EXHIBIT 12-F

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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

CALIFORNIA-AMERICAN WATER COMPANY REPLY BRIEF ON LEGAL ISSUES FOR EARLY RESOLUTION

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or installed by water or wastewater utilities subject to the Commission's jurisdiction."[43] This provision eliminates any question that GO 103-A might permit a municipality to regulate a desalination plant or any other water production facility as a wastewater system.

D. The CPUC Process Allows Public Input

Several parties recommended that the CPUC order CAW to partner with a public agency to develop a long-term water supply solution.[44] These parties argue that a public partner is necessary to provide public input and oversight. As an initial matter, these parties ignore the fact that if the Groundwater Replenishment Project is timely constructed, CAW will obtain a portion of its water supply from a public agency. Additionally, as CAW has explained previously, it has evaluated its options and believes that the MPWSP, owned and operated by CAW, is the best way to meet the SWRCB 2016 deadline.[45] Finally, the CPUC's regulation of CAW and its facilities, including the MPWSP, provides ample opportunity for public participation and oversight, as this proceeding demonstrates.

E. The CPUC Should Address Preemption

The County of Monterey ("County") and Monterey County Water Resources Agency ("MCWRA") state that the CPUC does not have to address the Ordinance, because the County has filed a Superior Court complaint for declaratory relief.[46] While CAW does not dispute the Superior Court's ability to provide declaratory relief, it still believes that it is important for the CPUC to address this threshold issue. As ALJ Weatherford correctly noted, "this issue of preemption is critical to this proceeding."[47] As such, the CPUC should make its own finding regarding preemption so that it may move forward with its review of the MPWSP. As discussed above, the Ordinance limiting the ownership and operation of a desalination facility to public agencies is preempted and therefore is not an obstacle to the MPWSP. With the SWRCB December 2016 deadline looming, CAW requests that the CPUC confirm this finding and proceed with its timely review of the MPWSP.

III. SALINAS VALLEY GROUNDWATER BASIN

In their opening briefs several parties discussed (1) whether appropriative rights are available for the MPWSP based on the availability of "surplus" water, (2) whether appropriative rights are available for the MPWSP based on the availability of "salvaged" water, and (3) the sufficiency of the record regarding adverse impacts or

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[43] General Order 103-A, Sec. I(9).

[44] *Opening Brief on Various Legal Issues of Monterey County Farm Bureau*, filed July 10, 2012 ("Farm Bureau Opening Brief"), Section III; LandWatch Opening Brief, pp. 7-8; *Opening Brief on Various Legal Issues by Citizens for Public Water* (Citizens Opening Brief"), filed July 11, 2012, pp. 15-16; Salinas Valley Opening Brief, pp. 7-10.

[45] *Application of California-American Water Company (U210W) for Approval of The Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates*, filed April 23, 2012 ("Application"), p. 12; *California-American Water Company Reply to Protests*, filed June 4, 2012, p. 10.

[46] *Opening Brief of The County of Monterey and Monterey County Water Resources Agency on Legal Issues in Accordance With Administrative Law Judge's Ruling Dated June 1, 2012*, filed July 11, 2012 ("Monterey, MCWRA Opening Brief"), pp. 1-2.

[47] *Administrative Law Judge's Ruling*, filed June 1, 2012 ("June 1 Ruling"), p. 3.

injuries to other water right holders associated with pumping water from the Salinas Valley Groundwater Basin ("SVGB"). MCWD also argued that its Annexation Agreement limits the water available to CAW. CAW will address these issues below.

Additionally, as CAW noted in its opening brief, it is important to emphasize that there is no State, County, or other permit or entitlement requirement for development of groundwater in the proposed location of the MPWSP.[48] Unlike surface water rights, there is no established State, County or local application or permitting requirement for initiating or developing a "groundwater right"; rather, in most unadjudicated groundwater basins such as the SVGB, a groundwater right is established by pumping and beneficially using groundwater from the groundwater basin.

A. The Groundwater Can Properly Be Characterized as "Surplus"

As CAW explained in its opening brief, the water that it will pump from the SVGB is "surplus" "because it can be pumped without adversely impacting other users or groundwater elevations and conditions in the SVGB."[49] Several parties asserted that the SVGB is in overdraft and there is no surplus available for new groundwater appropriators.[50] An examination of the definition of "surplus" however, reveals that this assertion is incorrect.

"***Any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water*** and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed."[51] The prior right holder's "right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus."[52] The court in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351 discussed this principle in the context of surface water:

> [I]s there then water wasted or unused or not put to any beneficial use? If so, the supply or product of the stream may be said to be ample for all, a surplus or excess exists, no injunction may issue against the taking of such surplus or excess [Citation], and the appropriator may take the surplus or excess without compensation.[53]

Here, the small amount of water that CAW may pump from the SVGB is "surplus" and available for appropriation. That highly-contaminated brackish water is unusable by other pumpers and SVGB right holders and is thus not "needed for the reasonable beneficial use of those having prior rights."[54] Stated differently, the rights of

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[48] CAW Opening Brief, p. 12.
[49] CAW Opening Brief, p. 15.
[50] LandWatch Opening Brief, p. 2; Salinas Valley Opening Brief, p. 10; Citizens Opening Brief, p. 5.
[51] *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1241 (emphasis provided); see also, *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926; *Stevinson Water District v. Roduner* (1950) 36 Cal.2d 264, 270 ("whenever water in a natural stream or watercourse. . . is ***not reasonably required for beneficial use by the owners of paramount rights***, whether the water is foreign or part of the natural flow, such owners cannot prevent use of the waters by other persons, and the water must be regarded as surplus water subject to appropriation by those who can beneficially use it" (emphasis provided)).
[52] *Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-136.
[53] *Id.* at 368-369.
[54] *City of Barstow,* 23 Cal. 4th at 1241.

prior right holders do not extend to the subject water because the water is "not necessary" for use on their land.[55] The water cannot be used on their land. Because the brackish water cannot be used by prior right holders, it is necessarily "wasted or unused or not [being] put to any beneficial use."[56] By definition, the small amount of water that CAW will pump from the SVGB as part of the MPWSP is "surplus" and subject to appropriation. Moreover, CAW's pumping of this water will contribute to the retardation and reversal of seawater intrusion to the SVGB, and therefore will actually contribute to an ***increase*** in the usable quantity of groundwater available to existing pumpers and other right holders in the SVGB.

The cases generally stating as a rule that there is no surplus water available for appropriation in an overdrafted groundwater basin are distinguishable from this case because those cases involve situations where the water to be appropriated is needed for the beneficial use of a prior right holder and the prior right holder is complaining of injury because it could and would put the appropriated water to reasonable beneficial use. For example, in *Corona Foothill Lemon Co. v. Fisher* (1937) 8 Cal.2d 522, the plaintiffs overlying groundwater right holders alleged that the defendants appropriated large quantities of water from an overdrafted basin and pumped the water outside of the basin.[57] The trial court found that there was no surplus water in the basin because the amount of water in the basin was not more than the amount necessarily required for domestic and irrigation uses on overlying lands. It also found that the defendants' operations had substantially lowered the water table in the basin and in the plaintiffs' wells – resulting in irreparable loss and injury to the plaintiffs.[58] On appeal, the reviewing court found that there was no surplus for appropriation because "the *overlying owners* were putting *all* water in the field to *reasonable beneficial use*."[59] Through the operation of the MPWSP, CAW may pump SVGB groundwater that currently is unusable by other right holders, and may do so without adversely affecting the SVGB or the other existing pumpers and right holders. Under these unique circumstances, it cannot be accurately asserted that all of the safe yield of the SVGB is being put to reasonable beneficial use by overlying pumpers, nor could it be fairly argued that CAW's development of small quantities of brackish groundwater will affect any reasonable beneficial use being made by those pumpers. Under these circumstances, such "surplus" groundwater may be appropriated by CAW.

Finally, a finding that the unusable brackish water is "surplus" water available for appropriation serves the policy set forth in Article X, Section 2 of the California Constitution to foster the beneficial use of water and avoid waste.[60] Here, the brackish water cannot otherwise be used by other overliers or potential appropriators, because

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[55] *Katz*, 141 Cal. at 135-136.
[56] *Peabody*, 2 Cal.2d at 368.
[57] *Id.* at 523-524.
[58] *Id.* at 525.
[59] *Id.* at 531 (original emphasis).
[60] *See, Pasadena*, 33 Cal.2d at 926 ("It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a surplus, whether of surface or ground water, the holder of prior rights may not enjoin its appropriation"); *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 436 ("It is not the policy of the law to permit any of the available waters of the country to remain unused, or to

of its degraded quality, and its use by CAW will not injure the SVGB or other right holders. Small quantities of SVGB groundwater may incidentally be developed as part of the MPWSP. The majority of water pumped by the proposed slant wells will be delivered to CAW's service area for municipal uses, less an amount of water equal to the percentage of water determined to originate from the SVGB. The SVGB water will be treated and delivered for overlying agricultural uses in the SVGB as part of the Castroville Seawater Intrusion Project, in lieu of a like volume of groundwater pumped from the SVGB by those users or the MCWRA. The small amount of brackish groundwater that may be pumped by the MPWSP is "surplus" to the needs of other SVGB pumpers and is available for appropriation by CAW as part of the MPWSP. The MPWSP involves the potential development of a small amount of otherwise unusable water from the SVGB, in order to create a substantial water supply for the Monterey Peninsula, while also ***increasing*** the amount of usable groundwater supply in the SVGB. The MPWSP is fully consistent with and in furtherance of the "maximum beneficial use of water" mandated by Article X, Section 2 of the California Constitution; indeed, the failure to implement the MPWSP due to "water rights" concerns, in these particular circumstances, may be contrary to the constitutional mandate.

B. The Groundwater Can Properly Be Characterized as "Salvaged"

In its opening brief, CAW demonstrated that the MPWSP "is also consistent with salvaged and developed water doctrines and statutes encouraging the use of desalinated and reclaimed waters."[61] LandWatch's opening brief asserts, "it is not clear how or why a desalination operation dependent on pumping brackish groundwater would be considered salvage. Unlike traditional salvage operations that depend on conservation (*e.g.*, of water that would otherwise be lost to evaporation or seepage), pumping brackish groundwater does not appear to result in saving water that would otherwise be lost."[62] The subject water is "salvaged" water, however, because the MPWSP will make use of brackish water that is otherwise "lost" to the SVGB and its right holders.

"Salvaged water refers to water that is created by efforts to make existing water use practices more efficient or otherwise to add to the amount of water that was previously available."[63] As discussed in LandWatch's brief, salvaged water is available for use by the salvager if no injury results to other lawful users. Given the unique nature of the MPWSP, the cases addressing appropriation of salvaged water are not factually similar to CAW's situation. However, the principles discussed in those cases support the assertion that the brackish water that CAW may incidentally pump as part of the MPWSP is "salvaged" water.

In *Wiggins v. Muscupiabe Land and Water Company* (1896) 113 Cal.182, the court addressed a situation where a stream flowed through a portion of the defendant's property to the plaintiff's property and then again entered the defendants' property. The defendant constructed and maintained a dam across the stream above the

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allow one having the natural advantage of a situation which gives him a legal right to water to prevent another from using it, while he, himself, does not desire to do so"); *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 370-371 (same).

[61] CAW Opening Brief, p. 18.

[62] LandWatch Opening Brief, p. 2.

[63] 1 Slater, California Water Law and Policy, § 2.08[10], at p. 2-20.

plaintiff's property and diverted all of the water from the stream onto its land. The plaintiff sued for damages and to enjoin the defendant's further interference with the flow of the stream. As part of its judgment, the trial court ruled that the defendant may provide a means for carrying to the plaintiff's land, without diminution, all of the waters of the stream in excess of one-hundred inches, and that if the defendant elected to take this action, it had the right to appropriate the one-hundred inches.[64] The basis for this portion of the trial court's judgment was a finding that one-hundred inches of water in the stream was lost by absorption and evaporation between the time that the stream entered the defendant's property and before it reached the plaintiff's property.[65] The appellate court approved the trial court's decision and noted that it "accord[ed] with the simplest principles of equity."[66]

> The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by absorption and evaporation.[67]

In *Pomona Land and Water Co. v. San Antonio Water Co.* ("*Pomona*") (1908) 152 Cal. 618, the court addressed a situation where the plaintiff and defendant had entered into an agreement allocating the natural flow of a creek at a point where it reached a dam. The plaintiff conveyed its water rights to the defendant and the defendant agreed to make a distribution of the natural flow of the creek at the dam pursuant to the agreed allocation. The defendant, who owned land riparian to the creek above the dam,[68] measured the natural flow of the creek at a point two and a half miles above the dam and again at the dam and determined that the creek was losing nineteen percent of its surface flow to seepage, percolation and evaporation between those two points.[69] Under the belief that its only obligation was to distribute to the plaintiff its allocation of the natural flow at the dam, as agreed, the defendant impounded the water of the creek in a thirty-two inch pipeline and carried it down above the dam, delivering the agreed amount to the plaintiff and retaining the salvaged water and its allocation of the natural flow. Additionally, after the natural flow of the creek had been impounded in the pipeline and the creek bed dried up, the defendant laid a pipeline in the saturated gravel and salvaged another twenty-five to fifty inches of water that it also used as its own. The plaintiff objected to the defendant's practice and argued that the salvaged water should also be allocated pursuant to its agreement with the defendant. With regard to the salvaged water, the court stated:

> It may not successfully be disputed that if, in fact, all the water to which plaintiffs were entitled was

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[64] *Wiggins v. Muscupiabe Land and Water Company* (1896) 113 Cal.182 at 195-196.
[65] *Id.* at 196.
[66] *Id.*
[67] *Id.*
[68] The water at issue was diverted and used under claims of appropriation. (*Pomona*, 152 Cal. at 624.)
[69] This work was actually completed by a power company to which the defendant granted permission to conduct certain work and erect necessary structures for developing power from the dam. However, the court agreed with the parties that the power company was simply an agent of the defendant and the power company was dropped from the case. For ease of reference, the power company's acts are attributed to the defendant herein.

> the one half of the natural flow of the stream as it reached the division dam, and that if in fact they receive this water, then the nineteen, or any other percentage, which was saved by the economical method of impounding the water above, and the twenty-five inches, more or less, which were rescued as developed water from the bed of the stream, were essentially new waters, the right to use and distribute which belonged to defendant.
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> . . .
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> So here, if plaintiffs get the one half of the natural flow to which they are entitled delivered, unimpaired in quantity and quality, through a pipe-line, they are not injured by the fact that other water, which otherwise would go to waste, as merely supporting the surface flow, was rescued. Nor can they lay claim to any of the water so saved.[70]

The salvaged water doctrine thus supports CAW's position that an appropriator may appropriate water (through improved efficiency, conservation or other special measures) that is unavailable or unusable to other right holders (i.e., is "lost" to them), to the extent other right holders do not hold an entitlement or right to the salvaged water and are not injured by the salvage operation.

The brackish water that CAW may incidentally pump as part of the MPWSP is unusable by other right holders and is thus "lost" to other pumpers as it flows seawater to the ocean. The area of the SVGB that is contaminated by the landward movement of seawater into the SVGB is not currently used or usable by overlying pumpers in the SVGB, because the quality of this water is not suitable for agricultural uses. CAW's potential incidental development of the contaminated groundwater that is captured in this transition zone with the ocean will not adversely affect other pumpers in the SVGB, and could incidentally benefit such other pumpers by retarding or reversing seawater intrusion that currently limits other pumpers ability to use non-contaminated SVGB groundwater. CAW is aware of no legitimate claim or argument by other pumpers that this brackish water is being or will be put to a beneficial use before it wastes to the ocean. By virtue of the MPWSP and the technology it will employ, CAW will be able to recover (salvage) the brackish water, desalt and treat it to a quality suitable for irrigation, and return the water to public agencies to distribute for beneficial uses in the SVGB in lieu of overlyers pumping that volume of water. The proposed operation of the slant wells has not been shown by any party to adversely affect the SVGB or any pumpers in the SVGB. Under these circumstances, the salvaged water doctrine informs analysis of the proposed MPWSP, and furthers the policy set forth in Article X, Section 2 of the California Constitution.

C. The Project Will Not Adversely Affect the SVGB

LandWatch's opening brief asserts that "CAW must show that its pumping would not impair *any* groundwater rights."[71] CAW's opening brief addressed the question of potential impacts from the proposed slant well, and recognized that "[t]he slant well program in the similar North Marina project was extensively analyzed in the CPUC's 2009 Final Environmental Impact Report ("FEIR"), and the CPUC concluded that it would not adversely affect other groundwater users or groundwater elevations and conditions in the SVGB."[72]

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[70] *Id.* at 623, 631.

[71] *Id.* (original emphasis).

[72] CAW Opening Brief, p. 15; *see* A.04-09-019, Reference Exhibit B, *Final Environmental Impact Report*, dated October 30, 2009 ("FEIR")

Specifically, with respect to the North Marina project slant wells, the CPUC found: (1) the drawdown effects and localized groundwater levels and conditions in the vicinity of the proposed slant wells will not cause damage to neighboring water supply wells;[73] (2) operation of the slant wells would not contribute to an imbalance of recharge and extraction in the SVGB and would not disrupt the balance of recharge and extraction from the SVGB;[74] (3) the quantity of contaminated groundwater that actually originates from the SVGB would be fully offset by the proposed return of desalinated water to the SVGB in an amount equal to the volume of SVGB-groundwater extracted from the slant wells;[75] (4) seawater intrusion in the SVGB would not increase and water quality conditions would not degrade over the long-term as a result of the slant well program, and during some periods and in certain areas of the SVGB, the slant well program would actually cause seawater intrusion in the SVGB to recede at a faster rate than without the slant well program;[76] (5) "Because the rate of regional seawater intrusion would be reduced over time and groundwater quality would improve, the [slant well program] would not contribute to groundwater degradation" in the SVGB;[77] and (6) operation of the slant wells would not adversely impact surface or groundwater resources outside of the Project area.[78]

CAW need not specifically address the lack of harm to every other pumper in the SVGB, on an individual basis, in order to demonstrate overall effects (or lack thereof) relating to implementation of the MPWSP. The best available science supports the conclusion that there will be no adverse effect to the SVGB or pumpers, and no information has been produced to the contrary.

D. The Annexation Agreement Does Not Affect the MPWSP

In its opening brief, MCWD repeats its claim that the 1996 *Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands* ("Annexation Agreement") limits CAW's proposed use of water for the MPWSP on the CEMEX property. As CAW explained in its opening brief, despite, any limitations and restrictions that the Annexation Agreement may have with respect to the use of groundwater on the CEMEX property, they have no application to the MPWSP because overlying or contractual groundwater rights, and associated uses and limitations, are legally distinct from appropriative groundwater rights and uses.[79] Assuming CAW can establish an appropriative groundwater right in connection with the MPWSP, as discussed above, that right would be legally distinct from the overlying or contractual groundwater rights (and any limitations thereon) that may be appurtenant to the use of groundwater on the CEMEX property.

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§ 5.2.2.1.

[73] FEIR, at 4.2-47, E-27 – E-28 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

[74] FEIR, at 4.2-50 -51,E-27 –E-28 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

[75] FEIR, at 4.2-50.

[76] FEIR, at 4.2-52,E-27 – E-28 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

[77] FEIR, at 4.2-52.

[78] FEIR, at E-30 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

[79] CAW Opening Brief, pp. 16-17; *see City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 ("Appropriation" refers "to any taking of water other than riparian or overlying uses"); *Corona Foothill Lemon Company v. Lillibridge* (1937) 8 Cal.2d 522.