

CALIFORNIA ENVIRONMENTAL LAW PROJECT

A Non-Profit Legal Corporation



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Re: Sierra Club Letter In Support of City of Marina's Opposition To
Approval Of A CDP For The California American Water
Desalination Project

Dear Mr. Ainsworth:

Sierra Club urges in this letter that the Coastal Commission carefully consider a reasonable range of alternatives to the Project, including the use of recycled water from the Pure Water Monterey Project.. Since there is at least one feasible alternative that would avoid or substantially lessen significant impacts caused by the Project that were identified in the CPUC EIR, and that would make it unnecessary to construct the proposed desalination facility, it would be prejudicial error for the Coastal Commission to fail to consider this recycled water alternative.

Sierra Club is a California nonprofit membership organization incorporated under the laws of the State of California in 1892. The Sierra Club has approximately 790,000 members, approximately one-fourth of whom live in California. The Sierra Club functions to educate and enlist people to protect and restore the natural and human environment, to practice and promote responsible use of the earth's ecosystems and resources, to explore, enjoy, and protect wild places, and to use all lawful means to achieve these objectives. Sierra Club and its members would be adversely affected if the Coastal Commission fails to comply with CEQA by issuing a CDP for the Project without carefully considering the recycled water Pure Water Monterey feasible alternative.

Sierra Club has been involved in water supply issues in the Monterey Peninsula since 1991 when it initiated a Complaint to the SWRCB, claiming that Cal-Am was unlawfully diverting water from the Carmel River alluvium without a permit to appropriate water. Sierra Club claimed these unlawful diversions were harming a drastically declining population of steelhead that inhabited the River. Sierra Club was a party to the proceedings before the SWRCB that resulted in SWRCB Order 95-10. Order 95-10 determined that California-American was diverting over 7,600 AFY from the Carmel River alluvium without a permit, and by reason of its unlawful diversions was adversely affecting trust resources in the Carmel River. The State Board, by Order 95-10, 24 years ago, ordered California-American to find a replacement water supply, and eliminate its unlawful diversions from the Carmel River. When California-American failed to do so, the State Board initiated a cease and desist order proceeding against California-American. By Order 2009-0060, the SWRCB required that California-American cease its unlawful diversions from the Carmel River by 2016., and in the interim take measures to limit harm to the steelhead (which by then was listed under the Endangered Species Act as a threatened species). Sierra Club was a party to this proceeding as well. In Order 2016-0016, the State Board extended the deadline for termination of the unlawful California-American diversions to 2021 but required California-American to reduce its diversions from the River incrementally until 2021, and imposed upon Cal-Am an effective diversion maximum level based on its diversion amounts from all sources during the previous three years. Sierra Club was also an active party to this proceeding.

Sierra Club promptly intervened in the Public Utility Commission's administrative proceeding in connection with for Cal-Am's application for construction of a desalination facility (A-12-04-019). Sierra Club's ultimate goal in its intervention was to ensure that the Commission carefully considered alternatives to the proposed 9.6 mgd desalination plant that would avoid or minimize significant environmental impacts that would likely be caused by the Project, including large consumption of energy, discharge of greenhouse gasses, disturbance of environmentally sensitive habitat, and adverse effects on the Salinas Valley Groundwater Basin.

In order to reduce the size and environmental impacts of the proposed 9.6 mgd desalination plant, Sierra Club and other intervenors successfully advocated that the Commission consider approving a Water Purchase Agreement authorizing Cal-Am to purchase 3,500 acre-feet per year of water from the Pure Water Monterey ("PWM") water recycling project. With the purchase of the recycled water from Pure Water Monterey, the Project, for the purpose of CEQA analysis, became the much smaller desalination plant (6.4 gpd) alternative proposed in the Cal-Am application. The Commission considered and approved the Agreement in a distinct earlier phase of its proceedings before issuance of the EIR. The PWM project is at the present time expected this year to deliver water to Cal-Am pursuant to the Water Purchase Agreement for use by its customers (an additional water supply of 3500 afy). At a later stage of the proceeding, Sierra Club, together with a number of other public interest groups, urged that the Commission consider as an alternative to the 6.4 gpd desalination plant a supplemental recycled water supply from PWM.

Sierra Club thus has a substantial interest in the proceedings before the Coastal Commission relating to Cal-Am's application for a CDP in connection with the Cal-Am Desalination project and is convinced the CPUC unlawfully acted when it declined to consider a Pure Water Monterey supplemental project that could produce an additional 2,250 AFY for the Peninsula, and that would make it unnecessary to build the 6.4 gpd facility at the present time. In any event, SierraClub believes that this Commission must carefully investigate the Pure Water Monterey supplemental water alternative in determining, under its applicable authority under the Coastal Act of 1976 and

CEQA, whether a CDP for the desalination plant is necessary under the circumstances, and whether it is preferable, as a matter of public policy, to use recycled water from a public facility, that would both avoid environmental damage to the site of the proposed plant, and would be less costly.

As a result of the CPUC's approval of the 3,500 afy PWM recycled water project, it remains evident that Cal-Am no longer needs any more than 6.4 mgd of additional capacity. Despite the fact that a 9.6 mgd desalination plant (as proposed in the Cal-Am CPUC application) was no longer needed to meet any of the Project's objectives, the CPUC FEIR still identifies the proposed project as a 9.6 mgd desalination plant and examines the 6.4 mgd project as a "reduced capacity" alternative. Thus, the CPUC EIR treats a hypothetical, infeasible (and unnecessary) project as the proposed project, and fails adequately to consider "reduced capacity" alternatives to a 6.4 mgd project that would still meet the needs of Peninsula residents. As a result, the CPUC failed to comply with CEQA's mandate to consider a reasonable range of alternatives to the 6.4 mgd plant, which legally became the Project after the 9.6 mgd plant was discarded. (Public Resources Code, § 21002; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.). Sierra Club asks that the Coastal Commission not repeat this error.

In addition, as pointed out by MCWD and the City in the CPUC proceeding, the CPUC's EIR's alternatives analysis relies on an overstatement of foreseeable water demand. In particular, the EIR fails to acknowledge what is evident from more than a decade of consistently declining demand on the Monterey Peninsula: a 6.4 mgd desalination plant is not needed in the Cal-Am service territory due to permanent conservation measures implemented by Cal-Am pursuant in large part to conservation measures mandated by the SWRCB and MPWMD.

Sierra Club, along with numerous other parties, repeatedly urged the CPUC to consider a PWM supplemental water alternative that could produce an additional 2250 afy for the customers of Cal-Am. In furtherance of this objective, Sierra Club was a party to a January 18, 2018 Motion for Additional Hearings before the Public Utilities Commission, filed in Application 12-04-019. The additional hearings requested were with respect to expansion of Pure Water Monterey as an alternative supplemental supply of water. In this

petition it was noted that it would be possible to expand the Pure Water Monterey project by 2250 AFY (in addition to the 3500 AFY already subject to a Water Purchase Agreement approved by the Commission in D16-09-021). If this expansion of the PWM project occurred, it would facilitate a smaller desalination facility and/or allow for the deferral of the desalination project through the issuance of a conditional CPCN to Cal-Am (when considered in connection with additional water offered by MCWD for sale to Cal-Am to supplement the PWM water).

The testimony of Paul Sciuto, the General Manager of One Water Monterey, provided evidence that all the work One Water Monterey had already completed would allow a timely Phase 3 hearing on Pure Water Monterey expansion and the expansion could be complete in time to meet the Cease and Desist Order's December 2021 deadline and provide sufficient water (2250 AFY) to meet realistic growth estimates. (Ex. PCA-7, with appendices.)

Ample testimony in the record before the CPUC demonstrates that with the Pure Water Monterey expansion of 2250 acre-feet per year, together with CalAm's other reliable sources of supply, and the additional water offered by MCWD, Cal-Am's available supply would significantly exceed the future demand. (*See, e.g.*, Ex. CA-51 (Mr. Crooks for Cal-Am), p. 14 at Table 4 (showing 2,005 acre feet year difference between estimated 2021 demand and future demand). *See also* Ex. WD-15 (Mr. Stoldt for MPWMD), pp. 11-14.

Under CEQA's "substantive mandate," agencies are prohibited from approving projects if there are feasible alternatives or mitigation measures available that would lessen the project's significant environmental impacts. (Pub. Resources Code § 21002; CEQA Guidelines, § 15092; *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) To enable agencies to achieve this mandate, CEQA requires an EIR to "describe a range of reasonable alternatives to the project . . . which would feasibly attain *most of the basic objectives of the project* but would avoid or *substantially lessen any of the significant effects of the project*, and evaluate the comparative merits of alternatives." (CEQA Guidelines, § 15126.6, subd. (a), italics added.) An "EIR should not exclude an alternative from detailed consideration merely because it "would impede to some degree the attainment of the project objectives.'" (CEQA Guidelines § 15126.6, subd.(b).) Similarly, the "applicant's

feeling about an alternative cannot substitute for the required facts and independent reasoning” regarding the feasibility of alternatives.” (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356; see also, *Laurel Heights I*, (1988) 47 Cal.3d 376 at 404 [courts will not “countenance a result that would require blind trust by the public”].)

As discussed *supra*, the FEIR’s alternatives analysis violated CEQA mandates by: (1) failing to examine a reasonable range of alternatives to the “proposed project,” (2) failing to evaluate a true “reduced size” desalination plant alternative because it improperly assumed the project must supply all of Cal-Am’s purported water demand immediately; (3) delegating to Cal-Am the duty to investigate the viable and environmentally superior Pure Water Monterey expansion alternative as part of the project approval; and determining that the 6.4 mgd facility was the environmentally superior alternative. Sierra Club asks the Commission, in the context of its permit review, to acknowledge there are feasible alternatives that would avoid or lessen the project’s significant and unavoidable environmental impacts, and to decline to issue a CDP, or to condition any CDP authorizing construction as containing a preconstruction condition that the Pure Water Monterey water would not be available in time to satisfy the SWRCB’s 2021 deadline.

As pointed out above, the “proposed Cal-Am project” identified and analyzed in the CPUC EIR was not the actual project that the Commission was considering for approval at the time it certified the EIR and approved the CPCN. Cal-Am’s initial project application included a variant (the “MPWSP Variant”) consisting of a 6.4 MGD rated capacity plant combined with a water purchase agreement for 3,500 AFY of potable, advanced-treated recycled water from MIW from its Pure Water Monterey project (April 2015 Draft EIR (“DEIR”), p. 3-4.) This proposal was developed to meet *all* of Cal-Am’s purported water demand as well as *all* of Cal-Am’s other project objectives. While the CPUC was preparing the revised EIR, the PWM project was approved when the Commission approved Cal-Am’s proposed water purchase agreement with M1W on September 22, 2016 (D16-09 021, p. 19). Thus, after the Commission acted, the 6.4 MGD rated capacity plant, as approved together with the water purchase agreement, should have been identified as the proposed project in the EIR. When the Commission circulated its revised draft

EIR in 2017, it still identified the 9.6 MGD capacity plant as the “proposed project.” (See FEIR § 3, p. 3-9.)

Given that the PWM project and water purchase agreement were approved prior to the circulation of the RDEIR, CEQA required the EIR to assume the PWM project would be built as approved, and to treat the 6.4 mgd plant as the proposed Project. (See *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal 4th 1086, 1119-1121) [EIR’s analysis must be based on “the proposed project as actually approved”].) The EIR left the public and sister agencies uncertain about what version of the project to comment on and diverted attention from considering feasible alternatives to the 6.4gpd desalination facility that had already been approved. This error was prejudicial, because “(o)nly through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the ‘no project’ alternative) and weigh other alternatives in the balance.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.) An accurate and stable project description is an essential element of a legally adequate FEIR. *Id.* at 192-193. It is incumbent on the Commission, as part of its review process, carefully to consider whether the Pure Water Monterey alternative makes construction of a desal facility redundant. The Commission should, as part of its alternatives analysis, consider the 6.4 mgd plant as the Project.

A “major function” of an EIR “is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” (*Laurel Heights I, supra*, 47 Cal.3d at 400). As the Supreme Court has emphasized, the discussion of alternatives (and mitigation measures) is the “core of an EIR,” which itself is the “heart of CEQA.”; *In re Bay-Delta Programmatic Environmental Impact Report Proceedings* (2008) 43 Cal.4th 1143 (“*In re Bay-Delta*”), 1162; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 587.)

The Legislature has indicated that where feasible in the coastal zone, adequately treated recycled water should “be made available to supplement existing surface and underground supplies” and to assist in meeting future water requirements of the coastal zone. (Water Code § 13142.5, subd. (e)(1).) This is precisely the policy behind the public benefit that the PWM project is

providing, pursuant to CPUC approval in D.16-09-021, by supplying 3,500 AFY of advanced treated recycled water for Cal-Am's use to serve its Monterey District. (D.16-09-021, pp. 2 54 [19APP315, pp. A14155, 14207.] Consistent with this statutory directive concerning use of recycled water in the coastal zone, the Coastal Commission is obligated as well to fully explore the possibility of Cal-Am purchasing additional supplemental recycled PWM water, either from an expanded project as proposed by M1W, or by utilizing MCWD's offer for a long-term sale of its unneeded portion of PWM supply or both.

For the foregoing reasons, Sierra Club urges the Coastal Commission to consider carefully the PWM supplemental water alternative before issuing a CDP for Cal-Am to construct a desalination facility at Marina City.

Sincerely,

CALIFORNIA ENVIRONMENTAL LAW
PROJECT

A handwritten signature in black ink that reads "Laurens H. Silver". The signature is written in a cursive style with a large initial 'L'.

Laurens H. Silver Esq., on behalf of the Sierra
Club

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