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## State Water Resources Control Board

August 31, 2022

### **Administrative Hearings Office’s Public Hearing in Court Reference to State Water Board in *City of Marina v. RMC Lonestar*, Monterey County Superior Court No. 20CV001387: Hearing Officer’s Ruling on California-American Water Company’s Motion in Limine**

#### Introduction

This document contains my rulings on the motion in limine filed by the California-American Water Company (“Cal-Am”) regarding written proposed direct testimony and associated exhibits filed by the City of Marina (“Marina” or “City”) in this proceeding. For the reasons stated in this ruling, I partially grant and partially deny this motion.

#### Background

On May 6, 2022, the State Water Board’s Administrative Hearings Office (“AHO”) issued its Notice of Public Hearing and Pre-Hearing Conference in this proceeding. The purpose of this proceeding, background, hearing issues and related information are discussed in that notice and are not repeated here.

Following the May 25, 2022 pre-hearing conference, the AHO issued its Pre-Hearing Conference Order and Notice of Second Pre-Hearing Conference on June 1, 2022. Among other things, that order specified a July 1, 2022 deadline for parties to file their written proposed direct testimony and associated exhibits. On June 30, 2022, I granted the parties’ stipulated request to extend that deadline to July 6. The parties filed their written proposed direct testimony and associated exhibits on July 6.

On August 9, 2022, Cal-Am filed a motion in limine to exclude five categories of written proposed direct testimony and associated exhibits that Marina had filed on July 6. Marina filed its opposition to this motion on August 22, 2022.

#### Discussion

As stated in the AHO’s hearing notice, “Government Code section 11513 shall apply to all evidence offered during this hearing.” (2022-05-06 AHO Hearing Notice (City of Marina), p. 21, ¶ 11.) Subdivision (c) of section 11513, provides:

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. *Any relevant evidence* shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Italics added.) Thus, although the standards for admissibility of evidence stated in this subdivision (c) are broad, evidence must be relevant to be admissible.

Evidence Code section 210 provides:

“Relevant evidence” means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

As Marina notes in its opposition to Cal-Am’s motion (2022-08-22 Marina Opp. to Cal-Am mtn. in limine (“Marina’s Opp.”), p. 5), in *Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 58, the Court of Appeal affirmed the trial court’s decision to admit evidence that “merely provided context and background information,” but that was “helpful and even necessary to the jury’s understanding of the issues.”

The specific categories of Marina’s written proposed testimony and associated exhibits that Cal-Am seeks to exclude are discussed in sections B.1 through B.4 and C., on pages 8-13, of Cal-Am’s motion. The following sections of Marina’s opposition respond to these sections of Cal-Am’s motion:

1. Cal-Am Motion, section B.1 (Annexation Agreement and Grant of Easement): Marina’s Opposition, sections A.1 and A.2.
2. Cal-Am Motion, section B.2 (City’s Settlement with CEMEX): Marina’s Opposition, section A.4.
3. Cal-Am Motion, section B.3 (City’s Denial of Coastal Development Permit): Marina’s Opposition, section A.3.
4. Cal-Am Motion, section B.4 (City’s Wetlands and Vernal Pools): Marina’s Opposition, section B.
5. Cal-Am Motion, section C (Mark Trudell’s Legal Conclusion Testimony): Marina’s Opposition, section A.5.

I request that, in the future, when a party files an opposition to another party’s motion, that party organize its opposition into sections that track, in order, the sections of the first party’s motion. That will facilitate my efficient review of the parties’ arguments and my preparation of future rulings.

## 1. The Annexation Agreement and Grant of Easement

This part of Cal-Am's motion concerns: (a) exhibit Marina 8, a 1996 annexation agreement among the Monterey County Water Resources Agency, Marina Coast Water District ("Marina CWD"), Marina, and numerous individuals and trusts; (b) exhibit Marina 9, a 2018 grant of easement from RMC Pacific Materials, LLC to Cal-Am; (c) exhibit Marina 10, a 2014 agreement for temporary investigative easement, option for permanent easement and escrow instructions between RMC Pacific Materials LLC (referred to as "CEMEX") and Cal-Am; and (d) the parts of exhibit Marina 1 (written proposed testimony of Layne Long) that refer to these exhibits. (2022-08-09 Cal-Am mtn. in limine ("Cal-Am mtn."), p. 9:12-20.)

Cal-Am argues that the Monterey County Superior Court "did not refer any issues relating to" this annexation agreement to the State Water Board, and that it and the related exhibits and written proposed testimony therefore are "irrelevant and should be excluded." (*Id.*, p. 8:10-12.)

Marina argues that information regarding the purposes of this agreement, the 500 acre-foot per year ("af/yr") extraction limit in the agreement, and the "successor and assigns" clause in the agreement provide "important background information" regarding Question 2 in the court's reference to the State Water Board and hearing issue 2.d. in the AHO's May 6, 2022 hearing notice (Marina Opp., p. 8:14-21), and "explain the context" of this limit (*id.*, p. 9:6). Marina argues that the grant of easement and option agreement are relevant because they show that CEMEX did not convey any water rights to Cal-Am and that Cal-Am must obtain its own water rights and comply with the 500 af/yr limit. (*Id.*, pp. 9:27-10:7.)

These exhibits and these parts of Mr. Long's written proposed testimony may provide some useful information about the background and context of the 500 af/yr extraction limit, and thus may be relevant under Evidence Code section 210. I therefore will accept into evidence these exhibits and this portion of Mr. Long's written proposed testimony for this limited purpose, and I deny the part of Cal-Am's motion that concerns these exhibits and this part of Mr. Long's written proposed testimony.

## 2. City's Settlement with CEMEX

This part of Cal-Am's motion concerns: (a) exhibit Marina 19, a 2017 consent settlement agreement between RMC Pacific Materials, LLC (doing business as CEMEX) and the Coastal Commission and a stipulated cease-and-desist order; and (b) the parts of Mr. Long's written proposed testimony that concern this exhibit. (Cal-Am mtn., p. 9:25-26.)

Cal-Am argues that, in this agreement, CEMEX committed to stop its sand mining operations, and that this agreement and evidence regarding it "is not relevant to any of the eight issues" the court referred to the State Water Board. (*Id.*, p. 10:1-3.)

Marina argues that this exhibit and these parts of Mr. Long's written proposed testimony are relevant to the effects of Cal-Am's proposed project on Marina's groundwater supply, alleged water rights and beneficial uses of groundwater, and on nearby vernal pools. (Marina opp., p. 11:16-22.)

The 2017 consent settlement agreement and the parts of Mr. Long's written proposed testimony that concern this agreement do not concern Cal-Am's proposed pumping of water from its proposed slant wells and therefore are not directly relevant to hearing issue 7 or hearing issue 7.a. However, this agreement and this part of Mr. Long's testimony may provide some useful background information regarding historical and authorized future uses of the CEMEX property. I therefore will accept this agreement and this part of Mr. Long's testimony into evidence for this limited purpose, and I deny the part of Cal-Am's motion that concerns this exhibit and this part of Mr. Long's testimony.

### 3. City's Denial of Coastal Development Permit

This part of Cal-Am's motion concerns: (a) exhibit Marina 11, the Marina Planning Commission's 2019 resolution denying Cal-Am's application for a coastal development permit for its proposed Monterey Peninsula Water Supply Project; and (b) the parts of Mr. Long's written proposed testimony that concern this resolution. (Cal-Am mtn., p. 10:19-21.)

Cal-Am argues that none of the eight issues the court referred to the State Water Board relate to Marina's denial of Cal-Am's application for a coastal development permit. (*Id.*, p. 10:22-24.)

Marina argues that the Marina Planning Commission's resolution denying Cal-Am's application for a coastal development permit contains findings regarding the proposed project's "anticipated depletion of groundwater supply and demonstrated lack of water rights," and that Mr. Long's testimony on this topic is relevant to hearing issues 7 and 8. (Marina opp., p. 10:23-28.)

The parts of the Marina Planning Commission's resolution discussed in this part of Mr. Long's testimony do not concern any water-right claims of Marina or Marina Coast Water District, and therefore are not relevant to hearing issue 7. These parts of the resolution do concern the question of whether Cal-Am has any water rights for its proposed project, and therefore may be relevant to hearing issue 8.(a). However, for the reasons discussed in my July 11, 2022 hearing officer's ruling, hearing issues 8.(a) and 8.(b) are legal issues that are best addressed through the parties' legal briefs, rather than through testimony.

It therefore appears that the Marina Planning Commission's resolution and this part of Mr. Long's testimony have at most only marginal relevance to the hearing issues. Nevertheless, I will accept this resolution and this part of Mr. Long's testimony into evidence for the limited purpose of providing background information regarding the

history of permitting actions regarding Cal-Am's proposed project. I therefore deny the part of Cal-Am's motion that concerns this exhibit and this part of Mr. Long's testimony.

#### 4. City's Wetlands and Vernal Pools

This part of Cal-Am's motion concerns: (a) exhibits Marina 7, 12-18, 20 (various documents regarding wetlands and vernal pools and the potential effects of Cal-Am's proposed project on them); (b) the parts of the written proposed testimony of Mr. Long and Mark Trudell that concern these topics; and (c) the written proposed testimony of Michael Josselyn. (Cal-Am mtn., p. 11:7-11.).

Cal-Am argues that these exhibits and these portions of written proposed testimony are not relevant to the eight hearing issues (*id.*, p. 11:12), and that "[a]ny purported right of the City relating to the preservation of vernal ponds is beyond the scope of both the Court's jurisdiction and the AHO's referral authority" (*id.*, p. 12:10-11).

Marina argues that Cal-Am's proposed project will "cause irreparable harm to the City's beneficial uses of the vernal ponds," and that this "is a water rights issue that the State Water Board must consider in this proceeding." (Marina opp., p. 13:4-8.)

In *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240, the California Supreme Court held that California courts "typically classify water rights in an underground basin as overlying, appropriative, or prescriptive." "An overlying right, 'analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto.'" (*Ibid.*) In contrast, a groundwater appropriative right "depends upon the actual taking of water." (*Id.*, p. 1241.)<sup>1</sup>

These rules regarding overlying rights and groundwater appropriative rights indicate that an essential element of each of these types of rights is the "taking," that is the pumping, of water for beneficial uses. These rights do not extend to *in situ* uses of water where no pumping or other conveyance of water from the natural source is involved. This conclusion is consistent with the rule that no one may obtain a surface-water appropriative right for beneficial uses that do not involve any diversions of water from the source. (See *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 604; *California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 820.)

Marina does not cite any evidence that it owns any lands that have overlying rights that could be affected by the pumping of Cal-Am's proposed wells, and Marina does not cite any legal authorities to support its argument that it has any water rights for the *in situ*

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<sup>1</sup> Prescriptive rights may change the relative priorities of overlying and appropriative rights. (See *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925.) They are not relevant to this hearing officer's ruling.

uses of water in vernal pools and wetlands within its boundaries. Marina therefore has not demonstrated that it has any “primary or paramount water right,” as those terms are used in hearing issue 7, for the wetlands and vernal pools discussed in the exhibits and written proposed testimony subject to this part of Cal-Am’s motion.

Because Marina’s written proposed testimony and related exhibits regarding wetlands and vernal pools do not concern any potential water rights of Marina or Marina CWD, they are not relevant to hearing issue 7 or hearing issue 8. I therefore grant the part of Cal-Am’s motion that concerns these exhibits and parts of exhibits.<sup>2</sup>

#### 5. Mark Trudell’s Legal Conclusion Testimony

This part of Cal-Am’s motion concerns paragraph 13 on page 9 of exhibit Marina 2, Mark Trudell’s written proposed testimony. (Cal-Am mtn., p. 13:13-14.)

Cal-Am states that this paragraph 13 contains Dr. Trudell’s interpretation of the term “groundwater” in Water Code section 10752, subdivision (a), and argues that, consistent with my July 11, 2022 hearing officer’s ruling, I should exclude this testimony.

Marina argues that “the paragraph CalAm seeks to exclude is nothing more than [Dr. Trudell’s] explanation to the AHO as to how he is defining ‘groundwater’ in providing the rest of his opinions about groundwater,” and that I therefore should deny this part of Cal-Am’s motion. (Marina opp., p. 12:16-19.)

I will admit this paragraph of Dr. Trudell’s written proposed testimony for the limited purpose of allowing him to explain the bases for the opinions of the rest of his written proposed testimony. If any party disagrees with Dr. Trudell’s interpretation of this statute, then that party may address that issue in its closing brief, and I will consider that argument when I prepare my proposed report of referee in this proceeding. I therefore deny this part of Cal-Am’s motion.

### CONCLUSIONS

1. Cal-Am’s motion in limine is granted in part. I will not accept into evidence: (a) exhibits Marina 5, 7, 12-18 and 20; (b) exhibit Marina 1, page 10, line 8 to page 15, line 11; and (c) exhibit Marina 2, page 29, line 25 to page 31, line 17. I will not allow Mr. Long to testify about this part of exhibit Marina 1, I will not allow Dr. Trudell to

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<sup>2</sup> The potential impacts of Cal-Am’s proposed project on these wetlands and vernal pools may be relevant in other proceedings regarding Cal-Am’s proposed project (see generally *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844), and nothing in this ruling should be construed to suggest otherwise. However, issues associated with these potential impacts are not within the scopes of any of the issues the court has referred to the State Water Board, and therefore are not within the scope of this proceeding.

testify about this part of exhibit Marina 2, and I will not allow cross-examination of these witness on these parts of their written proposed testimony. I will not allow Dr. Josselyn to testify.

2. In all other respects, Cal-Am's motion in limine is denied.
3. If Cal-Am wants to submit written proposed rebuttal testimony or exhibits rebutting the written proposed testimony or exhibits that were subject to the parts of its motion in limine that I am denying, then Cal-Am shall submit such written proposed rebuttal testimony or exhibits, using the same methods the parties used for submitting previous exhibits, on or before **September 19, 2022, at 1:00 pm**. Any such written proposed rebuttal testimony shall identify, separately for each part, the specific parts of Marina's written proposed testimony, or the specific Marina exhibits, that are being rebutted.

Aug. 31, 2022

/s/ ALAN B. LILLY

Alan B. Lilly

Presiding Hearing Officer

Administrative Hearings Office

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