PAJARO VALLEY WATER MANAGEMENT AGENCY

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October 19,2007

Ms. Elle Pirie
Second District Supervisor
Santa *Cruz* County Board of Supervisors
701 Ocean Street, Room 500
Santa Cruz, CA 95060

Re: October **16,2007** Discussion **of** Paja Valley Water Management Agency's Options by Bruce Laclergue, General Manager

Dear Ms. Pirie:

Enclosed, in response to your request for documentation of some of the issues touched upon by Bruce Laclergue, our General Manager during his presentation earlier this week to the Santa Cruz County Board of Supervisors, are copies of the following PVWMA Board agenda items:

- June 20,2007 - Action Item 5E: Consider Implementing a Proposition 218 Compliant Approval Process to Establish a Groundwater Charge;
- July 18,2007 – Action Item 5C: Continued discussion on Implementing a Proposition 218 Compliant Approval Process to Establish **a** Groundwater Charge; and,
- September 5,2007 – Item 4A: Further consideration **of** potential revenue alternatives in event ***of*** adverse result in validation action.

Also enclosed for your complete information are typewritten notes of Bruce's presentation.

Very truly yours,

Berta R. Rodriguez

Enclosures: **as** noted

Copy (w/enclosures) to:
Janet K. Beautz, Chair
Santa Cruz County of Supervisors
Bruce Laclergue

Item 6

MEMORANDUM

DATE: lune 14,2007
MEETING OF: **June 20,2007**
TO: Board of Directors
FROM: General Manager
RE: **ACTION ITEM** 5E: Consider Implementing a Proposition 218 Compliant Approval Process To Establish a Groundwater Charge

BACKGROUND

At the June 6,2007 Board Workshop, under discussion related to the adverse ruling by the Court of Appeal, the matter of developing a Proposition 218 compliant groundwater charge that **would** complement the Agency's existing augmentation charge was also discussed. Counsel subsequently prepared supplemental information on the Proposition 218 approval process **for** the Board to consider with **this** action. The information from Counsel is attached to this memo.

The information from Counsel identifies two approaches, which if successful would ensure Proposition 218 compliance for any proposed adjustments to fees or charges. Based on a review of the information prepared by Counsel, staff would recommend that Board consider moving forward with a process set forth in Article XIII D of **the** California Constitution for fees or charges *for* ">property-related" water service. **This** procedural approach entails providing 45-days mailed notice and conducting **a** public **"majority** protest" hearing. **The** other would involve the additional step of seeking an affirmative majority vote *of* the owners of parcels subject to the charge. Under Proposition 218, this additional step is required for property related fees or charges other **than** those **for** "sewer, water or refuse collection services."

The majority protest approach may be challenged on the issue of whether implementation of the groundwater management programs **and** practices outlined in the Revised Basin Management **Plan** constitutes provision *of* water service, **as** set forth in Proposition 218, thereby exempting the charge from the majority voter approval requirement applicable to property related *fees* and charges generally. The **Board** could voluntarily conduct **a** majority vote process in lieu of the less burdensome "majority **protest"** approach but this is likely not required. The Counsel memo clearly provides **a** rationale, based on statutory interpretation, *for* concluding that the majority protest process would be legally defensible, and it would clearly be the easier of the two processes to implement.

It was further discussed at the workshop meeting that the Board create a task force to build consensus OR the structure of a proposed charge, the amount of revenue **that** the Agency would need **on an** annual basis, and hence the appropriate groundwater charge to consider. **Staff will bnng** this matter forward **as** a discussion item at the next meeting of the **Board.**

FISCAL IMPACT

The administrative cost of implementing a Proposition 218 approval process, including the cost of providing notice to affected property owners, will vary depending on the approach selected.

RECOMMENDATION

Staff recommends that the Board direct staff to move forward with initiation of a Proposition 218 compliant "majority protest" procedural approach to address establishing a groundwater charge that complements the Agency's existing augmentation charge.

ATTACHMENT

- Counsel memo dated June 14,2007

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MEMORANDUM

TO: Bruce Laclergue, PVWMA General Manager

FROM: Anthony P. Condotti, PVWMA General Counsel

DATE: June 14, 2007

RE: ACTION ITEM 5E: Consider Implementing A Proposition 218 Compliant Approval Process To Establish A Groundwater Charge

This memorandum is being provided in anticipation of the Board of Directors' potential consideration of a process for moving forward a Proposition 218 compliant groundwater charge, pending the Agency's challenge to the adverse ruling by the Sixth Appellate District in the Validation Action (*PVWMA v. Aromas*). As discussed at the last meeting, the Court of Appeal determined that it was bound by the Supreme Court's decision in *Bighorn-Desert View Water Agency v. Verjil* to conclude that the charge is a "property related fee or charge" as treated in California Constitution, Article XIII D, subd. 6.

Regardless of the outcome of the validation action, it would *seem* unlikely under any scenario that the augmentation charge will ultimately be deemed a tax, subject to the voter approval requirements of Article XIII C, or an assessment subject to Article XIII D, subd. 4. Accordingly, while the Court of Appeal decision leaves many questions unanswered, the decision does present a roadmap of sorts for moving forward with a proposition 218 compliant "property related fee or charge" process pursuant to Article XIII D, subd. 6.[1]

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1 Procedurally, Article 13D requires the proposing agency to identify parcels upon which the charge will be imposed, and to conduct a public hearing. (*Art. 13D, § 6, subd. (a)(1).*) The hearing must be preceded by at least 45 days written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel ... ." (*Ibid.*) If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." (*Art. 13D, § 6, subd. (a)(2).*) Moreover. Unless the charge is for "sewer, water, [or] refuse collection

Proposition 218 prohibits the imposition of fees or charges for property related water services if, after the requisite notice is given and hearing conducted, written protests are filed by a majority of the owners of parcels identified for imposition of the charge. Property related fees or charges for purposes *other than sewer, water or refuse collection services* must furthermore be approved by a "majority of the property owners of the property subject to the fee or charge", i.e., by an affirmative majority vote. As discussed at the last meeting, one of the questions left unanswered by the Court of Appeal in *PVWMA v. Amrhein* is whether the augmentation charge would be exempt fiom voter approval requirements under the exemption for "sewer, water, and refuse collection services". Although the Court of Appeal essentially found that it was unnecessary to resolve this issue in order to render its decision, there are good arguments for concluding that this exception would apply. For instance, while the term "water service'' is not defined in Proposition 218, the Proposition 218 Omnibus Implementation Act (Cal. Govt. Code $53750, et seq.) defines "water" as'"any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The projects and programs described in the Agency's Revised Basin Management Plan, and funded by the augmentation charge, would seem to fall squarely within this definition.

Obviously, any proposed groundwater charge would be much more likely to survive a majority protest bearing than garner approval by a majority of property owner owners who choose to return a ballot for the same charge. Accordingly, there are distinct advantages to choosing the "majority protest" option. Moreover, while the lack of voter approval has frequently been cited as the basis for opposing the augmentation charge, the fundamental philosophical difference between supporters and opponents of the charge is not over whether the charge should be supported by a majority of voters. Rather, the difference seems to be over whether the cost of balancing the overdrafted groundwater basin should be shared by those who are contributing to the problem (all groundwater users), or borne exclusively by those who are suffering the effects of *overdraft* (coastal users). Given this philosophical divide it is reasonably likely that any revenue mechanism that seeks to spread the cost of groundwater management throughout the basin will be challenged in court, with the focus of *such* challenge bung whether charge is in compliance with the *substantive* requirements of Proposition 218 However, the Agency would have a number of strong arguments in its favor in defense of such a challenge.

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services," "no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." *(Art 13D, § 6, subd. (c).)* .

2 Proposition 218 imposes the following substantive requirements: (1) Revenues derived from the fee or charge shall *not* exceed the funds required to provide the property dated service. (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. (5) No fee or charge may be imposed for general governmental services including, but not limited lo. police, fire, ambulance or

Aside from the decision of whether *to* utilize a majority voter approval process, development of complementary, Proposition 218 compliant, groundwater charge will present a number of questions and issues that must be addressed, and which will also provide opportunities for consideration of alternatives to the existing augmentation charge:

For instance, under the current augmentation charge, the ultimate responsibility for paying the charge rests with the owner of the well from which groundwater is extracted. Applying the procedures of Prop. 218 for property related fees or charges, this would mean that a protest (or vote) submitted by the owner of a well serving a single residential parcel would carry the same weight as that of the owner of a well serving a large public water supply system. On the other hand, the owner of a residence served by a municipal water purveyor.would have no opportunity to participate.[3] In this regard, a single protest (or vote) per parcel process seems to give unfair weight *to* the owners of residential wells, at the expense of owners of large water production facilities for agricultural and municipal purposes. In developing a complementary charge, consideration may be given to providing notice, and an opportunity to protest (or vote) to all property owners who use groundwater, not just those who own wells.

Additionally, development of a complementary charge for groundwater use may provide an opportunity to explore alternative rate structures, such as: *(1)* differential charges for agricultural versus municipal or industrial uses, (2) development of a tiered fee structure to encourage conservation; or (3) differential charges based on superior groundwater nghts. Of come, the key to development of a successful charge will be to craft one that is fair, capable of garnering substantial (if not majority) public support, and reasonably likely to withstand a legal challenge. This will present a considerable, but worthwhile, challenge to any task force assigned by the new fee structure.

I will be happy to respond to questions or comments at Wednesday's meeting

Sincerely,

/s/
Anthony P. Condotti
General Counsel

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library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

3 Ironically, the Court of Appeal's determination that the augmentation charge is "property-related" was heavily influenced by the fact that approximately *80%* of the wells in the Pajaro Valley are for residential properties, even though these wells account for only about 5% *of* overall groundwater consumption.

MEMORANDUM

DATE: July 12, 2007
MEETING OF: July 18,2007
TO: Board of Directors
FROM: General Manager
RE: **ACTION ITEM** 5C: Continued discussion on Implementing a Proposition 218 Compliant Approval Process To Establish a Groundwater Charge

BACKGROUND .

At the June 6,2007 Board Workshop, under discussion related to the adverse ruling by the Court of Appeal, the matter of developing a Proposition 218 compliant groundwater charge that would complement the Agency's existing augmentation charge was also discussed. Counsel subsequently prepared supplemental information on the Proposition 218 approval process for *the* Board to consider with this action. The information from Counsel is attached to this memo.

The information from Counsel identifies two approaches, which if successful would. ensure Proposition 218 compliance for any proposed adjustments to fees or charges. Based on a review of the information prepared by Counsel, staff would recommend that Board consider moving forward with a process set forth in Article XIII D of the California Constitution for fees or charges for "property-related" water service. This procedural approach entails providing 45-days mailed notice and conducting a public "majority protest" hearing. The other would involve the additional *step* of seeking an affirmative majorityvote of the owners ofparcels subject to the charge. Under Proposition 218, this additional step is required for property related fees or charges other than those for "sewer, water or refuse collection services."

The majority protest approach may be challenged on the issue of whether implementation of the groundwater management programs and practices outlined in the Revised Basin Management Plan constitutes provision of water service, as set forth in Proposition 218, thereby exempting the charge from the majority voter approval requirement applicable to property related fees and charges generally The Board could voluntarily conduct a majority vote process in *lieu* of the less burdensome "majority protest" approach but this is likely not required. The Counsel memo clearly provides a rationale, based on statutory interpretation, for concluding that the majority protest process would be legally defensible, and it would clearly be the easier of the two processes io implement

It was further discussed at the workshop meeting that the Board create a task force to build consensus on the structure of a proposed charge, the amount of revenue that the Agency would need on an annual basis, and hence the appropriate groundwater charge to consider. Staff will bring this matter forward as a discussion item at the next meeting of the Board

FISCAL IMPACT

The administrative cost of implementing a Proposition 218 approval process, including the cost of providing notice to affected property owners, will vary depending on the approach selected.

RECOMMENDATION

Staff recommends that the Board direct staff to move forward with initiation of a Proposition 218 compliant "majority protest" procedural approach to address establishing a groundwater charge that complements the Agency's existing augmentation charge.

ATTACHMENT

- Counsel memo dated July 12, 2007

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MEMORANDUM

TO: Bruce Laclergue, PVWMA General Manager

PROM: Anthony P. Condotti, PVWMA General Counsel

DATE: July 12, 2007

RE: ACTION ITEM 5C: Continued Discussion On Implementing A Proposition 218 Compliant Approval Process To Establish A Groundwater *Charge*

This is a follow-up to the memorandum I provided in advance of the June 20th agenda item analyzing the possibility of moving forward with a Proposition 218 compliant groundwater *charge* based on the provisions of California Constitution Article XIIID, subd. 6 pertaining to "property-related fees or charges." It is my understanding that the Board will continue this discussion at the July 18" business meeting, with a follow-up discussion at the August business meeting to explore a range of potential alternatives for funding the Agency's Basin Management projects.

A strategy of moving forward now with an ordinance establishing a complementary groundwater pumping charge would provide the Agency with a fallback position in the event that the Court of Appeal's determination in *PVWMA v. Amrhein* that the augmentation charge is a "property-related fee *or* charge" is upheld and becomes final. It would not completely insulate the Agency from the risk of further litigation, because the Court of Appeal did not examine whether the augmentation charge complies with the "substantive" requirements of Proposition 218. However, given that *case* law involving *the* substantive requirements of Proposition 218 is not well-developed, and the philosophical divide that *exists* on the issue of how the costs of balancing the groundwater basin should be allocated, it is reasonably foreseeable that *any* methodology that one could propose will be challenged in court, and the result of *such* a challenge cannot be predicted with certainty.

In my opinion, however, there are a number of strong arguments that a unit *charge* imposed on groundwater pumping and used to fund implementation of the Revised BMP would satisfy the *substantive* requirements of Proposition 218 relating to "property-related fees or charges".

Under Proposition 218, fees or *charges* for property-related "sewer, water, or refuse collection services" are subject to a majority protest (as opposed to an affirmative majority vote, which is

required for all other property-related fees or *charges).* While the *term* "water service" *is* not defined in Proposition 218, the Proposition 218 Omnibus Implementation Act (Cal. Govt. Code §53750, et seq.) defines "water" as "any system of public improvements intended to provide for lhe production, storage, supply, treatment, or distribution of water." The projects and programs described in the *Agency's* Revised Basin Management Plan, and *funded* by the augmentation charge, would seem *to* clearly fall within this definition

Therefore, there appears to be *a* sound legal basis for concluding *that* a groundwater pumping charge adopted pursuant *to* a majority protest process would satisfy the requirements *of* Proposition 218, provided that the other substantive requirements can be met Accordingly, this memorandum examines those requirements as follows:

3. ***Revenues derived from the fee or charge shall not exceed the funds required io provide the property related service.***

As with the existing augmentation charge, all funds generated by a complementary groundwater pumping charge would *be* used for the purposes outlined in the Revised Basin Management Plan, as follows:

- Balance water demand within *the* PVWMA service area with sustainable water supplies;
- Prevent seawater intrusion in *the area* served by the PVWMA; and
- Initiate long-range programs to protect water supply and quality within the basin.

Assuming that the augmentation *charge* is ultimately determined to be a property-related fee or charge as defined by Proposition *218,* it logically follows that the projects and programs it funds would be considered a property-related service. Inasmuch as the current $160/af augmentation *charge* is insufficient to fully fund the projects outlined *in* the Revised BMP, it is clear that the revenue derived from a complementary groundwater charge would not exceed the funds required to provide this service.

2. ***Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.***

This requirement is self-explanatory.

3. *The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.*

There is an interesting distinction in Proposition 218 between the substantive requirements applicable to assessments versus property related fees or charges. Specifically, Proposition 218 states that that "no assessment shall be imposed on any parcel which exceeds the reasonable cost of the *proportional special benefit conferred on that parcel* [by the assessment]." By contrast, the amount of a property related fee or charge must not exceed the proportional *cost* of the service "*attributable to*" the parcel. For purposes of implementing a basin-wide groundwater pumping charge, this distinction would appear to be of critical importance. On the one hand, although *the* projects and programs described in the Revised BMP, *as* outlined above, have a basin-wide benefit, the specific methods for achieving a balanced groundwater basin clearly have a more direct *effect* on properties that receive supplemental water. Therefore, it would be difficult to establish that the projects outlined in the Revised BMP provide the necessary "special benefit" to parcels not receiving supplemental water so as to justify imposition of an assessment. On the other hand, the *cost* of balancing the groundwater basin "attributable to" a parcel of property can be directly correlated to the amount of groundwater extracted from a well on the parcel. Accordingly, there appears to be a very strong argument that a unit based groundwater pumping charge used *to* fund projects designed to mitigate *the* effects of groundwater overdraft does not exceed the proportional cost *of the* service "attributable to" the parcel, even of the parcel in question does not receive a direct "special benefit" proportional to the amount of the charge

4. *No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question.*

Since the purpose of the projects outlined in the Revised BMP is, generally, to balance the groundwater basin and, more specifically, to mitigate the *effects* of basin-wide over-pumping, it follows that *any* person that pumps groundwater is using and benefiting from the service funded by the augmentation charge—balancing the groundwater basin, and would likewise benefit from a complementary charge.

5. *No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.*

Unlike police, fire, ambulance, library or similar services, the use of groundwater is not generally available to the public at large in the same manner that it is available to property owners Rather, groundwater is generally only available: (1) a property owner or tenant who extracts the water from a well, as in a rural residential or agricultural user, (2) a property owner or tenant who

receives water at his or her residence or place of business,' or (3) a person who receives water service provided as a courtesy by a property owner or tenant. Unlike services provided by, for example, police or fire agencies, a person is not able to avail himself or herself of the basin's groundwater supply simply by being present within the boundaries of the Agency and displaying a need for water.

Based on the foregoing, there appears to be a strong argument that a complementary groundwater pumping charge that is adopted pursuant to the procedural requirements of Proposition 218 would meet the substantive requirements of Proposition 218 for property-related fees and charges.

I will be happy to respond to questions or comments at Wednesday's meeting.

Sincerely,

Anthony P. Condotti
General Counsel

[1] Proposition 218 defines property ownership to include tenancies of real property where the tenant is directly liable to pay the fee or charge in question.

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MEMORANDUM

TO: Bruce Laclergue, PVWMA General Manager

FROM: Anthony P. Condotti, PVWMA General Counsel

DATE: June 20, 2007

RE: **ACTION** ITEM 5E: Continued discussion on Implementing A Proposition 218 Compliant Approval Process To Establish A Groundwater Charge

This memorandum is being provided in anticipation of the Board of Directors' potential consideration of a process for moving forward a Proposition 218 compliant groundwater charge, pending the Agency's challenge to the adverse ruling by the Sixth Appellate District in the Validation Action (*PVWMA v. Amrhein*). As discussed at the last meeting, the Court of Appeal determined that it was bound by the Supreme Court's decision in *Bighorn-Desert View Water Agency v.* [illegible] that the charge is a "property related fee or charge" as treated in California Constitution, Article XIII D, subd. 6.

Regardless of the outcome of the validation action, it would seem unlikely under any scenario that the augmentation charge will ultimately be deemed a tax, subject to the voter approval requirements of Article XIII C, or an assessment subject to Article XIII D, subd. 4. Accordingly, while the Court of Appeal decision leaves many questions unanswered, the decision does present a roadmap of sorts for moving forward with a Proposition 218 compliant "property related fee or charge" process pursuant to Article XIII D, subd. 6.[1]

[1] Procedurally, Article 13D requires the proposing agency to identify parcels upon which the charge will be imposed, and to conduct a public hearing. (*Art. 13D, §6, subd. (a)(1).*) The hearing must be preceded by at least 45 days written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel ... " (*Ibid.*) If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." (*Art. 13D, § 6, subd. (a)(2).*) Moreover, unless the charge is for "sewer, water, [or] refuse collection services," "no property related fee or charge shall be imposed or increased unless and [it] is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the

Proposition 218 prohibits the imposition of fees or charges for property related water services if, after the requisite notice is given and hearing conducted, written protests are filed by a majority of the owners of parcels identified for imposition of the charge. Property related fees or charges for purposes *other than sewer, water or refuse collection services* must furthermore be approved by a "majority of the property owners of the property subject to the fee or charge", i.e., by an affirmative majority vote. As discussed at the last meeting, one of the questions left unanswered by the Court of Appeal in *PVWMA* v. *Amrhein* is whether the augmentation charge would be exempt from voter approval requirements under the exemption for "sewer, water, and refuse collection services". Although the Court of Appeal essentially found that it was unnecessary to resolve this issue in order to render its decision, there are good arguments for concluding that this exception would apply. For instance, while the term "water service" is not defined in Proposition 218, the Proposition 218 Omnibus Implementation *Act* (Cal. Govt. Code §53750, et seq.) defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The projects and programs described in the Agency's Revised Basin *Management* Plan, and funded by the augmentation charge, would seem to fall squarely within this definition.

Obviously, any proposed groundwater *charge* would be much more likely to *m e* a majority protest hearing than garner approval by a majority of property owner owners who choose *to* return *a* ballot for the same charge. Accordingly, there are distinct advantages to choosing the "majority protest" option. Moreover, while the lack of voter approval has frequently been cited as the basis for opposing the augmentation charge, the fundamental philosophical difference between supporters and opponents of the charge is not over whether the charge should be supported by a majority of voters. Rather, the difference seems to be over whether *the* cost of balancing the overdrafted groundwater basin should be shared by those who are contributing to the problem (all groundwater users), or borne exclusively by those who are suffering the effects of overdraft (coastal users). Given this philosophical divide it is reasonably likely that any revenue mechanism *that* seeks to spread the cost of groundwater management throughout the basin will be challenged in court, with the focus *of such* challenge being whether *charge* is in compliance with the *substantive* requirements of Proposition 218.[2] However, the Agency would have a number of strong arguments in its favor *in* defense of *such* a challenge.

2 Proposition 218 imposes the following substantive requirements: (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

Aside from the decision of whether to utilize a majority voter approval process, development of complementary, Proposition 218 compliant, groundwater pumping charge will present a number of questions and issues that must be addressed, and which will also provide opportunities fur consideration of alternatives to the existing augmentation charge.

For instance, under the current augmentation charge, the ultimate responsibility for paying the charge rests with the owner of the well from which groundwater is extracted. Applying the procedures of Prop. 218 for property related fees or charges, this would mean that a protest (or vote) submitted by the owner of a well serving a single residential parcel would carry the same weight as that of the owner of a well serving a large public water supply system. On the other hand, the owner Of a residence served by a municipal water purveyor would have no opportunity to participate.[3] In this regard, a single protest (or vote) per parcel process seems to give unfair weight to the owners of residential wells, at the expense of owners of large water production facilities for agricultural and municipal purposes. In developing a complementary charge, consideration maybe given to providing notice, and an opportunity to protest (or vote) to all property owners who use groundwater, not just those who own wells.

Additionally, developmetit of a complementary charge for groundwater use may provide an opportunity to explore alternative rate structures, such as: (1) differential charges for agricultural versus municipal or industrial uses; (2) development of a tiered fee structure to encourage conservation; or (3) differential charges based on superior groundwater rights. Of course, the key to development of a successful charge will be to craft one that is fair, capable of garnering substantial (if not majority) public support, and reasonably likely to withstand a legal challenge. This will present a considerable, but worthwhile, challenge to any task force assigned by the Board to recommend a new fee structure.

I will be happy to respond to questions or comments at Wednesday's meeting.

Sincerely,

Anthony P. Condotti
General Counsel

3 Ironically, the Court of Appeal's determination that the augmentation charge is "property-related" was heavily influenced by the fact that approximately 80% of the wells in the Pajaro Valley are for residential properties, even though these wells account for only about 5% of overall groundwater consumption.

MEMORANDUM

DATE: August 30, 2007
MEETING OF: September 5,2007 Board Workshop
TO: Board of Directors
FROM: General Counsel
RE: ITEM 4A: Further consideration of potential revenue alternatives in event of adverse result in validation action

At the July 18'' meeting the Board was furnished with a legal analysis supporting the notion of a Proposition 218 compliant majority protest process fox adopting a new augmentation charge ordinance to complement or replace the existing augmentation charge, along with the General Manager's recommendation that the Board move forward with that process pending the final outcome ofthe validation action. The August 22,2007 meeting included a-@sentationby attorney Janet Morningstar OR a range of potential revenue sources, including special taxes, property related fees and charges, assessments, and regulatory fees. Also at the August 22, 2007 meeting staff presented an updated cash flow model highlighting the difficult decisions facing the Board in the near future if the Agency is unsuccessful in the pending litigation and a replacement revenue stream is not identified. *To* facilitate the Board's further consideration of the Agency's situation going forward, the following is *a* reiteration ofthe alternative financing and regulatory options that have been identified.

Choosing an appropriate course of action would seem to require the Board to confront a threshold policy determination as to whether the *cost* of managing the groundwater basin should be primarily borne by *those* who are suffering the effects of overdraft, i.e., water users in coastal areas or, alternatively, should be spread among those who are causing the overdraft, i.e., all groundwater users. The answer to this threshold policy question will to a large extent guide the Board's decision-making. An assessment-based revenue scheme would generally reflect a policy determination to require those affected by overdraft .to pay for the remedy. The other alternatives would reflect a policy determination that the *cost* of the remedy should be spread among all water users who are contributing to the overdraft condition.

1. Seek Approval Of *An* Assessment In The CDS Service Area.

Proposition 2J 8 states that that "no assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional *special benefit conferred on that parcel* [by the assessment]." For this reason, in order to satisfy the requirements of Proposition 218, the Agency would likely be required *to* structure an assessment-based approach so as to apply only within the area *to* receive supplemental water, i.e., within the area served by the Coastal Distribution System.[1] As noted in Ms. Morningstar's presentation, the procedural requirements of Proposition 218 for assessments are very difficult *to* overcome, making the likelihood of success for an assessment-based approach doubtful. Actually, assessments are primarily used in connection with new subdivision projects where a single develope& owner approves of an assessment plan to finance infrastructure, and then sells individual parcels already subject to the assessment. New or increased assessments are rare in developed areas.

[1] Director Eiskamp's August 29,2007 letter to the Board appears to recognize this limitation by his comment urging the Board to attempt *to* "generate support *for* a rational allo[illegible] *benefit* which could result in voter approval."

The process for adopting an assessment is spelled out in Proposition 218. First, an agency proposing to levy an assessment must identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. Next, the proportionate special benefit derived by each identified parcel must be determined in relationship to the entirety of the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided: Proposition 218 prohibits the imposition of an assessment that exceeds the reasonable cost of the proportional special benefit conferred on the parcel to be assessed. Next, the Agency must provide 45 days mailed notice to each owner detailing the amount of the charge. and the basis for its calculation. The notice must also contain a ballot with detailed instructions specifying the manner in which the owner may submit his or her vote, for or against, the proposed charge. The public hearing process is essentially then held to tabulate whether there is a majority in favor of or opposed to the proposed charge. If the number of votes in opposition exceeds the number of votes in favor, then the Agency is precluded from adopting the charge. And the voting is weighted in accordance with the relative financial burden the charge will impose. Assuming most owners in the area served by the CDS believe that the cost of solving the overdraft problem should be shared by all water users, it seems fairly unlikely that assessment-based approach is likely to succeed.

2. Re-adopt The Augmentation Charge Pursuant To The Majority Protest Provisions Of Proposition 218 For "Property-Related" Few Or Charges.

At the July 18th meeting the Board received an analysis of the legal viability of a complementary groundwater pumping charge similar to the existing augmentation charge, but adopted pursuant to the procedural requirements of Proposition 218. As previously noted, this approach assumes that the Court of Appeal's determination in *PVWMA v. Amrhein* that the augmentation charge constitutes a "property-related fee or charge" is ultimately upheld. It would not completely insulate the Agency from the risk of further litigation, because the Court of Appeal did not examine whether the augmentation charge complies with the "substantive" requirements of Proposition 218, nor does the decision address whether the programs and activities spelled out in the Agency's Basin Management Plan would qualify as "water service" so as to be exempt from the majority voter approval process of Proposition 21.8. Nevertheless, this approach clearly stands the greatest chance of successfully overcoming the procedural requirements of Proposition 218, and the analysis presented at the July 18" meeting provides a rationale for meeting the substantive requirements that is reasonably likely to withstand a legal challenge.

***3. Seek* Voter Approval Of The Augmentation Charge.**

Regardless of whether it is legally mandated, the Board could voluntarily choose to seek voter approval of the augmentation charge. This would eliminate the question of whether the Agency provides "water service" as a potential issue for challenge, but would not completely insulate the Agency from a legal challenge based on Proposition 218's substantive requirements. Obviously, the likelihood of obtaining a majority vote in favor of the augmentation charge is less than the likely failure of a majority protest

4. Limit Groundwater Pumping As Authorized By Agency Act

The Agency Act authorizes the Agency to restrict groundwater pumping. Section 124-711 of the Act states as follows:

> Sec. 711. The agency, in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, control of extractions, and construction of wells and drainage facilities. These powers shall include the right to regulate, limit, or suspend extractions from extraction facilities, the construction of new extraction facilities, the enlarging of existing facilities; or the reactivation of abandoned extraction facilities. Limitation, control, or prohibition related to extraction shall be instituted only after the board has made factual findings that the limitation, control, or prohibition is necessary.

If the *Agency* limits pumping, then the Agency Act requires that the Agency allocate the rights to use the available supply of groundwater primarily on the basis of the amount *of* water used by tbe operator as a percentage of the total amount *of* water being used within the Agency. (Section 712). The Act authorizes the Agency to adjust the proposed allocationfor any of the following factors:

1) The number of acres actually irrigated compared to the number of acres owned or leased, for a period of three years.

(2) Water used in relation to best management practices for the use being made of the water.

(3) Wasteful or inefficient use.

(4) Reasonable need.

(5) Any other factor that the agency reasonably feels it should consider *in* order to reach an equitable distribution.[2]

The Agency Act contemplates the establishment of a market-based reallocation of groundwater in the event the Agency *imposes* pumping restrictions. In this regard, Section 124-713 states:

(a) If the agency limits or suspends extraction by operators of extraction facilities, no operator may extract increased amounts *of* groundwater from an existing, new, enlarged, *or* reactivated extraction facility, until the operator has applied for and received a permit from the agency

(b) The agency *shall* grant, at the earliest date possible, the permit upon a showing by the applicant that the applicant *has acquired from existing permitted extractors, water entitlement equivalent to the amount of water the applicant seeks to extract* in the permit application.

[2] One "other factor" *the* Agency must take into consideration in imposing pumping limits *is* the water rights of the producer. *See, City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.

5. Limit Groundwater Pumping With Supplemental Regulatory Fee

As mentioned by Ms. Morningstar, a possible alternative to the water entitlement marketplace approach contemplated by Section 713 would be to impose a regulatory pumping fee per unit of water in excess of the permitted amount determined by the Agency, and to use the funds generated thereby to provide supplemental water. Because such a supplemental water charge is not expressly permitted by the Agency Act, if the Board is interested in exploring this approach, additional analysis will be needed to determine whether the ability to restrict pumping as set forth in the Agency Act includes the implied ability to impose a regulatory fee in lieu of such restrictions. Alternatively, a regulatory charge could be implemented in connection with adjudication of the groundwater rights of the basin, discussed in further detail below.

6. Adjudicate Groundwater Rights Of Basin

Section 1106 of the Agency Act expressly authorizes the Agency to "commence, maintain, intervene in, defend, compromise, and assume the costs and expenses of legal actions and administrative proceedings now or hereafter begun involving surface and groundwater, including, but not limited to, a groundwater rights adjudicatio&" While one of the objectives of the Basin Management Plan strategies and programs may be to avoid the uncertainties and expenses of a water rights adjudication, the fact is that adjudication of the groundwater basin may put to rest many of the issues upon which the litigation over the augmentation charge (and other attempts to oppose BMP implementation) are based In the event of a groundwater rights adjudication, a reasonably likely outcome will be the imposition of basin-wide pumping restrictions, with a fee structure for pumping in excess of the established limits to generate revenue for development of supplemental water supplies.

Fiscal Impact:
Depends on approach selected.

Recommendation:

Board discussion and direction.

GENERAL MANAGER's PRESENTATION
TO THE SANTA CRUZ **COUNTY BOARD OF SUPERVISORS**
Tuesday, October 16,2007

I Introduce Chair Dobler, Directors Cervantes, Osmer, and Eiskamp [Agency Counsel?)

II Problem statement -- first recognized by State of California in 1953, Bulletin No. 5, Santa Cruz-Monterey Counties Investigation

A. Then: Two year study:
Approximately 35,000 Acre-feet pumping
Approximately 22,000 Acre feet = safe yield
Seasonal pumping depressions near river would recover to
Above sea level elevation; slight issue with intrusion
Notable that water flows from point of recharge, throughout aquifer and discharges offshore

B. Today:
+ 70,000 acres within Agency
Pumpage declined to somewhere between 50,000 to 60,000 acre-feet
(attributable to $160 augmentation fee charge)

Safe yield: approximately 25,000 acre-feet

Overdraft somewhere between 25,000 and 35,000 acre-feet ***per*** year

Groundwater elevation:
April 2005: 37,100 acreagebelow sea level (best timeofyear, after period of recovery); 52.5% of basin
Sept. 2005: 48,200 acreage below sea level (worst time of year, after period of heavy irrigation demand); 68.5% of basin

Seawater Intrusion: 10 → 15,000 acre-feet per year

III CHRONOLOGY OF EVENTS TO NOTE - Present Accomplishments and Activities largely unheralded:

1953 Bulletin 5 - previously noted above
1967 Authorization for fed water 19,900 AF from CVP through San Felipe Division to Watsonville sub-area; Parties include SCVWD and SBCWD
1975 Bulletin 118, **CA** groundwater: Pajaro Valley subject to conditions of critical overdraft
1984 PVWMA formed to effectively, efficiently manage groundwater in PV Basin, provide supplemental water to agriculture
1990 BMP required by feds in order to execute contract for allocations – BMP concept then: direct Pajaro River Water through a conveyance canal to College Lake; inject water when released from College Lake

1991 CVPIA entered prior to completion of BMP -- no new contracts; fix the Delta, set aside water for wildlife.

1993 Well registration, metering wells with usage above 10 acre-feet per year – initiate augmentation fee

1999 Purchase CVP contract from Mercy Spring (Los Banos) 6,200 a/f
Currently used by Westland Water District and Santa Clara Valley Water District
PVWMA has annual option *to* recover between 2009-2019

2002 Revised BMP – to acknowledge accelerated overdraft/intrusion rates and to qualify for federal money through Bureau of Reclamation (Title XVI)
Objective: "Balance Demand with sustainable supplies. Prevent sweater intrusion in area sewed by PVWMA. Initiate long-range programs to protect water supply and quality within Basin.
Groundwater modeling shows that by restricting pumping along coast, safe yield increases from 25,000 acre-feet to 50,000 acre-feet ["Managed Yield"]

Revised BMP Concept:
Development of recycled water; CDS; import water pipeline;
out-of-basin banking in advance of pipeline construction

2004 Fed Agreement through Bureau of Reclamation Title XVI program – recognizes up to $80M in eligible project expenses; provided matching funds **up** to 25% ($20M), Watsonville Area Recycled Water Project, CDS, portion ofpipeline and blend facilities

Projects Developed:

- around this time, Harkins Slough Project developed diverting surface runoff to local recharge pond near San Andreas Road

- Build 1st phase of **CDS** w/Prop. 13 grant and loan – *green* pipe [on Map] in Santa Cruz County

2005-06 IRWMP --- watershed approach ***to*** local problem (4 counties) Partner with SCVWD and SBCWD

- Four program areas: water supply, water quality, *flood* control, environmental enhancement
- State highly supportive of Pajaro Watershed IRWMP – awarded $25M grant Prop. 50 to implement projects. 2nd highest rated application in State.

IV 2006-07 CONSTRUCTION – collaborative effort with City of Watsonville

- 10 miles of CDS; 60 to 70 turnouts
- **All** the pipe in ground; substantially complete next month; working on turnouts and other appurtenances

(a) RWF – 4000 A/F tertiary treatment, disinfected with UV radiation for e-coli and pathogens

(b) Blended with 2000 acre-feet groundwater + 1000 acre-feet Harkins Slough project = 7,000 acre-feet

(c) Substantially complete in July 2008 – then UV testing – deliveries in Sept. 08?

- Important to note 65 M in construction including
- $43M in grant support = *65%*
- Agency Cash for CDS
- City cash and bonds for RWF – Agency *to* pay back City cash and debt service on bonds. Bond sale approved by City Council last week.

V LEGAL MATTERS – uncertainties regarding validity of past rate increases in the Agency's augmentation fee
Agency action upheld in trial court and in Appellate Court

(a) Supreme Court new ruling in ***Big Horn*** may influence prior decisions. Validation case back to Appellate court; reversed in May 07. Augmentation fee or charge is incidental to property ownership, therefore subject to Prop. 218

(b) Petition – State Supreme Court denied in September 07
On October 1st, original ordinances rescinded and augmentation charge restructured to $80, also protects the delivered water charge – currently at $262 acre-feet

(c) Case Management Conference including potential settlement by December

VI MATTERS OF CASH FLOW/FINANCIAL MODELING

(a) @$80/af – issues of longevity of Agency – i.e., "50,000 acre-feet @ $80/af = $4M

Staffing
O & M
Annual debt service → = $4.0M
Meeting obligations for repayment of over collected fees

(b) without grants = two years
with Prop. 50 Grant – $4.4M to RWF; $7.0M to CDS = ± 3.0 years

Title XVI - $10Million left in eligible matching costs.
Agreement – 5 more years @ $2M per year. Agency is proposing 2 years @ $5M each, then close hooks

Title XVI funds go to City of Watsonville; flexibility in debt service payments or reducing principal on bond.

(c) Need somewhere between $125 acre-feet to $140 acre-feet to arrive at $7.0M per year
5 years > 10 years

(d) Three approaches to rebuild rate – Board approved

- Prop. 218 compliant (2): majority protest or majorityvote
- Assessments *(2):* land or pumping
- Regulatory fee: tiered structure/per acre-feet pumped

(e) Holding public Forums on select water topics to generate community interest/support

November 1st at 7:00 pm, City of Watsonville, Community TV
4 speakers: overdraft; intrusion; water rights, adjudication of Seaside Coastal Basin

VII CLOSE WITH SUMMARY OF REVISED BMP/AGENCY SUCCESS

(a) Agency BMP efforts as outlined in Ricker's October 10, 2007 memo to Santa Cruz County Board of Supervisor, go over:
(b) Agency accomplishments – acknowledged earlier *to* be largely unheralded:
- BMP Implementation
- IRWMP Plan recognition
- IRWMP regional award to implement projects
- Other Prop. 13 and Title XVI grant awards
- Construction Program / completion
- Better delivered water quality then CSIP including UV disinfection

Provide a straight account of history and events to provide reference on the credibility and accomplishments of the Aency

The issue at hand is simply to restore financial stability.

Rebuilding new rate structure. The Directors and Staffhave learned some lessons from past differences and are seeking ways to work together with the public.

Take questions

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