

Submitted by Staff
at 2/24/11 Board meeting
Item 16

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MPWMD

February 24, 2011

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VIA E-MAIL (rbower@chateaujulien.com)

Robert Brower, Board Chair
Monterey Peninsula Water Management District
5 Harris Court, Bldg G
Monterey, CA 93940

Re: Ordinance No. 146
Our file: 32436.29385

Dear Chair Brower and Members of the Board:

I am writing regarding Item 16 on the District Board's agenda today regarding preparation of a mitigated negative declaration for Ordinance No. 146. Our firm represents a number of clients holding water credits issued by the District. We encourage the Board to proceed with the ordinance based on a mitigated negative declaration and on the alternative ground that the ordinance is subject to a Class 1 categorical exemption based on existing facilities pursuant to CEQA Guidelines section 15301.

Ordinance No. 146, if adopted, would do nothing more than preserve the status quo with respect to existing and future water credits issued by the District. District water credits represent past permitted water uses on existing developed properties. The tolling proposed by Ordinance No. 146 would simply extend the ability of property owners who now hold water credits or who may obtain water credits in the future to reinstitute lawful water use in the event that any moratorium may be interpreted to prohibit the use of water credits.

Today's current water use alone cannot be considered the environmental "baseline" for purposes of evaluating whether a Class 1 categorical exemption applies or whether Ordinance No. 146 will result in environmental changes. The District should apply a baseline that includes today's current water use **plus** the water use permissible under the existing water credits issued by the District. This is the appropriate baseline for two reasons. First, anyone with a valid water credit as of today could reinstitute that use and such use would be essentially a ministerial action beyond the purview of CEQA. Second, to apply a baseline of current water use alone would be to write off property owners who have previously obtained water credits from the District and

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would result in unfair, unreasonable, and disparate treatment of them as compared to those that may apply for and receive water credits from the District in the future. Under that scenario, the use of future water credits would be treated as not contributing to a change in the baseline, while use of past water credits would be treated as a change in the baseline and thus contributing to potential significant environmental impacts.

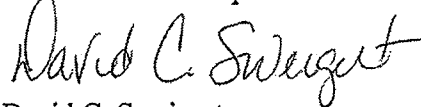
CEQA does not compel this kind of discrimination and unequal protection of similarly situated property owners. To the contrary, CEQA allows a public agency to apply an environmental baseline other than current environmental conditions where a reasonable basis exists for doing so. (See CEQA Guidelines § 15125 (existing physical conditions at the time environmental review is commenced “will normally constitute the baseline physical conditions” to be applied by lead agency).) It is appropriate and reasonable to apply a different baseline here for purposes of determining whether a Class 1 categorical exemption applies or whether a change in physical conditions will result from the adoption of Ordinance No. 146.

Ordinance No. 146 would merely extend the District’s ability to honor the important commitments it has made to property owners that they will be allowed to reinstitute water use on the site for which the credit was issued. CEQA should not be allowed to be used by some as a tool to prevent the District from honoring those commitments or preventing lawful water use commensurate with past use on existing developed properties.

We encourage the Board to authorize staff to move forward on the proposed ordinance as expeditiously as possible.

Very truly yours,

FENTON & KELLER
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David C. Sweigert
by TOB.

DCS:tob

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