

**CALIFORNIA ENVIRONMENTAL LAW PROJECT**

A Non-Profit Legal Corporation



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VIA E-Mail [dstoldt@mpwmd.dst.ca.us](mailto:dstoldt@mpwmd.dst.ca.us)

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Re: First Reading of Ordinance No. 168 to Establish a Water Entitlement for the  
City of Pacific Grove

Dear Dave:

Sierra Club hereby submits comments on this Agenda Item. Because the District has not complied with CEQA in connection with the conferral of a water entitlement to the City of Pacific Grove and a reallocation of water to the City, Sierra Club asks that the Proposed Ordinance be withdrawn until appropriate environmental documentation is performed consistent with CEQA.

**I. The Vesting of an Entitlement in the City Is a Project that Requires Independent Environmental Documentation By MPWMD Pursuant to CEQA.**

In *Save Our Carmel River, et al. v. MPWMD, et al.*, 141 Cal.App.4<sup>th</sup> 677, 46 Cal.Rptr.3d 387 (2006) the Court held:

Although the Guidelines define an action as ‘the whole of an action’ (Guidelines §15378(a)), an agency action qualifies as a project if it is ‘necessary to the carrying out of some private project involving a physical change in environment.’ (*Simi Valley Recreation and Park Dist. v. Local Agency Formation Com.* (1975)). 46 Cal.Rptr.3d at 400).

Here, the District’s decision to confer vested water to the City of Pacific Grove is a necessary step in the eventual development of new projects in Pacific Grove, including a new hotel on Cannery Row. See <http://www.montereyherald.com/20150825/american-tin-cannery-to-become-leading-luxury-hotel> and <http://www.montereyherald.com/business/20150826/pacific-grove-luxury-hotel-project-faces-hurdles-questions>.

The decision to reallocate water to the City of Monterey and confer an entitlement on the City , will have an environmental impact just as the water credit transfers discussed in the *Save Our Carmel River* case will have environmental impact, warranting appropriate environmental documentation by the MPWMD with respect to the environmental effects arising from the vesting of a water entitlement, and the reallocation of water previously allocated pursuant to the 1991 EIR. See *Save Our Peninsula Committee v. Monterey County Bd of Supervisors*, 87 Cal.App. 4<sup>th</sup> 99, at 129-131 (2001). The reallocation of water for “use” by the City of Pacific Grove and the creation of a water entitlement to be held in major part for future growth in the City “results in an increment of water that will be used rather than conserved.” 46 Cal.Rptr. 3d at 400. The District’s proposed ordinance enactment conferring a vested water entitlement on the City and significantly amending the 1991 MPWMD water allocation plan and the 1991 EIR water allocation “project” can be seen as “causing a ‘reasonably’ foreseeable indirect physical change in the environment.” *Id.* At 400-401. As a result, the District must prepare environmental documentation setting forth the environmental impacts of conferring a water entitlement on the City and augmenting the City’s allocation of water in a manner that will result in growth.

As proposed for a first reading, Ordinance No. 168 makes it clear that the

water entitlement is vested, unalterable, fully transferable, and not subject to reallocation:

Section 4A of the Ordinance provides:

A. CITY OF PACIFIC GROVE WATER ENTITLEMENT

1. The City of Pacific Grove Water Entitlement confers on the City of Pacific Grove, a vested property right to release up to 66 AFA of water for consumption from the California American Water Company Water Distribution System.
2. 13 AFA of metered water demand previously used by the City of Pacific Grove to irrigate its Golf Links and El Carmelo Cemetery shall be permanently suspended from use in order to provide lasting benefits to the Carmel River system.
3. Benefited Properties of the City of Pacific Grove Water Entitlement shall mean all properties that are located within the City of Pacific Grove.
4. City of Pacific Grove is authorized to separately sell, transfer and convey to owners of Benefited Properties for such consideration and upon such terms and conditions as City of Pacific Grove in its discretion may determine, such portions of the City of Pacific Grove Water Entitlement as it may choose. Any portion of the City of Pacific Grove Water Entitlement conveyed to the owner of a Benefited Property by an Assignment Document shall vest in the owner of the Benefited Property, and become appurtenant to title to the particular Benefited Property, at the time the Water Use Permit is issued as evidence of such conveyance.
5. The City of Pacific Grove Water Entitlement shall be separate and distinct from any other Allocations provided in Rule 30.
6. For purposes of collecting Capacity Fees and tracking the use of a Water Entitlement, the projected increase in Water Use Capacity of a Benefited Property shall be calculated in the manner set forth in Rule 24, as it may be amended from time to time.
7. Each Water Use Permit issued pursuant to this Rule shall

represent a vested property interest upon issuance and shall not be subject to Revocation or cancellation except as expressly set forth in subparagraph B below.

8. The portion of the City of Pacific Grove Water Entitlement granted by each Water Use Permit shall not be subject to reallocation pursuant to MPWMD Rule 30.

**II. The District Is Not A Responsible Agency With Respect to the City's Recycling Project But Is a Lead Agency For The Approval Of The City's Water Entitlement And Augmentation of Its Water Allocation.**

CEQA Guideline §15096 charges a Responsible Agency with "reaching its own conclusions on whether and how to approve the project involved." The City's Project is described in the DEIR as involving:

The proposed Project is the Pacific Grove Local Water Project (PGLWP). The Lead Agency is the City of Pacific Grove. The primary purpose of the Project is to produce and distribute high quality recycled water to replace potable water used for non-potable water demands such as landscaping. The Project service area is consistent with the water franchise agreement between the City and the California American Water Company (CAW).

Project Goals. In conjunction with the primary goal of replacing potable water high quality recycled water, additional key goals are:

1. To preserve available potable water supplies for domestic uses and to maximize the recycling and reuse of non-potable recycled municipal wastewater in a cost effective manner;
2. To substitute the City's use of CAW potable water with recycled water for non-potable water demands;
3. To reduce discharges to Monterey Bay and the Pacific Grove Area of Special Biological Significance (ASBS); and
4. To maximize the use of existing wastewater collection, treatment, recycling and recycled water distribution infrastructure for the development of irrigation water and other non-potable demands.

There are six primary benefits of the PGLWP:

1. The PGLWP conserves potable water for uses requiring potable water only, thereby helping to meet State requirements to conserve water and regional compliance for CAW's reduction of the use of water from the Carmel River;

2. It avoids all costs of producing an equivalent volume of potable water;
3. It requires less energy per unit of water produced, creates a smaller carbon footprint, and is otherwise resource-efficient;
4. It would provide a new supply of irrigation water, thereby reducing operational demands on Cal-Am's desalination plant and other system components;
5. By using sewage, stormwater, and dry weather flows as its sources of water, it helps achieve other State and local goals related to keeping the Pacific Grove Area of Special Biological Significance (ASBS) in particular and Monterey Bay in general, free of pollution; and
6. The LWP would be the first of four primary Projects designed to prevent illegal diversions from the Carmel River and excessive pumping from the Seaside Aquifer to come on line. It is the only project that is scheduled to be operational prior to January 1, 2017, the State's designated date for imposing the full Cease and Desist Order (CDO). As such, it would reduce illegal diversions and create other significant environmental benefits in advance of the ability of any of the other projects to do so.

The PGLWP consists of the construction and operation of a new satellite recycled water treatment plant (SRWTP) to recycle a portion of Pacific Grove's municipal wastewater, 8-inch pipeline and related appurtenances. Recycled water produced at the SRWTP, located at the retired Point Pinos Wastewater Treatment Plant (WWTP), during the first phase, would be used primarily for landscape irrigation at the Pacific Grove Golf Links and El Carmelo Cemetery, owned by the City of Pacific Grove and located adjacent to SRWTP. The initial Project consists of installing 2,800 linear feet (LF) of recycled water pipeline that would convey recycled water from the SRWTP to the Pacific Grove Golf Links and El Carmelo Cemetery's existing irrigation systems.

The proposed Project is intended to serve approximately 125-acre feet per year (AFY) of recycled water, primarily to the City of Pacific Grove Golf Links and El Carmelo Cemetery (Demand Group 1). The predominant use of recycled water would be for landscape irrigation.

(Draft EIR at S-1-S-2).

Section 15381 of the Guidelines defines a "responsible agency" as a public agency which proposes to carry out or approve a project for which a lead agency...has prepared an EIR..." The District is not carrying out or approving the Pacific Grove water recycling project. It is carrying out a water entitlement and reallocation project vesting rights in the City of Pacific Grove

The Project approved by the City is a water recycling project. The availability of water for growth as a result of the reduced use of potable water for irrigation is not a project component. This is illustrated by the absence anywhere in the DEIR, FEIR, or Supplemental FEIR of any discussion concerning the (cumulative) environmental impacts of the potable water being saved, being allocated for use for future new development projects. The DEIR section on "Growth Inducing Impacts" states only that "The proposed Project does not propose construction of any new residences and would therefore not directly induce substantial population growth." DEIR at 18-40.

Guideline 15096(d) provides also that a "responsible agency should review and comment on draft EIRs...for projects which the responsible agency would later be asked to approve." The MPWMD does not have before it a proposal to "approve" the City's recycling project. Rather, it has before it a proposal to adopt an Ordinance conferring a water entitlement on the City of Pacific Grove and amending the water allocation for the City previously approved in connection with the 1991 water allocation EIR.

Thus, for the purpose of its consideration of proposed Ordinance 168, MPWMD is not a responsible agency, but a Lead Agency, that must, in compliance with CEQA, prepare environmental documentation before approval of the Ordinance on the environmental effects of providing a water entitlement to the City of Pacific Grove that will result in substantial growth in the City arising from new or more dense development. It is not consistent with the CEQA Guidelines for the District to rely on the City's EIR and Supplemental EIR as a surrogate for environmental documentation required in connection with conferring a vested water right on the City of Pacific Grove and augmenting its water allocation by 66 afy.

### **III. There Are Changed Circumstances and New Information Related to the Allocation of Water To the City of Pacific Grove Under the 1991 Allocation EIR That Requires Supplemental Environmental Documentation.**

The City of Pacific Grove has less than one acre foot of water remaining from the allocation made to it in the MPWMD 1991 EIR. The proposed Ordinance reallocates to the City 66 acre feet of water. This constitutes a significant increment over what remains, and constitutes a significant increment over what was allocated to the City in the 1991 EIR. This reallocation of water supply to augment the the one afy that remains to the City constitutes changed circumstances or new information requiring supplemental environmental documentation pertaining to the District's Water Allocation Planning Program, which was the subject of the 1991 Water Allocation EIR. See Public Resources Code 21166; CEQA Guidelines §15162, §15163. In effect, the allocations previously made have been significantly changed with respect to the City's allocation. The District must treat the previously approved Water Allocation for Pacific Grove, and build out under that program (with less than one acre foot remaining) as the "baseline" for determining whether the augmented water allocation to the City will cause

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environmental impacts attributable to new development . *See Black Property Owners Association v. City of Berkeley*, 22 Cal.App.4th 974 (1994). (By Ordinance 62 the District ceased granting any permit which would authorize new or intensified water use if the to the extent the amount would exceed 21.43 afy for the City of Pacific Grove). The conferring of an entitlement now to use an additional 66 afy for new or intensified water use is a considerable increment over the one af remaining for growth or intensified use in the City.

Sierra Club respectfully requests this matter be removed from the calendar, and that the Ordinance not proceed to a second reading.

Sincerely,

CALIFORNIA ENVIRONMENTAL LAW  
PROJECT

A handwritten signature in cursive script that reads "Laurens H. Silver". The signature is written in black ink and is positioned below the typed name of the sender.

Laurens H. Silver on behalf of the Sierra Club,  
Ventana Chapter