



## HUMBOLDT BAY MUNICIPAL WATER DISTRICT

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FEB 04 2015

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### GENERAL MANAGER

CAROL RISCHÉ

February 4, 2015

Humboldt County Board of Supervisors  
825 5<sup>th</sup> Street, Room 111  
Eureka, CA 95501

Subject: General Plan Update – Water Resource Element (Policy WR-Px - Water Export Facilities)

Dear Chair Fennell and members of the Board,

The purpose of this letter is twofold: 1) to provide an update regarding our activities working with Humboldt County Planning staff on Policy WR-Px in an attempt to reconcile differences, and 2) to request this policy, as currently drafted, be deleted.

### Background

As previously shared, there was much interest and debate over policies relating to water exports when the Water Resource Element was considered by the Planning Commission. We attended every Planning Commission meeting when this Element was considered, and we provided numerous comments. Policy WR-Px was not originally included in the Element when considered by the Planning Commission. It was added at the proverbial "11<sup>th</sup> hour" by the Commission, and HBMWD and other parties did not have an opportunity to provide comments.

As shared in our November 26<sup>th</sup> letter to you, we understand and support the County's position and interests regarding water exports on rivers such as the Trinity and Eel River systems on which there are up-stream out-of-basin transfers, and Humboldt County's interests are harmed. We appreciate that you understand and have considered our unique situation in regards to the District's water rights and water supply operation on the Mad River. Thank you for accepting our comments in the introductory section which explain and differentiate a possible water transfer from the Mad River versus other out-of-basin exports.

### Recommendation

On behalf of my Board, I once again respectfully request that Policy WR-Px regarding Water Export Facilities be deleted.

As originally drafted, WR-Px reads: Water Export Facilities. No new facilities for export of water to locations outside Humboldt County shall be permitted unless the County has issued a Conditional Use Permit for such export facilities. Issuance of the use permit shall require a finding that the proposed water export will not be detrimental to beneficial use within the County. (Alternative A Policy).

At the GPU hearing on January 12<sup>th</sup>, alternative language was proposed which deleted the requirement for a Conditional Use Permit (CUP) and changed the nature of the required findings. Unfortunately, we

learned of the alternative language the day of the hearing and had little time to react to the proposed change.

Since that time, HBMWD staff has worked with County Planning staff to explain and support our position. We provided relevant sections from the Government Code which exempts "facilities for the production, generation, storage or transmission of water" from zoning or building code limitations imposed by a County. County Planning staff found a California Attorney General opinion on this matter which we believe supports our position. Last week, we consulted with Planning staff and thought we were in agreement regarding the County's lack of authority to require a CUP. Last Friday, I learned that County Counsel does not agree, but was open to speaking with our Counsel. David Aladjem, Downey Brand, special water rights/water law counsel, spoke with County Counsel and drafted an opinion for her consideration.

I was informed that the staff recommendation regarding Policy WR-Px was forwarded to you yesterday and that it continues to include a requirement for a CUP. **Once again, we respectfully request WR-Px be deleted. If the County would like to offer an alternative language that eliminates the jurisdictional conflict and addresses our concerns, we would be happy to consider that.**

Given the discussion at the January 12<sup>th</sup> GPU hearing regarding other considerations of interest and importance, I wanted to share the following. A party who wishes to transfer water must petition the State Water Resources Control Board to do so. All such petitions are broadly shared with resource agencies, the County or other interested governmental agencies and the public at large. These parties have an opportunity to participate in the process (via protest provisions and hearings before the State Board). In order for a water transfer to be approved by the State Board, the following findings must be determined and satisfied:

- (1) the transfer would not result in substantial injury to any legal user of water; and
- (2) the transfer would not unreasonably affect fish, wildlife or other instream beneficial uses.

By virtue of the process required by State Board, the County will have an opportunity to participate, and findings of no unreasonable injury must be made. Additionally, as you know, the District is contemplating a transfer to another public municipal agency as a means to protect the District's water rights (which we hold for public benefit) and to provide benefit to the Mad River watershed and Humboldt County residents.

As always, we appreciate the opportunity to comment and appreciate your continued consideration of this matter.

Sincerely,



Carol Rische  
General Manager

Enclosures

- 1) February 3, 2015 letter from David Aladjem, Downey Brand, to Deputy County Counsel
- 2) November 26, 2014 letter from HBMWD to Board of Supervisors

Cc: Kevin Hamblin, Robert Wahl, Humboldt County Planning Department  
Davina Smith, Humboldt County Deputy Counsel



February 3, 2015

**VIA ELECTRONIC MAIL:**  
**DSmith@co.humboldt.ca.us**

Davina Smith  
Deputy County Counsel  
County of Humboldt  
825 Fifth St., Rm. 110  
Eureka, California 95501

Re: General Plan Update – WR Px Water Export Facilities

Dear Davina:

Thank you for taking the time to discuss the above-referenced General Plan policy with me last Friday afternoon. As I mentioned, our firm serves as special counsel to the Humboldt Bay Municipal Water District and we have been asked to provide comments on the proposed policy to the County on behalf of the District.

As indicated in the District's letter of November 26, 2014 (copy enclosed for your reference), the District understands the County's desire to protect the water resources of the people of Humboldt County and to ensure that those resources are managed for the benefit of future generations. The District shares those goals and is committed to working with the County to achieve those goals, now and in the future. To that end, the District has sought to work cooperatively with the County over the past few years to craft amendments to the General Plan that would advance both the interests of the County and the interests of the District. However, over the District's objections, the County has indicated that it still wishes to consider the adoption of WR Px Water Export Facilities. It is my understanding that the County will consider this policy during the February 10, 2015 meeting of the Board of Supervisors.

The purpose of this letter is to set forth, as clearly as possible, the reasons that the District believes that the County lacks the legal authority to adopt the proposed policy. Specifically, the adoption of this policy would violate the District's authority under Water Code sections 380 *et seq.*, which give the District control over water transfers, subject only to the authority of the State Water Resources Control Board. Moreover, the policy would violate Government Code section 53091, which exempts the construction of water transmission facilities from the County's control. Finally, the policy fails to meet the constitutional standards of a "reasonable nexus" and proportionality, and so would open the County to a claim of regulatory taking.



First, as discussed in the District's November 26 letter, Water Code sections 380 *et seq.* provides (in section 381) that the authority of the District to transfer surplus water outside of its service area "shall control over any other provision of law." Such water transfers are still subject to the jurisdiction of the State Water Resources Control Board, but are not subject to local control to prevent parochial efforts to control water resources that are owned by all of the people of California. Thus, the County's general assertion of its police power, whether under the *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 175, or other authority, is specifically divested by section 381. Because Water Code section 380 notes that these provisions are in furtherance of article X, section 2 of the California Constitution and Water Code section 109, which states that promoting water transfers is the policy of the state, any official action by the County that would limit the District's authority to transfer water, subject of course to the jurisdiction of the State Water Resources Control Board, is void.

Second, the proposed policy would violate the provisions of Government Code section 53091(e), which specifically exempts "facilities for the production, generation, storage or transmission of water" from zoning or building code limitations imposed by a county. This exemption from zoning and building codes reflects "the obvious intent of the Legislature . . . to strike a balance between the value of local zoning control by cities and counties and the state interest in efficient storage and transmission of water." *City of Lafayette v. East Bay Municipal Utility District* (1993) 16 Cal.App.4th 1005, 1013; *see* 78 Ops. Att'y Gen. 31 (1995) (No. 94-902) (reaching the same conclusion for a California water district). More recently, the Court of Appeal characterized section 53091 as: "expressly except[ing] the location and construction of water and electrical facilities by local agencies from the general rule imposing zoning and building regulations on local agencies." *Delta Wetland Properties v. County of San Joaquin* (2004) 121 Cal.App.4th 128, 139.

During our conversation last Friday, you attempted to justify the County's proposed policy by stating that the proposed policy would only bar a water "export" pipeline but not a water "transmission" pipeline. As shown by the authorities discussed above, that proposed distinction lacks any basis in the statutory language, the legislative history of this provision, or the subsequent case law or opinions of the Attorney General interpreting section 53091. In fact, the County's interpretation of this provision would create precisely the situation that the Legislature sought to avoid: enabling a county to prevent the construction of a facility that would provide water to other portions of California. *See City of Lafayette, supra*, at 1013.

Third, if the County were to adopt the proposed policy, the County would have taken an action that would – effectively – bar any water transfers outside of the County due to the vague language ("not be detrimental to beneficial uses within the County") contained in the policy. This broad and vague language does not require the County to establish a reasonable relationship between the effects of a proposed transfer and the findings required to permit that transfer. Consequently, this language does not meet the constitutional standard for proportionality that has been established by both the United States and California Supreme Courts. *See, e.g., Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 (establishing the proportionality requirement), *Nolan v.*

*California Coastal Comm'n* (1987) 483 U.S. 825, 837 (establishing a requirement that there be a reasonable nexus between the condition and the impacts of the action in question), *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671. Because the District's water rights are a species of real property, moreover, such a regulation by the County would potentially involve a claim by the District as against the County for a regulatory taking. *See id.* (noting that the *Nolan/Dolan* standards apply to regulations of real property).

For all of the foregoing reasons, the District respectfully requests that the County not approve WR Px during the meeting of the Board of Supervisors next week. I would be happy to discuss this analysis with you, at your convenience.

Very truly yours,

DOWNEY BRAND LLP



David R.E. Aladjem

Enclosure (November 26, 2014 Letter to Board of Supervisors)

cc: Board of Directors  
Carol Rische, General Manager





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SHERI WOO, DIRECTOR

### GENERAL MANAGER

CAROL RISCHÉ

November 26, 2014

Humboldt County Board of Supervisors  
825 5<sup>th</sup> Street, Room 111  
Eureka, CA 95501

RE: General Plan Update - Chapter 11 Water Resources Element

Dear Members of the Board:

I am writing this letter on behalf of the Board of Directors of the Humboldt Bay Municipal Water District ("District") to provide comments on Chapter 11, Water Resource Element.

### Introduction

We provided comments to the Planning Commission when this chapter was under consideration by the Commission. There was much interest and debate over policies relating to water exports.

We understand and support the County's position in regard to water exports on the Trinity and Eel River systems on which there are up-stream out-of-basin transfers, and Humboldt County's interests are harmed. However, the District's operation on the Mad River is fundamentally different. There is no upstream, out-of-basin transfer. Ruth Lake is a small reservoir in the upper watershed which captures a small fraction of the natural watershed runoff (in an average water year Ruth Lake captures 2-3% of the watershed runoff). During the summer and fall, the District releases water into the Mad River channel which supplements the low-flow conditions and provides beneficial habitat for aquatic species, especially summer steelhead. These releases support the District's downstream diversion near Arcata.

The District lost its industrial customer base which triggered two key issues for the District and community:

1. Revenue loss which resulted in a significant cost shift to the District's Municipal Customers and rate increases in all communities served by HBMWD.
2. Underutilization of the District's appropriative water rights granted by the State of California. A key principle underlying California water law is "use it or lose it". The District's water rights permits expire in 2029. If the District does not achieve additional "beneficial use" the District will lose rights to most of the water it is permitted to use. The amount lost would be available for any party who applies to the State for a new appropriative water right. The State, not Humboldt County, will have exclusive jurisdiction over that application and future appropriations.



The District is striving to secure new water uses to provide ratepayer benefit, and to utilize and maintain local control of its water rights for the benefit of Humboldt County. One option under consideration is transferring water to a municipality outside the District's service territory, preferably in the north coast region. Such new use would not involve an upstream-out-of-basin transfer on the Mad River as occurs on the Trinity or Eel River systems. The District's current water supply operation on the Mad River would be maintained, existing infrastructure would be used, and the District's existing water rights permits exercised (thus protecting them).

#### **COMMENTS AND RECOMMENDATIONS ON WATER RESOURCE ELEMENT**

We recommend that the County's policy position regarding water exports be tailored given the operational differences on the Mad River, as well as the District's existing water rights which benefit Humboldt County. The District suggests the following changes to the March 19<sup>th</sup> draft of the Water Resource Element:

##### **Background Section 11.3**

- 1) **Public Water Supply** (page 11-5) – Addition of one sentence for informational purposes. See attached Element with District comment included.
- 2) **Water Exports** (page 11-6) – Several changes and an addition to differentiate the County's policy position on the Trinity, Klamath, and Eel Rivers with the District's operation and transfer opportunity on the Mad River. See attached Element with District comments included.

##### **Section 11.4 Goals and Policies**

- 3) **WR-Px. Water Export Facilities.** No new facilities for export of water to locations outside Humboldt County shall be permitted unless the County has issued a Conditional Use Permit for such export facilities. ~~Issuance of the use permit shall require a finding that the proposed water export will not be detrimental to beneficial use within the County.~~ (Alternative A Policy)

We recommend this policy be deleted in its entirety for the reasons we shared above. Furthermore, we do not believe the County has a legal basis to include this condition. The District's general counsel and water law special counsel independently reviewed this policy and provided the following comments:

*Policy WR-Px is legally defective as drafted and, moreover, is preempted by state law with respect to all District operations. Section 2 of Article 10 of the California Constitution declares that the general welfare requires that the water resources of the state be put to beneficial uses to the fullest extent possible. In furtherance of this policy, in 1983 the California Legislature added Chapter 3.6 [§§ 380 et seq.] to Division 1 of the Water Code. Chapter 3.6 is intended to encourage the voluntary transfer of water and water rights, consistent with public welfare of the areas of export and import. Section 381 expressly makes the authority granted to local public agencies pursuant to Chapter 3.6 controlling "over any other provision of law which contains more stringent limitations on the authority to serve water for use outside the agency, to the extent those other laws are inconsistent with the authority granted" by the Chapter. As it relates to local public water agencies like the District, the primary grant of authority is found at section 382(a), which states that "notwithstanding any other provision of law, every local or regional agency authorized to serve water ... may sell, lease, exchange, or otherwise transfer, for use outside the agency, either of the following: (1) water that is surplus to the needs of the users of the agency; or (2) or water .. which ...*

*voluntarily [goes unused].” The Water Code does impose some restrictions on such water transfers, including those created by Water Code section 384 which requires compliance with the “general laws of the state” and approval by the State Water Resources Control Board (“SWRCB”) as provided by Water Code sections 1725, et seq. SWRCB will only approve a water transfer if it determines the change will not: (1) injure any legal user of water, (2) unreasonably affect fish, wildlife or other beneficial instream uses, or (3) unreasonably affect the overall economy of the area from which the water is transferred. A County general plan is not a “general law of the state” so section 384 cannot reasonably be construed to require the District to comply with County regulations (like Policy WR-Px). Rather than attempt to legislate in this area preempted by state law, the County’s recourse is to bring any objections it may have to a proposed water transfer to the attention of the SWRCB when the SWRCB considers a proposed transfer.*

Counsel further provided that: *Although local agencies may attach conditions to the grant of a Conditional Use Permit (CUP), the conditions or exactions imposed must be reasonably related to the impacts of the project as permitted by the CUP approval. The “condition” stated in policy WR-Px (i.e. water export will not be detrimental to beneficial uses in Humboldt County) is so broad and poorly defined it will be very difficult to implement.*

#### **Section 11.5 Standards**

##### **4) WR-S13 Minimizing Effects of Water Exports.**

The District, on its own behalf, does not have comments on this standard; however, we are passing along comments provided by water law counsel for the County’s consideration. Counsel indicated that the reference to Water Code 1810 is not appropriate in that it applies to wheeling of water through another agency’s conveyance system. Counsel also suggested the County may wish to consider a “no injury” provision to prevent interference with other water rights and a “no unreasonable effect” standard to protect resources. Again, the District is not advocating for these changes but is sharing them for the County’s consideration.

#### **CLOSE**

We appreciate the opportunity to comment on the Water Resource Element, and look forward to seeing you at the GPU Public hearing on December 15<sup>th</sup>.

Sincerely,



Carol Rische  
General Manager

Enclosure: Chapter 11, Water Resource Element with District comments (e-version sent to County staff)

cc: Kevin Hamblin, Robert Wall, John Miller, Humboldt County Planning and Building Department  
Wholesale Municipal Customers