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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

CALIFORNIA AMERICAN WATER, Plaintiff, vs. CITY OF SEASIDE, et al., Defendants.	Case No. M66343 Assigned for All Purposes to the Honorable Roger D. Randall (Ret.) **CITY OF SEASIDE'S RESPONSE TO JANUARY 6, 2010 MINUTE ORDER RE ANNUAL REPORT OF WATERMASTER**
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT, Intervenor,	
MONTEREY COUNTY WATER RESOURCES AGENCY, Intervenor,	
AND RELATED CROSS-ACTION.	

I. INTRODUCTION

The City of Seaside (the "City") submits the following response to the first two concerns raised by the Court respecting Watermaster's 2009 Annual Report, as set forth in the Court's January 6, 2010 Minute Order. The first concern pertains to the appropriate calculation of the Replenishment Assessment ("RA") applicable to Operating Yield Over-Production. The second

concern pertains to the Memorandum of Understanding ("MOU") between the City and Watermaster respective of an in-lieu replenishment program proposed by the City involving its Blackhorse and Bayonet Golf Courses. For the reasons discussed herein, we respectfully request that the Court reconsider its Minute Order, and that it concur with the position adopted by Watermaster respective of both of these matters.

II. CALCULATION OF REPLENISHMENT ASSESSMENT UPON OPERATING YIELD OVER-PRODUCTION

A. Summary of Issues and Watermaster Position

The Amended Decision ("Decision") provides separate definitions for *Over-Production* and *Operating Yield Over-Production* ("OYO"). "Over-Production" is defined as production in excess of a producer's Base Water Right as applied to an initially assumed Native Safe Yield ("NSY") of 3,000 afy. (Decision, III.A.21, p. 14.) OYO is defined as production in excess of a producer's Operating Yield allocation. (Decision, III.A.21, 22, p. 14.) As discussed in the Annual Report, in calculating the appropriate RA, the question arose as to whether the phrase "*additional Watermaster Replenishment Assessment*" as applied to OYO, at Section III.L.J.iii of the Decision, meant that the OYO RA is to be *another* RA, but which is separate and distinct from the RA applied to standard Over-Production, or meant a *duplicative* RA applied to OYO.[1] Watermaster interpreted the Decision to mean the former; that the "*additional*" RA applicable to OYO was a separate and distinct form of RA. However, the Court's January 6, 2010 Minute Order reversed this interpretation, instructing that the RA applied to OYO is to be applied *in addition* to the base assessment for *all* production in excess NSY, hence resulting in a double RA on OYO. The City respectfully urges the court to reconsider this conclusion for the following reasons.

1. A Double RA Upon OYO is Inconsistent with the Purpose of the RA

The purpose of the RA is to secure non-native water supplies to replenish each acre-foot of

[1] Another way to pose the question is as follows: does the RA applicable to the "standard" Over-Production (i.e., production between a SPA producer's share of the NSY and its Operating Yield allocation) end where OYO begins, or does the standard Over-Production continue, subject to an RA, and overlap with OYO and the RA applicable thereto, thereby resulting in a double RA on OYO?

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production in excess of NSY. (See Decision, III.L.j.iii, p. 33 [providing that the RA is to be assessed on a "per acre-foot basis on each acre foot" of Over-Production]; see also definition of Over-Production, Decision, III.A.21, p. 14 [defining Over-Production in the Basin-wide context as all production in excess of the NSY].)].) If the Judgment were interpreted to require a double RA on OYO, more replenishment revenue would be generated than is required to replenish the cumulative production in excess of the NSY.

OYO is not allowed by the Decision's terms unless replenishment supplies are available to replenish the excess production. (Decision, III.L.j.iii, p. 3.) Because replenishment water is not presently available, the City acknowledges that its OYO is in violation of the Judgment. As discussed below, the City is taking aggressive steps to eliminate such violation. However, the purpose of the RA is not to punish for Over-Production or OYO, but to provide a mechanism to acquire replacement water on an acre-foot by acre-foot basis to offset water pumped in excess of NSY.

2. An Interpretation Resulting in a Double RA on OYO Would Likely Preclude Pragmatic Use of the Basin

OYO is separately provided for in the Decision as a distinct form of Over-Production that is authorized once replenishment water becomes available. In future years when replenishment supplies are available, OYO may become a valuable component of efficient water management strategies in which the Basin is used to store, treat, and deliver new water supplies, including desalinated water and treated recycled water. For example, efficient water supply strategies may involve delivery of replenishment water to the Basin where it is stored, treated (by virtue of percolation through the Basin's strata), and subsequently recovered by water users engaging in OYO, who pay the replenishment assessment, which in turn funds the replenishment water supply. Such a strategy could be implemented as a means to avoid construction of unnecessary delivery, treatment, and storage infrastructure. As a result, the community could lower the costs of the proposed Coastal Water Project, and potentially make greater beneficial use of treated recycled water. However, imposition of a double RA on OYO would render such desirable water management opportunities cost prohibitive by making it twice as expensive to undertake them, and

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thereby discourage pragmatic use of the Basin in the future.[2]

3. The City Has Applied Best Efforts to Mitigate and Eliminate its OYO

The City has made diligent efforts to reduce water consumption and eliminate its exposure to OYO RA liability. With respect to consumption within its municipal system, the City established a water conservation program that is consistent with similar regulations imposed by the Monterey Peninsula Water Management District on customers served by the California American Water Company, and has increased its tiered water rates (as much as roughly 22 percent) to incentivize conservation and eliminate recurrence of OYO (Declaration of Ray Corpuz, attached hereto, at ¶¶ 3, 4.). The City is also aggressively pursuing an agreement with the lessee of the City's Bayonet and Blackhorse Golf Courses to reduce the amount of water used for irrigation. In addition to these efforts, the City purchased 10 acre-feet of surplus Carryover Credits from the Granite Rock Company to offset a portion of its OYO. (See Annual Report, p.2, ¶ 4.) We would welcome the opportunity to further discuss the City's efforts to mitigate its water demands with the Court at a hearing if the Court desires.

4. A Double RA on OYO Would Further Impair the City's Financial Challenges

While we appreciate that the City's economic hardship is not a valid grounds to support one interpretation of the Decision over another, we hope the Court will appreciate the significant burden the imposition of a double RA liability on the City would cause. The recent economic downturn has adversely affected the City and its municipal tax revenues. Since 2007, the City has lost 30% of its tax revenue and has been forced to eliminate approximately 30 City staff positions. (Corpuz Decl. at ¶ 5, at ¶ 8.) The State of California has also taken approximately $8 million of the City's redevelopment funding revenue. (Corpuz Decl. at ¶ 7.) Imposition of a double RA liability on the City's historical OYO will exacerbate the City's financial troubles.

[2] If desired by the Court, counsel will also produce (and request judicial notice to be taken of) decisions entered in other groundwater basins that similarly allow for production in excess of the native safe yield subject to a uniform (i.e., single) replenishment assessment, which allows for the more dynamic and efficient water management strategies discussed herein.

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III. THE CITY'S IN-LIEU REPLENISHMENT PROGRAM

A. Summary of Issues, MOU, and Concerns

The City's RA liability presents a financial predicament for the City. As a point of reference, the accrued RA liability of $1,278,820.52 equates to the annual salary of roughly 30 City staff positions. (Corpuz Decl. at ¶ 8.) However, the proposed in-lieu replenishment program involving the City's golf courses presents a solution whereby the City's RA liability would be "exchanged" for comparable replenishment water. The City is completing negotiations with Marina Coast Water District ("MCWD") to obtain water supplies—initially derived from Salinas Basin groundwater and later reclaimed water—for use on the City's golf courses in lieu of groundwater production from the Basin. The offset groundwater production will be provided to Watermaster as in-lieu replenishment in exchange for a credit against the City's RA liability. Watermaster unanimously approved the MOU at its November 4, 2009 Board meeting after considerable discussion. (See Declaration of Dewey Evans, attached hereto, at ¶ 2.) In its January 6, 2010 Minute Order, the Court expressed concerns with Paragraph 4 of the MOU, which provides for a stay of enforcement of the City's RA liability so long as the City commences in-lieu replenishment under the program of at least 200 acre-feet within one year (i.e., before November 4, 2010) and maintains in lieu replenishment of at least 200 acre-feet annually thereafter during the five year term of the MOU. The Court expressed specific concerns citing the risk that the stay of enforcement would reduce funds available to Watermaster to secure replenishment supplies. For the following reasons, the City urges the Court to endorse the MOU as a prudent and practical measure that will not reduce funds available to secure replenishment supplies.

B. The MOU Will Not Deprive the Basin of Replenishment Water

The one-year start-up period and 200 acre-foot minimum replenishment threshold set forth in Paragraph 4 are designed to foster sufficient time to finalize agreements to arrange for delivery of surface water supplies to the golf courses and to ensure that *at least* a minimum amount of in lieu replenishment is generated annually. The City is nearing completion of negotiations so the program can be implemented, and it anticipates to be able to establish in-lieu replenishment of 400 acre-feet or more each year. (Corpuz Decl. at ¶ 9.) The 200 acre-foot threshold was established only as a

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bare minimum. More importantly, any potential stay of enforcement is limited to the five-year term of the MOU. (See MOU, Paragraph 1.) Thus, if the full extent of the City's accrued RA liability is not offset, the remaining RA liability will be due when the MOU expires in November of 2014. Of course, if the City is unable to commence the in-lieu program by November, 2010, its full RA liability will be due at that time.

Other than this proposed in-lieu replenishment program, it is unlikely that any meaningful amount of replenishment water will be available for purchase by Watermaster prior to 2014. (Evans Decl. at ¶ 4.) Thus, collection of Seaside's accrued liability would only increase the amount of replenishment funds held in reserve by Watermaster. Likewise, temporary suspension of the City's accrued RA liability (that which it is not able to offset if any at all) until 2014 will not impair the amount of replenishment water that Watermaster will be able to purchase after 2014 when replenishment supplies do become available. In sum, this is the only program likely to provide replenishment water in the near term, and it should not deprive Watermaster of funds to procure other replenishment sources when they do become available. Therefore, we respectfully urge this Court to allow the MOU to proceed as written. Of course, the City welcomes further discussion with the Court regarding how it would like the City and Watermaster to proceed as to this matter.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court concur with and adopt the positions taken by Watermaster respective of the calculation of RA on OYO and the MOU regarding the proposed in-lieu replenishment program. The City would also appreciate the opportunity to further discuss these matters with the Court at a hearing if the Court so desires.

Dated: February 5, 2010

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF)
SANTA BARBARA

I am employed by Brownstein Hyatt Farber Schreck in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 East Carrillo Street, Santa Barbara, California 93101. On February 5, 2010, I served the within documents:

CITY OF SEASIDE'S RESPONSE TO JANUARY 6, 2010 MINUTE ORDER RE ANNUAL REPORT OF WATERMASTER

DECLARATION OF DEWEY EVANS (CEO OF WATERMASTER) IN SUPPORT OF THE CITY OF SEASIDE'S RESPONSE TO THE COURT'S JANUARY 6, 2010 MINUTE ORDER

DECLARATION OF RAY CORPUZ (CITY MANAGER OF THE CITY OF SEASIDE) IN SUPPORT OF THE CITY OF SEASIDE'S RESPONSE TO THE COURT'S JANUARY 6, 2010 MINUTE ORDER

✠ By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Barbara, addressed as set forth below.

☐ By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, (with billing directed to sender) picked up by or delivered to an overnight delivery service in Santa Barbara, California, addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 5, 2010, at Santa Barbara, California.

Maria Klachko-Blair

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