Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: September 17, 2007

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: In Relation to the Monte Verde Project No. 6563, City Council Agenda Item 203, Scheduled to be Heard on September 17, 2007

INTRODUCTION

On August 31, 2007, U.S. District Court Judge Oliver W. Wanger, as a follow-up to his May 25, 2007 ruling, announced a series of severe restrictions on the operations of the massive pumps that supply water from the California Bay Sacramento-San Joaquin Delta [Bay-Delta] to two-thirds of all Californians, including 3 million San Diego County residents. *See* San Diego County Water Authority News Release, August 31, 2007. Water is supplied or diverted to end-users by way of the Central Valley Project [CVP] and the State Water Project [SWP]. San Diegans get their Bay-Delta water from the City's Water Department, by way of arrangements with the San Diego County Water Authority [Water Authority], who obtains this water from the Metropolitan Water District [MWD] as supplied by the State Water Project.

Judge Wanger's ruling is the consequence of years of significant water use impact on a threatened species—the Delta Smelt—and a recent proposed plan to increase water usage evaluated and considered in the Long-Term Central Valley Project and State Water Project Operations Criteria and Plan [2004 OCAP or OCAP]. The OCAP surveys how these two water diversion projects—the Central Valley Project and the State Water Project—are currently managed in light of evolving circumstances. The United States Fish & Wildlife Service [FWS] evaluated the biological impacts of the OCAP pursuant to the federal Endangered Species Act [ESA] and determined in a written Biological Opinion [BiOp] that the current project operations described in the OCAP and planned future actions would not jeopardize the continued existence of the Delta Smelt or adversely modify its critical habitat.

Judge Wanger found that the Delta Smelt was undisputedly in jeopardy as to its survival and recovery and that the FWS BiOp determination of no jeopardy was arbitrary, capricious, and contrary to law. *See Natural Resources Defense Council v. Kempthorne*, Slip Copy, 2007 WL 1577896 at 1 & 58 (E.D. Cal.) (May 25, 2007).

San Diegans may be severely impacted by this recent court ruling because the Bay-Delta provides more than one-third of all water used in the County. Last year, 41 percent of all water used in San Diego County was imported from the Bay-Delta. *See* Water Authority News Release, June 1, 2007. As indicated in a recent San Diego Union-Tribune Article, "[t]he precise amount of water required for smelt protection won't be known for months," but "[e]arly estimates are that the safeguards would lower normal deliveries from 14 percent to 37 percent." *Multiyear Shortage of Water Discussed, Agencies Concerned with Recent Ruling* by Mike Lee, San Diego Union-Tribune, September 5, 2007.

Pursuant to California Law (SB221 and SB610), the City of San Diego is required, before approving certain large developments, to verify that there will be a sufficient water supply over a 20 year window. The Monte Verde Project is a large-scale development encompassing more than 500 residential units, and as such is subject to the water supply verification requirements of State Law. The Monte Verde Project impact on water supply was evaluated in 2004 by the City's Water Department in a Water Supply Assessment Report [Water Report]. This Water Report was referenced in the Project's Environmental Impact Report [EIR], but did not and could not take into account recent events and recent judicial determinations.

One of the consequences of today's City Council determination on the Monte Verde Project will be the approval of the water supply verification found in the Water Report, which under the provisions of State Law may be challenged in court. Any challenge to the verification must be initiated within 90 days. Government Code Section 66473.7(o). Given that the 2004 Water Supply Assessment Report forms the basis behind the water supply analysis in the EIR for this project, the EIR's adequacy remains questionable at this time as well. *See* Section 5.4 of Monte Verde Project EIR. This memo addresses the inability of the City of San Diego to make any determinations regarding water supply adequacy in light of Judge Wanger's recent rulings.

ANALYSIS

Under California Law, a "sufficient water supply" is defined as a water supplier's 20-year projected water supplies available during normal, single-dry, and multiple-dry years, which will meet the subdivision's water demands in addition to existing and planned future uses, including, but not limited to, agricultural and industrial uses. Government code Section 66473.7(a)(2). This City determination must be supported by substantial evidence in the record. Furthermore, if the water supplier's verification relies on projected water supplies that are not currently available to the public water system, the water verification must be based upon 1) written contracts or other proof of valid rights to the identified water supply that identify the terms and conditions under which the water will be available to serve the proposed subdivision; 2) capital outlay programs for the financing of the delivery of the water; 3) securing the applicable federal, state, and local permits for the construction of necessary infrastructure associated with supplying the water; and 4) necessary regulatory approvals that are required in order to be able to convey or deliver the water to the subdivision. Government Code Section 66473.7(d)(1)–(4). The City's

2004 Water Supply Assessment Report for Monte Verde does not adequately provide this necessary analysis and supporting documentation for projected water supplies.

Under the California Environmental Quality Act [CEQA], a water supply assessment should also be incorporated into the Environmental Impact Report for the Monte Verde Project. Water Code Section 10910 *et seq.*; Public Resources Code Section 21151.9. Given recent events and the Delta Smelt judicial determination, the City will need to re-evaluate the adequacy of the Monte Verde Project Water Assessment Report and the EIR.

In recognition of the County's serious water deficit and the Delta Smelt determination, Fern Steiner, chair of the Water Authority, has stated in an August 31, 2007 news release that "[t]he water supply impacts of this court decision to San Diego County will be significant, and supply shortages and mandatory water use restrictions are a very real possibility. This decision comes on the heels of the historic dry conditions we are experiencing throughout California, which are already impacting water supplies." According to a Water Authority June 1st news release, with historic dry-year conditions in California and the West, "the Metropolitan Water District of Southern California [MWD] already was withdrawing water from storage to meet demand this year." According to the Water Authority August 31st news release, the MWD, from which the Water Authority purchases Bay-Delta water supplies, has already advised agricultural customers who buy water at a discount through an MWD program to expect a 30 percent cut in those supplies beginning January 1, 2008. According to Steiner, "[w]hile this ruling will determine water deliveries for the next year or so, we are very concerned that its limits could continue under the new permanent rules for operating the State Water Project pumps." *See* Water Authority August 31, 2007 News Release.

Leading the drive to address this serious water shortfall, the city of Long Beach declared, on Thursday, September 13, 2007, a water emergency. For Long Beach residents this means (1) a prohibition on lawn watering during the day, (2) a limit on frequency of lawn watering to three times a week, (3) a prohibition on use of water hoses to clean driveways, patios, sidewalks or any other paved or cemented areas unless they use a pressurized water device, (4) a limit on water served to customers at local restaurants, and (5) a requirement that local hotels give guests the option of re-using towels and linens without having them washed every day. The Los Angeles Department of Water and Power may enforce mandatory water rationing similar to Long Beach's if Judge Wanger's decision is upheld and if the region has another dry winter. *See* September 14, 2007, Los Angeles Times Article *Long Beach Puts Limits on Water Use* by Hector Becerra and Ari B. Bloomekatz.

This water shortfall is exacerbated by the fact that for years Californian's have been increasing their water dependency upon Bay-Delta water supply. According to a May 2007 Delta Smelt fact sheet prepared by Earthjustice, "[a]nnual exports have increased 25% from 1994-1998 and 2001-2006, draining the delta of more than 1.2 million acre-feet of additional water. Annual exports in 2005 and 2006 were the first and third highest export levels on record. Wintertime exports have increased by 49% from 1994-1998 and 2001-2006, and springtime exports have

increased by 30%." *Delta Smelt Facts*, May 2007, Earthjustice, found at http://www.earthjustice.org/library/background/delta-smelt-facts-may-2007.html?print=t

In addition to this water shortfall and increasing water usage, San Diegans are further impacted by the environmental consequences of climate change. Recognizing the significance of climate change, Judge Wanger's May 25, 2007 determination on the inadequacy of the FWS's Biological Opinion took note of the fact that the BiOp failed to account for the impacts of climate change on "water supply reliability." The FWS's Biological Opinion assumed that hydrology of the water bodies affected will follow historical patterns for the next 20 years. The Biological Assessment performed by the Bureau of Reclamation, and provided to the FWS, also did not address climate change impacts. *See Natural Resources Defense Council v. Kempthorne*, Slip Copy, 2007 WL 1577896 at 38-39 (E.D. Cal.) (May 25, 2007). As stated by Judge Wanger:

> In California, a significant percentage of annual precipitation falls as snow in the high Sierra Nevada Mountains. Snow pack acts as a form of water storage by melting to release water later in the spring and early summer months...The effects of global climate change are expected to have a profound effect on this dynamic. Among other things, more precipitation will occur as rain rather than snow, less water will be released slowly from snow pack "storage" during spring and summer months, and flooding is expected to increase....These developments will make it more difficult to fill the large reservoirs in most years, reducing reservoir yields and will magnify the effect of [Central Valley Project] operations on downstream fishes. These developments will also dramatically increase the cost of surface storage relative to other water supply options, such as conservation....
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> [T]he Biological Assessment [BA]...entirely ignores global climate change and existing climate change models. Instead, the BA projects future project impacts in explicit reliance on seventy-two years of historical records. In effect, the Biological Assessment assumes that neither climate nor hydrology will change. This assumption is not supportable....The [Fish & Wildlife] Service can and must evaluate how the range of likely impacts would affect [Central Valley Project] operations and impacts, including the Bureau [of Reclamation's] ability to provide water to contractors while complying with environmental standards....
>
> The [FWS's] BiOp does not gauge the potential effect of various climate change scenarios on Delta hydrology. Assuming, *arguendo*, a lawful adaptive management approach, there is no discussion when and how climate change impacts will be addressed, whether existing take limits will remain, and the probable impacts on [Central Valley Project-State Water Project] operations.

Id at 39-41.

Given our growing water dependency on Bay-Delta water supply, and recent court imposed and other operational and climate change limitations to Bay-Delta water availability, it is imperative

that the City of San Diego fully take into account these significant changed circumstances and re-analyze the implications of future water supply availability and water supply alternatives for existing commercial, residential and industrial use and future development.

Case law supports further CEQA analysis and a re-evaluation of prior water supply projections. Judge Wanger's Order demonstrates the uncertainty and risk associated with reliance upon water entitlements or contracts ("paper" water) for future water supply from the State Water Project. The City of San Diego's future water supply is inherently dependent upon State Water Project entitlements to Bay-Delta water as is demonstrated in the City's Water Supply Assessment Reports, the City's Urban Water Management Plan [UWMP] (2005), the San Diego County Water Authority's Updated 2005 Urban Water Management Plan (2007) and the Metropolitan Water District's Urban Regional Water Management Plan (2005). San Diego's UWMP incorporates by reference the Water Authority's and MWD's UWMPs. Other courts have recognized that water entitlements do not ensure the same amount of water in any given year. Thus, the discussion, analysis, mitigation and findings in a Water Assessment or in an Environmental Impact Report need to accurately reflect these uncertainties. *See Santa Clarita Organization for Planning the Environment v. County of Los Angeles* 106 Cal. App. 4th 715 (2003) ("'there is a huge gap between what is promised and what can be delivered,' rendering State Water Project entitlements nothing more than 'hopes, expectations, water futures or, as the parties refer to them, 'paper water'"', *quoting Planning & Conservation League v. Department of Water Resources* 83 Cal. App. 4th 892, 908, fn. 5 (2000)); *California Oak Foundation v. City of Santa Clarita* 35 Cal. Rptr. 3d 434 (2005); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* 53 Cal. Rptr. 3d 821, 832-833 (2007).

Urban Water Management Plans [UWMPs] are used to assess the reliability of future water supply over a twenty year period. UWMPs are relied upon by the City to prepare Water Supply Assessments for large-scale projects such as residential developments of 500 or more dwelling units. *See* Government Code Section 66473.7, Water Code Section 10910 *et seq.*, Public Resources Code Section 21151.9 and CEQA Guidelines Section 15083.5. An UWMP's failure to adequately reflect water supply reliability can be detrimental to the City's ability to accommodate future development and potentially a basis for future litigation. *See Friends of the Santa Clara River v. Castaic Lake Water Agency* 123 Cal. App. 4th 1 (2004). The relationship between UWMP responsibilities and CEQA obligations is discussed in the recent California Supreme Court decision *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* 53 Cal.Rptr.3d 821 (2007), where the Court found the long-term water supply analysis in the EIR to be inadequate. In *Vineyard Area Citizens for Responsible Growth*, the California Supreme Court articulated certain principles for water supply analytical adequacy under CEQA:

> First, CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to "evaluate the pros and cons of supplying the amount of water that the [project] will need." (*Santiago County Water Dist. v. County of Orange, supra,* 118 cal.App.3d at p. 829, 172 Cal.Rptr.602).

> Second, an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years....CEQA's demand for meaningful information "is not satisfied by simply stating information will be provided in the future." (*Santa Clarita, supra,* 106 Cal.App.4th at p. 723, 131 Cal.Rptr.2d 186).
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> Third, the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ("paper water") are insufficient bases for decisionmaking under CEQA. (*Santa Clarita, supra,* 106 Cal.App.4th at pp. 720-723, 131 Cal.Rptr. 2d 186). An EIR for a land use project must address the impacts of likely future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability. (*California Oak, supra,* 133 Cal.App.4th at p. 12144, 35 Cal.Rptr. 3d 434).
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> Finally, where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies. (*Napa Citizens, supra,* 91 Cal.App.4th at p. 373, 110 Cal.Rptr. 2d 579)....[W]hen an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis. (*see id.* At p. 374, 110 Cal.Rptr. 2d 579)....[However,] none of the Court of Appeal decisions on point holds or suggests that an EIR for a land use plan is inadequate unless it demonstrates that the project is definitely assured water through signed, enforceable agreements with a provider and already built or approved treatment and delivery facilities.

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova 53 Cal.Rptr.3d at 834-835. The Supreme Court further added:

> If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact. (Section 21100, subd. (b).). In approving a project based on an EIR that takes this approach, however, the agency would also have to make, as appropriate to the circumstances, any findings CEQA requires regarding incorporated mitigation

> measures, infeasibility of mitigation, and overriding benefits of the project (section 21081) as to each alternative prong of the analysis....
>
> When an individual land use project requires CEQA evaluation, the urban water management plan's information and analysis may be incorporated in the water supply and demand assessment required by both the Water Code and CEQA "[i]f the projected water demand associated with the proposed project was accounted for in the most recently adopted urban water management plan." (Wat.Code Section 10910, subd.(c)(2).) Thus the Water Code and the CEQA provision requiring compliance with it (Pub. Resources Code, Section 21151.9) contemplate that analysis in an individual project's CEQA evaluation may incorporate previous overall water planning projects, assuming the individual project's demand was included in the overall water plan.

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova 53 Cal.Rptr.3d at 837. This recent California Supreme Court ruling fully supports a second look at the City's prior water supply analyses. *See also New Water Requirements for Large-Scale Developments* by Bruce Tepper, 27-JAN L.A.Law 18 (January 2005); *Addressing California's Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step?* by Ryan Waterman, 31 Ecology LQ. 117 (2004); *Water,Population Growth,and Endangered Species in the West* by Holly Doremus, 72 U.Colo. L.Rev. 361 (Spring 2001); *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?* by A. Dan Tarlock and Sarah B. van de Wetering, 27 Pub. Land & Resources L.Rev. 33 (2006); Curtin's *California Land Use & Planning Law,* at 244-252 (27th Ed. 2007); and, *Bay/Delta, In search of a Permanent Solution,* Metropolitan Water District, http://www.mwdh2o.com/mwdh2o/pages/yourwater/supply/baydelta01.html.

CONCLUSION

The City Attorney recommends that City Council continue the hearing on the Monte Verde Project until such time as the CEQA EIR and the 2004 Water Supply Assessment Report prepared for this project are updated or re-assessed to fully analyze and take into account recent events, case law and changed circumstances. At a minimum, given that Judge Wanger is expected is clarify his ruling in 45 days, this matter should be continued for no less than 45 days.

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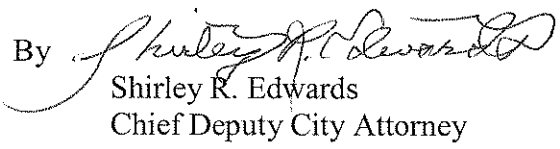
By 
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