



CALIFORNIA
AMERICAN WATER

*Received at 5/26/11
Board Meeting*

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Item 2

May 26, 2011

David C. Laredo
MPWMD District Counsel
De Lay & Laredo
606 Forest Ave.
Pacific Grove, CA 93950

Re: MPWMD Draft Resolution 2011-09

Dear Mr. Laredo:

INTRODUCTION

Thank you for providing me with a draft of Monterey Peninsula Water Management District ("District") Resolution 2011-09 and the supporting staff note relating to the collection and remittance of the User Fee. California American Water has reviewed the draft resolution and staff note. We understand that Resolution 2011-09 is being offered in response to various decisions of the California Public Utilities Commission ("CPUC") relating to the User Fee to ensure the District is not subject to various legal claims or defenses should litigation be required to address those CPUC decisions. We note at the outset that we have been working cooperatively with the District at all levels to address those CPUC decisions and the programs historically funded by the User Fee. As discussed in our telephone conference yesterday, California American Water is submitting this letter to you to satisfy our obligation to exhaust our administrative remedies should it be necessary for California American Water to litigate the District's action on Resolution 2011-09. We, nevertheless, remain committed to our cooperative efforts with the District.

We understand that the operative language of Resolution 2011-09 is to "order California American Water to collect and remit to the District the Water Distribution System User Fee as required by District Ordinance 123."¹ Accordingly, we infer from that language that the intent of Resolution 2011-09 is not to change any aspect of Ordinance 123 in terms of ultimate responsibility for the User Fee; i.e., this Ordinance neither imposes the User Fee directly on California American Water in lieu of California American Water's

¹ Our comments are limited to the text of Resolution 2011-09 provided to us at 8:03 a.m. on May 23, 2011. This letter does not address subsequent changes to the Resolution.

customers, nor requires California American Water to remit the User Fee regardless of whether California American Water is authorized by the CPUC to collect the User Fee. The ultimate liability for the User Fee under Ordinance 123, if Resolution 2011-09 is passed, would remain with our customers.

If our understanding of this resolution is incorrect, and it is the District's intent to require California American Water to collect the User Fee to the District without CPUC authorization to collect the User Fee or to require California American Water to remit payment without first collecting the funds from our customers, we offer the following additional factual information and comments regarding draft Resolution 2011-09.

If there is some other purpose for Resolution 2011-09, we respectfully request an explanation of the purposes of Resolution 2011-09 and that the District Board delay action on this proposed resolution until California American Water can evaluate and comment on the purposes of Resolution 2011-09 as clarified.

ADDITIONAL FACTUAL BACKGROUND

Subsequent to the CPUC issuing D.11-03-035, California American Water has met on multiple occasions with MPWMD staff and District Counsel to discuss how to proceed in light of the CPUC's decision. As respects ASR, California American Water, District staff and District counsel discussed an arrangement whereby California American Water would acquire the assets, close the current funding gap, and obtain the necessary funding to construct ASR Well #4. This proposal had numerous advantages, including resolving longstanding complications with the California Department of Public Health related to the use of the ASR wells to recover water from the Seaside Basin.

As respects the Mitigation Program, subsequent to the CPUC issuing a draft order in the User Fee proceeding, California American Water requested District staff to provide California American Water with a budget to implement the Mitigation Program to ensure the requirements of Order 95-10 were met. That budget was incorporated into the *Interim Implementation Agreement for 2011-2012 Carmel River Mitigation Program*, which the District Board approved on May 16, 2011. The purpose of that agreement as stated therein is: "To ensure the Mitigation Program required by Order 95-10 continues pending a decision by the CPUC on California American Water's amended application regarding the User Fee."

COMMENTS ON DRAFT RESOLUTION 2011-09

With the above-described purpose in mind and in consideration of the additional facts, we offer the following comments on the draft resolution and staff note:

1. Resolution 2011-09 imposes on California American Water obligations that are inconsistent with California Public Utilities Commission Decisions 09-07-021 and 11-03-035 and may be preempted by Constitutional powers of the CPUC.
2. Resolution 2011-09 and the Staff Note omit relevant information regarding the *Interim Implementation Agreement for 2011-2012 Carmel River Mitigation Program* and therefore inaccurately describes the current funding available for

the Mitigation Program, and accordingly whether the obligations under Order 95-10 are met.

3. The District has failed to evaluate any alternative method of collecting the User Fee or all reasonable methods of funding the ASR Project.
4. Requiring California American Water to pay the User Fee without regard to our authority to recover these costs could be a taking in violation of the California and United States Constitutions.
5. Resolution 2011-09 combined with the *Interim Implementation Agreement for 2011-2012 Carmel River Mitigation Program* may exceed the funding authorized pursuant to Ordinance 123.
6. Resolution 2011-09 may exceed the scope of Ordinance 123 if the 8.325 percent User Fee funds new capital improvements instead of merely "[maintaining] plant, equipment, facilities, supplies, personnel and reasonable reserves necessary to provide water service."
7. Resolution 2011-09 exceeds the scope of Ordinance 123 to the extent it seeks to order the remittance of more than 1.2 percent of California American Water's water and related charges.
8. Ordinance 123, as interpreted by Resolution 2011-09, may be void for vagueness because Ordinance 123 does not clearly set forth the obligation of California American Water that Resolution 2011-09 purports to enforce.
9. Resolution 2011-09 also states that California American Water's operations in the Seaside Groundwater Basin are adversely affecting steelhead and the California Red Legged Frog. California American Water is aware of no report finding that pumping water from the Seaside Basin affects steelhead or frogs.
10. Resolution 2011-09 inaccurately characterizes the purposes of the Mitigation Program because the CEQA project that requires the Mitigation Program is the District's Water Allocation Program, not an approval requested by California American Water.
11. Resolution 2011-09 imposes obligations on California American Water that it has no authority to implement because it requires California American Water to "set" the User Fee.

Based on the foregoing, adopting Resolution 2011-09 would be arbitrary and capricious and an abuse of discretion by the District Board. It would also create a controversy regarding California American Water's rights and duties under Resolution 2011-09 and CPUC decisions D.09-07-021 and D.11-03-035. California American Water respectfully requests that the District refrain from acting on Resolution 2011-09 at this time. If the District determines that it must persist on this course, the District Board should not act on Resolution 2011-09 as currently drafted or based on the existing staff note, but should send the matter back to staff for revisions and explanations consistent with our comments. California American Water also requests that we further discuss the

David Laredo, District Counsel
Monterey Peninsula Water Management District
May 26, 2011
Page 4 of 4

District's concerns that have led to this course of action to determine if those concerns could be addressed short of this order.

We look forward to continuing the cooperative spirit of our efforts to maintain the Mitigation and ASR Program. Please direct any questions regarding this letter to my attention.

Best Regards,

A handwritten signature in black ink, appearing to read 'Tim Miller', written over a horizontal line.

Tim Miller
Corporate Counsel

cc: Robert MacLean
Darby Fuerst
Edward Simon
Craig Anthony