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December 19, 2013

Ms. Dana McRae
County Counsel
County of Santa Cruz
701 Ocean Street, Room 505
Santa Cruz, CA 95060

Re: Town of Davenport Water Right and Water Supply Issues

Dear Ms. McRae:

You have asked us to provide you with an overview letter addressing the water rights and water supply issues affecting the Town of Davenport. In preparing this letter we have reviewed various historical documents and agreements, in addition to certain records from the State Water Resource Control Board ("State Board"), all of which we have discussed with you. Following is our brief analysis of the key issues. Also, per your request, we have prepared preliminary legal budgets for (1) pursuing a new appropriative water right in the name of the County of Santa Cruz and/or (2) adjudicating the San Vicente and Mill Creek systems.

Background

Dating back to the early 1900s, the Town of Davenport and its related communities, including but not limited to New Town (collectively, "Davenport"), have always used and relied upon water supplies from San Vicente Creek, Mill Creek and their related tributaries. The two main points of diversion from San Vicente and Mill Creeks are located on land owned by Coast Dairies & Land Company ("Coast Dairies"). Water is conveyed via pipelines (approximately 4.2 miles from the San Vicente Creek diversion and 3.5 miles from the Mill Creek diversion) to a water tank and sediment collector known as the "Sandbox" which is located on property currently owned by Cemex. Cemex is a successor-in-interest to a number of other companies, including Santa Cruz Portland Cement Company ("Portland Cement") and RMC Pacific Materials ("RMC"), that have owned and operated a cement plant near Davenport since about 1905. Historically, the Sandbox has served as a junction point from which water can be delivered in one direction to the cement plant, and in another direction to Davenport. Water being conveyed to Davenport is first sent to a treatment plant that is owned and operated by the County Sanitation District ("District") and located on the Cemex property. From there it is distributed for municipal use throughout Davenport. We are informed that the cement plant ceased operations in or around 2009 and is using little to no water at this time. Davenport,

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however, continues to use and rely upon water diverted from the Sandbox to serve all of its domestic and municipal needs.

Discussion

Early records show a deliberate arrangement between Coast Dairies and Portland Cement to develop and dedicate a municipal water supply for the Davenport community. To carry out this arrangement, as part of its original land conveyances to Portland Cement, Coast Dairies also granted necessary water rights and access rights to enable the development of a sufficient water supply to serve both the manufacturing needs of the cement company and the municipal needs of a town that would grow with the company.

Davenport's municipal water supply and water rights were initially established through grant deeds and other recorded instruments, such as the 1905 Memorandum of Agreement between Coast Dairies and Portland Cement. The 1905 Agreement states in part:

[Coast Dairies] intends and proposes to locate and establish a village or town site, or village and town sites, by subdividing into town lots land belonging to it, which is situate convenient to the said land granted aforesaid to [Portland Cement], such lots to be offered for sale, exchange, lease or rent ... to such persons as may desire to acquire the same for residence or business, other than the business of the manufacture and sale of cement; it being especially hereby intended to provide for the comfort and accommodation of the persons who may be employed by said cement company ... and for the families and guests of such persons ... who may be employed as aforesaid, their families, friends and guests, and other persons, whether transient or seeking permanent residence, with homes, supplies, comforts, conveniences, accommodations and investments.

In consideration of these and other provisions, Coast Dairies conveyed the right to Portland Cement to construct diversion works on San Vicente Creek and deliver water to the location upon which the cement plant would be located. In addition, Coast Dairies reserved the right to divert water from the Creek to the plant site, through the lands of Portland Cement, and then to other lands owned by Coast Dairies, including but not limited to the above-referenced town sites and lots which became the Town of Davenport. We understand that concerns have been raised over certain reversionary language in the 1905 Agreement, which states: "[I]f for any cause the business of manufacturing cement thereat, should be abandoned or permanently discontinued, then the said rights hereby granted to the said water of said creek shall cease, and

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thereupon and thereby revert to said [Coast Dairies], its successors or assigns." Based on our reading of the 1905 Agreement, other recorded documents, and relevant legal authorities such as those discussed below, we believe the reversionary language applies only to the water supply and water rights used for construction and operation of the cement plant, and does not apply to or otherwise affect the water supply and water rights that have been dedicated to public use.

The early development of Davenport's water supply and water rights are also recognized in a 1923 grant deed from Coast Dairies to Portland Cement, which states:

[Portland Cement] hereby agrees, while engaged in the manufacture of cement at Davenport, to continue to supply [Coast Dairies], its successors and assigns, with water of the same quality and in the same quantity and from the system as at present constituted and practiced in the past, when such water is available to [Portland Cement] from its present supply in San Vicente Canyon, free of any charge for distribution, for household and domestic purposes to the inhabitants of the Town of Davenport, California.

This water supply and water rights arrangement has remained in place for more than a century to serve the municipal needs of the Davenport community. In later years, successors-in-interest to Portland Cement entered agreements with Davenport to construct the water filtration and treatment facility that is used to deliver water from the Sandbox to Davenport. Those agreements recognize the historic water deliveries to Davenport and expressly require those deliveries to continue free of charge for the benefit of Davenport residents.

Based on our review, we conclude that the County of Santa Cruz has strong claims for ensuring a sufficient and reliable water supply from San Vicente and Mill Creeks to serve the existing and future water needs of Davenport. The California courts have determined that where a water right holder knowingly allows water under its right to be used for the public without objection, and the public appropriates the water, makes investments in and relies upon it, the water is dedicated to the public and the original holder of the right may not obtain an injunction to prevent the public use of the water. (See, e.g., *Conaway v. Yolo Water & Power Co.* (1928) 204 Cal. 125; *Collier v. Merced Irr. Dist.* (1935) 213 Cal. 554; *Burr v. Maclay Rancho Water Co.* (1911) 160 Cal. 268; *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29.) In addition, courts have found that property, including water, may be shown to have been devoted to a public use by implication from the acts of its owners and their dealings and relations to such property. (See, e.g., *Yucaipa Water Co. No. 1 v. Public Utilities Comm.* (1960) 54 Cal.2d 823; *Corona City Water Co. v. Public Utilities Comm.* (1960) 54 Cal.2d 834.)

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As applied to Davenport, the facts and circumstances show that one or more private water right holders have expressly and impliedly held themselves out as supplying water to serve the needs of the public. Water from San Vicente and Mill Creeks has been diverted, conveyed and used to serve the municipal needs of Davenport on a continuous basis for more than 100 years without objection from any water right holder. Moreover, Davenport has relied upon and invested in the water supply for the benefit of the public. Accordingly, the water supply, water rights, and facilities used to serve Davenport have been dedicated to public use. In addition, the County has strong contractual and other claims to the water supply, water rights, and related facilities to ensure the ongoing public health, safety and welfare of the community.

**Estimates to Pursue New Appropriative Water Rights in the Name of the County
and/or Adjudicate the San Vicente and Mill Creek Systems**

You also have asked us to prepare preliminary legal budgets to (1) pursue a new appropriative water right from the State Board in the name of the County and/or (2) adjudicate the San Vicente and Mill Creek systems. Both items are very difficult to budget because of the various unknowns in any adjudicatory proceeding. Costs would be influenced by key factors such as the number of parties involved (and related service of process requirements, although we would seek orders to streamline that effort), the nature of water right claims made by other parties, and the need to address fishery issues and the inevitable involvement of the National Marine Fisheries Service, the Department of Fish and Wildlife, and possibly others. Most likely, an appropriative water right application would also involve review under the California Environmental Quality Act, and may be subject to other habitat conservation requirements. Another unpredictable factor is the time it would take to complete a water right application and hearing, or an adjudication, and the possible need to see either proceeding through an appeal process. In most cases, some parties benefit from the status quo and do everything possible to delay the process and increase costs.

Our firm has extensive experience in appropriative water right applications and in adjudicating both surface and groundwater supplies. A water right application is likely to take a considerable amount of time. Although State Board staff indicates a 2-5 year process for new applications, the process could take considerably longer (perhaps up to twice as long or more) because of endangered species issues, habitat conservation requirements, and the possibility of other party interests involving San Vicente and Mill Creeks. For an adjudication, our most recent experiences in the groundwater arena show that the process can take 15 years or longer to resolve. However, here it is possible that a limited number of parties and competing claims could yield a quicker process. At this time, our best estimate to oversee an appropriative water right application is approximately \$125,000 per year for attorney fees in the application and investigation periods, and \$350,000 per year during hearing stages. Our best estimate to adjudicate this matter is approximately \$350,000 per year for attorney fees, and we believe it

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would likely take at least five years. For either proceeding there will be additional costs for experts, service and court reporters which are extremely hard to forecast at this point, but \$100,000 per year is probably a reasonable estimate.

Please let us know if you have any questions or concerns. We look forward to discussing this letter with you in the near future.

Sincerely,



Paeter E. Garcia
of BEST BEST & KRIEGER LLP

