissioner Mann: What would Cal-Am's water rates be if the Project is not operated at full capacity? (See Transcript, pp. 322:10-323:7; also see Staff Report, p. 92.)

Cal-Am Response: As approved by the CPUC, the Project is intended to function at 86% capacity, producing 6,252 afy of water per year in normal years. (See Ex. 42, Direct Testimony of Ian Crooks to the CPUC Errata Version (Sept. 27, 2017).) This "provides a reasonable 14% operational reserve capacity to meet maximum day/month demands, dry weather reserves, variable water return percent, and additional supply for other system supply constraints in availability" to ensure water supply reliability. (*Ibid.*) During dry years, a "water supply shortfall can be covered by increasing desalination plant output to 100% and peaking other system supplies . . . depending on operational variables and regulatory availability." (*Ibid.*) Accordingly, the CPUC's ratesetting determination already considers that the Project will run at 86% capacity.

Further, as described in Attachment A, Section H, *supra*, staff's assumption that Project water would cost $6,100 per acre foot is incorrect. The CPUC decision expressly states that the "cost per acre-foot (AF) for the 6.4 mgd plant 'under the Tier 2 and PTM caps (inclusive of the 3,500 of GWR water) is $4,265 per AF and $4,472 per AF respectively." (CPUC Decision D.18-09-017, p. 123, fn. 332; see also Ex. 14, Rebuttal Testimony of Jeffrey T. Linam (Oct. 13, 2017).) These costs assume the Project is operating at 86% capacity. There is no reasonable basis for staff's reliance on a projected per acre foot cost of $6,100 per year.

Questions from Commissioner Brownsey: Why are Cal-Am's water rates, as included in a 2017 study, among the highest out of a survey of 500 public and private companies? How do water conservation and reduction of use have the unintended consequence of increasing water prices? (See Transcript, pp. 328:16-329:4.)

Cal-Am Response: The numbers provided in Food & Water Watch's 2017 study are misleading and do not reflect actual average water use in Monterey. As discussed in Attachment A, Section H, *supra*, the study wrongly assumed that the average water use of a single-family residential household in Monterey is 60,000 gallons per year. (Staff Report, p. 73.) The correct average use is 44,000 gallons per year. (Ex. 12, p. 1.) Conservation pricing generally charges higher tiered rates for higher than average levels of water use to discourage excessive use of water. Therefore, under conservation pricing, assuming a baseline of 60,000 gallons per year—16,000 gallons per year above the actual average water use in Monterey—artificially skews the average cost of water above actual costs. (*Ibid.*) Applying the correct usage model into a monthly estimate utilizing a 5/8-inch meter, the average monthly water bill is about $78 (or $936 annually), rather than the approximately $100 per month cited in the Food & Water Watch study for 2017. (*Ibid.*) Additionally, Food & Water Watch relies on sources that explicitly warn against the sort of rate comparison employed by the study. (See Attachment A, Section H, *supra*.) As such, the Commission should not rely on the Food & Water Watch study and instead should credit the CPUC's thorough ratesetting determination for the Project as

reasonable and just. (See CPUC Decision, D.18-09-017, pp. 19-20, 123-24; Pub. Util. Code, §§ 451, 454.)

In addition, water conservation and reduction in water use can have the unintended consequence of increasing water prices because water utilities generally have high fixed costs associated with infrastructure, improvements, staff, and maintenance. This situation is not unique to Cal-Am; on average, about 70 percent of a water utility's revenue is devoted to fixed costs. When sales are reduced as a result of water conservation, the variable costs go down, but the fixed costs remain, so the cost of each unit of water must increase to support the fixed costs and keep the water utility's finances stable. While customers who conserve will always pay less than those who do not, they may not see substantial reductions in monthly bills due to conservation because the fixed costs remain.

Question from Commissioner Groom: Is there a water rate chart or analysis available for the Commission to review? (See Transcript, pp. 329:24-330:19.)

Cal-Am Response: The ratemaking framework approved by the CPUC was developed through a lengthy briefing process and included input from ratepayers and community organizations. (See CPUC Decision, D.18-09-017, pp. 19-20, 123-124; see also Section H, *supra*.) The rates ultimately approved by the CPUC were based on extensive collaboration: "Sixteen parties (a sub-set of parties, including the applicant, ratepayer advocates, environmental groups, and public water agencies)" contributed to the process. A description of the ratemaking framework and the process is provided in the CPUC decision. (CPUC Decision, D.19-09-017, pp. 77, 88-99; see also *id.*, Appendix F.) As stated above, the CPUC found that costs per acre foot would be between $4,265 and $4,472. (*Id.*, p. 123, fn. 332.)

In addition, Cal-Am's rate schedule for Monterey County is based on use: single family; multi-family; and non-residential.[43] For each use, the rates feature pricing tiers with price in the first tier being the lowest. Each tier has a certain amount of water allocated to it and if the user uses more water than is allocated to a particular tier, the user moves to the next higher priced tier associated with a greater consumption of water. Cal-Am's water rate schedule in Monterey County for single-family residences effective January 2020 is as follows:

[43] Cal-Am's Monterey Rate Schedules are available at: https://amwater.com/caaw/customer-service-billing/billing-payment-info/water-rates/monterey-district

Residential Customers:	Base Rate Per 100 gal (CGL)	
For the first 29.9 CGL.....	$1.0078	(I)
For the next 29.9 CGL.....	$1.5117	
For the next 44.9 CGL.....	$3.5274	
For the next 67.3 CGL.....	$6.5508	
For all water over 172.0 CGL.....	$8.0625	(I)

(See Regular and LIRA Rates, Ex. 15.) Cal-Am also offers a low income ratepayer assistance ("LIRA") program that discounts rates for qualifying households by up to 30%.[44] The water rate schedule in Monterey County for the LIRA program effective January 2020 is as follows:

Residential Customers:	Base Rate Per 100 gal (CGL)	
For the first 29.9 CGL.....	$0.7055	(I)
For the next 29.9 CGL.....	$1.0582	
For the next 44.9 CGL.....	$2.4692	
For the next 67.3 CGL.....	$4.5856	
For all water over 172.0 CGL.....	$8.0625	(I)

(*Ibid.*)

E. Coastal Waters

Questions from Commissioner O'Malley: Is there sufficient wastewater available for mixing with the Project's brine discharges? What impact would highly concentrated brine discharges have on the receiving marine environment? What is the process for the Project's brine discharge? Will it comingle with wastewater? Where will the water for brine dilution come from? (See Transcript, p. 324:4-18.)

Cal-Am Response: The Project's potential environmental impacts from brine discharges were analyzed in detail in the Final EIR/EIS. The Final EIR/EIS incorporates mitigation measures developed jointly by various parties as part of the "Brine Discharge Settlement," including *inter alia*, Surfrider Foundation ("Surfrider"), Monterey Peninsula Regional Water Authority ("MPRWA"), Monterey Regional Water Pollution Control Agency, and Cal-Am. (CPUC Decision 18-09-017, p. 116.) Due largely to the leadership and direction of Surfrider in the settlement process, the Brine Discharge Settlement creates standards and conditions for the collection of relevant, long-term water quality data to determine and ensure compliance with defined water quality standards. (Brine Discharge Settlement at Section 3.) It also requires implementation of specific corrective actions if salinity standards are exceeded, before Cal-Am can continue to

[44] For example, for a household of 4 persons to qualify for LIRA rates, the total gross income from all sources must be less than $52,400. Exhibit 15 provides further detail on qualifying households.

discharge brine. (*Id.* at Sections 4.4-4.6.) Accordingly, the Project's brine discharges and associated mitigation measures, which are described below, were thoroughly evaluated by and reflect the interests of multiple stakeholders.

As discussed in the Final EIR/EIS, the Project will generate approximately 9 mgd of brine that will be discharged through M1W's existing ocean outfall. (Final EIR/EIS, p. 5.5-61.) Depending on the season, the Project will utilize treated wastewater flowing from the M1W Regional Wastewater Treatment Plant for mixing with brine discharges. (*Ibid.*) During the non-irrigation season (November through March), when the highest wastewater flows occur, brine would be combined and discharged with varying amounts of secondary wastewater. (*Ibid.*) During the irrigation season (April through October), when the secondary treated wastewater may be treated and distributed to irrigators, it is possible that only brine would be discharged from the Project. (*Ibid.*) Nevertheless, as described below, the Project would ensure that applicable water quality and salinity standards are met year-round. (*Id.* at p. 5.5-64.)

Due to the varying amount of wastewater available for mixing throughout the year, the Final EIR/EIS evaluated four discharge scenarios for water quality impact: brine only, brine with wastewater, high brine only, and high brine with wastewater. (*Id.* p. 5.5-61.) As expected, the worst case condition for dilution would be when only brine is discharged during the irrigation season. (*Id.* at p. 5.5-64.) In all scenarios modeled, the applicable Ocean Plan salinity limit would be met. (*Ibid.*) As discussed in detail in Section 4.3 of the Final EIR/EIS, brine generated at the desalination plant would flow through a 1,100-foot-long diffuser resting above the ocean floor at approximately 90 to 110 feet below sea level. (*Id.* at p. 4.3-70.) The diffuser would be equipped with 172 2-inch diameter ports through which the brine stream discharge. (*Ibid.*) As a result of this process, the diffuser would disperse the brine stream, "thereby minimizing differences in salinity and other water quality parameters between the discharged brine and the surrounding water." (*Id.* pp. 4.3-70 to 71.) Moreover, Project discharges, "would not violate water quality standards, waste discharge requirements, or otherwise degrade the water quality (including hypoxia) of receiving waters in Monterey Bay by increasing salinity levels." (*Ibid.*)

Furthermore, in order to comply with applicable monitoring and reporting requirements for operation of new desalination facilities, the project would implement Mitigation Measure ("MM") 4.3-5 (Implement Protocols to Avoid Exceeding Water Quality Objectives). (Final EIR/EIS, p. 4.3-104; see also Attachment A, Section C.) In addition to implementing routine monitoring and reporting, MM 4.3-4 also includes corrective actions that would be required to be implemented if data indicates deleterious effects to receiving water quality or marine biological resources. (*Id.* at 4.3-93.) Accordingly, any Project impacts relating to brine discharges have been thoroughly studied in the Final EIR/EIS and mitigated, where necessary, to the extent feasible.

Questions from Commissioner Escalante: Have the state agencies vested with authority over marine protected areas expressed any concerns about marine protected areas in the vicinity of the Project? What are the Project's impacts to marine protected areas, such as the Elkhorn Slough and the Pacific Grove? (See Transcript p. 333:16-23.)

Cal-Am Response: Aside from the Coastal Commission, state agencies vested with authority over the marine protected areas within the Project's footprint include the California Department of Fish and Wildlife (CDFW), the California Fish and Game Commission, the State Water Board and the California State Lands Commission (CSLC). (See Final EIR/EIS, pp. 4.5-37, 4.5-39, 4.5-42.) The CDFW, State Water Board, and CSLC each commented on the Draft EIR/EIS for the Project. (Final EIR/EIS, Ch. 8.4.)

In its comments on the Draft EIR/EIS, CDFW requested that "special status biological resources should be evaluated and addressed prior to Project implementation, in order to comply with State law[]." (*Id.* at p. 8.4-6.) As discussed in further detail below, the Final EIR/EIS evaluated such potential impacts in detail and concluded that the Project would not result in a significant impact on marine biological resources with implementation of the mitigation measures identified. (Final EIR/EIS, pp. 4.5-47, 5.5-134.) With respect to Project impacts on marine species, the State Water Board confirmed that "[s]lant wells are… the preferred intake technology in the Ocean Plan because they minimize or eliminate intake and mortality of marine life." (*Id.* at p. 8.4-22.) As such, State Water Board concluded that "CalAm's construction and maintenance plan for the slant wells appears to avoid impacts to marine life" and "[o]verall, it appears that the MPWSP has been sited and designed in a manner that would result in minimal impacts to marine life and is consistent with the intent of the Ocean Plan to protect marine life and water quality." (*Ibid.*) CSLC's comments did not concern Project impacts on marine resources. (*Id.*, pp. 8.4-17 to 8.4-20.)

As noted above, the Final EIR/EIS evaluated potential impacts to marine protected areas. (See Final EIR/EIS, Ch. 4.3, 4.5.) Significantly, the Final EIR/EIS was prepared jointly with the Monterey Bay National Marine Sanctuary ("MBNMS"), which served as the NEPA lead agency for the Project. (*Id.* at ES-2.) The MBNMS is the federal agency charged with overseeing specified marine area offshore of California's central coast, including areas impacted by the Project. As such, the Final EIR/EIS reflects the analysis and conclusions of MBNMS staff. The Final EIR/EIS concluded that the Project would not result in a significant impact on marine biological resources. (Final EIR/EIS, p. 4.5-47, 5.5-134.) For instance, with respect to special status marine species in these areas, Section 4.5.1.3 identified certain mammals, birds, turtles and fish that may be impacted by the Project. (*Id.*, pp. 4.5-10 to 4.5-25.) Impact 4.5-1 determined that the Project would not result in a substantial impact upon any such species or on any natural community or habitat identified in any applicable local or regional plans, policies or regulations. (*Id.*, pp. 4.5-47, 5.5-135.) Additionally, the Final EIR/EIS confirmed that there are no known marine species in Monterey Bay with population numbers suspected of dropping below self-sustaining levels (except for the California Sea otter). (*Id.*, p. 5.5-135.) Accordingly, Final EIR/EIS determined that the Project "would not cause a fish or marine wildlife population to drop below self-sustaining levels and would not interfere

with the movement of any native marine resident or migratory fish or marine wildlife species in MBNMS." (*Ibid*.)

F. Groundwater

Questions from Commissioner Brownsey: Is groundwater data missing that could impact how the Salinas Valley Groundwater Basin aquifers have been characterized? If so, does that impact the Project? (Transcript, pp. 327:23-329:13.)

Cal-Am Response: As explained above in Attachment A, Section D, the Commission has sufficient information regarding the Project's potential impacts to groundwater supplies in the SGVB to determine that the Project conforms to the groundwater protection provision of Coastal Act Section 30231. The EIR/EIS consultant team performed over six years of fieldwork, data analysis, and groundwater modeling, and the modeling and its results were subject to substantial peer review and public comment. (See, e.g., Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), at p. 3.) Based on the extensive data and peer-reviewed modeling, the Final EIR/EIS conservatively analyzed the Project's potential impacts to groundwater supplies in the SVGB, finding that such impacts would be less than significant. (See Final EIR/EIS, pp. 8.2-86, 8.2-97, 4.4-64, 4.4-90 to 4.492.) Any additional, non-peer reviewed modeling is unnecessary and would not change the Final EIR/EIS's conclusions. (See Staff Report Addendum, Ex. 7, pp. 19-20 [Weiss Associates confirmed the Final EIR/EIS's modeling was conservative].) Nonetheless, Cal-Am has consented to additional modeling work by Weiss Associates for purposes of moving the Project forward through the Commission process.

Questions from Commissioner Brownsey: How do the slant wells work? When the slant wells withdraw water, do they extract fresh water? What basin is that water coming from? What is the impact on Marina's water? (Transcript, pp. 327:23-329:13.)

Cal-Am Response: The Project's slant wells would extend from the wellheads (the surface components) located on the CEMEX site to beneath Monterey Bay at a fourteen-degree angle. (See Final EIR/EIS, pp. 3-9, 3-18.) The slant wells would withdraw water from the groundwater aquifers that extend beneath the ocean floor. (*Id*., pp. 3-9, 3-20.)

As explained in detail in Attachment A, Section D, the Project will withdraw primarily seawater from the Salinas Valley Groundwater Basin. (See *id*., pp. 4.4-4.4-92, 8.5-561.) This "feedwater" would be "a combination of brackish groundwater representing the ambient conditions in the water bearing sediments of the Dune Sand and 180-FTE Aquifers at the coast, and the seawater that is drawn in through the aquifer sediments to recharge the capture zone."[45] (*Id*., p. 8.2-3.) As shown in Final EIR/EIS, Table 8.2.8-1, copied below, TDS and chloride concentrations in the Project's monitoring wells show

[45] "The capture zone is the localized region that would contribute source water to the slant wells." (Final EIR/EIS, p. 8.2-3; see also *id*., p. 4.4-52.)

that the water within the capture zone is substantially exceeds applicable standards for human consumption or irrigation without treatment. (See Final EIR/EIS, p. 8.2-48.)

TABLE 8.2.8-1
TOTAL DISSOLVED SOLIDS CONCENTRATIONS IN MPWSP MONITORING WELLS LOCATED WITHIN THE SLANT WELL CAPTURE ZONE

Well Number	Sample Date	Aquifer	Total Dissolved Solids (TDS) (mg/L)	Chloride (mg/L)
			California Drinking Water Standard: 500 mg/L[a]	California Drinking Water Standard: 250 mg/L[a]
MW-1S	2/13/15	Dune Sand	26,600	14,504
MW-1M	2/14/15	180-FTE	30,900	16,037
MW-3S	2/25/15	Dune Sand	23,400	11,680
MW-3M	2/24/15	180-FTE	28,500	14,686
MW-4S	3/7/15	Dune Sand	11,900	5,497
MW-4M	3/6/15	180 FTE	17,900	9,751

NOTES:
[a] California Secondary Maximum Contaminant Level (Cal. Code Regs., tit. 22, § 64449)
SOURCE: Geoscience, 2015

As Project pumping continues, the ocean water percentage of the Project's feedwater will reach 96 to 99%. (*Id*., p. 4.4-56.) Any fresh water (i.e., water with less than 500 mg/L TDS (Final EIR/EIS, p. 4.4-31)) will be returned to the Basin as part of Cal-Am's obligations under the Return Water Settlement Agreement and Monterey County Water Resources Agency Act. (See CPUC Decision D.18-09-017, pp. 104-105, 110; see also Attachment A, Section D.)

Further, Project pumping will not impact the City of Marina's water supplies. Marina's municipal wells are over 2 miles outside of the Project's capture zone. (See Final EIR/EIS, p. 4.4-75.) Further, Marina's municipal wells are screened in the Deeper Aquifer, but the Project will extract contaminated groundwater from the Dune Sands Aquifer and the 180-Foot Aquifer of the SVGB. (*Ibid.*) There are no known potable groundwater supply wells currently operating in the 180-Foot and 400-Foot Aquifers within the area of potential impacts of the Project's slant wells. (Final EIR/EIS, p. 8.5-633.) Therefore, the Project will not adversely impact Marina's municipal water supply.

G. Water Supply and Demand

Questions from Commissioners Brownsey and Gold: Why is there a divergence of views on water demand? (Transcript, p. 329:6-329:13.) How do we reconcile the differences in the water demand estimates put forth by various parties? (Transcript, pp. 334:21-335:6.)

Cal-Am Response: The estimates of supply and demand that diverge from the CPUC's conclusive supply and demand determination are being put forward by Project opponents in an attempt to derail the Project. These alternative supply and demand estimates all

suffer from significant flaws. Importantly, the CPUC is the agency charged by statute with exclusive jurisdiction to determine utility supply and demand and its determinations reflect a six year process. (See Attachment A, Section I.3; see also *Citizens Utilities Company of California v. Super. Ct.* (1976) 56 Cal.App.3d 399, 408; see also *City of Oakland v. Key System* (1944) 64 Cal.App.2d 427, 435.) Indeed, many of the entities now claiming to have re-calculated Peninsula supply and demand were parties to the CPUC's proceedings on the Project, and made substantially the same arguments in support of their positions then that they are now advancing before the Commission. (See Attachment A, Section I.3.a.) The CPUC considered the testimony of those parties and the evidence presented, and nevertheless determined that Cal-Am's future customer demand is 14,000 afy. *(Ibid*.; see also CPUC Decision D.18-09-017, p. 171.) Following the CPUC's decision, Project opponents, including MCWD, challenged that decision, including its findings on supply and demand, before the California Supreme Court—the Supreme Court wholly rejected those challenges and affirmed the CPUC's decision. Commission staff, MPWMD, and the various Project opponents lack authority to second-guess the binding supply and demand determinations handed down by the CPUC. (See CPUC Decision D.18-09-017, pp. 167-171, 194-195.) Moreover, many of the positions taken in the Stoldt Memo, upon which the Staff Report relies, directly contradict arguments put forward during earlier proceedings related to the Project before the State Water Board. (See Attachment A, Section I.3.d.) Accordingly, there is no need to reconcile the disparate estimates of supply and demand—rather, staff must utilize the supply and demand levels calculated by the CPUC.

As described in detail in Attachment A, each of the supply and demand estimates put forward by various entities and Project opponents is deeply flawed, and do not constitute substantial evidence to conclude that Peninsula supply and demand should be reassessed from the levels set by the CPUC. (See Attachment A, Section I.3.)

Question from Commissioner Escalante: Is there more room for water conservation in Cal-Am's service area? (Transcript, p. 333:3-333:15.)

Cal-Am Response: As a result of both the State Water Board CDO and long-standing drought conditions, water users in Cal-Am's service area are already burdened by "extreme conservation and moratorium measures." (See CPUC Decision D.18-09-017, pp. 52-53.) Indeed, the MPRWA has stated that "the Monterey Peninsula is already one of the most efficient water use communities in the state," and that the Cal-Am service area is already "drought hardened," a fact that the CPUC recognized in its decision on the Project. (*Id.*, p. 28.) Moreover, multiple entities, including MPWMD and the Monterey County Hospitality Association, have argued that additional conservation measures "would force economic stagnation upon the region, and can result in harm to the health and safety of the community." (See Final EIR/EIS, p. 5.5-358.) As such, "meaningful additional conservation will not be a reasonable option" to address the Monterey Peninsula's ongoing water crisis. (CPUC Decision D.18-09-017, p. 28 [quoting testimony provided by MPRWA].)

H. Agriculture

Question from Commissioner Groom: What are the Project's potential impacts to agriculture? (See Transcript, pp. 329:24-330:19.)

Cal-Am Response: The CPUC determined that the Project would boost the economic vitality of the agricultural industry in the region by improving long-term water supply reliability and water infrastructure. (CPUC Decision, D.18-09-017, Appx. C, pp. C-74 to C-75; see also *id*., pp. 159 [Project "reflects community values . . . by supporting agriculture"].) Rather, without the Project, "the lack of water supply would adversely affect the region's economic vitality, including the County's 'four pillars' – agriculture, tourism, education, and research – by substantially reducing the reliability of water resources and water infrastructure" in the region. (*Id*., p. 67.)

The Project specifically will provide desalinated product water to the Castroville Community Services Department ("CCSD") and Castroville Seawater Intrusion Project ("CSIP") as part of the CPUC-approved "Return Water Settlement Agreement." (See Attachment A, Section D, *supra*.) CCSD provides municipal and domestic water service to customers in the disadvantaged agricultural community of Castroville. (See, e.g., Ex. 11, Declaration of Eric Tynan, *MCWD v. County of Monterey*, Case No. 19CV003305.) CSIP similarly serves agricultural operations in the region to allow farmers to "safely irrigate their crops and reduce pumping of seawater-tainted groundwater."[46] Project water supplied to CCSD and CSIP will support and improve regional agricultural operations that are currently threatened by saltwater intrusion and a lack of reliable water supplies. (See, e.g., Final EIR/EIS, p. 8.6-414 [letter from Salinas Valley Water Coalition and Monterey County Farm Bureau stating that the Project, with implementation of the Return Water Settlement Agreement, would not cause agricultural impacts]; Ex. 11, p. 4 [describing CCSD's dire need for Project water].) The CCSD Manager has stated that "halting construction of the MPWSP will severely prejudice CCSD and the disadvantaged community of Castroville that despretately needs a new, reliable long-term water supply." (Ex. 11, p. 4.) The Monterey County Farm Bureau, which represents farmers and agricultural operations in the Salinas Valley, has explicitly supported the Project with implementation of the Return Water Settlement Agreement. In contrast, the Monterey County Farm Bureau has raised concerns that the PWM Expansion could capture water discharged in the Salinas Valley that could be used for agriculture and instead reuse it elsewhere, and has recommended that the PWM Expansion be put on hold. (SEIR for PWM Expansion, p. 4-593.) The City of Salinas, MCWRA, and private agricultural operators have raised similar concerns that the PWM Expansion would come at the expense of the Salinas Valley agricultural community. (See, e.g., *id.*, pp. 4-4 to 4-5; 4-42 to 4-44; 4-195.) Cal-Am will provide additional detail on potential impacts to the agricultural community from the PWM Expansion in an

[46] Monterey County Water Resources Agency, Monterey County Water Recycling Projects (CSIP/SVRP), https://www.co.monterey.ca.us/government/government-links/water-resources-agency/projects-facilities/castroville-seawater-intrusion-project-salinas-valley-reclamation-project-csip-svip.

Environmental Justice technical analysis that will be submitted separately to the Commission.

As for direct impacts, the EIR/EIS found that there would be no impacts to agriculture from construction of the slant wells. (See Final EIR/EIS, § 4.16.) The agriculture related concern raised by Project opponents is that alleged saltwater intrusion resulting from the Project's operations may impact regional agriculture. These concerns are not based in fact. All available evidence indicates that seawater intrusion will not occur. If anything, the CPUC concluded that the Project will work to prevent further saltwater intrusion. (See Final EIR/EIS, pp. 4.4-92, 8.5-561; HWG Response to Coastal Commission (Feb. 20, 2020), at p. 2; see also Section I.D, supra.)

Further, the Project will neither extract nor impact water that could otherwise be used for agricultural purposes. As fully discussed in Attachment A, Section D, the State Water Board has reviewed the existing groundwater record and the Weiss Report, and in its May 8, 2020 letter, concluded that the modeling "already conducted, revised, and relied upon by the [CPUC] . . . provide a conservative overprediction of the volume of shallow, inland water the Project would capture during operation." (See Letter from Eileen Sobeck, State Water Board, to John Ainsworth, Coastal Commission (May 8, 2020), p. 3.) The State Water Board further stated that the Project's groundwater impacts "have already been resolved by the Public Utilities Commission, after extensive environmental review and consideration of evidence and testimony over a multi-year adjudicative proceeding." Although MCWD and others have claimed that pockets of "fresh water" exist that may be impacted by the project, these pockets are either hydraulically disconnected from the Project's capture zone or are composed of water unfit for agricultural irrigation. (Final EIR/EIS, p. 8.2-61; CPUC Decision D.18-09-017, Appx. J, pp. 15, 19-21; see also Attachment A, Section D.) As determined by the CPUC, the enhanced water supply reliability provided by the Project will benefit agricultural operations in the region and there is no evidence that regional agriculture will be negatively impacted.

I. Coastal Act Section 30260 Override

Questions from Commissioner O'Malley: If the Commission finds that the Project is inconsistent with Coastal Act or LCP policies, but that the Project satisfies the tests of Section 30260, is approval of the Project mandatory or discretionary? Similarly, if the Commission finds that the PWM Expansion is feasible, does the Commission still have discretion to approve the Project under Section 30260? (See Transcript, pp. 324:21-325:19.)

Cal-Am Response: Section 30260 is discretionary. Section 30260 provides that "[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with [the Coastal Act]." (Pub. Resources Code, § 30260.) If a proposed coastal-dependent industrial facility is inconsistent with a Coastal Act or LCP policy, Section 30260 provides that the facility "***may nonetheless be permitted***" if three criteria are met: "(1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental

effects are mitigated to the maximum extent feasible." (Ibid. [emphasis added].) In MCWD's lawsuit challenging the Commission's approval of the test slant well under section 30260, the Sixth District Court of Appeal upheld the Commission's exercise of discretion to approve the test slant well notwithstanding potential impacts to ESHA. (See *MCWD v. Cal. Coastal Com.* (2016) 2016 Cal.App.Unpub.LEXIS 8028.)

Further, the Commission does not have the authority to consider the PWM Expansion as an alternative to the Project under Section 30260. As explained in Attachment A, Section J, the first test of section 30260 is whether "alternative ***locations*** are infeasible or more environmentally damaging." (Pub. Resources Code, § 30260 [emphasis added].) The PWM Expansion is not an alternative location to the Project components located within the Coastal Zone, but rather a wholly separate proposed project. The Final EIR/EIS evaluated alternative locations to the Project components located within the Coastal Zone and concluded, based on substantial evidence, that the proposed location of Project infrastructure, including the slant wells on the CEMEX site, is the environmentally superior alternative. (See Section C *supra*; see also Final EIR/EIS, Ch. 5.)

Acting as lead agency under CEQA, the CPUC also considered certain project alternatives outside of the Coastal Zone, like the PWM Expansion. The CPUC specifically rejected the PWM Expansion as infeasible for "myriad independent reasons." (CPUC Decision D.18-09-017, Appx. C, p. C-17.) The CPUC noted that by September 2018, the PWM Expansion was already far behind schedule and there was not "sufficient certainty concerning short- and long-term availability of source water supplies for the PWM Expansion." (*Id.*, p. C-71; see also Attachment A, Section I.2, for a discussion of the infeasibility of the PWM Expansion.) Further uncertainty has arisen since the CPUC's decision about the Original PWM Project's ability to deliver the amount of water it is obligated to provide, along with related technical issues, which substantially call into question the PWM Expansion's feasibility. Coupled with the fact that the M1W Board has denied certification of the PWM Expansion's Final SEIR, these issues further support the CPUC's conclusion that the PWM Expansion is not a feasible alternative to the Project.

ATTACHMENT C

PROPOSED SPECIAL CONDITIONS

1. **Outfall Construction.** PRIOR TO THE COMMENCEMENT OF PROJECT OPERATION, Permittee shall demonstrate that a Coastal Development Permit or Amendment has been obtained authorizing Project-related construction on the Monterey One Water outfall.

2. **Public Access Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit to the Executive Director for review and written approval a Public Access Plan indicating the location of construction and maintenance areas, staging areas, and access corridors on the CEMEX site. The Public Access Plan shall indicate:

    a. The specific location of all construction areas, all staging areas, and all access corridors, to be used for both construction and ongoing maintenance for those Project components on the CEMEX site. All such areas within which construction or maintenance activities are to take place shall be minimized to the maximum extent feasible in order to have the least impact on public access, including by using, as feasible, inland areas for staging and storing heavy equipment and materials.

    b. Construction and maintenance equipment, materials, or activity shall not occur outside the staging area and construction corridors identified in the plan required by this condition.

    c. No overnight storage of equipment or materials shall occur on sandy beach or within public parking areas. In addition, no motorized equipment will be allowed on the sandy beach at any time. During the construction stages of the Project, the Permittee shall not store any construction materials or waste where it will be or could potentially be subject to wave, wind, rain or tidal erosion and dispersion.

    d. The specific area to remain as open space following completion of construction, showing how and where public access will be possible. Following completion of construction and during Project operations, the Permittee shall ensure the area enclosed by Project fencing does not occupy more than approximately 0.25 acres aboveground.

    e. Commitment to modify this plan, as required by the Executive Director, to minimize impacts on public access, in light of any future restoration and access plan prepared pursuant to the CEMEX Settlement Agreement.

3. **Dune Migration and Wind Blown Sand.** By acceptance of this permit, the Permittee agrees to monitor and report on the risk of impacts to the wellheads at the CEMEX site from dune migration and wind-blown sand to the Executive Director as follows and shall implement corrective measures as reviewed and approved by the Executive Director:

a. Permittee shall conduct annual monitoring of the rate of dune migration and risk from wind-blown sand to the wellheads at the CEMEX site. An annual monitoring report shall be provided no later than June 30 each year to the Executive Director.

b. As necessary, the annual monitoring report shall include recommendations for the implementation of dune restoration and/or stabilization efforts which could include, but are not limited to, measures such as: the removal of invasive non-native plants; the reestablishment of native dune species; recontouring and stabilization of blowout areas; redirecting/consolidating footpaths; and sand removal. Any proposed dune restoration and stabilization activities must be reviewed and approved by the Executive Director prior to implementation by the Permittee.

c. If based on the annual monitoring report it is determined that dune restoration and stabilization efforts will not eliminate impacts from dune migration and wind-blown sand during the useful life of the wellheads at the CEMEX site, and the Permittee determines that the at-risk well(s) are necessary for the continued operations of the project, beginning at least 5 years prior to the anticipated exposure of the wellheads to such risks, Permittee shall implement the planning and permitting necessary to propose one or more of the following measures:

    i. Sand fencing;

    ii. Constructing physical protective barriers;

    iii. Raising or relocating the impacted well head; or

    iv. Other measures as may be agreed upon with the Executive Director.

    If any of these measures employed would result in impacts to ESHA, ESHA impacts shall be fully mitigated at a 3:1 ratio consistent with the project's HMMP.

d. If the Permittee determines that an at risk wellhead is no longer necessary for the project, instead of permitting any of the measures identified in subsection (c), the Permittee may abandon the well in accordance with Mitigation Measure 4.2-10.