Office of
The City Attorney
City of San Diego

MEMORANDUM

533-5800

DATE: September 4, 2007

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Water Recycling and the Waiver from Secondary Treatment at Point Loma

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INTRODUCTION

The City's waiver from secondary treatment requirements at the Point Loma Wastewater Treatment Plant expires in June of 2008. The City must either reapply for another five-year waiver by December of 2007, or immediately begin upgrading the plant to meet secondary treatment requirements. Upgrading the Point Loma plant to secondary treatment is estimated to cost between $1 billion and $1.5 billion. Opinions differ as to whether the environmental benefits of secondary treatment are worth the expense.

The City is also facing threats to its water supply. About 90% of the City's water is imported. Recent litigation over the pumping of water from the Delta, and drought conditions affecting the water in the Colorado River, are drying up the two primary sources of water in San Diego.

The convergence of these two events offer a unique opportunity for the City to seek continued relief from secondary treatment requirements at the Point Loma plant in return for increased water recycling in San Diego.

DISCUSSION

I. *Natural Resources Defense Council v. Kempthorne*

On February 15, 2005, a coalition of environmental groups filed a lawsuit against various federal and state agencies challenging the sufficiency of a study concluding that certain operational changes in the Delta would not harm the Delta Smelt. The Delta Smelt is a small, slender fish historically found throughout the Delta. Some consider the Delta Smelt an indicator of the overall health of the Bay-Delta ecosystem.

The Delta Smelt was listed as an endangered species in 1992. Under the Endangered Species Act, federal agencies must ensure their actions are not likely to jeopardize the continued existence of an endangered species. In 2005, the Delta Smelt population was just 2.4% of what it was when it was listed as an endangered species. This decline in population coincided with increases in water export from the Delta.

The United States Fish & Wildlife issued a report concluding that the Delta Smelt would not be adversely affected by current and future operation of the federally-managed Central Valley Project and California's State Water Project. The Fish & Wildlife Service found that the level of anticipated "take" (Delta Smelt caught in the pump screens) was at or below historical levels, and therefore unlikely to jeopardize their existence if certain conservation measures were followed.

This conclusion was challenged by environmental groups as arbitrary, incomplete, not supported by current data, and flawed by relying on discretionary and uncertain conservation measures. After considering argument from both sides, Federal District Court Judge Wanger ruled that the defendants failed to meet the Endangered Species Act's requirement to ensure survival and recovery of the Delta Smelt. Specifically, Judge Wanger agreed that the best data on the Delta Smelt was not used, the effect of climate change should have been considered, the conservation measures were inadequate, and that the conclusion was arbitrary by not considering the current population of Delta Smelt when looking at incidental take projections.

On August 31, Judge Wanger announced severe restrictions on the operation of the massive pumps that send water from the Delta to Southern California in order to protect the Delta Smelt. These restrictions are anticipated to take effect as soon as this Christmas. Water officials are investigating what impacts this decision could have on local water supplies. About one-third of the water used in San Diego County comes from the Delta. Water rationing is a possibility.

II. The Colorado River

Climate change is significantly impacting the Colorado River. Over the past eight years, the Colorado River has received just over half its average flow. Parts of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming all rely on water from the Colorado River. Climate change is leading to drier winters and less snowpack in the mountains; snowpack needed to gradually supply water to the river in the warmer months. Some studies suggest the climate of the Upper Colorado River Basin will rise between 3.6 to 7.2 degrees Fahrenheit in the next fifty years.

Southern California is at the end of the line when it comes to the Colorado River. Shortages in the Colorado River are likely to affect Southern California the most, at a time when California has already committed to reduce its over-dependence on Colorado River water.

III. San Diego County Grand Jury

The 1998-1999 San Diego County Grand Jury criticized San Diego for its over-reliance on imported water. It recommended increased use of reclaimed water, and consideration of the City's Water Repurification Program (aka "Toilet-to-Tap"). The City Council canceled the Water Repurification Program on January 19, 1999 (Resolution No. R-291210).

The 2006-2007 Grand Jury revisited the issue, and criticized the City for taking little action since the prior report. The Grand Jury recommended the City endorse the *Water Reuse Study* and proceed with the steps outlined therein.

IV. Water Reuse Study

On January 13, 2004, the City Council passed a resolution (R-298781) authorizing a one-year study of all aspects of water reuse, including indirect potable reuse (aka "Toilet-to-Tap" or "Reservoir Augmentation"). The study was completed in March 2006, and is available on the Water Department's website.

The North City Water Reclamation Plant has a design capacity of 30 million gallons per day. Only about 6 million gallons per day is being reused. The *Water Reuse Study* concludes that indirect potable reuse is a viable alternative at the North City Water Reclamation Plant, maximizing recycled water use at the lowest unit cost.

V. Water Reclamation Master Plan

Pursuant to Municipal Code Section 64.0806(a), the City is required to update its Water Reclamation Master Plan every five years. The last update occurred in late 2000. The City must update its Master Plan now.

The City needs guidance from the City Council on which alternatives in the *Water Reuse Study* to incorporate into the Master Plan. While the study has been presented once to the Natural Resources & Culture Committee, it has not been presented to the full City Council for action. The *Water Reuse Study* should be presented to the full City Council as soon as possible, so that the Master Plan can be updated.

VI. The Connection Between Water Recycling and the Waiver

There is an opportunity for a combined solution to the dispute over the level of treatment at the Point Loma Wastewater Treatment Plant and the City's need for water. The issues were combined before, when the Ocean Pollution Reduction Act allowed the City to re-apply for a waiver from secondary treatment in return for constructing 45 million gallons per day of reclaimed water capacity.

Litigation over another waiver from secondary treatment is nearly assured. The City has been involved in litigation over some aspect of its wastewater system almost continuously for the last

twenty years. Some local environmental groups have indicated they will challenge the grant of another waiver. The City settled litigation over the current waiver by agreeing to conduct certain studies and increasing ocean monitoring, but the parties reserved their right to raise the same issues with regard to subsequent waivers.

Local environmental groups have indicated they may forgo litigation over the waiver if the City commits to increased recycling of wastewater. There is unused capacity at the North City Water Reclamation Plant which could be utilized under one of the alternatives set forth in the *Water Reuse Study*. In the longer term, there may be other opportunities to capture and recycle wastewater and reduce the City's reliance on imported water.

CONCLUSION

The City has the opportunity to jointly address the issues of water supply and wastewater treatment in San Diego. The City is facing significant reductions in the amount of water it receives from the Delta and the Colorado River, which is likely to get worse over time. The City is also facing the prospect of upgrading the Point Loma Wastewater Treatment Plant to secondary levels, estimated to cost as much as $1.5 billion. The City Attorney will engage the Federal Environmental Protection Agency, the Regional Water Quality Control Board, and local environmental groups to explore and evaluate the possibility of a consent decree or other mechanism that allows the City to pursue increased water recycling in return for continued waivers from secondary treatment at Point Loma.

Michael J. Aguirre

MICHAEL J. AGUIRRE
City Attorney