

EXHIBIT 2-E
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TO: Dave Laredo, Stephanie Pintar

FROM: Fran Farina

RE: MEMO ON ORDINANCE 125 MODIFICATIONS

We have been tasked with modifying Ordinance 125 for second reading in August. Modifications must address Rule 11 definitions, Rule 25.5 deletion of the 15% reduction and potential definitional conflicts, and Rule 28-B to clarify that water credit transfers can only originate from Non-Residential commercial or industrial uses. An analysis of Rule 24 is also necessitated due to the Laredo memo of February 11, 2005 (Laredo memo).

As part of the review process, all existing sections of the ordinance were also reviewed for potential revision.

Rule 11 (Definitions)

To facilitate writing this section, I reviewed the existing District Rules, changes which occur in Ordinance 125 Section Three, and the Laredo memo.

Commercial Use

In Section Three of Ordinance 125 as currently written, Commercial Use is deleted in its entirety and Industrial Use is modified to "industrial" with a modified definition. **Both definitions should be retained.** Commercial Use shall mean water used in connection with commercial premises devoted primarily to, but not limited to offices, stores, markets, hotels, motels, and restaurants.

Industrial Use

Industrial Use is currently defined as water use at an industrial site where the water is used primarily in manufacturing or processing activities. Steph has new verbiage which could be utilized as long as it is within the context of industrial use. For example, the definition could read, "Industrial Use shall mean water used in connection with industrial premises devoted primarily to, but not limited to, factories, refineries, bottling plants, nurseries, and commercial laundries."

Governmental Use and Public Authority Use

There is no current definition for "Governmental Use" although the ordinance proposes to add a new definition of "Governmental." This is defined as meaning "related to government, and shall include local, state and federal government, and public agencies."

The ordinance proposes to delete the definition "Public Authority Use." That definition currently reads, "Public Authority Use shall mean water used by a public entity." This would be inconsistent with the current definition of "User Category" which identifies a classification of water use as "Public Authority." (See definition of User Category below.)

We should discuss the resolution of these definitions.

Public Water Credit Account

Ordinance 125 proposes to amend the definition of Public Water Credit Account to mean "a separate water account maintained by the District to track Non-Residential water credits that have been transferred to a Jurisdiction and to track Public Water Credits allowed by Ordinance No. 75 and No. 91. Water used from this account shall not be assessed a Connection Charge by the District."

This text requires amendment such as, "Non-Residential ~~c~~Commercial Use ~~and/or~~ Industrial Use water credits" in order to avoid confusion. The previous language stated, "The Public Water Credit account shall also include commercial water credits that have been transferred to a jurisdiction."

Mixed Use

The ordinance proposes a new definition, "Mixed Use" instead of "Mixed Use Water User" to mean water for domestic or other uses from any Water Distribution System or private well where one or more water meters or Connections provides both Residential and Non-Residential use, often within the same building. This could raise an issue but only if the definition of "Commercial Use" was deleted. If the commercial use portion of a mixed use project were reduced, the District could quantify the water credit for possible transfer.

Connection

The current definition of "Connection" identifies three categories: Residential Connection, Commercial/Governmental Connection, and Industrial Connection. The ordinance deletes these references. Connection is the point of intersection where a user gains access to the Water Distribution System (WDS). The new reference is that a connection is either "Residential" or Non-Residential." These modifications are appropriate and eliminate confusion when viewed in light of Rule 24, Tables 1 (Residential Fixture Unit Count Values) and 2 (Non-Residential Water

Use Factors¹). They track the Laredo memo explanation that the District has established dual systems to regulate water use and water use permits – residential and non-residential. This is separate and distinct from rules established for water credits, either Rule 25.5 (on-site) or Rule 28-B (transfers).

Capacity

The Capacity definition is modified slightly in Ordinance 125 to mean the maximum potential water use which theoretically may occur, based on average water use data for similar structures and uses in the Monterey Peninsula region, as shown by projected water use tables set forth in Rule 24. Capacity shall have the same meaning as “Water Use Capacity.” The words deleted after “theoretically may occur” were “on a specific Site.” Similar to the comment above, this tracks the Laredo memo which identified “capacity” for residential water use as determined by fixture unit count on Table 1 and non-residential water use as determined by water use factors on Table 2, both within Rule 24. This is separate and distinct from rules established for water credits, either Rule 25.5 (on-site) or Rule 28-B (transfers).

Residential and Non-Residential

The current rules define “Residential” as water used for household purposes, including water used on the premises for irrigating lawns, gardens and shrubbery, washing vehicles, and other similar and customary purposes pertaining to single and multi-family dwellings. A new definition, “Non-Residential” is included in Ordinance 125 that reads, “Non-Residential shall mean water uses not associated with Residential use.” This will not cause a problem with Rule 28-B as long as that rule continues to reference “Non-Residential Commercial Use and Industrial Use.” It does not create a problem with Rule 25.5 as a water credit can be established from any use, residential or non-residential. No further clarification is required so long as it is used on-site.

However, we may want to expand the definition of Non-Residential so that it is compatible with water uses defined in “User Category.” A more complete definition would be “Non-Residential shall mean water uses not associated with Residential use. These uses include Commercial, Industrial, Public Authority, Golf Course, Other Use, Non-Revenue Metered Use, and Reclaimed Water.

Water Credit and Water Use Credit

The current rules define “Water Use Credit as “a limited entitlement by a Person to use a specific quantity of water upon a specific Site. Water Use Credits shall be limited by time, and by other conditions as set forth in the District’s Rules and Regulations.” Ordinance 125 proposes a new

¹ Ordinance 125 add a new definition “Water Use Factor” to mean a number assigned to one or more specific types of Non-Residential uses that when calculated together with a measurement related to the type of use will result in an estimated annual water demand.

definition "Water Credit" which shall mean a record allowing reuse of a specific quantity of water upon a specific Site. A Water Credit differs from a Water Use Credit in that it is not characterized by a Permanent Abandonment of Use, but may be the result of a temporary cessation of use. Both definitions are applicable to the establishment of on-site water credits and pose no definitional difficulty. Neither definition presents a problem if the language in Rule 28-B makes it clear that only credits from Commercial Use or Industrial Use can be transferred.

User Category

The current rules contain a definition of "User Category" to mean "the classification of a water use in one of the following categories: Residential (single-family and multi-family), Commercial and Industrial, Public Authority, Golf Course, Other Use, Non-Revenue Metered Use, and Reclaimed Water Users."

Summary of Rule 11 Issues

Commercial Use and Industrial Use must not be deleted from the existing rules. Similarly, Public Authority Use should not be deleted. A new definition of Governmental Use could be added which means the same as Public Authority Use. Public Water Credit Account requires a minor modification to read, "to track Non-Residential commercial or industrial water credits that have been transferred to a Jurisdiction, etc." The definition of Non-Residential should be expanded to be compatible with water uses defined in User Category.

Rule 20 (Permits Required)

Since Ordinance 124 has already been adopted and will be effective prior to second reading, we need to modify the Ordinance 125 text in **Rule 20-C** so that 11 now reads

11. For a Water Distribution System that serves water to Parcels within the Former Fort Ord Lands within MPWMD, but that does not derive water from the Seaside Groundwater Basin or the Carmel River Basin, including the Carmel Valley Alluvial Aquifer.

Delete the footnote at the bottom of the page as well as the footnote symbol after the caption "C. Exemptions for Water Distribution System Permit."

Rule 24 (Calculation of Water Use Capacity and Connection Charges)

The existing Rule 24 (Water Permit Process) includes a section (24-B-2) which enables transfer of Water Use Credits by a "government agency" from one location owned and operated by that agency to another location owned and operated by that agency but only for open space use. This is now relocated into Rule 28-C and replaces "government agency" with "Public entity."

The Ordinance 125 version of Rule 24 is titled "Calculation of Water Use Capacity and Connection Charges." In this context, the terms "Residential" and "Non-Residential" present no conflict with the water credit transfer terminology in Rule 28-B if language is retained which clarifies that transfers may only occur from Non-Residential commercial or industrial uses.

Rule 25.5 (Water Credits)

The existing Rule 25.5 contains language (25.5-A-1 and 25.5-A-2) which provides that as part of the Water Use Credit determination, **the District "shall quantify the increment of reduction which exceeds the District's target of 15% conservation based upon the criteria used for the Water Allocation EIR."** It is staff's position that this refers to the District's conservation goal which has been achieved through toilet retrofits and, therefore, requires no reduction in the determination. **The recent appellate decision in *Save Our Carmel River v. MPWMD (City of Monterey)* made specific reference to the reduction.**

A 15 percent reduction is figured into the credit, to be reserved by the District pursuant to its mandated conservation program. (See District Rule 25.5-A-1.) Thus the credit received by the water customer is only 85 percent of the reduction in capacity. *Id.* at 5.

Several options can be considered. First, eliminate the existing language. While this may delete it as a requirement, without further explanation it exposes the District to an accusation of removing mitigation without CEQA evaluation. A second option would be to insert language which clarifies what the current reference means and then indicate that once the District has achieved its 15% conservation goal as described in the Water Allocation EIR, no further reductions from credits are required. A separate memo could then be prepared to identify when the goal was achieved to be kept in the Policies and Procedures Manual. A variation of this option would be to recite the history and explain that the mitigation was accomplished and when. A third option is to include text comparable to the court's or the District's (Rule 28-B-8) and begin implementation on the ordinance effective date. **Discussion is required to resolve this issue.**

A second issue is whether the use of "Residential" and "Non-Residential" in determining a Water Use Credit presents problems. It does not. Language in the revised Rule 25.5-A provides, "Except as allowed by Rule 28-B, Water Use Credits shall not be transferable to any other Site."

Rule 28 (Permit and Water Use Credit Transfers)

The existing Rule 28-B for water credit transfers has certain specific references which track the enabling District ordinances. Thus, transfers are only allowed from commercial or industrial water use. In Ordinance 125, commercial and industrial were deleted and replaced with Non-Residential. This raised the issue of potential expansion of the transfer program because Non-Residential includes more uses than commercial and industrial uses. A possible version of Rule 28-B is attached in an effort to track the original intent while including recent modifications for

policy and procedure purposes.

Conclusion

Ordinance 125 can proceed with second reading with revisions to Rule 11 definitions (see summary above), resolution of the 15% reduction issue in Rule 25.5 for establishing water credits, and modifications to Rule 28-B to retain the original intent that transfer credits are only created from commercial or industrial uses.

Rule 28-B Proposed Text

B. WATER USE CREDIT TRANSFERS

Water Use Credits for existing Non-Residential Commercial Use or Industrial Use which have been allowed by the District on or after March 1, 1985, may be transferred directly from one property to another for Non-Residential Commercial Use or Industrial Use and shall be referred to as "property-to-property transfers." Water Use Credits for existing Non-Residential Commercial Use or Industrial Use may also be transferred directly into a Jurisdiction's Allocation and shall be referred to as "property-to-Jurisdiction transfers." All Water Use Credit transfers require the approval of the Board of Directors. The following conditions shall apply:

1-4 as proposed in Ordinance 125.

5. Water Use Credit transfers shall only be allowed from an existing Non-Residential Commercial Use or Industrial Use, and shall be applied to the intensification of another existing Non-Residential Commercial Use or Industrial Use or added to a Jurisdiction's Allocation. Transfer credits shall not derive from any prior open space water use except as allowed by Rule 28-C.

6. Property-to-property transfers shall only enable intensification of an existing Non-Residential commercial or industrial Water Use Capacity, as proposed by a current application for a Water Permit. Transfers shall not be allowed for new Non-Residential commercial or industrial water meter Connections. Transferred Water Use Credit shall not be "banked" for future use at any new or different Site.

7. The use of Water Use Credits resulting from a property-to-Jurisdiction transfer shall be at the discretion of the Jurisdiction.

8. All Water Use Credit transfers shall originate only from prior documented Non-Residential commercial or industrial Water Use Capacity and shall be subject to each and every limitation on the calculation of Water Use Credit set forth in Rule 25.5. The District shall permanently retain 15 percent of the amount of Water Use Credit transferred as a contribution to general water