

*Submitted by staff at
1/27/2011 Board Meeting.
Item 2.1*

**REIMBURSEMENT AGREEMENT BETWEEN
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
AND
CALIFORNIA AMERICAN WATER
FOR
CONSTRUCTION & TESTING OF SEASIDE MIDDLE SCHOOL ASR WELL #1**

THIS AGREEMENT is entered into this _____ day of _____ 2011, by and between California-American Water Company (California American Water) and the Monterey Peninsula Water Management District (Water Management District).

**Article I.
Recitals**

1.01 The Water Management District was created by the California Legislature in 1977 by Statutes of 1977, Chapter 527, as amended. This law is hereinafter referred to as "the Water Management District Law." Section 325 of the Water Management District Law provides that "the district shall have the power as limited in this law to do any and every lawful act necessary in order that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants within the district, including, but not limited to, irrigation, domestic, fire protection, municipal, commercial, industrial, recreational, and all other beneficial uses and purposes."

1.02 On July 5, 1995, the California State Water Resources Control Board issued Decision 1632, approving certain applications of the Water Management District seeking to construct the New Los Padres Dam. Decision 1632 granted to the Water Management District the right to appropriate approximately 29,000 acre-feet of water per year from the Carmel River, directly and to storage. This water right was originally reflected in Permit 20808.

1.03 The Water Management District has not, and will not, construct the New Los Padres Dam due to a vote of the electorate.

1.04 In 1997, the Water Management District identified an Aquifer Storage and Recovery (ASR) Program as an alternative to constructing the New Los Padres Dam. The ASR program enables excess winter flows from the Carmel River to be diverted and stored in the Seaside Groundwater Basin for use during the summer months in accord with guidelines set by federal and state fisheries agencies.

1.05 The California State Water Resources Control Board also issued Order 95-10 on July 5, 1995. In Order 95-10, the State Water Resources Control Board found that California American Water did not have the rights to approximately 70 percent of the water it was diverting from the Carmel River.

1.06 In Condition No. 2 of Order 95-10, the State Water Resources Control Board ordered California American Water to obtain legal water rights to the water it diverts from the Carmel River, or obtain water from another source and reduce its Carmel River Diversions on a one-for-one basis.

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**

1.07 To implement the ASR Program and in an effort to comply with Order 95-10, California American Water and the Water Management District sought and obtained approval from the State Water Resources Control Board to modify Permit 20808 to implement Phase 1 of this ASR program. On December 3, 2007, the State Water Resources Control Board issued jointly to the Water Management District and California American Water Permit 20808A to implement Phase 1 of the ASR Program. Those rights not used to implement ASR Phase 1 remained with the Water Management District under newly issued Permit 20808B.

1.08 On June 27, 2008 the Water Management District filed an application to change Permit 20808B to implement Phase 2 of the Aquifer Storage and Recovery (ASR) Program. California American Water is working cooperatively with the Water Management District to implement Phase 2 of the ASR Program.

1.09 On October 20, 2009, the State Water Resources Control Board issued Order WR 2009-0060. In that order, the State Water Resources Control Board found that California American Water was in violation of Condition No. 2 of Order 95-10.

1.10 Condition No. 5 of WR 2009-0060 requires California American Water to implement one or more "small projects" that would provide a temporary supply of water of at least 500 acre-feet per year.

1.11 California American Water has submitted to the California Public Utilities Commission a rate case for the period of 2012 through 2014. That rate case contemplates only design and planning tasks for ASR Phase 2 between 2012 and 2014.

1.12 Projects that expand the ASR Program as a means of supplying potable water are a benefit to the Monterey Peninsula environs and ratepayers as cost effective ways to provide water without further degradation of the Carmel River or Seaside Groundwater Basin.

Article II. Purpose

2.01 This Agreement is intended to assist California American Water's compliance with Condition No. 5 of Order WR 2009-0060 by advancing the schedule for design, planning, construction and testing of the ASR program compared to the Strategic Capital Expenditure Plan contained in California American Water's 2012 to 2014 rate case.

2.02 This Agreement specifies terms and conditions upon which: (a) California American Water shall reimburse the Water Management District for the construction costs to construct one Aquifer Storage and Recovery injection well and appurtenant facilities located at Seaside Middle School (hereinafter and collectively "Seaside Middle School ASR Well #1"); and (b) the Water Management District shall contribute the Seaside Middle School ASR Well #1 to California American Water suitable and able to operate as an injection well.

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**

2.03 Based upon the facts set forth in Section I, California American Water shall pay the Water Management District the expenses the Water Management District incurs to design, plan, construct, and test the Seaside Middle School ASR Well #1 in an amount not to exceed \$2,500,000 subject to the other terms and conditions in this Agreement. This "not to exceed" amount, however, shall not limit the Water Management District from incur contingency costs and expenses of ten percent (\$250,000), which California American Water agrees to pay to the extent these are reasonable and necessary.

Article III.

Use of Funds; Contingency For Site Acquisition and Entitlement Progress

3.01 The Water Management District shall use funds received pursuant to Section II exclusively as reimbursement for reasonable and necessary design, planning, construction and testing costs incurred, including interest paid by the Water Management District, related to of the Seaside Middle School ASR Well #1.

3.02 California American Water's obligations under this Agreement are contingent upon California American Water closing escrow to purchase easements at Seaside Middle School.

3.03 The timing of California American Water's payment obligations hereunder are further subject to the Water Management District making satisfactory progress on the necessary permits such that at the time the Seaside Middle School ASR Well #1 is transferred to California American Water, the well is fully entitled to operate as an ASR injection well except for any entitlements required from the California Department of Public Health. The entitlements to be procured by the Water Management District include, but are not limited to, water rights, waste discharge requirements, water distribution system permits, and CEQA compliance.

Article IV.

Terms Of Construction

4.01 The Seaside Middle School ASR Well #1 will be constructed to the specifications contained in Exhibit A along with any subsequent changes authorized by California American Water, and in accordance with the terms and conditions of the construction contract between the Water Management District and its contractors.

4.02 The Water Management District shall pay all contractors and other vendors in accordance with the contracts between such parties. The Water Management District shall invoice California American Water once each calendar quarter. Such invoice shall include copies of all invoices received by the Water Management District from its vendors that are included as a charge listed in the Water Management District's invoice. Unless otherwise provided by this agreement, California American Water shall pay the full amount of the Water Management District's invoice within 30 days of receipt.

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**

4.03 California American Water will construct pipelines to transport water between Seaside Middle School ASR Well #1 and California American Water's existing potable water system.

4.04 California American Water is responsible, at its sole cost, for permitting, regulatory monitoring or other necessary approvals from the California Public Utilities Commission or the California Department of Public Health that California American Water requires to operate the well in connection with its potable water distribution system. California American Water shall also be responsible for any on-going mitigation monitoring and reporting associated with the operation of Seaside Middle School ASR Well #1. This agreement is not intended to change the obligations of the Parties with respect to the Seaside Basin Adjudication or the federal Endangered Species Act, except as those obligations may arise from actions required by the Parties pursuant to the other provisions of this Agreement. The Parties further acknowledge that this project is intended to be associated with State Water Resources Control Board permit 20808B, which has yet to be issued by the State Water Resources Control Board. The Parties agree to meet and confer regarding the monitoring and reporting obligations associated with Permit 20808B or any successor permit.

4.05 After the transfer of Seaside Middle School ASR Well #1 to California American Water, California American Water will indemnify and defend the Water Management District from any third party claims arising out of California American Water's use and ownership of Seaside Middle School ASR Well #1, except for any challenges to the entitlements procured by the Water Management District.

4.06 The Water Management District shall assign to California American Water all rights to make claims against design professionals and construction contractors for the design and construction of the well and appurtenances, such that California American Water may directly prosecute claims against those vendors for design or construction defects, whether patent or latent, in the Seaside Middle School ASR Well #1. The Water Management District shall further ensure that its contracts with such vendors do not contain exculpatory clauses that limit the right of California American Water to seek any remedy available under California law for such defects. The Water Management District shall further ensure that all warranties for the Seaside Middle School ASR Well #1 are assigned to California American Water unless such assignment is prohibited by law. The Water Management District shall specify any right or warranty that it is prohibited: (a) by the terms of a contract that predates this Agreement, or (b) by law, from assigning to California American Water.

**Article V.
Responsibilities**

5.01 In its performance of activities under this Agreement, the Water Management District shall act as an independent contractor and not as an agent or employee of California American Water. The Water Management District shall have exclusive and complete control over its employees and subcontractors, and shall determine the method of performing the services hereunder.

5.02 California American Water, for its part, agrees to provide access to information in its possession and cooperation of its staff in order to assist the Water Management District and

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**

its contractor(s) to carry out its responsibilities herein. Any information California American Water provides to the Water Management District for the purposes of this agreement marked as "confidential" shall be treated in the same manner as "Confidential Information" is treated under the California American Water-Water Management District Non-Disclosure Agreement dated June 22, 2009.

Article VI. Amendment and Integration

6.01 This Agreement sets forth the entire understanding of the parties with respect to the subject matter herein. There are no other agreements expressed or implied, oral or written, except as set forth herein.

6.02 If, during the course of the work herein contemplated, the need to change the purpose of this Agreement should arise, for whatever reason, whichever party first identifies such need to change shall notify the other party in writing. The authorized representatives of the parties shall meet within seven (7) working days of the date of such notice, to discuss the need for change so identified and to determine if this Agreement should be amended.

6.03 Any changes agreed to shall be documented by duly approved and executed amendments to this Agreement or other means acceptable to both parties.

Article VII. Subsequent Review by California Public Utilities Commission

7.01 The Water Management District and California American Water each acknowledge that: (a) CPUC Decision 09-07-021 does not provide funds from California American Water rate payers to construct the Seaside Middle School ASR Well #1; (b) that California American Water has been authorized to establish a memorandum account for costs related to compliance with Order WR 2009-0060; (c) that the CPUC will undertake a reasonableness review of expenses recorded in that memorandum account; and (d) that the CPUC may disallow costs it deems unreasonable or imprudent.

7.02 The Parties nonetheless deem this reimbursement agreement is important to the Monterey Peninsula's water supply and that any effort California American Water undertakes to comply cost-effectively with Order WR 2009-0060 inures to the benefit of the Water Management District's constituents.

7.03 As to any event where the CPUC disallows California American Water's request for reimbursement of recorded interim costs funded pursuant to this Agreement, then and in those events California American Water and the Water Management District shall immediately meet and confer in an attempt to identify the reason(s) for disallowance, and shall agree as to how consequences of disallowance may be equitably shared between them. Should an agreed sharing of this risk not be reached within ninety (90) days after the date either party first requests resolution, the parties shall then select a mediator by requesting a list of seven (7) qualified arbitrators from the State Mediation and Conciliation Service. The parties shall flip a coin to determine who strikes first and shall alternate striking mediators until one name remains. The

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**

selected mediator shall provide a written recommendation as to how the parties shall equitably share the consequences of the disallowed interim costs, taking into account the amount of disallowance, the nature of the activity that was disallowed, and the long term benefits of that activity.

7.04 The Water Management District and California American Water shall meet on an as-needed basis throughout construction of the Seaside Middle School ASR Well #1 with the purpose of, among other things, ensuring that no activities performed by the Water Management District under this Agreement are duplicative of activities performed by California American Water unless by their nature an activity requires a cooperative effort.

**Article VIII.
Disputes**

8.01 In the event a dispute arises out of the performance of this Agreement, either party shall, as soon as a conflict is identified, submit a written statement of the conflict to the other party. Within five (5) working days of receipt of such a statement of conflict, the second party will respond and a meeting will be arranged not more than five (5) working days thereafter to arrive at a negotiated settlement or procedure for settlement. If, within twenty (20) working days from the initial filing of a statement of conflict an agreement cannot be reached, the parties agree to submit the matter to non-binding mediation. If meditation is unsuccessful, it is agreed that the dispute may be resolved in a court of law competent to hear this matter.

8.02 This Agreement shall be construed in accord with California law without reference to conflicts of laws principles.

8.03 The prevailing party shall be awarded costs of suit and attorneys' fees.

**Article IX.
Notices**

9.01 All communications to either party by the other shall be deemed given when made in writing and delivered or mailed to such party at its respective address, as follows:

Water Management District:

Monterey Peninsula Water Management District
5 Harris Court, Bldg. G
Monterey, California 93942

With a copy to:
David C. Laredo
General Counsel
606 Forest Avenue
Pacific Grove, CA 93950

California American Water:

California American Water – Monterey
511 Forest Lodge Road, Suite 100

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**

Pacific Grove, California 93950

With a copy to:
Carrie Gleeson
General Counsel
1033 B Avenue, Suite 200
Coronado, CA 92118

**Article X.
Records and Cooperation with the CPUC**

10.01 The Water Management District shall maintain complete and accurate records in accordance with generally accepted accounting practices for government agencies sufficient to show that funds received pursuant to Section II have been used exclusively to pay reasonable and necessary costs incurred to construct Seaside Middle School ASR Well #1.

10.02 The Water Management District shall fully assist and cooperate with California American Water in responding to data requests issued by the CPUC regarding the purposes of, or any activities undertaken in connection with this Agreement.

10.03 The Water Management District and California American Water shall fully assist and cooperate with each other in seeking authority from the CPUC for California American Water to recover in rates from California American Water's ratepayers all payments made to the Water Management District under this Agreement.

**Article XI.
Indemnification**

11.01 Notwithstanding any other provision of this Agreement, each party shall indemnify, defend, protect, hold harmless, and release the other, any parent or affiliate, and their respective officers, agents, and employees, from and against any and all claims losses, proceedings, damages, causes of action, liability, costs, or expense (including attorney's fees and witness costs) arising from or in connection with, or caused by any negligent act or omission or willful misconduct of such indemnifying party. This indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages or compensation payable to or for the indemnifying party under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**Article XII.
Termination and Survival.**

12.01 Any party may terminate this agreement at its convenience by providing the other party written notice in the manner specified in Article IX at least 90 calendar days prior to the proposed termination date.

12.02 Notwithstanding any other provision of this Agreement, California American Water may terminate this Agreement if the State Water Resources Control Board disapproves this project as an acceptable project for compliance with Condition No. 5 of WR-2009-0060. Such termination shall be in writing. California American Water shall reimburse the Water Management District any reasonable and prudent costs the Water Management District incurred in implementing this Agreement between the effective date and the date the Water Management District's General Manager receives California American Water's notice of termination.

12.03 Any obligation for one party to indemnify another shall survive the termination of this Agreement.

12.04 The obligations under Article VII and Article X shall remain in effect until the expiration of the time California American Water is required to preserve records regarding any aspect of this transaction pursuant to Resolution A-4691 of the California Public Utilities Commission dated July 12, 1977.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement effective as of the day and year first above written.

MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

BY: Darby W. Fuerst
General Manager

CALIFORNIA-AMERICAN WATER COMPANY

BY: Robert MacLean
President

U:\Darby\wp\Seaside Basin\asr2\calam_reimbursement_agreement_seaside middle school well1_27jan2011.doc

**Agreement Between MPWMD and
California American Water
Re: Reimbursement For
Seaside Middle School ASR Well Construction**