



## ORDINANCE NO. 2007-01

### **AN ORDINANCE OF THE PAJARO VALLEY WATER MANAGEMENT AGENCY REPEALING SECTION 4 OF ORDINANCE NO. 2003-01 AND SECTION 4 OF ORDINANCE NO. 2004-02, AND AMENDING SECTION 5 OF ORDINANCE NO. 2004-03 TO MAKE FUTURE ADJUSTMENTS TO COMPONENT 1 OF DELIVERED WATER CHARGE SUBJECT TO FUTURE BOARD ACTION.**

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The Board of Directors of the Pajaro Valley Water Management Agency makes the following findings:

1. The Pajaro Valley Water Management Agency was formed, among other reasons, to provide integrated management of the ground and surface water resources within the Pajaro Basin (“Basin”). As the sole local agency responsible for the integrated management of water resources for the Pajaro Basin, the Agency bears responsibility for the management and augmentation of water supplies for domestic, agricultural, municipal and industrial purposes. The purposes and functions of the Agency are set forth in the PVWMA enabling Act, California Water Code Appendix, Chapter 124 (the “Act”).
2. The PVWMA Augmentation Charge (the “Augmentation Charge Ordinance”) was established by Ordinance No. 93-1 for the purposes enumerated in the Act, and has been amended or supplemented from time to time by Ordinance Nos. 93-2, 95-1, 96-2, 96-3, 98-2, 2002-01, 2002-02, 2003-01, 2004-02 and 2005-01.
3. Ordinance No. 2002-02 was adopted on May 31, 2002, among other things increasing the augmentation charge from \$50/acre foot (af) to \$80/af. On October 24, 2002, a complaint challenging the validity of Ordinance No. 2002-02 was filed in the Santa Cruz County Superior Court in the matter entitled *James P. Scurich, et al., v. PVWMA*, SCSC Case No. 144843 (the “Scurich Case”). On January 8, 2003, the Superior Court granted a motion to dismiss the complaint for lack of jurisdiction, because plaintiffs failed to properly serve the complaint by publication within the statutory period set forth at Code of Civil Procedure section 863 for challenges to “capacity charges” described in Government Code section 66013. On or about May 27, 2004, the Court of Appeal for the Sixth Appellate District issued an unpublished decision reversing the trial court in part, concluding that, to the extent that the augmentation charge was imposed for capital facilities, that portion of the charge was subject to the time and notice requirements of Code of Civil Procedure section 863. However, the Court of Appeal concluded that plaintiffs could challenge the portion of the ordinance that imposed groundwater augmentation charges for anything other than the costs of capital improvements. The Scurich Case was subsequently remanded to the Santa Cruz County Superior Court and stayed pending the outcome of the “Validation Action” discussed below.

4. The Board of Directors adopted Ordinance No. 2003-01 on May 28, 2003 which, in addition to enacting certain administrative changes to the Augmentation Charge Ordinance, adopted Section 4, which amended the Augmentation Charge Ordinance to increase the amount of the augmentation charge by \$40, from \$80/af to \$120/af.
5. On July 1, 2003, the Agency filed its Complaint for validation of Ordinance 2003-01 (the "Validation Action") pursuant to Code of Civil Procedure sections 860 et seq. in the Santa Cruz County Superior Court. The sole issue in the Validation Action was the validity of the \$40 increase in the augmentation charge, and not the validity of any other provision of Ordinance No. 2003-01. After trial, the Honorable Samuel S. Stevens filed the operative Statement of Decision on August 13, 2004, in which he made detailed factual findings and resolved all issues presented in the Agency's favor. Judge Stevens' decision was timely appealed. On July 26, 2006, the Court of Appeal issued an opinion finding no error and affirming Judge Stevens' judgment in all respects.
6. On July 25, 2006, the California Supreme Court released its opinion in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4<sup>th</sup> 205, which held that "a public water agency's charges for ongoing water delivery," to parcels that voluntarily apply for and obtain domestic water service were "fees and charges within the meaning of article XIII D."
7. Based on the *Bighorn* decision, respondents in the Validation Action filed a motion for rehearing with the appellate court. On August 8, 2006, the appellate court granted the motion for rehearing.
8. Upon reviewing the *Bighorn* decision and the parties' briefs on rehearing, the Court of Appeal issued a new decision on May 21, 2007 in which it reversed its prior decision and concluded that the augmentation charge is a "property related fee or charge" and, therefore, that Ordinance No. 2003-01 was adopted in violation of the requirements of California Constitution Article XIII D, subd. (6) (the "Validation Action Decision").
9. On September 12, 2007, the Agency's Petition For Review was denied by the California Supreme Court, thus affirming the Court of Appeal's Validation Action Decision.
10. The Board of Directors adopted Ordinance Nos. 2004-02 and 2004-03 on November 17, 2004. Section 4 of Ordinance No. 2004-02 amended the Augmentation Charge Ordinance to increase the amount of the augmentation charge by an additional \$40, from \$120/af to \$160/af.
11. Subsequently, two actions were filed in the Santa Cruz County Superior Court, entitled *Harold W. Griffith v. PVWMA* (SCSC Case No. 150716); *San Andreas Mutual Water Company v. PVWMA* (SCSC Case No. 150923) (the "Subsequent Litigation") challenging the validity of Section 4 of Ordinance No. 2004-02, among other things.<sup>1</sup> As with the Validation Action, the Subsequent Litigation did not challenge any provision of

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<sup>1</sup> *Harold W. Griffith v. PVWMA* (SCSC Case No. 150716) also includes challenges to prior augmentation charge ordinances as well as the Agency's management fee.

Ordinance No. 2004-02 other than Section 4. The Court of Appeal decision in the Validation Action likewise applies to Ordinance No. 2004-02. However, based upon the Court of Appeal decision in the Scurich Case, prior augmentation charge increases, including the increase adopted by Ordinance 2002-02, would be appear to be time-barred, to the extent that the charges imposed thereby fund capital facilities.

12. Ordinance 2004-03 established charges for supplemental water delivered pursuant to the Revised Basin Management Plan Programs. Section 2 of Ordinance No. 2004-03 established a formula for determining the amount of the delivered water charge as the sum of the amount of the groundwater augmentation charge (“Component 1”) and the estimated avoided cost of pumping groundwater (“Component 2”), and set the initial delivery charge at \$262 per acre foot of delivered water. Section 5 of Ordinance 2004-03 includes a provision whereby Component 1 of the delivery charge is “automatically adjusted to be equal to the change, if any, in the Groundwater Augmentation Charge at any time, whether that fee is increased or decreased.” To date, there have been no legal challenges to Ordinance No. 2004-03.

**NOW, THEREFORE**, based on the above findings, the Board of Directors of the Pajaro Valley Water Management Agency ordains as follows:

**SECTION 1. REPEAL OF ORDINANCE NOS. 2003-01 AND 2004-02**

Ordinance No. 2003-01 and Ordinance No. 2004-02 are hereby repealed in their entirety.

**SECTION 2. AMENDMENT TO ORDINANCE NO. 2004-03.**

Section 5 “REVIEW AND ADJUSTMENT OF RATES” of Ordinance No. 2004-03 is hereby amended to read as follows:

“The portion of Component 2 consisting of capital facilities and operation and maintenance costs shall be reviewed and adjusted annually by the Board. Any change in the Project Water rate as a result of this annual process shall become effective on January 1 of the following calendar year. Additional adjustments for energy costs may be made quarterly, if necessary.

The portion comprising Component 1 shall be adjusted as determined by resolution of the Board of Directors.”

**SECTION 3. PRIOR AUGMENTATION CHARGE ORDINANCES.**

**3.01. AUGMENTATION CHARGES**

The Augmentation Charge Ordinance was originally established by Ordinance 93-1, and has been amended and/or supplemented by Ordinance Nos. 93-2, 96-2, 96-3, 95-1, 98-2, 2002-01, 2002-02, 2003-01, 2004-02 and 2005-01 (collectively the “Prior Ordinances”). The Prior Ordinances are amended, supplemented and revised as stated in this Ordinance No. 2007-01. To the extent that any provision of the Prior Ordinances conflicts with the provisions of this Ordinance, the provisions of this Ordinance shall control and be operative to amend, revised and replace the conflicting provisions of the

Prior Ordinances. All other provisions of the Prior Ordinances remain in full force and effect and shall not be affected by this Ordinance. Except for Section 4 of each ordinance, and except as amended by any subsequent ordinances including Ordinance No. 2005-01 and this Ordinance, the Board of Directors hereby readopts the remaining provisions of Ordinance Nos. 2003-01 and 2004-02 by reference, as though set forth in full herein.

**SECTION 4. SEVERABILITY**

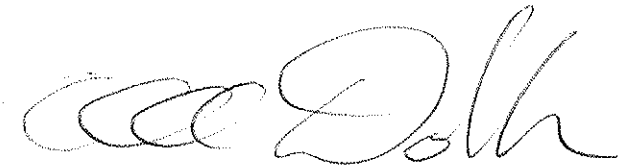
If any section, subsection, paragraph, sentence, clause, or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, it shall not affect the validity of the remaining portion of this ordinance, including any other section, subsection, sentence, clause, or phrase therein.

**SECTION 5. EFFECTIVE DATE**

This ordinance be in full force and shall take effect immediately upon its adoption by the Board of Directors, and shall apply to all augmentation charges billed after its effective date.


**PASSED AND ADOPTED** this 3<sup>rd</sup> day of October 2007, by the following vote:

**AYES:** Directors: Dobler, Imazio, Cervantes, Osmer, Koenig  
**NOES:** Directors: Eiskamp, Kegebein  
**ABSENT:** Directors: None  
**ABSTAIN:** Directors: None



Michael Dobler, Chair

**ATTEST:**

BY:   
Bruce Laclergue, General Manager  
Secretary

-for-