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TO: Henrietta Stern

FROM: David C. Laredo

RE: Historical Water Use Baseline for Alluvial Wells

You have asked for our informal review of issues relating to baseline water use for alluvial wells in the context of recent letters forwarded by National Marine Fisheries Service (NOAA) and California Department of Fish & Game (CDFG) in relation to an application to create the St. Dunstan's Water Distribution System (WDS).

NOAA and CDFG each submitted letters in response to the District's circulation of an Initial Study and Proposed Negative Declaration under the California Environmental Quality Act (CEQA) for proposed creation of the St. Dunstan's WDS under District Rule 22. These letters assert water is not currently available for expanded use due to State Water Resources Control Board (SWRCB) Order WR 95-10, and due to concerns regarding the Endangered Species Act (ESA) listed steelhead and the California Red Legged Frog. In essence, the contention is made that any increase in water use from the Carmel Valley Alluvial Aquifer cumulatively affects Carmel River flow, in reliance upon CEQA Guideline section 15130 that impacts consist of "an impact which is created as a result of the combination of the project evaluated... together with other projects causing related impacts."

Concerns raised in the context of the proposed expansion of the Cal-Am WDS apply equally to the creation or expansion of any non-Cal-Am WDS that derives its water supply from the Carmel Valley Alluvial Aquifer. It is my conclusion that the baseline water use for any existing alluvial well, including pre-existing Water Distribution Systems (WDS), cannot exceed historical use without further review under the CEQA. Staff may use a rule of reason to quantify the increments of water that fall under the definition of "historical use." By way of example, staff could use the average of the previous 10 years, assuming that data are available, to determine this increment of use. Alternate methodologies may also satisfy this rule of reason, so long as an objective standard is used to quantify actual historical water use.

Staff also holds authority to grant a permit for a quantity of use that exceeds demonstrated historical use pursuant to District Rule 40. Such a discretionary determination can only be made in reliance upon a proper CEQA analysis. This analysis cannot be made pursuant to a CEQA exemption. CEQA exemptions are not available to permit applications that propose a new WDS or increased water use above the historical baseline due to the cumulative impacts issues, including those raised by NOAA and CDFG. CEQA Guideline section 15300.2 (b) states, "All

exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.”

It appears that applications that propose water use at or below historical use, however, are allowable under a CEQA mitigated negative declaration (at least in reference to water use impacts) as those projects will not contribute the cumulative impacts of increased water use. Conditions to limit water use so that it does not exceed historical use would justify a finding that “the project will not have a significant effect on the environment” pursuant to section 15075 of the CEQA Guidelines.

An alternate approach that justifies reliance upon a mitigated negative declaration in reference to water use impacts would be based upon the provisions of CEQA Guideline section 15130 that provides, “... a project’s contribution to a significant cumulative impact will be rendered less than cumulatively considerable if the project is required to implement or fund a share of a mitigation measure or measures designed to alleviate the cumulative impact.” This approach must result in full mitigation of the adverse effect of proposed water use – meaning that the mitigation effort shall fully offset existing water use in an identical or larger quantity as compared to the proposed new water use. The approach to mitigate water use impacts shall not be satisfied, however, if it merely results in some form of payment into a “fund” which does not in fact result in a quantifiable and actual mitigation effort separate and distinct from efforts underway to mitigate Cal-Am’s unlawful diversions (e.g., contributing to the existing or planned Cal-Am ASR project cannot provide a mitigation effort for a non-Cal-Am well). Actual mitigations could include, by example, some sort of mitigation bank, restoration project, or reclamation project.

I trust that the summary nature of this memo is helpful to you. If you would like to discuss this matter in further detail, please do not hesitate to contact me.

Sincerely,

De LAY & LAREDO

David C. Laredo