



CALIFORNIA  
AMERICAN WATER

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Presented by  
Eric Sabalsite on  
10/17/2016  
Item 18

October 17, 2016

David C. Laredo  
MPWMD General Counsel  
De Lay & Laredo  
606 Forest Avenue  
Pacific Grove, CA 93950  
[dave@laredolaw.net](mailto:dave@laredolaw.net)

**Re: MPWMD Draft Resolution 2016-18**

Dear Mr. Laredo:

Thank you for the opportunity to comment on the Monterey Peninsula Water Management District's (the District) intention to adopt draft Resolution 2016-18, which would require California-American Water Company (CAW) to set, collect and remit to the District the Water Distribution System User Fee (User Fee). We request that this letter be included in the administrative record for this matter.

As the staff memorandum accompanying draft Resolution 2016-18 in your Board Packet indicates, this draft Resolution is a republication of Resolution 2011-09, which the District adopted in May 2011 and is the subject of an existing lawsuit brought by CAW against the District in July 2011. In that pending lawsuit, the District and CAW agreed to stay the legal proceedings "until such time as there is a final, non-appealable, ruling by the California Public Utilities Commission." (Stipulation of Parties and [Proposed] Order to Stay Proceedings, filed October 27, 2011.)

The User Fee is also the subject of an ongoing proceeding before the California Public Utilities Commission (the Commission) – Proceeding No. A.10-01-012. The Commission issued Decisions D.11-03-035 and D.13-01-040 in that proceeding, denying approval of an all-party settlement agreement that would have authorized CAW to collect the User Fee from its customers going forward. The District appealed those two Commission decisions to the California Supreme Court.

In January 2016, the California Supreme Court issued an opinion in *Monterey Peninsula Water Management District v. Public Utilities Commission* that set aside the two challenged Commission decisions. The Supreme Court remanded the matter back to the Commission for further proceedings. The Commission proceedings have resumed but have not concluded since the remand, and the Commission has yet to issue a final ruling.

Adoption of Resolution 2016-18 is improper and ill-advised for several reasons:

- It represents an end-run around the agreement reached by the District and CAW as reflected in the Stipulation, which is that the parties agreed to stay the litigation and take no further action with respect to Resolution 2011-09 until the Commission issues a final decision on the User Fee, which has not yet occurred. As the staff memorandum for Resolution 2016-18 acknowledges, this Resolution merely “republishes” Resolution 2011-09.
- The District misinterprets, and provides a regrettably truncated description of, the effect and directive of the California Supreme Court opinion. While the staff memorandum explains that the Supreme Court remanded the matter to the Commission, it fails to acknowledge that the Supreme Court directed the Commission on remand to “distinguish between agency-oriented charges and utility-oriented charges.” By pursuing the collection by CAW of a User Fee, through adoption of Resolution 2016-18, before the Commission has acted and made that determination, the District prematurely presumes that the Commission will find that the User Fee is an “agency-originated charge.” The Commission has not made such a determination and, therefore, CAW cannot proceed as if it had done so, and simply ignore the Commission’s potential jurisdiction.
- Adoption of Resolution 2016-18 will not advance the cause of persuading the Commission to act. Instead, its only effect would be to widen the scope of uncertainty created by the adoption of District resolutions directing CAW to collect the User Fee before the Commission has made a final determination.
- Draft Resolution 2016-18 states that,

California American Water’s continued failure to comply with District Resolution No. 2011-09 and Ordinance No. 123 compromises efforts of the District to achieve the purposes required by the District’s Mitigation and ASR programs, as well as its efforts to augment the supply of water available to the Monterey Peninsula. California American Water’s failure to remit the full User Fee to the District interferes with mitigations required by the California Environmental Quality Act (CEQA) and significantly and adversely affects Carmel River populations of steelhead and red-legged frog, in contravention of State Water Resources Control Board (SWRCB) Order No. WR 95-10 and Order WR 2009-0060.

The District has provided no evidence to support any of these assertions. To the contrary, as the staff memorandum and draft Resolution both state, CAW and the District have worked collaboratively to put in place an alternative funding mechanism – the Water Supply Charge – to defray some of the costs covered by the User Fee while awaiting an ultimate decision from the Commission.

- To the extent that Resolution 2016-18 could be interpreted to require CAW to pay the User Fee without regard to its authority to collect these fees, it could be a taking in violation of the California and United States Constitutions. If this is not the District’s intention, that should be made clear in revisions to the draft Resolution.

- If adopted, Resolution 2016-18 would impose obligations on CAW that it has no authority to implement because it requires CAW to “set” the User Fee.
- The apparent intention in Resolution 2016-18 to simultaneously re-enact the User Fee but also to seek to remove the stay in the pending litigation and proceed with that litigation (which currently involves only a challenge to the District’s prior Resolution 2011-09) will only further complicate the current proceedings and lead both the District and CAW to expend additional scarce resources, as the parties would have to litigate the propriety of both Resolutions, either through amendment of the pleadings in the current case or initiation of a separate action with regard to the proposed new Resolution.

For all these reasons, adopting Resolution 2016-18 would be unlawful, arbitrary and capricious and an abuse of discretion by the District Board.

CAW respectfully requests that the District refrain from acting on draft Resolution 2016-18 at this time. If the District determines that it must persist on this course, the District Board should not act on Resolution 2016-18 as currently drafted or based on the existing staff memorandum, but should send the matter back to staff for revisions and explanations consistent with our comments. CAW also requests that we further discuss the District’s concerns that have led to this course of action.

CAW’s position remains that we stand ready to enter into a contract with the District to collect the User Fee on its behalf as long as the Commission authorizes us to do so or agrees with the view that it lacks the jurisdiction to prohibit CAW’s collection of the User Fee.

Sincerely,

Handwritten signature of Anthony Cerasuolo in cursive script.

Anthony Cerasuolo  
Vice President, Legal