MEMORANDUM

DATE: January 12, 2012
MEETING OF: January 18, 2012
TO: Board of Directors
FROM: General Manager
RE: **DISCUSSION/ACTION ITEM 11C:** Consider Agency's authority to Impose Pumping Restrictions

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BACKGROUND

The California Regional Water Quality Control Board, Central Coast Region (RWQCB), in a letter dated July 5, 2011, asked at what point the Agency would be willing to require pumping restrictions to "…preserve water quality and the long-term sustainability of the aquifer." They have also requested that staff provide an update to their board at its' February 2, 2012 monthly meeting in Salinas. In response to the RWQCB inquiry, and a further request for analysis by Director Osmer at our last board meeting, our general counsel has provided the attached memo for board consideration.

With the successful rate-setting effort by the Agency in 2010, and the community based basin management plan update effort currently underway, local commitment to the management of our groundwater basin is evident. In addition the Agency is committing significant financial resources to the BMP effort both in consulting and staff time.

Although the need to impose pumping restrictions at any time in the near future seems remote, the concept has not been discussed by the Board and public to any great extent. There would clearly be significant economic impacts as a result, and complex legal ramifications as well.

The discussion item tonight is intended to increase the board and public's understanding of this issue.

FISCAL IMPACT
None at this time

STAFF RECOMMENDATIONS
That the Board receives presentation from counsel and consider implications of pumping restrictions

ATTACHMENTS
- Memo from Anthony Condotti, Agency Counsel
- California Regional Water Quality Control Board letter August 9, 2011

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MEMORANDUM

TO: Board of Directors, Pajaro Valley Water Management Agency
CC: Mary Bannister
FROM: Anthony P. Condotti, General Counsel
DATE: January 12, 2012
RE: AGENDA ITEM 11.C – Agency's Authority To Impose Pumping Restrictions

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At the last meeting the Board directed staff to agendize for discussion the subject of the Regional Water Quality Control Board's July 5, 2011 letter that, among other things, asks at what point the PVWMA Board would consider exercising its authority to impose pumping restrictions as a means of preserving water quality and protecting the long-term sustainability of the groundwater basin. This memorandum provides a brief overview of the legal framework within which such a decision could be considered. It addresses both the Agency's regulatory authority and some potential legal issues that could come into play if a regulatory approach is adopted. This is *not* meant as a comprehensive analysis, and of necessity does not delve into all of the potential issues and nuances.

Summary Of Agency's Statutory Authority To Regulate And Limit Groundwater Extractions

As has been discussed on numerous occasions, the Agency Act authorizes the Agency to restrict groundwater pumping. Section 124-711 of the Act states as follows:

> Sec. 711. The agency, in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, ***control of extractions***, and construction of wells and drainage facilities. These powers shall include the right to ***regulate, limit, or suspend extractions from extraction facilities***, the construction of new extraction facilities, the enlarging of existing facilities, or the reactivation of abandoned extraction facilities. Limitation, control, or prohibition related to extraction shall be instituted only after the board has made factual findings that the limitation, control, or prohibition is necessary.

The Agency Act specifies certain criteria for determining how such restrictions are to be implemented. First, it requires that the Agency allocate the rights to use the available supply of

groundwater "primarily on the basis of the amount of water used by the operator as a percentage of the total amount of water being used within the Agency." (Section 712). This would seem to suggest imposition of pumping restrictions on an "across-the-board" basis. However, the Act authorizes the Agency to adjust the proposed allocation for any of the following factors:

(1) The number of acres actually irrigated compared to the number of acres owned or leased, for a period of three years.

(2) Water used in relation to best management practices for the use being made of the water.

(3) Wasteful or inefficient use.

(4) Reasonable need.

(5) Any other factor that the agency reasonably feels it should consider in order to reach an equitable distribution.

Potential Legal Constraints That May Arise Under State Law

Notwithstanding the language of the Act, the extent to which such restrictions would be effective is uncertain. One respected water law treatise speaks to the issue as follows:

> "The extent to which these special act agencies will be able to effectively regulate, condition, and potentially limit the extraction of groundwater is as yet unclear. There is some concern that a broad prohibition on extractions during overdraft conditions would be difficult to uphold. However, the regulatory agency probably has its greatest authority when taking action to preclude the adverse impacts associated with overdraft."[1]

Given the uncertainties noted above, it is reasonably foreseeable that any attempt by the Agency to exercise its regulatory authority to impose pumping restrictions by ordinance would be subject to multiple legal challenges.

[1] Scott S. Slater, *California Water Law and Policy*, §11.06 (2004, Mathew Bender Publications, Inc.).

One major concern would be the risk of litigation alleging infringement upon established water rights.[2] Adopting a regulatory framework that recognizes and is consistent with the groundwater rights of various categories of users[3] might reduce this risk. But given the complexity of the issues, and the likelihood of considerable disagreement among various parties and categories of users about the nature and extent of those rights, coming up with a set of regulations that both meets the requirements of the Agency Act and is consistent with established principles of water law would be challenging.[4]

As a practical matter, the Agency would likely be required to resort to the court system to enforce an ordinance imposing pumping restrictions against water users who fail or refuse to comply. It is reasonably foreseeable that water users would attempt to defend such enforcement actions by claiming that their water rights are being infringed. Thus the Agency may be forced to adjudicate many individual water rights claims in its efforts to gain compliance. This would no doubt be expensive and considerably burdensome on staff. One way to preempt the possibility of a multiplicity of lawsuits would be for the Agency to initiate a basin-wide adjudication to establish the legal framework for imposing pumping restrictions at the outset. But such litigation would be very costly and contentious, and the resolution thereof would likely take several years. Barring such preemptive action, it is also reasonably foreseeable that a regulatory approach would spur individual water users or groups of users to initiate a basin-wide adjudication, in which the Agency would also be a party. This would of course result in the same acrimony, cost and time issues as an Agency-initiated adjudication.

In conclusion, while the Agency Act on its face appears to confer broad authority to impose pumping restrictions, the path leading to the point at which such restrictions could be effectively implemented is fraught with uncertainty, except for the near certainty of many years of complicated and expensive litigation that such an action may precipitate.

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[2] In the context of a groundwater rights adjudication, the California Supreme Court, in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, held that the trial court could not disregard the water rights of producers in imposing a "physical solution" as a means of resolving water rights adjudication.

[3] The priorities of various categories of water rights in California are fairly well defined. They are, in order of priority: (1) pueblo rights; (2) prescriptive rights (appropriative rights that have been established by a period of use during overdraft conditions); (3) overlying rights (water is extracted and put to reasonable use on the same parcel from which it is extracted); and (4) appropriative rights (water extracted from one parcel and used on another, e.g., use by a municipal purveyor, and that has not ripened into a prescriptive right). To be consistent with these priorities, a regulatory approach would presumably restrict groundwater extractions in order of priority, first by restricting appropriations, then overlying uses, then prescriptive uses.

[4] The provision of the Agency Act requiring the Agency to allocate the available supply on a percentage basis presents an interesting legal issue, particularly since the groundwater rights of an operator are not listed as a factor that must be considered in allocating rights to the available supply.

I will be happy to respond to any Board member questions or comments.

Sincerely,

/s/
Anthony P. Condotti
General Counsel