

Beech Markup of staff submission, August 20, 2012

ITEM: PUBLIC HEARING

14. CONSIDER APPEAL OF STAFF DETERMINATION TO AUTHORIZE PERMIT FOR FLORES (Well #1) WATER DISTRIBUTION SYSTEM, APPLICATION #20110401FLO ON APN 103-071-002 AT 564 MONHOLLAN ROAD, CARMEL

Meeting Date:	August 20, 2012	Budgeted:	N/A
From:	David J. Stoldt, General Manager	Program/ Line Item No.:	N/A N/A
Prepared By:	Henrietta Stern	Cost Estimate:	N/A

RECEIVED

AUG 20 2012

MPWMD

General Counsel Review: Pending review
 Committee Recommendation: N/A
 CEQA Compliance: N/A

Submitted by David Beech
Item 14

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Beech Appeal:

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The appeal did not identify which District Rules were violated.

➤ This is not correct. Violated rules were identified in section "Detailed Grounds for Appeal".

The four concerns above relate primarily to Rules 22- B and 22-C.

The requested relief in the appeal is for the Flores and Piseni Wells to be tested again concurrently pursuant to MPWMD procedures, and that the Beech Well should be monitored during this time. Specifically, the requested relief in the appeal (page 4) is the following:

- A. The Flores Well #1 and Piseni Well #2 shall be fully tested again “pursuant to MPWMD procedures” and not “some ad hoc partial test.”
 - B. Well #1 and #2 should be tested concurrently in October to replicate 2010 conditions and assess the combined effect on the Beech Well. Concurrent testing would also reduce the number of days Beech could not use his well during the testing. [Note: Concurrent testing of two wells on separate parcels is not consistent with District procedures.]
- > **The applicants requested simultaneous testing in October 2010, and this was granted by the District. We are only asking for repetition of this, to check cumulative impact on our well.**
- C. A 95% recovery within six days shall be demonstrated by actual measurements of wells #1 and #2 rather than estimates. [Note: This request somewhat conflicts with Request #1 as it does not follow District procedures].
- > **We have shown that our request strictly satisfies written Procedures for Recovery testing. See Response to Oliver memo. The Board has the discretion to specify the “Evaluation” referred to.**
- D. Well capacity shall be determined by the actual pumping rates chosen for the tests, with no use of estimates. [Note: This request conflicts with Request #1 as it does not follow District procedures.]
- > **We have shown that our request strictly satisfies written Procedures for Recovery testing. See Response to Oliver memo, in which we also agree to adopt his wording for clarification.**

Beech requests that the \$750 appeal fee be waived in light of “issues of public interest.” Rule 70 allows the Board to take such action.

- **The earlier part of Rule 70 even allows that the General Manager can grant a fee exemption before the issue reaches the Board, but this has not been mentioned or acted upon.**

Suggested changes to District rules and procedures are not part of this hearing, and do not apply to an applicant's compliance to the rules and procedures in place at the time of application. It is noted that the recently approved Ordinance No. 150 improves future notification for Neighboring Well Owners of the opportunity to be monitored during a well pumping test, and enables better communication earlier in the WDS process.

- **We mentioned these changes only as evidence of public interest worthy of a fee refund – in your words,**
- **“improves future notification ... and enables better communication ...”. You do not mention our committee attendance and our suggestions incorporated in Ordinance 150.**

Some of the issues in the referral and appeal were already resolved by the Board in its action on November 21, 2011, and will not be addressed again in this hearing. The “Discussion” section below addresses the components of the referral and appeal. It includes a memorandum from the District Water Resources Division Manager, Joe Oliver, about certain assertions or calculations in the appeal related to hydrogeology that are incorrect (**Exhibit 14-E**).

- **Please see our separate markup responding to Mr. Oliver's memorandum.**

The District also received a communication from the applicant's hydrogeologist, Aaron Bierman, which is provided as **Exhibit 14-F**. This provides 2011 well monitoring data and new 2012 data showing lack of connectivity between the Flores/Pisenti Wells and the Beech Well. This submittal also includes a previously submitted timeline of events and letters from the Monterey County Health Department regarding the adequacy of supply for the two wells.

- **Although this communication was dated August 6th 2012, we did not receive any courtesy indication of it until it was referenced in the meeting package distributed late on August 15th, 2012, so we have had no opportunity for detailed analysis.**
- **However, it is immediately undermined by the fact that it made observations only on Pisenti Well #2 and not on Flores Well #1, on the grounds that Well #2 is closer to the Beech well. What kind of assumption is this in fractured rock? Completely ignored is the fact that the measured behavior of**

Well #1 in October 2010 (drawdown 61.11 ft., strong recovery) was much more like that probably experienced by the Beech well than that of Well #2, (drawdown 8.71 ft., very poor recovery).

- At what time of day was the “drive-by” espionage conducted by Mr. Bierman? Since much of our irrigation takes place during hours of darkness, was it with the aid of a flashlight? This is reminiscent of the professional opinion Mr. Bierman gave in his amended reports (March 22, 2011, p.20) that the Beeches “dewatered their own well”, based on looking at a Google map that showed we had green lawns, but despite the fact that the well had never run dry at any other time.
- We have no confidence in the estimating techniques being applied, and urgently request data-driven retesting. If the applicants are so confident that their estimated pumping rates derived from the 2010 tests are valid, why are they so reluctant to actually measure at those rates now there is the opportunity?

The Flores and Pisenti applications have an extensive administrative history. Please refer to the District website for previous Board action in September and November 2011 at:

<http://www.mpwmd.dst.ca.us/asd/board/boardpacket/2011/20110919/17/item17.htm> and

<http://www.mpwmd.dst.ca.us/asd/board/boardpacket/2011/20111121/16/item16.htm>. Also refer to the overview in the July 2012 Staff Determination in **Exhibit 14-A**.

RECOMMENDATIONS: The Board has several options for action. Rule 71-C states the Board must “consider the record and such additional evidence as may be offered, and shall find whether, in its opinion, an error was made” by staff. The Board “may affirm, reverse, or modify the action appealed as it deems just and equitable...” Similarly, Rule 70 states, “The Board may deny, approve or continue any appeal. The General Manager shall notify the appellant and/or Applicant within ten (10) days in writing by mail of the Board action taken; namely continuance, approval, conditional approval, or denial.”

The applicants’ right of due process compels the District to show that any finding of adverse impact or permit denial is based on scientific evidence in the record.

- For scientific evidence of non-compliance with Recovery Procedures, see Mr.Oliver's memo, and our response. Non-compliance with notification of neighbors is already uncontested.
 - Are the appellants also entitled to due process? There is no mention of this in the staff position, but we hope that the Board will take a wider view.
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Option 3- Continue Consideration of Flores Permit Hearing Until Well Testing Occurs: This would be similar to Option 2, except that no action on the Flores WDS Permit would be taken by the Board until a test is performed that confirms lack of adverse impact to the Beech Well. The same restrictions and protocol described in Option 2 would be in place. From the applicant's perspective, this would be a de facto approval of the Beech appeal, with some refinement and greater oversight by District staff. The Board would need to specify the rationale for such action, which is not supported by the technical evidence in the record. There is also the potential for litigation by applicants due to perceived violation of due process rights.

- Whatever the applicant's perspective (is this speculation?), this would be far from approval of the Beech Appeal, which may be framed in these terms as follows:

Option 3B - Continue Consideration of Flores and Piseni Permit Hearing Until Full Well Testing Has Occurred Pursuant to MPWMD Procedures,

- ***Specifically:***
 - *Simultaneous 72-hour pumping of Well #1 and Well #2 with concurrent monitoring of Beech well*
 - *95% recovery within six days shall be demonstrated by actual measurements*
 - *Well capacity calculation shall utilize actual pumping rates, with no substitution of estimated values*

- **Hopefully the Board will see merit in Option 3B, and be prepared to adopt it without needing to hear debate of all the other detail in the staff positions.**
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- **Failing this, we respectfully request that this stage of the Hearing be continued, as it is not humanly possible for the Appellants, or indeed the Board members themselves, to absorb so much material in so short a time.**
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- **However, we are keen to see progress, and in the event that Option 3B is adopted, we are ready to schedule the retesting for dates after our return from vacation on September 3rd, 2012.**