

FEE EXEMPT

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN BERNARDINO

11
12 CHINO BASIN MUNICIPAL WATER
13 DISTRICT,

14 Plaintiff,

15 vs.

16 CITY OF CHINO, et al.,

17 Defendants.

Case No: RCV 51010

*Assigned for All Purposes to the
Honorable Stanford E. Reichert*

**CITY OF ONTARIO'S RESPONSE
REGARDING ISSUE FOR FURTHER
BRIEFING**

Date: April 28, 2017
Time: 1:30 P.M.
Dept.: S-35

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20 Pursuant to the "Notice of Hearing and Revised Proposed Order Re: SYRA and
21 Response to Questions; Issue for Further Briefing" (the "Revised Proposed Order") that was
22 issued by the Court on February 22, 2017, the City of Ontario ("Ontario") hereby submits this
23 response to the briefs that were filed on March 10, 2017.

24 **I. Introduction**

25 The Court's Revised Proposed Order presents the following question for further
26 briefing: whether the 135,000 acre-feet ("AF") Safe Yield reset is inclusive of 20,000 acre-feet
27 per year ("AFY") of desalter-induced recharge. (*See* Revised Proposed Order, at 5:15-26.)

1 Chino Basin Watermaster (“Watermaster”) responds to the Court’s question by laying out a
2 workable understanding of the relationship between Safe Yield and desalter-induced recharge.
3 In contrast, Monte Vista Water District, Cucamonga Valley Water District, the City of Pomona,
4 and the City of Upland (collectively, the “Four Agencies”) seek to explain the relationship
5 between Safe Yield and desalter-induced recharge in a manner that is legally defective and that
6 calls for discarding all the efforts that lead to the Revised Proposed Order. The City of Chino’s
7 (“Chino’s”) brief does not address the question of the relationship between Safe Yield and
8 desalter-induced recharge. Accordingly Ontario does not respond to Chino’s brief, but reserves
9 its rights should any of Chino’s arguments become relevant.

10 The sharply divided views expressed by Watermaster and the Four Agencies arise from a
11 perceived conflict between the Judgment’s definition of “Safe Yield” and paragraph 7.1 to Peace
12 II. Watermaster explains that the parties can agree to reserve or “sequester” a portion of Safe
13 Yield for a specific purpose, and they did so by contractually sequestering desalter-induced
14 recharge for desalter replenishment under the Peace Agreements. (*See* Watermaster brief, at
15 3:17-27, citing Peace I at ¶7.5, and Peace II at ¶7.1; *see also* Watermaster brief, at 4:14-16.) In
16 contrast, the Four Agencies attempt to deal with this issue by insisting – for the first time in this
17 proceeding – that Safe Yield cannot include desalter-induced recharge and Safe Yield must be
18 reduced to 115,000 AFY.

19 Watermaster’s approach also addresses the key issue of backfill under Exhibit “H” to the
20 Restated Judgment (“Appropriative Pool Plan”) at paragraph 10(a)(1), which provides for
21 backfill only “to compensate for any reduction in the Safe Yield by reason of recalculation”
22 Watermaster’s brief makes it clear that sequestering desalter-induced recharge to offset desalter
23 production is not a “recalculation” of Safe Yield that triggers backfill (*see* Watermaster’s brief,
24 at p.5); whereas the Four Agencies do not address this important issue and instead leave it open
25 for debate.

26 In short, Watermaster’s approach of sequestering the portion of Safe Yield attributable to
27 desalter-induced recharge can be harmonized with the Judgment and the Peace Agreements, and
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1 it also offers a degree of clarity regarding the implementation of the Revised Proposed Order.
2 Watermaster's response shows that this proceeding can be concluded by reducing the Safe Yield
3 to 135,000 AFY based upon the record before the Court, and Watermaster can reasonably
4 continue to administer the Judgment on that basis.

5 **II. Watermaster's Approach Can Be Harmonized With the Judgment and the Peace**
6 **Agreements, and It Can Be Effectuated Without Further Proceedings**

7 Watermaster's brief explains that uncertainty regarding the relationship between Safe
8 Yield and desalter-induced recharge arises from a perceived conflict between Peace II and the
9 Judgment's definition of "Safe Yield." Specifically, the Judgment defines "Safe Yield,"
10 consistent with physical reality, to be inclusive of all water coming into the Chino Basin from
11 whatever source, including desalter-induced recharge to the extent it contributes to the "long-
12 term average annual quantity of ground water . . . which can be produced from the Basin under
13 cultural conditions of a particular year without causing an undesirable result." (See Watermaster
14 brief, at 3:3-7, quoting Restated Judgment, at ¶ 4(x).) This definition of "Safe Yield" is a key
15 Basin management tool that was not amended by the Peace Agreements. However, Paragraph
16 7.1 of Peace II prohibits Watermaster and the Parties from "request[ing] that Safe Yield be
17 recalculated in a manner that incorporates New Yield *attributable to the Desalters* into the
18 determination of Safe Yield so that this source of supply will be available for Desalter
19 Production rather than for use by individual parties to the Judgment" for "the initial term of
20 [Peace I]." (Peace II, at ¶7.1, emphasis in original.) Watermaster navigates this perceived
21 conflict by explaining how the Judgment's definition of "Safe Yield" and paragraph 7.1 of Peace
22 II can be harmonized. (See Watermaster Brief, at 3:11-3:27.)

23 Watermaster's approach harmonizes the Judgment and the Peace Agreements by
24 recognizing that the parties can agree to reserve or "sequester" a portion of Safe Yield for a
25 specific purpose, and that they did so through the Peace Agreements by reserving desalter-
26 induced recharge for desalter replenishment. (See Watermaster brief, at 3:17-27, citing Peace I,
27 at ¶7.5, and Peace II, at ¶7.1; see also Watermaster brief, at 4:14-16.) Specifically, paragraph 7.1

1 of Peace II requires Watermaster to “make an annual finding as to the quantity of New Yield
2 made available by . . . the [desalters],” and this annually-determined quantity is reserved as an
3 offset to desalter production. (Peace I, ¶7.5.)

4 Importantly, Watermaster’s brief clearly shows, consistent with the Court’s tentative
5 ruling, that its proposed sequestering of the annually determined amount of desalter-induced
6 recharge does **not** trigger backfill under paragraph 10(a)(1) of the Appropriative Pool Plan. (*See*
7 Revised Proposed Order, at pp. 28, 30.) According to the Revised Proposed Order, “backfilling
8 Safe Yield from unproduced Ag Pool water . . . is an unacceptable circumvention of the court’s
9 orders based on Peace I and Peace II. (*Id.*, at 56:17-20.) Backfill is triggered only “to
10 compensate for any reduction in the Safe Yield by reason of recalculation” (Appropriative Pool
11 Plan, ¶10(a)(1)), and Watermaster’s sequestering of the portion of Safe Yield attributable to
12 desalter-induced recharge is not the same as a “reduction in the Safe Yield by reason of
13 recalculation.” Thus, the sequestering does not trigger backfill, and accordingly it does not
14 reduce the amount of unproduced Agricultural Pool water that otherwise is available for land use
15 conversions under paragraph 10 of the Appropriative Pool Plan. To illustrate, under paragraph
16 10 of the Appropriative Pool Plan, the reduction in Safe Yield from 140,000 AFY to 135,000
17 AFY triggers the following allocation of unproduced Agricultural Pool water: first the 5,000
18 AFY is backfilled; then land use conversions are satisfied; and any remaining water is available
19 for early transfer and as a supplement to Operating Safe Yield. (*See* Revised Proposed Order, at
20 64:3-9, 67:5-6.) This result is consistent with the policy of encouraging and facilitating land use
21 conversions that has been firmly embedded in the Judgment (*see* Exhibit “H” to Restated
22 Judgment, at ¶10), and affirmed by the Court. (*See, e.g.*, Revised Proposed Order, at 21:27-
23 24:11; 48:24-49:1; 51:11-13; 64:4-7.)

24 In summary, Watermaster’s approach comports with the Judgment’s definition of “Safe
25 Yield,” and it is consistent with physical reality and the requirement under the Peace Agreements
26 to reserve desalter-induced recharge to offset desalter replenishment. Additionally,
27 Watermaster’s brief clarifies that its approach does not trigger backfill (beyond that attributable
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1 to the reduction in Safe Yield from 140,000 AFY to 135,000 AFY) consistent with the Court’s
2 tentative ruling, and it describes a workable resolution for the last remaining issue currently
3 pending before the Court.

4 **III. The Four Agencies’ Approach Is Defective as a Matter of Law, and It Unnecessarily**
5 **Seeks to Complicate and Prolong This Proceeding**

6 The brief submitted by the Four Agencies proposes to discard all the efforts that lead to
7 the Revised Proposed Order, in favor of advocating now for a technically unsupported Safe
8 Yield reset to a much lower amount and the appointment of a special referee. If this
9 unnecessarily complicated approach is adopted, this Safe Yield reset might not be completed
10 before the initiation of the next reset for 2020. Additionally, this approach suffers from
11 numerous fatal defects.

12 First, as discussed in more detail above, the Four Agencies’ insistence that Safe Yield
13 must be reset to a lower amount to exclude desalter-induced recharge cannot be reconciled with
14 the Judgment’s definition of “Safe Yield.” (*See* Restated Judgment, at ¶ 4(x).) The “Safe Yield”
15 definition serves as a fundamental Basin management tool that was not amended by the Peace
16 Agreements, and accordingly Safe Yield cannot be calculated in a manner that is inconsistent
17 with that definition.

18 Contrary to the assertion of the Four Agencies, resetting the Safe Yield to 135,000 AFY
19 will not authorize production of 155,000 AFY and a corresponding uncontrolled overdraft of
20 20,000 AFY. (*See* Four Agencies’ brief, 3:23-4:8.) Instead, the portion of the 135,000 AFY that
21 is determined by Watermaster to be the “annual . . . quantity of New Yield made available by . . .
22 the [desalters]” (*see* Peace II, at ¶7.1) will be sequestered for designated purposes, as described
23 in more detail above and in Watermaster’s brief.

24 Second, as discussed above, the Four Agencies’ brief fails to address the important issue
25 of backfill under the Appropriative Pool Plan. The Safe Yield reset from 140,000 AFY to
26 135,000 AFY presumably will trigger backfill in the relatively modest amount of 5,000 AFY.
27 (*See* Appropriative Pool Plan, at ¶10(a)(1).) However, the Four Agencies’ approach could
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1 trigger an unprecedented additional 20,000 AFY of backfill – all from unproduced Agricultural
2 Pool water that otherwise would be available to satisfy land use conversion claims. (*See id.*, at
3 ¶10.)

4 Third, this request to reduce Safe Yield to 115,000 AFY is not supported by the technical
5 record before the Court that the Court has accepted as the basis for the Safe Yield reset. (*See*,
6 *e.g.*, Revised Proposed Order, at 13:3-14:7.) The Four Agencies want to simply deduct 20,000
7 AFY from the Safe Yield amount of 135,000 AFY, but that proposed deduction is meaningless,
8 except that it would serve to reallocate water that is currently available for land use conversions
9 away from the municipalities that provide water service to redeveloped agricultural land, in a
10 manner that is inconsistent with the Judgement. The 20,000 AFY was calculated as a component
11 of Safe Yield (*see* Exhibit “1” to Wildermuth Decl. in Support of Watermaster’s Motion re:
12 SYRA); it was not calculated based on the definition of “New Yield” (Peace I, ¶1.1(aa)); nor was
13 it calculated based on paragraph 7.1 of Peace II, which requires Watermaster to “make an annual
14 finding as to the quantity of New Yield made available by . . . the [desalters].”

15 Fourth, the Four Agencies previously did not object to the Safe Yield reset to 135,000
16 AFY (*see* Revised Proposed Order, at 4:3-5), and presumably they concurred with that Safe
17 Yield calculation. They should not be permitted to reopen the technical portion of this
18 proceeding at this late stage.

19 Finally, none of the Court’s preconditions for the appointment of a special referee have
20 been met. The Court stated that it would consider engaging a special referee if (1) “Watermaster
21 and the parties wish to engage the court on specific physical consequences of the court’s order”;
22 or (2) “Watermaster wants the court to start engaging in making predictions on the practical
23 effect of its rulings.” (Revised Proposed Order, at 3:22-25; 4:19-23; 5:6-7.) The Four Agencies
24 have not identified any such issues that would be appropriate for the appointment of a referee.
25 The mere fact that the case is complex and “affects the public interest, the rights of the parties,
26 and their investment-backed expectations” (Four Agencies’ brief, 4:26-28), whatever those may
27 be, does not justify the lengthy delay such an appointment inevitably would cause nor the
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1 substantial additional commitment of time and resources that would be required of all involved.
2 While Ontario does not support the unnecessary appointment of a special referee in order to
3 conclude this Safe Yield reset proceeding, Ontario reserves its right to advocate for the
4 appointment of a special referee in the future if circumstances warrant.

5 In summary, the Four Agencies' approach is fundamentally defective as a matter of law
6 because it cannot be reconciled with the Judgment's definition of "Safe Yield." It also is
7 defective because it fails to address the important issue of backfill; it is not adequately supported
8 by the record before the Court; it raises significant new issues that are inconsistent with positions
9 previously taken by the Four Agencies' in this proceeding; and it unnecessarily seeks to
10 complicate and prolong this proceeding. For all of these reasons, the Four Agencies' approach
11 should be rejected.

12 **IV. Conclusion**

13 For all the reasons set forth above, Ontario respectfully requests that the Court finalize its
14 Revised Proposed Order in light of Watermaster's answer to the question presented by the Court
15 for further briefing, and that the Court disregard the Four Agencies' answer to that question and
16 deny their request for the appointment of a special referee.

18 Dated: March 24, 2017

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CHINO BASIN WATERMASTER
Case No. RCV 51010
Chino Basin Municipal Water District v. The City of Chino

PROOF OF SERVICE

I declare that:

I am employed in the County of San Bernardino, California. I am over the age of 18 years and not a party to the within action. My business address is Chino Basin Watermaster, 9641 San Bernardino Road, Rancho Cucamonga, California 91730; telephone (909) 484-3888.

On March 24, 2017 I served the following:

1. CITY OF ONTARIO'S RESPONSE REGARDING ISSUE FOR FURTHER BRIEFING

BY MAIL: in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid, for delivery by United States Postal Service mail at Rancho Cucamonga, California, addresses as follows:

See attached service list: Mailing List 1

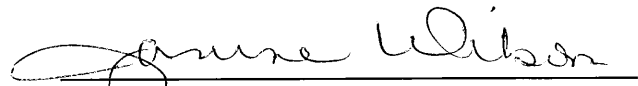
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 24, 2017 in Rancho Cucamonga, California.



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