

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of California-American Water
Company (U210W) for Approval of the
Monterey Peninsula Water Supply Project and
Authorization to Recover All Present and
Future Costs in Rates.

A.12-04-019

(Filed April 23, 2012)

PROTEST BY WATER PLUS

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I. INTRODUCTION

Advocating for Monterey Peninsula water ratepayers in compliance with all applicable federal, state, and county laws and court rulings as well as legally enforceable contracts and agreements, Water Plus protests against the water-supply project proposed by the California-American Water Company (“Cal-Am” or “the company”) in A.12-04-019.

This project is internally inconsistent, illegal, irresponsibly promoted at no risk to shareholders, cynically pandering to environmentalists and ratepayers with unrealistic assurances about recycling and low-cost financing, inhibitive of open competition, possibly outside the jurisdiction of the California Public Utilities Commission (“CPUC”), defiant of the fundamental American principle of equality under the law, and unlikely to succeed in time to keep the state cease-and-desist order¹ from taking effect and devastating the economy of the Monterey Peninsula, as well as threatening the public health of its residents.

II. A.12-04-019 IS INTERNALLY INCONSISTENT

¹ California Water Resources Control Board Order WR 2009-0060, based on WR 95-10.

The proposal implicitly claims that the project will use treated wastewater injected into the Seaside aquifer to address nonpoint pollution from saltwater intrusion,² but the use of treated wastewater is covered in a memorandum of understanding with local public agencies that are necessarily outside the project, which Cal-Am claims is entirely under the jurisdiction of the CPUC, as the company itself is.³ Cal-Am uses the first claim as the basis of its eligibility to obtain a low-interest state revolving-fund loan under the auspices of the federal Clean Water Act⁴ and the second claim to circumvent Monterey County law and court rulings that could block the project.⁵ The two claims, both vital to the project, are inconsistent.

III. A.12-04-019 IS ILLEGAL

The project proposed is illegal on a number of grounds.

A. It is Forbidden by a Monterey County Ordinance. A Monterey County ordinance requires that a public agency build and own a desalination plant within the county.⁶ Cal-Am, a private company, proposes to flaunt this ordinance.

B. It Disregards a Monterey Superior Court Requirement of a New EIR. A Monterey County Superior Court ruled that the EIR for A.04-09-019, including Cal-Am's currently proposed project, was illegal and needed to be replaced by a new EIR prepared by a local Monterey County public agency.⁷ Cal-Am proposes not to follow this requirement, but to supplement the current EIR prepared by the CPUC,⁸ which is not within the county.

² A.12-04-019: *Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates*, April 23, 2012 ("A.12-04-019"), pp. 5 & 14.

³ A.12-04-019, pp. 5, 8 & 12.

⁴ S.12-04-019, pp. 13-14.

⁵ Oral presentation by Cali-Am president Robert MacLean to a meeting of the Monterey Peninsula Regional Water Authority on April 23, 2012.

⁶ Monterey County Ordinance 10.72.030(B).

⁷ Ruling by Monterey County Superior Court Judge Lydia Villarreal, December 19, 2011.

⁸ A.12-04-019, P. 22.

C. It Cannot Circumvent Water Rights by the Use of Slant Wells. The Ag Land Trust prevailed in a law suit claiming that the use of straight wells proposed in A.04-09-019 infringes on local water rights.⁹ To get around this ruling, Cal-Am proposes to use slant wells that draw water from under the bay.¹⁰ According to a California State University at Monterey Bay study, however, the same aquifer from which the straight wells would have withdrawn water extends a substantial distance under the bay.¹¹ Slant wells, no less than straight wells, would thus infringe on local water rights.

D. It has No Legal Access to the Marina Outfall Pipe. According to an agreement with the Monterey Regional Water Pollution Control Agency (“pollution control agency”), the pipe’s owner, the Marina Coast Water District in fact has the exclusive right for use of the pipe in a desalination project.¹²

E. It Cannot Use Treated Wastewater from the Pollution Control Agency. The loans obtained by the pollution control agency for the development of its water-treatment facilities to limit salt-water intrusion in the coastal area of the Salinas Valley restrict the use of the treated water to farmers in the area.¹³ According to a University of California at Santa Cruz study, removal of this restriction without penalty to the pollution control agency would require legislation.¹⁴

⁹ Ruling by Monterey County Superior Court Judge Lydia Villarreal, February 2, 2012.

¹⁰ A.12-04-019, p. 7.

¹¹ *Salinas Valley Water Table Evaluation: A Visualization Using GIS* by April McMillian, California State University, Monterey Bay, May 8, 2003.

¹² *Outfall Agreement* between Monterey Regional Water Pollution Control Agency and Marina Coast Water District, February 12, 2010.

¹³ *Contract between the United States and Monterey Regional Water Pollution Control Agency for a Loan for Construction of a Small Reclamation Project*, United States Department of the Interior, Bureau of Reclamation (Contract No. 5-07-20-W1284), March 16, 1995 & *State Revolving Fund Loan Program Loan Contract between the State Water Resources Control Board and Monterey Regional Water Pollution Control Agency* (Contract No. 5-804-550-0), April 18, 1995.

¹⁴ *Monterey Regional Water Pollution Control Agency Small Reclamation Project Act, Local Project Loan Refinance Study, Phase 1 Final Report*, University of California, Santa Cruz, January, 2008.

IV. A.12-04-019 PUTS RATEPAYERS, NOT SHAREHOLDERS, AT IRRESPONSIBLE RISK

Whether the proposed project succeeds or fails entails no risk to shareholders. As it has done for the costs of its abandoned A.04-09-019 project,¹⁵ Cal-Am no doubt expects to recover all costs due to errors in the current project from ratepayers, the CPUC shielding shareholders from all risk. Promoters of competing projects do not have this shield to protect them. In fact, the promoter of The People’s Moss Landing Water Desal Project (“People’s project”), Nader Agha, has risked an investment of tens of millions of dollars in his project. The playing field is hardly level, and ratepayers are effectively left holding the bag, which in all fairness should be in the hands of shareholders.

V. A.12-04-019 PANDERS TO ENVIRONMENTALISTS AND RATEPAYERS WITH UNREALISTIC ASSURANCES

The proposal is cynical in making unrealistic assurances to environmentalists about sustainable water use and to ratepayers about low-cost financing. The company must know that the project cannot realize either of these assurances.

A. Cal-Am Panders to Environmentalists. In its proposal, the company offers its memorandum of understanding with the pollution control agency and the Monterey Peninsula Water Management District to reflect the friendliness of the project to the environment.¹⁶ The proposal states that treated wastewater injected into the Seaside aquifer by the pollution control agency would provide a substantial portion of the project’s water supply.¹⁷ The attraction of this proposal to environmentalists is that the project would use available water resources before

¹⁵ Footnote 28 of Cal-Am’s Compliance Filing of March 1, 2012: “To the extent that there are any lawsuits stemming from California-American water’s withdrawal [from A.04-09-019], these would be costs associated with providing service and . . . California-American Water’s costs should be recovered from customers.”

¹⁶ A.12-04-019, pp. 11 & 12.

¹⁷ A.12-04-019, p.6.

resorting to other water sources like desalination. The proposal also places two conditions on this use of treated waste wastewater: Its use in the project would depend not only on the wastewater's availability in time to meet the cease-and-desist order deadline but also on its relatively low cost compared to desalination.¹⁸ The cynicism stems from both these conditions—from the first because Cal-Am must know that currently only Salinas Valley farmers have legal access to the treated wastewater and from the second because the proposal states in a different section that recycled water is substantially more costly per acre-foot than desalinated water.¹⁹ The company does not appear to be serious about its offer to use treated wastewater as part of its water supply.

B. Cal-Am Panders to Ratepayers in its Promise of Low-cost Project Financing. In its proposal, Cal-Am describes its plan to secure low-cost financing from the revolving fund administered by the state Water Resources Control Board.²⁰ The limited money available in this fund customarily goes to projects much smaller than the one in the current proposal. The projects are rated, and rarely does a project rated lower than A receive funding. The size of the project is not the only problem likely to cause it to receive a rating lower than A. All projects that receive funding must be either publicly owned or, uniquely in the case of projects that address nonpoint pollution, non-profit.²¹ The proposal reflects Cal-Am's belief that it can qualify for the funding as a non-profit because it will assess ratepayers for the project's support as a "surcharge" on their bills that will not add to shareholder profits by not affecting the

¹⁸ A.12-04-019, p. 11: "To the extent that water from the Groundwater Replenishment Project is available in time to meet the SWRCB deadline and at a reasonable price, it will allow California-American Water to build a smaller desalination plant..."

¹⁹ A.12-04-019, p. 10: "Although California-American Water has pursued several recycled water projects in its service area, it has found that the cost per acre-foot to develop and operate these projects is significantly higher than the cost of a desalination project."

²⁰ A.12-04-019, pp. 13-14.

²¹ Personal e-mail communication with public-finance consultant Roy Nelsen of Hanson, Wulff & Company, San Francisco.

company's rate base.²² The nonpoint pollution condition is one that the project is unlikely to meet for at least two reasons: The use of treated wastewater needed to meet this condition by preventing saltwater intrusion into the Seaside aquifer is neither an integral nor a likely part of the project, as noted earlier, and use of slant wells extending under the bay into a Salinas aquifer²³ would cause saltwater intrusion into the aquifer that could more than make up for the saltwater intrusion prevented by the injection of treated wastewater into the Seaside aquifer. By leading to a rating considerably lower than A, all these problems are highly likely to doom the project's prospects for low-cost funding. The promise of low-cost financing is an empty, if not a cynical, one.

VI. A.12-04-019 INHIBITS OPEN COMPETITON

A number of water-supply proposals exist for projects that would each provide sufficient water to the Monterey Peninsula to meet the state's requirement. The supplemental EIR proposed in A.12-04-019 considers only one of these projects. Cal-Am is used to behaving like a monopoly. This behavior is appropriate for a water distributor but not a water supplier. Although a region like the Monterey Peninsula may have only a single water distributor, that is not the case with water suppliers. State water law recognizes in its "wheeling" sections that a region may have more than a single supplier from which its water distributor must convey water to users if it has sufficient capacity to do so.²⁴ Cal-Am itself has recognized this provision in the law: In its current proposal, the company has asked the CPUC to authorize it to use treated wastewater in addition to desalinated water as part of its water supply.²⁵ That being the case,

²² A.12-04-019, p. 21.

²³ See Footnote 10.

²⁴ California Water Code Sections 1810-1814, enacted in 1986.

²⁵ A.12-04-019, p. 23.

Cal-Am is deficient in its exclusion of other possible water suppliers, like the People's project, in its proposal and proposed supplemental EIR,

VII. A.12-04-019 MAY BE OUTSIDE THE JURISDICTION OF THE CPUC

The CPUC has regulatory authority over Cal-Am as a utility because it is a monopoly, not subject to competition. In A.12-04-019, Cal-Am is making a proposal for a project that faces competition outside the realm of its distribution monopoly. For this reason, the CPUC may not have jurisdiction to decide on the merits of Cal-Am's project. In an open market, competition must make this decision.

VIII. A.12-04-019 DEFIES THE AMERICAN PRINCIPLE OF EQUALITY UNDER THE LAW

Since 2004, Nader Agha has sought to build a desalination plant at Moss Landing but has been prohibited from doing so by Monterey County law. Now Cal-Am, under the protection of the CPUC, claims to be above that law.²⁶ Despite being a private company like Agha's, Cal-Am by the very existence of its proposal claims that it can disregard county law because it is special. This claim clearly runs counter to the fundamental American principle of equality under the law.

IX. A.12-04-09 IS UNLIKELY TO PRODUCE SUFFICIENT WATER IN TIME TO BEAT THE CEASE-AND-DESIST ORDER DEADLINE

The need to surmount all the problems indicated here makes it highly unlikely that the Cal-Am water-supply project proposed in A.12--04-019 will produce the water required by the state before the cease-and-desist order deadline at the end of 2016. Much more likely to meet this deadline is Nader Agha's People's project which, in addition to a possible public partner in the city of Pacific Grove, has necessary permits and much needed infrastructure already in place. If Cal-Am wishes to risk shareholder money on its project, as Nader Agha has on his project,

²⁶ See Footnote 4.

then of course it should be free to do so, but the CPUC should not allow Cal-Am to gamble ratepayer money on the project it currently proposes, especially since it appears so unlikely to succeed.

X. CONCLUSION

Water Plus opposes Cal-Am's A.12-04-019 water-supply project based on the many objections to it raised here and respectfully recommends to the CPUC that it require Cal-Am to prepare a revision of its proposal that takes these objections into account.

May 24, 2012

Respectfully submitted,

WATER PLUS

By: _____

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