

EXHIBIT 1-E**De LAY & LAREDO**

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TO: Board Members

FROM: David C. Laredo, General Counsel

RE: Hearing Guidelines re: Ryan Ranch Water Distribution System

This memo provides an overview of the process to be followed during the January 21, 2009, Monterey Peninsula Water Management District ("MPWMD" or "District") administrative hearing regarding the sufficiency of physical supplies to serve the Ryan Ranch Water Distribution System ("WDS" or "System").

Background & Process Overview

The District was created to address water problems in the Monterey Peninsula area, and was endowed with the powers set forth in the District Law.¹ The District is authorized to establish a written permit system to regulate Water Distribution Systems ("WDS"), regardless of the number of connections served or the source of the water supply. Regulation is necessary to protect District water resources and to assure that sufficient water will be available for present and future beneficial use by all District inhabitants and lands.

The District has enacted a comprehensive scheme, dating back to 1980, to review and regulate the creation and expansion of WDS. For each WDS, the District permit sets a System Capacity and an Expansion Capacity. The District has defined those terms by ordinance, as codified by its Rules and Regulations (District Rules) in District Rule 11.² Most recently, the Board adopted Ordinance No. 136, codified in Rule 40, to address a circumstance where a WDS has not yet exceeded its System Capacity or its Expansion Capacity, but for which credible evidence establishes that the System Capacity or Expansion Capacity, or both, require modification.

Pursuant to Rule 40(B)1,³ the District may issue a Notification of Apparent Insufficient Physical Supplies to Serve a Water Distribution System ("WDS") where the General Manager determines that physical water supplies serving a WDS do not appear sufficient to support the System Capacity and/or Expansion Capacity. The General Manager's determination is required to be based upon credible information presented by a certified hydrogeologist, a registered geologist with a specialty in

¹ District Law is set forth in Chapter 527, Statutes of 1977, West's Water Code - Appendix, Section 118-1, et seq.

² District Rule 11 defines "System Capacity" as the amount of water in gallons, cubic feet or Acre-Feet that can be produced for annual delivery to a WDS based on the cumulative Sustained Yield of Wells adjusted for periodic lowering of the water table and the projected yield of other Sources of Supply; "Expansion Capacity Limit" as the maximum number of connections beyond which a Water Distribution System is not authorized to Expand.

³ Adopted by District Ordinance No. 136.

hydrogeology, a certified engineering geologist with a specialty in hydrogeology, or a registered civil engineer with a specialty in hydrogeology.⁴

California American Water ("CAW") owns and operates the Ryan Ranch WDS pursuant to the 1989 Ryan Ranch WDS Permit. This WDS permit specifies that the Ryan Ranch WDS System Capacity is 175 acre-feet per year ("AFY"). On September 19, 2008, General Manager Darby Fuerst forwarded a letter ("Notification") pursuant to Rule 40 that sets forth his determination that the physical water supplies that serve CAW's Ryan Ranch WDS do not appear sufficient to support the System Capacity specified in the Ryan Ranch WDS permit. (September 19, 2008 letter from D. Fuerst to C. Anthony, attached as Exhibit A.)

Pursuant to District Rule 40 (b), when Notification is issued by the General Manager, the District Board of Directors shall hold a hearing to determine whether, and to what extent, modifications should be made to the System Capacity or Expansion Capacity Limits, or both, presently specified for the WDS.⁵ In accord with District Rule 40 (b), a hearing has been calendared for January 21, 2009, to allow the Board of Directors to determine the sufficiency of physical supplies available to serve the Ryan Ranch WDS. (Rule 40, attached as Exhibit B).

Modification of the System Capacity or Expansion Capacity Limits, or both, is required to be supported by substantial evidence, including credible expert analysis, that establishes physical water supplies available to the WDS are not sufficient to meet permitted System Capacity or Expansion Capacity limits.⁶ The Board is required to render a written decision, with findings, which may thereafter be subject to judicial review within ninety (90) days pursuant to the provisions of the Code of Civil Procedure, section 1094.6.⁷

Hearing Guidelines

Overview

The District Board of Directors is required to conduct the hearing on the Ryan Ranch WDS as a civil proceeding and must provide a full opportunity for all Parties to address the District's determination that physical water supplies are insufficient to serve the System, as well as any proposed modifications to permitted System Capacity or Expansion Capacity Limits. Parties may include the District, CAW as the owner of the owner or operator of the WDS, other owners or occupants of parcels within the WDS, and other persons potentially affected by modification of these limits.

Courts have established the minimum due process safeguards for administrative hearings to include: (1) adequate notice to the proper parties; (2) a reasonable opportunity to be heard; and (3) a chance to

⁴ District Rule 40(B)(1), p. 40-3.

⁵ District Rule 40(B)(2)(b), pp. 40-3 - 40-4.

⁶ District Rule 40(B)(3), p. 40-4.

⁷ District Rule 16, p. 16-1.

controvert the evidence. A proceeding before an administrative officer or board is adequate if the basic requirements of notice and opportunity for hearing are met. *Blinder, Robinson and Co. v. Tom*, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986). A full judicial-type hearing is not required. *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 58 Cal. Rptr. 2d 721 (1996).

Process

The Chair of the Board presides over the hearing, just as a judge would in a courtroom. All members of the Board must remain neutral. Only facts presented during the hearing may be taken into account as forming a basis for the decision of the Board. The hearing is required to be conducted in an orderly manner, with proper decorum by all persons present. The intent of the hearing is to allow full and fair review of the issues.

At the beginning of the hearing, the Chair of the Board should identify him or herself and state expectations for the hearing. Each Party appearing in the matter should be identified, and a single principal spokesperson should be identified for each Party.

The Board has the authority to conduct fair and impartial hearing including, but not limited to, the power to:

1. Administer oaths or affirmations (through the Chair);
2. Hear testimony. Hearsay testimony may be admitted and relied upon by the Board in making its determination; the Board shall determine the weight, if any, given to such testimony. The Board, through the Chair, may question Parties and/or witnesses and request additional information prior to closing the hearing;
3. Receive/Weigh Evidence. Technical rules of evidence shall not apply. Relevant documents may be received into evidence without formal proof of authentication. The Board shall determine the weight, if any, afforded documents or testimony received into evidence; Irrelevant and unduly repetitious evidence may be excluded by order of the Chair;
4. Preserve and authenticate the record of the hearing (through the Clerk of the Board) and all exhibits and evidence introduced at the hearing;
5. Regulate the course of the hearing (through the Chair) and take action as needed to preserve proper decorum by all persons present at the hearings. If necessary, disruptive people may be removed from the hearing room and cause cases to be determined outside of their presence; and
6. Issue a final order which includes findings of fact and conclusions of law.

Parties who fail to appear at the hearing shall be in default. The failure of any Party to appear at the hearing shall constitute a failure to exhaust administrative remedies.

Parties appearing at the hearing must be prepared to proceed, and may call witnesses, present or refer to other evidence at the hearing. The Chair may allow one representative of each Party to make brief opening and/or closing statements.

The Chair, as appropriate, shall regulate the course of the hearing as presiding officer, may administer oaths or affirmations, rule upon motions, objections, and the admissibility of evidence (the technical rules of evidence shall not apply), grant continuances of the hearing as needed for good cause, and shall sign all written orders or decisions on behalf of the Board.

The Hearing shall be recorded. The District shall determine the manner in which the transcript of proceedings shall occur. The Chair shall have sole discretion whether or not to certify that transcript as an official record of the hearing. Any Party may obtain a copy of the official transcription at their own cost.

All evidence must be part of the record. Board members shall not conduct independent investigations into the subject of the hearing.

Role of Counsel

District General Counsel

District General Counsel shall not act as District prosecutor or as defense counsel at this hearing, but shall instead provide general advice and consultation to the Chair and Board. District General Counsel, upon request of the Chair, may prepare a draft tentative decision, including proposed findings and order. The Board shall have sole authority to accept, reject or modify any tentative decision, findings or order.

District General Counsel, or his deputy, shall represent the District in any court-proceeding to review the hearing on the Ryan Ranch WDS, including but not limited to proceedings convened pursuant to California Code of Civil Procedure section 1094.6.

District's Prosecuting Attorney

In conducting this administrative hearing, the District has retained Fran Farina as an independent attorney to assist staff with the prosecution of the action. This action has been taken to avoid any possibility of bias or potential due process violation following the guidance of *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196 (1992) and *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d. 234 (2003).

The Prosecuting Attorney and staff shall present evidence and/or testimony in support of the General Manager's determination regarding sufficiency of physical water supplies to the Ryan Ranch WDS.

Staff and/or the Prosecuting Attorney may submit a report on the determination, present evidence by declaration or testimony, and set forth a recommendation as to relevant findings and conclusions. Any report submitted by District staff or the Prosecuting Attorney shall constitute prima facie evidence of the respective facts contained in those documents. This means that the report may be enough evidence by itself to support the District's determination.

At the hearing, the Prosecuting Attorney bears the burden of proof to establish whether, and to what extent, modifications should be made to the System Capacity or Expansion Capacity Limits, or both, presently specified for the WDS. The burden of proof shall be substantial evidence that establishes physical water supplies available to the WDS are not sufficient to meet permitted limits, and if so, what new System Capacity or Expansion Capacity Limits should be adopted. *See Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 718, 97 Cal. Rptr. 840 (1971).

"Substantial evidence is evidence 'of ponderable legal significance,' which is reasonable in nature, credible and of solid value." *JKH Enterprises, Inc. v. Department of Industrial Relations*, 142 Cal.App.4th 1046, 1057 (2006). Substantial evidence is not synonymous with "any" evidence. *Newman v. State Personnel Bd.*, 10 Cal.App.4th 41, 47 (1992). Generally, substantial evidence has been defined as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *California Youth Authority v. State Personnel Bd.*, 104 Cal.App.4th 575, 585 (2002); *Desmond v. County of Contra Costa*, 21 Cal.App.4th 330, 335 (1993).

Evidence regarding the determination of insufficiency may be presented by any Party, including CAW, any owner or occupant of any real property affected by the determination, other persons potentially affected by modification of these limits, and/or by the District's Prosecuting Attorney or staff. Substantial evidence must be based upon credible information presented via declarations and/or oral testimony from a certified hydrogeologist, a registered geologist with a specialty in hydrogeology, a certified engineering geologist with a specialty in hydrogeology, or a registered civil engineer with a specialty in hydrogeology.⁸

Other Parties

Each party shall have the right:

1. To be present; Individuals may represent themselves or hire an attorney to represent them at their own expense.
2. To call and examine witnesses on any matter relevant to the issues of the hearing.
3. To introduce documentary and physical evidence.
4. To cross-examine witnesses on any matter relevant to the issues of the hearing.

⁸ District Rule 40(B)(1), p. 40-3.

5. To impeach any witness regardless of which party first called the witness to testify.
6. To introduce rebuttal evidence.

The Decision, Findings and Order

After the Parties have been heard, the Chair shall close the hearing and the Board shall then take the matter under submission. The Board may discuss the matter and reach a decision that determines, based on substantial evidence of the written and oral evidence presented at the hearing, whether to uphold or modify the System Capacity or Expansion Capacity limits, or both. If modifications are to be made to the System Capacity or Expansion Capacity Limits, the decision should quantify those limits and provide for any conditions as may be relevant. The Decision should list findings of the Board to support the decision, stating the reasons therefore. The Chair may direct District Counsel to prepare a tentative decision.

The Board should include findings as to the following elements relating to its determination as to the sufficiency of physical water supplies for the WDS:

1. The identity of the responsible and affected Parties;
2. A description of the Ryan Ranch WDS, including the present System Capacity or Expansion Capacity limits, and basis for same;
3. The basis for General Manager Darby Fuerst's determination regarding the insufficiency of physical water supplies to service the Ryan Ranch WDS, including reference to Rule 40 and a description of the circumstances pertaining to the insufficiency, including the demand of the WDS and number of existing connections;
4. The modifications, if any, to the permitted System Capacity Limit of the Ryan Ranch WDS, and the grounds for same, based upon substantial evidence;
5. The modifications, if any, to the Expansion Capacity Limit of the Ryan Ranch WDS, if any, and the grounds for same, based upon substantial evidence;
6. The Board's directions regarding receipt and/or processing of expansion or extension applications for the Ryan Ranch WDS;
7. The adoption of other conditions for the Ryan Ranch WDS which may be warranted due to the absence or extent of special conditions or situations, as they relate to the insufficiency; and
8. The Process for compliance and continued monitoring of the Ryan Ranch WDS.

The findings shall support the decision and show the reasons for that decision. Findings shall be supported by substantial evidence received at the hearing. The Board shall determine the weight, if any, to be afforded documents, testimony or other materials received into evidence.

The Board may review and adopt the final decision and findings at a later meeting. Adoption of the decision may be on the consent calendar, or may be set as an action item at that meeting. The Board's written determination and Notice of Decision shall be served upon all Parties. The decision of the Board shall be final.

Judicial Review

The Notice of Decision shall advise that if any Party disagrees with the Board's final written determination, that Party may obtain review of the Decision in the Superior Court by filing with the court a petition for writ of mandate within ninety (90) days in accord Rule 16 of the District Rules, which incorporates by reference section 1094.6 of the California Code of Civil Procedure⁹.

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⁹ District Rule 16, p. 16-1.