An Aquifer Betrayed: The Monterey Desalinization Project at Odds with California Water Law

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This issue of Environmental Law News bids a grateful farewell to Julia Stein, who steps down from her post as Editor-in-Chief. Julia has captained this publication with passion and dedication, and we are thankful for her tenure. We are pleased that Julia will stay connected to Environmental Law News as an advisor and as a member of our excellent team of staff editors going forward.

In our fall issue, we feature analysis from a range of authors on critical issues shaping California today, from water to housing to carbon-free energy. We begin with an article from Osha Meserve and Rebecca Robbins that chronicles the second part of the California WaterFix hearings at the State Water Resources Control Board, tracing the evidence and arguments presented in the hearing with an eye toward the next step in the ongoing Delta saga. Next, Sarah Hoffman investigates connections between the recently-amended Housing Accountability Act, the state housing crisis, and local agency authority, and recommends approaches that agencies can take to navigate this sleeping tiger of a law. Callie Lindemann also explores the issue of local agency authority, focusing her analysis through the lens of a recent appellate decision that upholds the ability of an irrigation district to terminate water deliveries based on a violation of district rules. Martin Stratte then describes the connection between open-pit metallic mining and California’s quest to develop carbon-free energy, taking us on an expert journey through the state’s new metallic mine backfill regulations and offering ideas for improvement. With similar focus, Ryan Mahoney takes a deep dive into the issue of reservoir sedimentation, providing a thorough review of the law, science, and policy that affects this important aspect of state water supply. Finally, Paul Kibei brings us his perspective on water law issues raised by the Monterey desalination project proposed by the California-American Water Company and recently approved by the California Public Utilities Commission.

We would love to hear thoughts or suggestions you have for us, whether they be article topics for Environmental Law News, webinar topics, suggestions for future in-person programs, or other ways you think we can better serve our membership. And if you are interested in writing for our Spring 2020 issue, please reach out to me, Jennifer Harder, at jharder@pacific.edu. We are always excited to hear from prospective authors!

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The Monterey Desalination Project at Odds with California Water Law
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I. INTRODUCTION
The California American Water Company's Monterey Peninsula Water Supply Project (Cal-Am Project) is a proposed desalination facility in Monterey County that was approved by the California Public Utilities Commission (CPUC) in September 2018. The Cal-Am Project would treat water pumped from inland coastal groundwater aquifers—the Dune Sand Aquifer and the 180-Foot Aquifer—rather than water pumped directly from the ocean. The Cal-Am Project's pumping of these coastal aquifers is expected to result in increased seawater intrusion in groundwater.

The Marina Coast Water District and the City of Marina filed petitions with the California Supreme Court alleging violations of the California Environmental Quality Act (CEQA) in connection with the approval of the Cal-Am Project. Beyond the CEQA issues set forth in these petitions, there are three additional key California water law issues related to the Cal-Am Project: (a) whether the groundwater supply for the Cal-Am Project qualifies as "developed" water; (b) whether the seawater intrusion effects of the Cal-Am Project on coastal aquifer salinity violate California reasonable use law; and (c) whether the seawater intrusion effects of the Cal-Am Project conflict with California's Sustainable Groundwater Management Act (SGMA).

These three other California water law issues pertain to the CEQA violations alleged in the petitions filed with the California Supreme Court but focus on a more fundamental underlying concern—how to reconcile the provisions of California water law that protect the public interest in maintaining groundwater resources with the private interest in seeking to secure an inexpensive water supply to operate a desalination facility. This more fundamental concern is explored in this article.

II. KEY EVENTS LEADING TO THE CPUC’S APPROVAL OF THE CAL-AM PROJECT

A. State Water Board Orders Regarding Cal-Am's Carmel River Diversions
In 1995, the State Water Resources Control Board (State Water Board) issued Order WR 95-10 and in 2009 the State Water Board issued Order WR 2009-0060. In its 1995 Order, the State Water Board determined that Cal-Am had been unlawfully diverting water from the Carmel River (in Monterey County) in excess of Cal-Am's surface water rights. More specifically, State Water Board Order WR 95-10 found that although Cal-Am had been diverting 10,730 acre-feet per year (AFY) from the Carmel River, Cal-Am only had a legal right to divert 3,376 AFY of Carmel River water. These excessive unlawful diversions by Cal-Am had damaged other beneficial uses of the Carmel River, including fisheries and the rights of other diverters.

In its 2009 Order, the State Water Board began to require mandatory annual reductions in Cal-Am's Carmel River withdrawals. State Water Board Order WR 95-10 and State Water Board Order WR 2009-0060 left Cal-Am with a shortfall to meet its water supply obligations. The Cal-Am Project was proposed to provide Cal-Am with a means to make up the shortfall resulting from State Water Board Order WR 05-10 and State Water Board Order WR 2009-0060.

B. 2013 State Water Board Report on Water Supply for Cal-Am Project
As the CPUC was beginning its review of the proposed Cal-Am Project, it requested that the State Water Board review Cal-Am's claim that it did not require traditional overlying or appropriative groundwater rights for the groundwater that would supply the desalination facility because this groundwater qualified as "developed" water (or "salvaged" water) under California water law. There is some support in California water law that one may not need a traditional water right to withdraw water directly from the ocean because seawater cannot be used as drinking or irrigation supply unless it is first desalinated.
In its application to the CPUC for approval of the Cal-Am Project, Cal-Am suggested that because there was evidence of seawater intrusion in the coastal groundwater aquifers that would supply the proposed desalination facility, the water in these coastal groundwater aquifers should qualify as “developed” water not requiring a traditional groundwater right. Because the waters of a natural groundwater aquifer had never before been previously recognized as “developed” water in California, the CPUC asked for the State Water Board’s view of Cal-Am’s new theory.

In July 2013, the State Water Board issued a report titled Final Review of California American Water Company’s Monterey Peninsula Water Supply Project (State Water Board 2013 Review). As explained below, the State Water Board 2013 Review of the Cal-Am Project’s water supply claims was inconclusive. The State Water Board Review 2013 Review indicated the types of evidence that Cal-Am would need to prove its right to “developed” water, and clarified that Cal-Am bore the legal burden of proving such a “right.” The State Water Board 2013 Review, however, then went on to conclude there was insufficient data and modeling to be able to determine whether the Cal-Am Project’s water supply qualified as “developed” water.

In the State Water Board 2013 Review, under the “Legal Conclusions” heading, the report found: “To appropriate groundwater from the Basin, the burden is on Cal-Am to show their project will not cause injury to other users. Key factors will be: (1) how much fresh water Cal-Am extracts as a proportion of the total pumped amount (to determine the amount of water that, after treatment, would be considered desalinated seawater available for export as developed water) . . . (3) whether pumping affects seawater intrusion within the Basin . . . and (5) how groundwater rights might be affected in the future if the proportion of fresh and seawater changes in the larger Basin area or the immediate area around Cal-Am’s wells.”

Under the “Recommendations” section State Water Board 2013 Review determined: “Additional information is needed to accurately determine MPWSWP impacts on current and future conditions of the Basin . . . updated groundwater modeling is needed to evaluate future impacts from the MPWSWP. Specifically, modeling scenarios are necessary to predict changes . . . in the extent and boundary of the seawater intrusion front . . . The studies will form the basis for a plan that avoids injury to other groundwater users and protects beneficial uses in the Basin.”

The absence of sufficient data and modeling to be able to evaluate Cal-Am’s “developed” water theory was highlighted in other sections of the State Water Board 2013 Review. For instance, page 5 of the study states: “Information provided to the State Water Board does not allow staff to definitively address the issue of how the proposed project would affect water rights in the Basin.”

The State Water Board 2013 Review also found that existing data and modeling suggested the groundwater pumping anticipated by the Cal-Am Project was likely to increase seawater intrusion in the coastal groundwater aquifers where such pumping was to occur: “Within the zone of influence of the MPWSWP extraction wells, seawater would be drawn into the aquifers from the seaward direction, and brackish water from within the seawater intruded portion of the aquifers would also be drawn toward the extraction well system. Based on our current understanding of the groundwater system, a greater volume of seawater, relative to brackish water, would be drawn into the extraction well system.”

The State Water Board 2013 Review went on to conclude: “Cal-Am needs no groundwater right or other water right to extract seawater from Monterey Bay. Based on the information provided, however, the proposed MPWSWP could extract some fresh water from within the Basin. An appropriative groundwater right is needed to extract water from the Basin for use outside the parcel where the wells are located. To appropriate groundwater from the Basin, Cal-Am will have to demonstrate that the MPWSWP will develop a new source of water that is surplus to the needs of groundwater users in the Basin and that operating the Project will not result in injury to other users. This includes showing that the Project will not adversely affect the seawater intrusion front.”

From these excerpts, it is clear that the State Water Board 2013 Review did not determine that the groundwater that would supply the Cal-Am Project qualified as “developed” water under California water law. To the contrary, the State Water Board 2013 Review found that there was inadequate data and modeling to determine whether the groundwater supply for the Cal-Am Project could be regarded as “developed” water and clarified that the burden of proof remained on Cal-Am to provide additional data and modeling to establish the groundwater could be regarded as “developed” water.

C. CEQA Environmental Impact Report for the Cal-Am Project

Pursuant to CEQA, in 2017 the CPUC released a copy of a proposed final Environmental Impact Report (EIR). The EIR for the Cal-Am project was prepared by consultants hired and paid by the Cal-Am rather than CPUC staff. After receiving comments on the EIR, the
CPUC then certified the EIR in September 2018 as part of its approval of the Cal-Am Project.

Although the State Water Board 2013 Review found that Cal-Am needed to provide additional data and modeling regarding the impact of the Cal-Am Project on seawater intrusion and salinity levels in the coastal aquifers affected project groundwater pumping, the EIR confirms that such modeling was not in fact done by Cal-Am as part of the CEQA environmental review. More specifically, the EIR explained: “the [model] used was not constructed or employed to calculate changes in water quality and water density due to any mixing of ocean water and groundwater.”

The EIR prepared by Cal-Am also acknowledged that the operation of the Cal-Am Project was anticipated to lower the groundwater table in the coastal aquifers, and that this would exacerbate seawater intrusion into these aquifers. Additionally, in oral testimony before the CPUC regarding the analysis and findings in the EIR, Peter Leffler (the hydrologist hired by the Cal-Am) testified that groundwater pumping for the Cal-Am Project was likely to draw additional seawater into the aquifers.

Yet, after expressly conceding that the modeling done in the final EIR did not calculate changes in water quality in the coastal aquifers due to the mixing of ocean water and groundwater, and after conceding that the Cal-Am Project would result in increased seawater intrusion in these aquifers, the EIR nonetheless went on to find that the Cal-Am Project would not result in significant adverse seawater intrusion effects. The key to understanding how the EIR arrived at this finding is to appreciate the EIR’s assumption about the existing/baseline salinity conditions of the coastal aquifers.

Based on a limited set of sampling, the EIR assumed that the salinity levels in the coastal aquifers (based on previous seawater intrusion) were already so high there was currently no fresh water in these aquifers suitable for beneficial uses. Thus, Cal-Am’s position was that despite the fact that the Cal-Am Project was anticipated to further degrade water quality in these coastal aquifers by increasing seawater intrusion, this would not in fact adversely impact beneficial uses of the coastal aquifers (or the rights of other to use groundwater in the coastal aquifers) because the water in the aquifers was already unusable due to prior seawater intrusion. This reasoning was also presented as justification as for not doing additional modeling or investigation to determine the effects of the operation of the Cal-Am Project on water quality and salinity in the coastal aquifers (in that such modeling and investigation was not needed because the aquifers were already so degraded).

The seawater intrusion findings and analysis in the EIR therefore hinge entirely on the validity of Cal-Am’s assumption regarding existing/baseline conditions in the coastal aquifers. If this assumption is incorrect, and the coastal aquifers in fact contain low-salinity freshwater that could be put to beneficial uses such as drinking water, then the remainder of the EIR’s analysis and findings regarding seawater intrusion impacts collapses.

D. 2018 Stanford Water Quality Study

Because of its concerns regarding the impact of the Cal-Am Project on fresh water in the coastal groundwater aquifers (a water supply source for local water providers), the Marina Coast Water District retained Stanford University Hydrology Professors Rosemary Knight and Ian Gottschalk to undertake additional testing, analysis and modeling of fresh water in the coastal aquifers where the Cal-Am Project groundwater pumping would occur, and of the impacts of such groundwater pumping on salinity levels/seawater intrusion in these coastal aquifers.

Professors Knight and Gottschalk teamed up with the hydrology firm Aqua Geo Frameworks to undertake this additional testing, analysis and modeling, and in March 2018 they released a report on salinity conditions in the coastal aquifers (Stanford Water Quality Study) which was submitted to the CPUC prior to approval of the Cal-Am Project.

The Stanford Water Quality Study found that there were significant areas of low-salinity fresh water in the Dune Sand Aquifer and the 180-Foot Aquifer suitable for beneficial uses including drinking water. More specifically, it was found on pages 48–49, “At the eastern edge of the Dune Sand Aquifer . . . a source drinking water has been identified, as well as within the Lower 180-Foot Aquifer.” Similarly, it was found on page 49 of the Stanford Water Quality Study, that: “[S]ources of drinking water are encountered throughout the Dune Sand Aquifer and throughout the Upper 180-Foot Aquifer south of the Salinas River, North of the Salinas River, sources of drinking water are certainly encountered within regions of the 180-Foot Aquifer.”

This led the Stanford Water Quality Study to conclude that “The detection of water with anomalously low concentrations of dissolved solids in five newly constructed monitoring well clusters suggest the presence of fresher groundwater in the Dune Sand Aquifer . . . and in the 180-Foot Aquifer.”
III. CONFLICTS BETWEEN THE CAL-AM PROJECT AND CALIFORNIA WATER LAW

A. The Groundwater Supply for the Cal-Am Project Does Not Qualify as “Developed” Water to Which There Is a Right of Extraction

As the State Water Board 2013 Review made clear, under California water law the burden is on Cal-Am to establish that it has such “developed” water rights to pump and use the groundwater in the coastal aquifers. This means Cal-Am must establish that the groundwater in the coastal aquifers is presently too degraded for beneficial uses such as drinking water, and this means that the Cal-Am must establish the Cal-Am Project will not result in further seawater intrusion that would injure such beneficial uses.

In light of the studies and testimony discussed above, it does not appear that Cal-Am can meet its burden of establishing that its groundwater supply for the Cal-Am Project falls within the scope of “developed” water under California water law.

As discussed above, the Stanford Water Quality Study undertook additional groundwater sampling which confirmed that there are significant areas of fresh water in the coastal aquifers that can serve the beneficial use of drinking water. The expert hydrologist retained by Cal-Am also provided oral testimony to the CPUC that the groundwater pumping activities associated with the Cal-Am Project were likely to increase seawater intrusion into the coastal aquifers. This anticipated increase in seawater intrusion was also conceded in the EIR. Such additional seawater intrusion would impact the fresh water drinking water sources identified in the Stanford Water Quality Study, thereby adversely impacting beneficial uses and existing users of the groundwater in these coastal aquifers.

As discussed above, in the EIR prepared by Cal-Am and certified by the CPUC, it was conceded that the groundwater modeling done in the final EIR for the Cal-Am Project “was not constructed or employed to calculate changes in water quality and water density due to any mixing or ocean water and groundwater.” Without such modeling, there does not appear to be evidence that Cal-Am or the CPUC can rely upon to support a finding that operation of the Cal-Am Project will not likely result in increased seawater intrusion into the coastal aquifers and therefore not cause injury to the beneficial uses of fresh water located within such coastal aquifers.

Beyond the information in the Stanford Water Quality Study, confirming that there are significant sources of fresh water in the coastal aquifers that could serve the beneficial use of drinking water, there is an additional reason why Cal-Am’s “developed” water right theory fails in connection with the Cal-Am Project. There are previous reported California court cases where evidence has suggested that groundwater may require treatment before it can be properly used as drinking water or for other beneficial uses, but in these cases the need for such treatment of groundwater has not been held to eliminate the need to establish a traditional water right to pump and use such groundwater.

More specifically, in its 2005 decision in California Oak Foundation v. City of Santa Clarita, the California Court of Appeal considered whether a lead agency had properly evaluated the need for treatment of elevated arsenic levels in groundwater before such groundwater could be used as drinking water for a proposed residential project. In this case, however, the project proponent did already establish that it had overlying and appropriative rights to extract and use the groundwater question. In California Oak Foundation, the project proponent did not claim, as Cal-Am now seems to in regard to the Cal-Am Project, that the fact that treatment of groundwater would be needed means that the groundwater in question should therefore be considered “developed” water to which no groundwater water right at all is needed.

The adoption of the expansive definition of “developed” water suggested by Cal-Am in regard to the Cal-Am Project would support the contention that contaminated groundwater in a natural aquifer anywhere in California can be extracted by anyone that proposes to treat such groundwater regardless of whether the person has a traditional right to the groundwater. Such a contention is inconsistent with California Oak Foundation and would create chaos concerning groundwater rights throughout the state.

For these reasons, there does not appear to be a basis for either the CPUC or a reviewing court to find that Cal-Am has met its burden of establishing “developed” water rights to extract water from the coastal aquifers for the Cal-Am Project. Moreover, neither Cal-Am nor the CPUC nor the State Water Board have pointed to an instance in which groundwater in a natural aquifer has been held to fall within the scope of a “developed” water claim. Without such “developed” water rights there is no water supply for the Cal-Am Project.

B. The Seawater Intrusion Effects of the Cal-Am Project Constitute an Unlawfully Unreasonable Method of Diversion Under California Law

Article X, section 2 of the California Constitution provides: “It is hereby declared that because of the conditions prevailing in this State the general welfare
requires that . . . the waste or unreasonable use or unreasonable method of use of water be prevented . . .
The right to water or to the use of water in or from any natural stream or watercourse in this state . . . does not
and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method
of diversion of water."

This provision of the California Constitution provides the basis for section 100 of the California Water Code. Section 100 provides: "The right to water or the use of water or flow of water in or from any natural stream or watercourse . . . shall be limited to such water as shall
be reasonably required . . . and such right does not include and shall not extend to the waste or unreasonable
use or unreasonable method of use or unreasonable method of diversion of water."

The California courts, including the California Supreme Court and the California Court of Appeal, have held that the reasonable use provisions of the California Constitution apply to groundwater as well as surface water. More specifically, in its 2006 decision in Allegretti Company v. County of Imperial, the California Court of Appeal upheld the condition in a county groundwater well permit to limit extraction to prevent overdraft. The Allegretti Court held: "[A]s our high court in City of Barstow acknowledged, although
an overlying user such as Allegretti may have superior rights to others lacking legal priority, Allegretti's water
"right" is nonetheless restricted to a reasonable beneficial use consistent with article X, section 2 of the
California Constitution. (City of Barstow v. Mojave Water Agency, supra, 23 Cal.4th at p. 1240, 99 Cal.Rptr.2d
294, 5 P.3d 853.) Allegretti's claim to an unlimited right to use as much water as it needs to irrigate flies in the
face of that standard." Thus, it is a settled question that California reasonable use law applies to groundwater extraction and usage.

In its 1986 decision in United States v. State Water Resources Control Board, the California Court of Appeal confirmed that diversions of water that result in seawater intrusion interfering with beneficial uses constitutes an "unreasonable method of diversion" under California reasonable use law. This decision, which became known as the Racanelli decision (after Judge Racanelli who authored the opinion) involved diversions by the State Water Project and federal Central Valley Project that reduced downstream flows such that seawater intrusion was adversely affecting water quality and beneficial uses. More specifically, the Racanelli decision affirmed the finding of the State Water Board that such diversions violated the reasonable use provisions of the California Constitution and the California Water Code, holding:

"Here the Board determined that changed circumstances revealed new information about the adverse effects of the projects upon the Delta necessitated revised water quality standards. Accordingly, the Board had the authority to modify the projects' permits to curtail their use of water on the ground that the projects' use and diversion of the water had become unreasonable . . . We perceive no legal obstacles to the Board's determination that particular methods of use have become unreasonable by their deleterious effects upon water quality."24

The 1986 Racanelli decision therefore held that diversions of water that cause seawater intrusion and resulting deleterious effects on water quality and beneficial uses fall within the requirements and prohibitions of California reasonable use law. Given that California reasonable use law applies to groundwater as well as surface water (see discussion of 2006 California Court of Appeal decision in Allegretti above), the holding and reasoning in the Racanelli decision are applicable with equal force to the impacts the Cal-Am Project would have on seawater intrusion in the coastal aquifers.

As detailed above, the results of the Stanford Water Quality Study confirm that there are significant sources of low-saline fresh water in the coastal aquifers that are proposed to supply the Cal-Am Project, and that this fresh water is suitable for the beneficial use of drinking water. The CEQA EIR prepared for the Cal-Am Project and testimony before the CPUC by Cal-Am's own hydrologist confirm that the operation of the Cal-Am Project will lower the groundwater table and thereby worsen salinity conditions in the coastal aquifers. Under the standards and reasoning in the Allegretti and Racanelli decisions, the groundwater pumping proposed for the Cal-Am Project constitutes an unlawfully unreasonable method of diversion/extraction under California reasonable use law.

C. The Seawater Intrusion Effects of the Cal-Am Project Conflict with Provisions of SGMA Which Require Avoidance of Seawater Intrusion

Pursuant to SGMA, local agencies are preparing groundwater sustainability plans (GSPs) for groundwater basins throughout the state, including for the Salinas Valley Groundwater Basin that includes the coastal aquifers identified as the source of water for the Cal-Am Project.25

Under SGMA, GSPs must contain provisions to avoid "undesirable results." The definition of "undesirable results" under SGMA specifically includes "significant and unavoidable seawater intrusion." Therefore,
at the same time that the CPUC has approved the Cal-Am Project that will degrade significant sources of fresh water in the coastal aquifers due to increased seawater intrusion resulting from groundwater pumping, under SGMA a GSP is being prepared that covers these same coastal aquifers that is statutorily mandated to avoid the undesirable result of seawater intrusion.

In this way, the actions of one state agency (the CPUC) in approving the Cal-Am Project are directly undermining the efforts of two other state agencies (the State Water Board and the California Department of Water Resources) jointly responsible for implementation of SGMA. In this way, the CPUC’s approval of the Cal-Am Project also frustrates the efforts of the local agency preparing the GSP that encompasses the coastal aquifers to comply with SGMA.

In the EIR prepared for the Cal-Am Project, Cal-Am reached the finding that the project’s groundwater pumping would not cause “significant and unreasonable seawater intrusion” and therefore did not run afoul of SGMA. However, as with the EIR’s finding that the Cal-Am Project would not have significant adverse effects on groundwater resources, the reasoning used by Cal-Am to support its SGMA-consistency analysis is based entirely on the company’s unsupported assumption that the coastal aquifers are already so degraded by previous seawater intrusion that there presently are no beneficial uses of the groundwater in these aquifers. Relying on this assumption, Cal-Am’s SGMA-consistency argument is essentially that the Cal-Am Project’s anticipated salinity effects on the coastal aquifers should not be considered “significant and unreasonable” because these aquifers are already too far gone in terms of salinity.

As detailed above, however, the Stanford Water Quality Study revealed that Cal-Am’s core assumption here is wrong. In fact, recent testing has confirmed that there are significant sources of low-saline fresh water in these coastal aquifers that are suitable for the beneficial use of drinking water. And as also detailed above, relying entirely on its now discredited assumption, the EIR for the Cal-Am Project disregarded the recommendation in the State Water Board 2013 Review and did not do any modeling of the impact of project operations on salinity and seawater intrusion in the coastal aquifers. In the absence of such modeling, there is no evidence that Cal-Am or the CPUC can now rely upon to support the finding that the operations of the Cal-Am Project are consistent with SGMA’s requirements regarding the avoidance of the undesirable result of seawater intrusion.

In responding to the petitions filed by the City of Marina and the Marina Coast Water District, the California Supreme Court may be uniquely positioned to ensure that CPUC approvals of projects like the Cal-Am Project are aligned with the provisions of SGMA rather than at cross-purposes. The California Supreme Court can achieve this needed alignment by adopting an approach similar to that set forth in its landmark 1983 decision in National Audubon Society v. Superior Court of Alpine County (National Audubon).

In National Audubon, the California Supreme Court addressed the question of how the State Water Board’s issuance of appropriative water licenses (to the Los Angeles Department of Water and Power) should be reconciled with California public trust law’s requirement that state agencies fully protect public trust resources “whenever feasible.” The approach laid out by the California Supreme Court required the State Water Board to explore and adopt all feasible ways to prevent harm to public trust resources in implementing and overseeing the appropriative water rights systems.

Similar to the approach in National Audubon, the California Supreme Court could find that in its review of the proposed Cal-Am Project that the CPUC must take all feasible actions to avoid SGMA’s designated undesirable results, including but not limited to the SGMA undesirable result of “significant and unreasonable seawater intrusion.” This would reconcile the private interest in projects like the Cal-Am Project with the public interest in protecting groundwater resources reflected in SGMA. In the case of the Cal-Am Project, the CPUC’s reliance on Cal-Am’s unsupported and faulty assumptions regarding existing fresh water/salinity conditions in the coastal aquifers would not comport with this standard, as it would require that the CPUC disregard the uncontroverted data and findings in the Stanford Water Quality Study.

IV. CONCLUSION: TRADING ONE HARM FOR ANOTHER

In issuing State Water Board Order WR 95-10 in 1995 and State Water Board Order WR 2009-0060 in 2009, the State Water Board sought to prevent Cal-Am from continuing to unlawfully injure the beneficial uses of the Carmel River, including injury to other water rights holders on the Carmel River. Cal-Am’s private interest in continuing high-levels of diversion from the Carmel River was curtailed by the State Water Board to protect the public interest of ensuring sufficient water was left instream to meet other needs.

With the CPUC’s approval of the Cal-Am Project, however, it appears that in the end all that may have been accomplished by these previous State Water Board orders is to trade injury to the beneficial uses of
the Carmel River for injury to the beneficial uses of our coastal aquifers.

This trading of harms is a poor result from a policy standpoint, allowing the same private party to shift damage to public resources from one surface watercourse to another subsurface watercourse. But perhaps more importantly, this shifting of harms from the Carmel River to the coastal aquifers is at odds with California water rights law, California reasonable use law and SGMA.

ENDNOTES

* Paul Stanton Kibei is Professor of Water Law at Golden Gate University School of Law and Natural Resource Counsel to the Water and Power Law Group. This article is based on an amicus letter the author prepared for the Resource Renewal Institute and submitted to the California Supreme Court in December 2018 in connection with approval of the Monterey Desalination Project discussed herein.


2. The Marina Coast Water District and City of Marina Petitions to the California Supreme Court were both filed on October 12, 2018.


6. Id. at 48.

7. Id. at 50-51.

8. Id. at 5.

9. Id. at 46.

10. Id. at 46.


12. Id. at pp. 8.2-8 and pp. 4.464-4.4-96.


14. EIR, supra note 11.

15. Interpretation of Hydrostratigraphy and Water Quality from AEM Data Collected in the Northern Salinas Valley, CA (March 2018).

16. Id. at 48-49.

17. Id. at 49.

18. Id. at 64.

19. EIR, supra note 11, at pp. 8.2-80.


22. Id.


24. Id. at 130.


28. Id.