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Honorable Mayor and City Council Members
City of Marina
211 Hillcrest Avenue
Marina, CA 93933

RE: Appeal of California American Water Company (Cal Am) of the Denial by the City Planning Commission for a Coastal Development Permit for a proposed Slant Test Well Project located at CEMEX's Lapis Road Property; Further Comments on the Mitigated Negative Declaration

Dear Mayor Delgado and Members of the City Council:

This letter is submitted on behalf of our client, Marina Coast Water District ("MCWD"), in opposition to the foregoing appeal of the California American Water Slant Test Well Project (Project). Formed by a citizens group in 1958, MCWD is a municipally owned water district serving residents, businesses and organizations throughout Marina and the Ord Community. The District supplies water to over 8,250 water connections, maintains and operates 105 miles of pipeline, 7 reservoirs, 5 booster pump stations and 6 wells. It is also responsible for maintaining the service area's sewer system, which includes 20 lift stations and 110 miles of pipeline. Based on its fifty plus years of experience in providing water service in this area, MCWD is uniquely qualified to comment on the Draft Initial Study and Mitigated Negative Declaration (IS/MND) for the Project. (See *Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187, 206 [Water District's operations provided it with expertise in groundwater for purposes of commenting on a project's potential environmental impacts on water supplies].) As addressed in MCWD's prior comment letters on the Project, MCWD has substantial concerns relating to the proposed Project's potential impacts on local water supplies and water quality. MCWD, incorporates its prior comments into this letter by reference, and submits the following additional comments on the draft IS/MND and the City Council's staff report for the Project (including attachments thereto).

These comments, as were MCWD's prior comments, are based on MCWD's review of the IS/MND, documents contained in the City's files, other public records, independent investigation of this matter, and MCWD's expertise in developing project's similar to the slant well proposed here. As discussed in detail below, MCWD agrees with the City's Planning

Commission that the Project's potential adverse environmental impacts, including its potential cumulative impacts, have not been adequately considered, evaluated, and mitigated in the IS/MND. Simply put, because substantial evidence supports a "fair argument" that the proposed Project may have significant adverse environment impacts, the City cannot make the required findings to certify the IS/MND under the California Environmental Quality Act ("CEQA") or the Coastal Act. To comply with CEQA and the CEQA Guidelines, the City must prepare an environmental impact report ("EIR") to analyze the potential impacts associated with the Project's potential direct, indirect, *and cumulative* adverse environmental impacts. Therefore, MCWD requests the City Council affirm the Planning Commission's decision not to certify the IS/MND, deny Cal Am's appeal, and Cal Am's request for a Coastal Development permit.

I. CEQA Requires an EIR Whenever a "Fair Argument" Can Be Made that a Significant Impact Will Occur Because of a Project.

If an agency's initial study for a project produces substantial evidence supporting a "fair argument" the project may have a significant adverse effect on the physical environment, the agency must (assuming the project is not exempt from CEQA), prepare an EIR. (CEQA Guidelines, § 15064, subd. (f)(1); *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 171-172.) If, on the other hand, "[t]here is no substantial evidence, in light of the whole record...that the project may have a significant effect on the environment," the agency may adopt a negative declaration. (Pub. Resources Code, § 21080, subd. (c)(1); see also § 21082.2, subd. (a); CEQA Guidelines, § 15064, subd. (f)(3); *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319 ("CBE v. South Coast").)

The "fair argument" test requires the preparation of an EIR whenever "there is substantial evidence that any aspect of the project, *either individually or cumulatively*, may cause a significant effect on the environment, *regardless of whether the overall effect of the project is adverse or beneficial....*" (CEQA Guidelines, § 15063(b)(1) [italics added].) Furthermore, as the California Supreme Court explained long ago, a project need not have an "important or momentous effect of semi-permanent duration" to require an EIR. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 87 ("No Oil").) Rather, an agency must prepare an EIR "whenever it perceives some substantial evidence that a project may have a significant effect environmentally." (*Id.* at p. 85.) An EIR is required even if substantial evidence in the record supports a conclusion that significant impacts will not occur, if a "fair argument" supports the opposite conclusion. (*Id.* at 75.)

Where experts have presented conflicting evidence on the extent of the environmental effects a project, like here, the City must consider the effects to be significant and prepare an EIR. (*Pocket Protectors v. Sacramento* (2004) 124 Cal.App.4th 903, 935; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-18; CEQA Guidelines, § 15064(f)(5).) "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (*Pocket Protectors, supra*, 25 Cal.App.4th at p. 935.) In the context of reviewing a negative declaration, "neither the lead

agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." (*Ibid.*) Where such substantial evidence is presented, "evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310.)

As discussed in section II, *infra*, expert testimony and additional substantial evidence in the record establish much more than the required "fair argument" that the proposed Project will have an adverse environmental impact, necessitating an EIR.

II. Substantial Evidence Supports a "Fair Argument" that the Project May Have Significant Adverse Impacts on the Environment.

The discussion contained in Sections II, A-G of this letter demonstrates the IS/MND fails to comply with CEQA. For each of the reasons discussed below, CEQA requires the City to prepare an EIR before the City Council considers approving the Project. CEQA, however, does not require that an EIR be prepared for a project that is rejected or disapproved by a public agency. (CEQA Guidelines, § 15061, subd. (h)(4).) Therefore, the City Council may, without violating CEQA, exercise its discretion to reject Cal Am's appeal and deny the Project at the September 3, 2014 hearing.

A. The IS/MND's Project Description Is Inconsistent, Misleading, and Improperly Segments the Project.

An accurate, stable and finite project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity. (See *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655 ("*Raptor*"); *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 [an accurate, stable and finite project description is the sine qua non of an informative and legally sufficient CEQA document].) The court in *County of Inyo* explained why a thorough project description is necessary:

A curtailed or distorted project description may stultify the objectives of the reporting process. Only 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.

(71 Cal.App.3d at 192-93.) The IS/MND's project description fails to comply with this mandate.

Specifically, the IS/MND's project description omits critical information and fails to address potential future uses of the proposed slant well or future phases of the Project. The IS/MND states that "[a]t the conclusion of the 24-month operational phase, the slant test well,

monitoring well clusters, and all related appurtenances and infrastructure are proposed to be decommissioned and removed.” (IS/MND, p. 23.) The IS/MND, however, elsewhere notes: “it is possible that, if the MPWSP is successfully developed, Cal Am will seek to have the slant test well converted into a permanent facility and connected to the subsurface intake system as one of several permanent MPWSP subsurface intake wells.” (IS/MND, p. 6.) The IS/MND then states that it “does not speculate regarding any disposition of the slant test well other than what has been proposed in the current application, namely, that the slant test well and all related project components would be decommissioned and removed after the testing period.” (*Ibid.* [italics added].) The current application, contrary to the IS/MND’s representation, does not propose or even suggest in that the slant well will be removed after the proposed two year permit expires. (See RBF Consulting. 2013, Application Package for the Temporary Slant Test Well Project, Marina, CA. Prepared on behalf of California American Water. July 2, 2013. Temecula, CA: RBF Consulting, Attachment “E” (Project Description) [hereafter “Application Package”].) Rather, the project description included in the current Application Package contemplates future use of the well as part of the Monterey Peninsula Water Supply Project (“MPWSP”) stating:

For the purposes of this application, the slant test well will be a temporary permitted facility until March of 2016. The MPWSP is a separate, potential future project, and its intake wells will be the subject of a separate permitting process. Conversion of the temporary slant test well to a permanent well would require considerable additional information such as conveyance, pumps and treatment, all of which would be addressed, if desired, as part of a separate CEQA and permitting process for the potential future MPWSP.

(Application Package, Attachment “E” (Project Description), p. 1 [italics added].) The City’s responses to comments further evidence that converting the well to a permanent well is both contemplated and foreseeable, stating: “[a]s currently proposed, *in the event the slant test well is not converted into a permanent well*, it would be decommissioned ...” (Response to Comments on Initial Study and Mitigated Negative Declaration, June 2014, p. 38 [italics added].)

Accordingly, the IS/MND’s project description misrepresents the likely future use of the proposed slant test well as an intake well for the MPWSP. The City cannot truncate its review of the Project’s potential environmental impacts based on the applicant’s statement that “for the purposes of this application” the slant well should be deemed temporary. More than substantial evidence in the record demonstrates this is not the case. CEQA does not allow the City to check its common sense at the door. Here, the applicant’s desire to use the slant well as a future intake well for the MPWSP is clearly foreseeable given the applicant’s statements and its financial investment in the slant well. In fact, use of the slant well (if it is approved and constructed) as a future intake well may result in less environmental impacts than drilling another new well in another location on the CEMEX property for the MPWSP. That is why CEQA requires an analysis of both the short-term and long-term impacts of operating the proposed slant test well at this proposed location now. A later EIR evaluating the potential long-term effects from operation of the proposed slant well would treat the impacts as a *fait accompli* because they

would be part of the environmental baseline. Therefore, unless these impacts are evaluated now, these long-term impacts are unlikely to be addressed in future environmental review. Consequently, CEQA requires the IS/MND to disclose and analyze the potential environmental impacts that could result from future use of the slant well beyond the 24 month requested in the permit. (See e.g., *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 259-63 (EIR must examine future mining activities at same time as the initial mining reclamation plan). The IS/MND's failure in this regard is fatal. (*Raptor, supra*, 149 Cal.App.4th at p. 730 [even if an environmental document is adequate in all other respects, the use of a "truncated project concept" violates CEQA and mandates the conclusion that the lead agency did not proceed in a manner required by law].) These impacts must be discussed in a focused EIR, as addressed below.

In addition, the record demonstrates that the Project's infrastructure improvements are a necessary and intended first step towards the development of the MPWSP. (Application Package, Attachment "C" ["This information will then be used to finalize the number, capacity, location, and design criteria of the potential future [MPWSP] intake wells"]; see also IS/MND at p. 6 [The slant test well project is a "critical step" for the MPWSP].) The applicant, and the IS/MND, claims that it may review the impacts of the entire MPWSP development separately from the proposed slant test well, as further separate approvals are needed for the MPWSP project. (Application Package, Attachment "E" (Project Description), p. 1; IS/MND at p. 6.) However, this approach violates decades of CEQA precedent holding that an agency must review the full environmental consequences of a project prior to taking a necessary first step towards that project. (See, e.g., *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279, 282; *Carmel-by-the-Sea v. Board of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 243-44 [rezone that "was a necessary first step to approval of a specific development project" triggered environmental review for that yet-to-be-considered project].) This is required regardless of whether further approvals are necessary, and even if the full development never actually occurs. (*Bozung, supra*, 13 Cal.3d at pp. 279, 282-84.)

As the Supreme Court explained in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 ("*Laurel Heights*"), an agency must analyze the effects of potential future development in its EIR if such development is: (1) "a reasonably foreseeable consequence of the initial project," and (2) "will likely change the scope or nature of the initial project or its environmental effects." (47 Cal.3d at 396.) In that case, the University of California San Francisco ("UCSF") had purchased a 354,000 square foot building, but prepared an EIR only for the initial occupation of 100,000 square feet by the School of Pharmacy. (*Id.* at p. 393.) UCSF argued that its future plans to occupy the remainder of the building, not available for ten years, were speculative. (*Id.* at p. 394.) Further, like the applicant here, UCSF claimed that, because these plans required further approvals that would be evaluated in their own right, the agency could evaluate the impacts of the potential expansion at a later time. (*Ibid.*) The Supreme Court rejected this argument, finding that deferring environmental review to a later point, when "bureaucratic and financial momentum" would make it difficult to deny the expansion, violated CEQA. (*Id.* at pp. 395-96.)

Here, the MPWSP is far more defined than the future expansion in *Laurel Heights*, which had not been precisely planned and was several years away from being approved. (*Id.* at pp. 396-97. Because that MPWSP is currently undergoing environmental review by the California Public Utilities Commission, there is no question that the MPWSP is "reasonably foreseeable" under *Laurel Heights*. (See IS/MND, p. 5) Furthermore, there is no question that the MPWSP will change the scope of the slant test well project and its environmental effects, as would future use of just the slant well. (See IS/MND, pp. 4-6, 149.)

As most of the City's Planning Commissioners recognized in their comments before rejecting the IS/MND, the IS/MND's failure to look at potential long-term impacts made it impossible for them to know the true scope of the Project's impacts. The Planning Commission was incorrectly advised that the City's environmental review could only evaluate the potential short-term impacts of the slant test well under CEQA based on the applicant's project description. This advice was incorrect. Under CEQA, the project refers to the underlying "activity" for which approval is being sought. (CEQA Guidelines, § 15378, subd. (c).) "The entirety of the project must be described, and not some smaller portion of it." (*Raptor, supra*, 149 Cal.App.4th at p. 644, citing *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829-831 [EIR for mining operation failed to include extension of water facilities, obscuring from view an important aspect of the project].) CEQA's conception of a project is broadly construed and applied in order to maximize protection of the environment. (*Nelson, supra*, 190 Cal.App.4th at p. 271, citing *Raptor, supra*, 149 Cal.App.4th at p. 730.) CEQA's "big picture approach to the definition of a project (i.e., including 'the whole of an action') prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." (*Ibid.*) As Court in *Nelson* explained:

Environmental considerations may not be submerged by chopping a single CEQA project into smaller parts for piecemeal assessment. (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) Rather, "the whole of an action" or the entire activity for which the approvals are being sought must be considered by the agency. (CEQA Guidelines, § 15378, subds. (a) & (c).)

(*Nelson, supra*, 190 Cal.App.4th at p. 271, italics in original.) The IS/MND violates these requirements by failing to consider the effects of the MPWSP entire slant well intake system and by instead doing a piecemeal assessment of just the effects of an allegedly non-permanent slant test well. Therefore, the City must prepare a focused EIR based on the revised project description or deny the Project.

B. The IS/MND's Environmental Baseline for Groundwater Supplies and Water Quality Fails to Provide Sufficient Information to Understand the Potentially Significant Environmental Impacts of the Project.

Before the impacts of a project can be assessed and mitigation measures considered, an MND must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined. (CEQA Guidelines, §§ 15125, 15126.2, subd. (a); see

also *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.) According to CEQA Guidelines section 15125, subdivision (a): "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation." This same requirement applies to an MND. (*CBE v. South Coast, supra*, 48 Cal.4th at p. 328.) As the Supreme Court explained in *CBE v. South Coast*, a comparison must be made between "existing physical conditions without the [project] and the conditions expected to be produced by the project. Without such a comparison, the EIR will not inform decision makers and the public of the project's significant environmental impacts, as CEQA mandates." (*Ibid.*) The IS/MND fails to provide sufficient baseline information regarding groundwater supplies and water quality in the Project area to meaningfully evaluate the Project's potential impacts on water supplies and water quality.

In response to MCWD's comments that baseline monitoring was required over multiple water year types to ensure the Project's impacts on groundwater supplies are adequately mitigated, City staff responded: "additional baseline monitoring is not required under CEQA and would not minimize any potentially significant environmental impacts." (Response to Comments on Initial Study and Mitigated Negative Declaration, June 2014, p. 33.) The response is absurd. In fact, without this information it is impossible to determine whether the slant well causes adverse impacts to water supplies and water quality. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 119 ["Without a determination and description of the existing physical conditions on the property at the start of the environmental review process, the EIR cannot provide a meaningful assessment of the environmental impacts of the proposed project."]). The failure of the IS/MND to accurately identify the site's baseline conditions contravenes CEQA and undercuts the legitimacy of the environmental impact analysis. (*Ibid.*; see also *CBE v. South Coast, supra*, 48 Cal.4th at p. 328.) Staff's response also fails to acknowledge the entire purpose of the Project is to determine if the proposed slant test well will adversely impact water supplies and water quality, at least according to the applicant.

The fact that the one of the purposes of the slant test well is assess baseline conditions for the MPWSP does not excuse the IS/MND from providing essential existing information necessary to determine whether the slant well itself will cause adverse hydrologic impacts. Thus, as MCWD's prior comments request, additional baseline information is needed to inform the public and decision makers of baseline conditions at the site.¹ Without this basic information, the IS/MND fails to provide the information needed to assess the Project's potential adverse

¹ / It appears some of this information may be available in the Monterey Peninsula Water Supply Project Hydrogeologic Investigation, Technical Memorandum (TMI) that was released in July 2014. Available at

<http://bloximages.newyork1.vip.townnews.com/montereycountyweekly.com/content/tncms/asset/s/v3/editorial/b/45/b45da1aa-0be2-11e4-9a63-0017a43b2370/53c4bf87d820e.pdf.pdf>.

Information from this report should be summarized and evaluated in a revised environmental document the City proposes to adopt relating to the project.

impacts on water supplies and water quality in the area. Therefore, CEQA requires this information be clearly presented in a revised IS/MND or focused EIR. As explained in a recent Court of Appeal decision on a mining project:

The decision makers and general public should not be forced to sift through obscure minutiae or appendices in order to ferret out the fundamental baseline assumptions that are being used for purposes of the environmental analysis ... *The data ... must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project ... we hold that in any new EIR prepared in connection with this proposed Project, the baseline must not be obscured, but must be plainly identified in the EIR.*

(*Raptor*, *supra*, 149 Cal.App.4th at p. 659 (italics added.)) The IS/MND fails to meet this standard.

C. The Project has Significant and Unmitigated Water Supply and Water Quality Impacts.

As explained in MCWD's prior comments, the Project will result in significant unmitigated impacts to water supplies and water quality. MCWD's comments provide more than substantial evidence of a "fair argument," which requires preparation of an EIR as addressed above. MCWD notes that City staff misrepresent the purpose and conclusions in the SWRCB draft report in their responses to MCWD's comments. Specifically, City staff's response to MCWD's prior comments suggests the draft report indicates that no significant impacts to water supplies or water quality would result from the Project because the applicant could supply replacement water if there were any impacts, stating: "Cal Am could meet this requirement, including through replacement of fresh water supplies within the Basin and/or use of a "physical solution." (Response to Comments on Initial Study and Mitigated Negative Declaration, June 2014, p. 38.) SWRCB's draft report, however, does not support this statement. Rather, the draft report expressly states:

Information provided to the State Water Board to date does not allow staff to definitively address the issue of how the proposed project would affect water rights in the Basin. Currently, it is unknown which aquifer(s) the wells will extract water from and further complicating the analysis, the relationship of the aquifers in the well area to surrounding low-permeability aquitards is uncertain. *Given these significant unknowns, this State Water Board report provides the Commission with a "first cut" review of the MPWSP by assuming the MPWSP hydrogeologic characteristics and effects to the SVGB would be similar to the North Marina Project alternative analyzed in the FEIR, with the changes described in the Commission's February 2013 correspondence. The State Water Board also provides*

recommendations for additional work to clarify the hydrogeologic unknowns so a more definitive review can be done at a later date.

(IS/MND, Appendix "E", p. 4.) The report concludes:

Until the degree of confinement and connection between the Dune Sand Aquifer and the 180-Foot Aquifer has been more thoroughly studied, *the potential for injury to inland water users due to reduced groundwater elevations and diversion of fresh water from the aquifer cannot be determined.*

(IS/MND, Appendix "E", p. 27 (italics added).) Thus, despite the IS/MND's suggestions to the contrary, the SWCB's draft report actually provides substantial evidence of a "fair argument" that the proposed Project *may result in adverse environmental impacts* to water supplies and quality.

Furthermore, the City's unwilling to address the current emergency drought conditions in assessing the Project's potential environmental impacts is incomprehensible. The current drought conditions have profoundly impacted groundwater levels statewide and regionally:

WHEREAS the state's water supplies have dipped to alarming levels, indicated by: snowpack in California's mountains is approximately 20 percent of the normal average for this date; California's largest water reservoirs have very low water levels for this time of year; California's major river systems, including the Sacramento and San Joaquin rivers, have significantly reduced surface water flows; and *groundwater levels throughout the state have dropped significantly;*

(Governor's Proclamation of a State of Emergency, January 17, 2014; see <http://gov.ca.gov/news.php?id=18368>.) CEQA requires the IS/MND to evaluate the potential impacts of the Project based on current conditions, which includes the current drought conditions. It does not. Moreover, the IS/MND's *application of the CEQA Checklist threshold* for these impacts is not supported by substantial evidence given current drought conditions. (IS/MND p. 119 ["A drawdown of 1 foot above natural fluctuations on groundwater levels"]). Any net deficit as stated in the threshold itself should be the measuring stick to determine whether mitigation is required. A six inches deficit at neighbor wells could potentially be justified for requiring replacement water as explained in MCWD's prior comments.

"A threshold of significance is an identifiable quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect *will normally* be determined to be significant by the agency." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1107 [italics added].) However, "the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant." (*Id.* at 1109.) A bare

conclusion that an effect will not be significant because it complies with a threshold is insufficient. (*Id.* at 1111.) Given the State's drought conditions, the IS/MND was required to address how much fresh water may be pumped and discharged into the ocean. Simply stating that supplying replacement water to adjacent well owners addresses the potential impact is not sufficient and will not address the short- or long-term environmental impacts of the Project. A focused EIR must be prepared to address these impacts before the City can consider approving the Project.

Finally, the IS/MND fails to address where the estimated 0.7 acre feet required for construction of the slant well will come from or where the applicant will obtain replacement water for wells that are impacted by the Project. "CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, *and of the environmental consequences of those contingencies.*" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432 ("*Vineyard*") [italics added].) The IS/MND clearly fails to meet this requirement. In fact, the applicant now suggests it will obtain water from a different unidentified source than addressed in the IS/MND. (See SWCA letter, dated August 20, 2014, pp. 3-4, included in City Council Packet at pp. 173-174.) The City's environmental consultant dismisses the potential impacts from this change in one sentence stating the potential impacts are "marginal in the context of regional water supplies." (*Ibid.*) This conclusion is inconsistent with the IS/MND's thresholds and improper under CEQA, especially given the drought conditions in the state. (See e.g., *Los Angeles Unified School District, supra*, 58 Cal.App.4th at 1025 [rejecting ratio theory]; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720 [same].)

D. The Proposed Mitigation Measures for Potential Hydrology Impacts are Inadequate under CEQA.

The EIR improperly defers identifying mitigation for potential hydrology impacts to a later date when the City's mitigation will not be subject to public review and comment. This approach has been soundly rejected by the Courts. CEQA permits deferral of mitigation only when: (1) an EIR contains criteria or performance standards to govern future actions; (2) practical considerations preclude the development of earlier measures; and (3) the lead agency has assurances that the future mitigation will be both "feasible and efficacious." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 (*CBE v. City of Richmond*); see also *Raptor, supra*, 149 Cal.App.4th at pp. 669-71 [county improperly deferred mitigation when it allowed a land management plan for special status vernal pool species to be developed with the California Department of Fish and Game ("CDFG") and USFWS after certification of EIR]; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396 [conditioning a permit on "recommendations of a report that had yet to be performed" constituted improper deferral of mitigation].) "A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*CBE v. City of Richmond, supra*, 184 Cal.App.4th at p. 92, quoting *Sundstrom, supra*, 202 Cal.App.3d at p. 307.) "Fundamentally, the development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation

between a project proponent and the lead agency after project approval; but rather, *an open process that also involves other interested agencies and the public.*" (*CBE v. City of Richmond, supra*, 184 Cal.App.4th at p. 93.) Here, the three mitigation measures included in the IS/MND to address the potential hydrologic impacts of the Project all violate these requirements.

HYD/mm-1. Initially, HYD/mm-1 improperly defers identifying baseline conditions required to assess the effectiveness of the mitigation as addressed above. CEQA requires the identification of baseline conditions in an open process that also involves other interested agencies and the public. This mitigation measure also violates CEQA in at least three other ways.

First, the measure improperly delegates to the project applicant the responsibility for preparing the groundwater monitoring plan, including establishing the baseline groundwater conditions, defining the nature and extent of "feasible mitigation" measures, and designating the project monitoring person or persons who would determine if implementation of mitigation is necessary. (IS/MND, p. 119.) As explained in *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, this is improper under CEQA. In *Sundstrom*, a property owner challenged the county's issuance of a use permit. The use permit included a condition that required the applicant to submit a hydrological study, which would be subject to review and approval by the county planning commission. (*Id.* at p. 306.) The use permit also required that any mitigation measures recommended by the hydrological study be incorporated into the Project's plans. (*Ibid.*) The appellate court concluded that the conditions in the use permit "improperly delegate[d] the County's legal responsibility to assess environmental impact by directing the applicant himself to conduct the hydrological studies subject to the approval of the planning commission staff." (*Id.* at p. 307.) The county's board of supervisors could not delegate its responsibility to assess the Project's environmental impacts to the staff of the planning commission. (*Ibid.*) The IS/MND violates this same CEQA requirement by improperly delegating to Cal Am the preparation of the groundwater monitoring plan subject to City approval. In fact, by allowing the applicant to determine if mitigation is necessary, the violation is even more apparent.

Second, HYD/mm-1 also establishes a performance standard that is inconsistent with the City's threshold of significance for water supply impacts and, therefore, will not ensure the Project's water supply impacts are less than significant. The IS/MND's threshold of significance for water supply impacts (Impact IX(b)) provides that an impact would be significant if the Project could: "Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level...." (IS/MND, p. 102 [emphasis added].) HYD/mm-1, however, does not require mitigation for impacts unless there is "[a] drawdown of 1 foot above natural fluctuations on groundwater levels [at existing wells]." (IS/MND, p. 102.) As noted in MCWD's prior comments, the City fails to provide any justification for the 1-foot threshold included in this migration measure. Nonetheless, the IS/MND states the impact will be less than significant with mitigation because the applicant is "coordinating closely with adjacent well owners regarding any concerns they may have associated with drawdown of their water supplies and has proposed to closely monitor the rate of drawdown and implement mitigation measures in the event actual drawdown exceeds current estimates established through analytic modeling."

(IS/MND, p. 113.) The IS/MND further notes that “[p]ossible mitigation measures include monetary compensation (i.e., for increased pumping costs or for upgraded wells), provision of replacement water from alternative sources, or a reduction in pumping activities.” (IS/MND, p. 113.) None of the proposed measures are adequate under CEQA, except reducing pumping activities, as MCWD noted in its prior comments.

Third, the proposed mitigation does not include a specific performance standard such as the creation of a water supply mechanism that would place neighboring landowners in a situation substantially similar to their situation prior to the decline in the water levels. Rather HYD/mm-1 proposes a mitigation goal. This does not satisfy CEQA. Mitigation alternatives must be able to remedy the environmental problem. (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099 (*Gray*).) While providing replacement water could be a viable mitigation measure under certain circumstances, the IS/MND was required to evaluate the feasibility and impacts of providing such replacement water. (*Id.* at 1119-1120; see also *Vineyard, supra*, 40 Cal.4th at 434.) In failing to provide this information, the IS/MND fails to comply with CEQA. (See *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 285 [failure to analyze impacts of obtaining potable water in case of insufficient groundwater rendered EIR inadequate].) Therefore, HYD/mm-1 must be revised to ensure there are no adverse environmental impacts to water supplies or water quality.

HYD/mm-2. HYD/mm-2 also improperly defers mitigation. The IS/MND states that “on-site soils are highly susceptible to erosion and earthmoving activities could result in erosion and/or siltation in sensitive adjacent areas.” (IS/MND, p. 113.) The IS/MND, without explanation, suggests that with the City of Marina General Plan Policy 4.121.1, preparation of an erosion control plan would be required and therefore with the implementation of HYD/mm-2 any such impact to less than significant levels. (*Ibid.*) Neither the City of Marina General Plan Policy 4.121.1 (addressing vernal pools) or the mitigation measure include any performance standard to ensure this is the case. Rather, HYD/mm-2 provides in relevant part that applicant shall submit an erosion control plan to the City for approval by the City that includes “a schedule for the completion of erosion- and sediment-control structures, which ensures that all such erosion-control structures are in place by mid-November of the year that construction begins. The plan shall identify standard Best Management Practices to be implemented to address both temporary and permanent measures to control erosion and reduce sedimentation.” Standard Best Management Practices (BMPs), however, may not be sufficient to address potential impacts from soils that are highly susceptible to erosion. Without further criteria for success, or performance standards (i.e. manuals or guidelines that address the types of BMPs that are effective for the soil types in the areas that will be disturbed, there is no assurance the impact will be less than significant as mitigated.

Finally, as addressed in II.E, *infra*, the City's revisions to HYD/mm-3 require recirculation for the IS/MND. The revised measure, however, fails to establish any performance standards to ensure the impacts will be less-than significant. (California American Water Slant Test Well Project Errata, p. 5.) Allowing the applicant to negotiate a solution with MRWPCA in

the future, with no public review, does not ensure the impact will remain less than significant and therefore violates CEQA.

E. The Revisions to the Project's Mitigation Measures included in the IS/MND Errata Require Re-Circulation.

The City's staff report to the Planning Commission included an Errata with proposed revisions to HYD/mm-3. (California American Water Slant Test Well Project Errata, p. 5.) These revisions require recirculation of the IS/MND. The law is well-established that even if an EIR is not required, a revised negative declaration must be circulated for full public review if it adds new mitigation measures or identifies new impacts. (CEQA Guidelines § 15073.5(a), (b); *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1392, 1411, 1417.) As the CEQA Guidelines explain, a "lead agency is required to recirculate a negative declaration when the document must be substantially revised after public notice of its availability has previously been given pursuant to Section 15072, but prior to its adoption." (CEQA Guidelines, § 15073.5, subd. (a).) "Substantial revision" means "[a] new, avoidable significant effect is identified and mitigation measures or project revisions must be added ..." or "[t]he lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required." (CEQA Guidelines, § 15073.5, subd. (b).)

In response to MRWPCA's comments that removal of the slant well (if it is removed) could adversely affect the land and ocean outfalls to a greater extent than the construction of the well, City staff responded:

The City and Cal Am are receptive to MRWPCA's concerns that removal of the well could adversely affect the outfall. *If removal of the well to the total depth of 40 feet below ground surface upon project completion proves to be infeasible and Cal Am and MRWPCA cannot agree on a feasible and safe method of removing the well to the required depth at the time of project decommissioning, then implementation of HYD/mm-3 and removal of the well casing to a depth of 40 feet below ground surface could be achieved through mutually agreed upon measures, including for example, removal to a safe depth at the time of decommissioning (no less than 5 feet as required by Bulletin 74-81 and 74-90) and future removal to the total depth of 40 feet at a later date.* Because the MRWPCA outfall sits at a higher elevation than the slant test well would, it would be subject to exposure as a result of coastal erosion before the slant test well. Removal of the well could be timed to take place as necessary to protect MRWPCA facilities and eliminate the potential for surfacing of the well components.

(Response to Comments on Initial Study and Mitigated Negative Declaration, June 2014, p. 38.)
As the response indicates, the revision to HYD/mm-3 is needed to address potential impacts if

removal of slant well is not feasible as proposed in the IS/MND. (*Ibid.*) The revised mitigation measure defers setting any criteria for determining a feasible and safe method for removing the well. Rather, the IS/MND suggests that the applicant and MRWPCA will negotiate a solution later. This is improper as discussed above. (See discussion in II.D, *supra*, addressing improper deferral of mitigation). Regardless of whether the City agrees this is an improper deferral, the IS/MND must be recirculated because the originally proposed mitigation measure would not reduce these potential effects to a less-than-significant level and the revisions were required to address them. (See CEQA Guidelines, § 15073.5, subd. (b).) MCWD suggests that City develop a performance standard for this impact prior to the required recirculation.

F. The IS/MND's Treatment of Cumulative Impacts Is Inadequate.

The IS/MND conclusion that the Project's cumulative impacts would be "less than significant" without mitigation is not supported by any analysis, much less substantial evidence. (AR 147.) The entire cumulative analysis in the IS/MND states:

These projects are likely to entail similar impacts associated with development in Marina's sensitive coastal dune areas. Impacts to sensitive species and habitat areas associated with the slant test well would be fully mitigated and would therefore not compound or increase cumulative impacts. The MPWSP has the potential to result in hydrogeologic impacts such as water drawdown and/or changes in water quality. The purpose of the slant test well is to determine the potential for the MPWSP to cause seawater intrusion, drawdown of nearby groundwater wells or other adverse environmental effects and would allow interested stakeholders to more accurately identify and avoid any potential impacts. *The slant test well's hydrogeologic impacts would be minimal and would not be cumulatively considerable when considered in conjunction with the MPWSP.* Based on the analysis presented in this Initial Study, the project would not result in a cumulatively considerable impact, particularly due its short time frame, area of effect, project design, and incorporation of identified mitigation measures. [¶] Therefore, any measureable effects associated with the slant test well project would be cumulatively less than significant. [Italics added.]

(IS/MND, p. 149.) The IS/MND provides neither a quantitative or qualitative discussion of why the Project's impacts "would not be cumulatively considerable when considered in conjunction with the MPWSP." It is also internally inconsistent. The IS/MND does not conclude the Project will have no impacts as mitigated. Rather, the IS/MND concludes all the Project's impacts would be less-than-significant with mitigation. (IS/MND, pp. 30-147.) Setting aside that MCWD disputes several of these conclusions, the IS/MND's determination the Project's direct impacts are adequately mitigated does not mean the Project's impacts are not cumulatively considerable, especially "when considered in conjunction with the MPWSP." (IS/MND, p. 149.) "Under CEQA, a project having no significant effect on the environment when considered by itself may nonetheless have such an impact when considered in conjunction with—or

cumulatively to—other past, existing or planned environmental influences.” (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1072, citing CEQA Guidelines, §§ 15130, subd. (a), 15064, subd. (h)(1).)

The exact approach adopted by the IS/MND was rejected in *Los Angeles Unified School District*, supra, 58 Cal.App.4th at 1024. In that case, the EIR concluded that a project would contribute an insignificant amount of noise to existing conditions. In rejecting this rationale, the court explained the EIR's “ratio theory” had previously been rejected in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720, where the EIR concluded the project would emit relatively minor amounts of ozone precursors compared to the total volume of precursors already emitted in the county. (*Los Angeles Unified School District*, supra, 58 Cal.App.4th at 1025.) The Court further explained the approach was flawed because it trivialized the project's impacts by focusing on individual inputs and not their collective significance. (*Ibid.*) Following this explanation, the Court held the relevant issue was not the relative amount of traffic resulting from a project, but whether any additional traffic should be considered significant in light of existing conditions. (*Id.* at 1025-1026.) Here, like the EIR in *Los Angeles Unified School District*, the IS/MND does not address whether the Project's impacts should be considered significant in light of existing conditions. Most importantly, the IS/MND fails to consider existing drought conditions and fails to discuss the impacts of other projects. Rather, as CEQA forbids, the IS/MND simply states that because the Project's impacts are less-than-significant, its cumulative impacts are insignificant. As a result, the City cannot evaluate whether the additional impacts created by the Project should be considered cumulatively considerable.

Moreover, the City's cumulative impacts analysis does not consider future use of this specific slant well in future phases of the MPWSP in its cumulative impacts discussion. As addressed above, CEQA prohibits a project proponent from seeking approval of a large project in a piecemeal fashion in order to take advantage of environmental exemptions or lesser CEQA review for smaller projects. (*Arviv Enterprises, Inc. v. South Area Planning Commission* (2002) 101 Cal.App.4th 1333 1340; see also *Orinda Assn. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171; *Assn. for a Cleaner Env't v. Yosemite Cmty. College Dist.* (2004) 116 Cal.App.4th 629, 638.) Rather, CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Bozung*, supra, 13 Cal.3d at pp. 283-84; *City of Santee v. Count of San Diego* (1989) 214 Cal.App.3d 1438, 1452; *Citizens Assn. for Sensible Dev. of Bishop Area v. County of Inyo* (“*Bishop Area*”) (1985) 172 Cal.App.3d 151, 165.) “The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish.” (*Natural Res. Def. Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268 [italics added].)

Here, the IS/MND states: “Because no long-term operations are proposed, the potential environmental effects of any long-term operations are not considered in this document.” (IS/MND, p. 6.) Contrary, to the IS/MND's conclusion, CEQA does not allow the City to limit

its analysis to the project as proposed by the applicant and defer analysis of potential long-term impacts to future environmental review. The courts have repeatedly rejected this approach as addressed in detail above. The Court decision in *Whitman v. Board of Supervisors* ("Whitman") (1979) 88 Cal.App.3d 397, is particularly instructive here. In *Whitman*, an EIR prepared for two test wells did not evaluate a pipeline that would be needed to carry any oil produced from the wells. The court found the EIR inadequate, explaining that "[t]he record before us reflects the construction of the pipeline was, from the very beginning, within the contemplation of [the project proponent] should its well prove productive. Although admittedly contingent on the happening of certain occurrences, the pipeline was, nevertheless part of [the] overall plan for the project and could have been discussed in the EIR in at least general terms." (*Id.* at 414-415.) The same is true here.

Similarly, the IS/MND's failure to discuss the potential impacts of the MPWSP in its cumulative impacts analysis was an error. In response to MCWD's comment on this point, the City staff responded: "[p]otential impacts associated with the MPWSP are outside of the scope of the MND." (Response to Comments on Initial Study and Mitigated Negative Declaration, June 2014, p. 34) Again, consideration of future phases or activities, as discussed above, follows from CEQA's policy that environmental review should be conducted "as early in the planning process as possible to enable environmental considerations to include project, program, or design." (*Bozung, supra*, 13 Cal.3d at p. 282; CEQA Guidelines § 15004(b).) "[T]he later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project." (*Laurel Heights, supra*, 47 Cal.3d at 395.) Analysis of the MPWSP's proposed slant well intake system as a whole is required now so that the Project's potential impacts are analyzed and can be mitigated before any further actions are taken that may limit mitigation options.

In summary, the IS/MND provides no analysis for its conclusion that cumulative impacts would not occur. Because there is a "fair argument" that Project will result in cumulatively considerable impacts, an EIR is required before the City can approve the proposed Project. (See *San Bernardino Valley Audubon Society v. Metropolitan Water District*. (1999) 71 Cal.App.4th 382, 389 [EIR required for habitat conservation plan in part because initial study did not adequately explain why cumulative adverse effects to endangered species would not occur].)

G. Consideration of the Proposed Project's Effects on Plan Consistency and Land Use is Inadequate.

As noted in MCWD's prior comments, City staff's contention that the 1996 Annexation Agreement is not relevant to the City's CEQA analysis ignores the fact that a primary purpose of the 1996 Annexation Agreement is to protect the groundwater resources of the Salinas River Groundwater Basin. As such, at a minimum the IS/MND was required to address the Agreement in the IS/MND's Land Use analysis. The IS/MND Land Use section provides the following threshold of significance for impacts to land use plans (Impact X(B)):

Would the project conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?

(IS/MND, p. 121.) The 1996 Annexation Agreement clearly falls within this threshold. Thus, the IS/MND's failure to address the 1996 Annexation Agreement requires recirculation of the IS/MND. Even if this threshold was not on point, which it is, City staff's failure to provide a substantive response to this issue and its suggestion that the 1996 Annexation Agreement is not a CEQA issue is inexplicable given the purpose of the agreement.

III. CONCLUSION

On behalf of MCWD, we urge the City to weigh seriously the concerns voiced by the MCWD. The City should view the IS/MND for what it is - the beginnings of a baseline for Cal Am's MPWSP. The City cannot make the required finding to approve the Project under CEQA or the City's Local Coastal Plan ("LCP") based on the substantial evidence demonstrating that the Project may have significant unmitigated environmental impacts. Therefore, we respectfully suggest the City Council should direct staff to prepare a focused EIR to address the deficiencies identified herein and by other commenters. Thank you for the opportunity to comment on the IS/MND and for your consideration of the above matters. If the City decides to approve the Project, please send me a copy of the Notice of Determination ("NOD") immediately upon filing. (Pub. Resources Code, §§ 21152; 21167, subd. (f).)

Very truly yours,



Howard "Chip" Wilkins III

cc (via e-mail only):

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