

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM OF LAW
MS 59**

(619) 533-5800

DATE: March 27, 2008

TO: Alejandra Gavaldon, Policy Advisor, Mayor's Office

FROM: City Attorney

SUBJECT: Fluoridation Funding Offer from First 5 Commission

INTRODUCTION

The City of San Diego is in receipt of a letter From the First 5 Commission [First 5] dated February 29, 2008, notifying the City of a funding offer of up to \$3,927,016 for the purpose of fluoridating its public water supply. First 5 is requesting the City's acknowledgement of this offer. Further, First 5 requests that City staff be directed to work with First 5 to negotiate and draft a contract between First 5 and the City to fluoridate the City's water supplies using First 5 funds for the capital equipment required plus two years of operations and maintenance.

This Memorandum is in response to your March 6, 2008 Memorandum requesting legal guidance on the various issues specified therein.

QUESTIONS PRESENTED

1. What are the legal obligations in the State law requiring the City to fluoridate its public water supply?
2. What legal requirements are associated with fluoridation cost verification?
3. What does the State law say about contract negotiation and fluoridation timelines?
4. What are the City's funding and notification obligations?
5. What additional issues and potential legal impacts could arise from fluoridation?

SHORT ANSWERS

1. State Legislation Requiring the City to Fluoridate its Public Water Supply.

Under the California Safe Drinking Water Act, the City must build and operate capital facilities to fluoridate its water system when outside funding is provided.

2. Legal Requirements Associated With Fluoridation Cost Verification.

The City must estimate its capital, noncapital and operation and maintenance costs, which must be certified as “reasonable” by the Department of Public Health [DPH].

3. Legal Requirements for Contract Negotiation and Fluoridation Timelines.

The City must negotiate in good faith to achieve the purposes of the fluoridation legislation. Construction of the facilities must be completed within two years of receipt of capital funds. Once construction is complete, operation of the system must begin within three months of receipt of operation and maintenance funds.

4. Legal Obligations for Funding and Notification Costs.

Operation and maintenance [O&M] of the fluoridation system is contingent upon continued receipt of outside funding. Notification costs are categorized as O&M costs.

5. Additional Issues and Potential Legal Impacts Arising From Fluoridation.

The City must continue to meet its National Pollutant Discharge Elimination System [NPDES] permit requirements after fluoridation is added. There is no legal exception. According to staff, the City can continue to comply with its NPDES permitting requirements at its Point Loma and North City Water Reclamation Plants following fluoridation. However, permit requirements for reclaimed water at the South Bay Plant could be violated by the City’s addition of fluoride.

Under the Act, the City will assume liability for operation of the system, likely through the Water Department’s current insurance policies.

BACKGROUND

In 1995, the State legislature enacted a law amending the California Safe Drinking Water Act by requiring public water systems with 10,000 or more service connections (which includes the City) to fluoridate their water supplies. A public water system is exempt from fluoridating, however, until sufficient outside funding is available. (*See* Cal. Health & Safety Code §§ 116410-116415.) The City is currently exempt from fluoridating under state law. Both the California Attorney General and this office opined that when sufficient funding became available, San Diego Municipal Code Section 67.0101, which prohibits the City from

fluoridation, would be preempted by the state law. (83 Op. Cal. Atty Gen. 24 (2000); Report to the Committee on Natural Resources & Culture dated September 6, 1996.

LEGAL ANALYSIS

I. State Legislation Requiring the City to Fluoridate its Public Water Supply.

California has adopted a comprehensive statutory scheme, the “California Safe Drinking Water Act” [Act] (Cal. Health & Safety Code §§ 116275-116751¹), to assure the provision of safe drinking water throughout the state. The Act assigns certain responsibilities to the DPH with respect to the fluoridation of public water systems, including the adoption of implementing regulations (Cal. Code Reg. tit. 22, §§ 64433-64434).

To begin, Section 116409 legislatively preempts any local regulation, ordinance, initiative or other laws that purport to prohibit or restrict the fluoridation of drinking water by public water systems with 10,000 or more service connections. For more than a decade, the City has been exempt from complying with the Act’s fluoridation requirements. Section 116415 grants an exemption from the fluoridation requirements if the local agency does not have an “outside” source of funding for its fluoridation system. An outside source would be one that is other than “the system’s ratepayers, shareholders, local taxpayers, bondholders, or any fees or charges levied by the water system” (§ 116415, subds. (a)(1)(A), (a)(1)(B).)

Accordingly, following receipt of a reasonable offer for fluoridation funding, the City must comply with the fluoridation requirements contained in Health & Safety Code Sections 116409-116415 along with the implementing regulations. The outside source would typically be a federal grant or a gift from a private foundation, or as here, from the First 5 Commission. (See § 116415, subd. (g).) Where an outside source of funding has been identified and made available in installing a fluoridation system, the city would have two years to complete installation under the DPH’s regulations. (Reg. 64433.) (83 Op. Cal. Atty Gen. 24 (2000).)

This letter of intent triggers the obligation to negotiate contract provisions for the design, construction and implementation of fluoridation within the City’s treatment system. Although the Act and its implementing regulations do not micromanage how this is accomplished, the contract negotiations must presumptively be done in good faith. A registered civil engineer employed by DPH is charged with determining whether the cost submittals and/or proposals offered by the City are reasonable. DPH District 14 Director Sean Sterchi has offered to meet with representatives of the City at our convenience to discuss the necessary sequence of actions.

II. Legal Requirements Associated With Fluoridation Cost Verification.

The legal requirements associated with cost verification are contained in H&S Code Section 116410 (d), which states that the estimates provided to DPH of the total capital and associated costs and noncapital operation and maintenance costs related to fluoridation

¹All statutory references are to the California Health & Safety Code, unless otherwise indicated.

treatments shall be reasonable, as determined by a registered civil engineer recognized or employed by DPH who must be familiar with the design, construction, operation, and maintenance of fluoridations systems.

There are two separate funding conditions that trigger compliance with the state fluoridation mandate. The first concerns the installation of a fluoridation system. Local compliance with that requirement is necessary when funds from an outside source become available “sufficient to pay the capital and associated costs” of the installation. (§ 116415, subd. (a)(1)(A).) The second concerns the operation of the fluoridation system. Compliance with the latter requirement is necessary “in any given fiscal year (July 1-June 30)” when funds from an outside source become available “sufficient to pay noncapital operation and maintenance costs.” (§ 116415, subd. (a)(1)(B).)

The Act prescribes the administrative procedure to be followed when a public water system intends to fluoridate its drinking water, including an application to amend the water system’s existing permit (§ 116550, subd. (a)), investigation of the proposed plan by DPH (§ 116535), a public hearing on the application (§ 116545) and DPH’s denial or issuance of a permit amendment, including any conditions necessary to assure pure, wholesome water that does not endanger the health of consumers (§ 116540). *Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 705 (2005).

The manner of fluoridation is also prescribed by the Act and its implementing regulations, which mandate the concentration of fluoride in drinking water supplied to the public. (§ 116410, subds. (a), (b)(1) & (2).) For example, the regulations contain extensive monitoring and compliance requirements (Cal. Code Regs. tit. 22, § 64433.3) and impose stringent recordkeeping, reporting and notification requirements for fluoridating water systems (Cal. Code Regs. tit. 22, § 64433.7). *Coshow*, at 705-706.

It is clear that the City need not undertake any activity until outside funds become available to install a fluoridation system. When that amount of money is tendered, the city must act. However, it need not operate the system once it is installed unless outside funds are thereafter provided in any given fiscal year to cover noncapital operation and maintenance costs. (83 Op. Cal. Atty Gen. 24 (2000).) The City’s recourse regarding cost overruns would need to be addressed in the negotiated funding agreement, as the Act does not address the issue.

III. Legal Requirements for Contract Negotiation and Fluoridation Timelines.

It is apparent that DPH has interpreted section 116415 to require installation of a fluoridation system when the capital funds become available, even if funds for operating and maintaining the system are not then available. This is a reasonable construction of section 116415 by the agency which must enforce it. (83 Op. Cal. Atty Gen. 24 (2000).) Once a system has been installed, the city may obtain an exemption from operating the system for any fiscal year in which operation and maintenance funds from an outside source are unavailable. (*Id.*, see also § 116415, subd. (a)(1)(B); Reg 64433, subd. (f)(2).)

There are remedies and sanctions associated with the failure to comply with the Act. Section 116415 (c) states:

If the owner or operator of any public water system subject to Section 116410 fails, or refuses, to comply with any regulations adopted pursuant to Section 116410, or any order of the department implementing these regulations, the Attorney General shall, upon the request of the department, institute mandamus proceedings, or other appropriate proceedings, in order to compel compliance with the order, rule, or regulation. This remedy shall be in addition to all other authorized remedies or sanctions.

A. Contract Negotiation Team.

The Act and its implementing regulations do not specify who comprises the contract negotiation team. However, as part of the City's obligation to negotiate the terms of the contract in good faith, representatives of all affected City departments should be present to insure cost projections are accurate and in line with DPH projections.

B. Fluoridation Timeline.

Once the contract negotiations are concluded and successful, Regulation § 64433 provides that installation shall be completed within two years of the date the funds are received by the water system; the water system may apply to DPH for an extension of the deadline. Following installation, if DPH identifies a source of sufficient funds to cover the noncapital operations and maintenance costs for the period of a year or more, the system shall fluoridate within three months of receiving the funds and shall continue fluoridating so long as such funds are received.

As DPH has authority to grant extensions of time for compliance with its regulatory scheme, the DPH representative would need to be consulted on this issue. The penalties contemplated in the statutory scheme include the mandamus remedy referenced above.

IV. Legal Obligations for Funding and Notification Costs.

The City need not undertake any activity until outside funds become available to install a fluoridation system. When that amount of money is tendered, the City must act. However, it need not operate the system once it is installed unless outside funds are thereafter provided in any given fiscal year to cover noncapital operation and maintenance costs. (Reg. 64433 (a).)

Following installation, if DPH identifies a source of sufficient funds not excluded by Section 116415 to cover the noncapital operations and maintenance costs for the period of a year or more, the system shall fluoridate within three months of receiving the funds and shall continue fluoridating so long as such funds are received. (*Id.*)

As far as whether the funds must be provided on an “up front” or “reimbursable” basis, the only written opinion available reference to this issue is the Attorney General’s Opinion (*infra*), wherein the AG opines that a City has no obligation to act until the funds are “tendered”. Accordingly, the City’s options regarding whether the funding needs to be provided upfront (preferred) or on a reimbursable basis should be addressed in the negotiated funding agreement.

As this office has previously advised (*see*, Memorandum of Law No. ML-2007-1, attached), recent amendments to the Act render San Diego Municipal Code Section 67.0101 void and of no effect. However, the City is under no obligation to fund fluoridation unless a reasonable amount of funds have been tendered to the City in a given fiscal year. The City’s recourse regarding cost overruns would need to be addressed in the negotiated funding agreement, as the Act and its regulations do not directly address the issue.

A. Public Notification Requirements and Costs.

The City’s costs for public notification requirements would presumably be paid from the yearly noncapital O&M funds provided from First 5 or other outside agency or organization, as the public notification requirements are mandated by the DPH (CCR sections 64433 (f) (2); 64433.7; 64433.8). For example, water systems that fluoridated the previous fiscal year (July 1 through June 30), the water supplier must report the operations and maintenance costs for that year to DPH by August 1. This figure is used as a benchmark to determine required funds for the next fiscal year. The statutory requirements are spelled out in greater detail in DPH’s regulations. The City should consult with DPH regarding its interpretation of these regulations.

V. Additional Issues and Potential Legal Impacts Arising From Fluoridation.

A. NPDES.

In addition to the concerns raised about the capital and O&M costs of fluoridation, the Act also has potential impacts on the City’s wastewater and storm water systems. Ultimately, the City must continue to meet its NPDES permit requirements after fluoridation is added and there is no legal exception for the addition of fluoride mandated by the Act. However, according to staff, the City can continue to comply with its NPDES permitting requirements for *ocean discharge* at its Point Loma and South Bay Plants following fluoridation.

Water Department and MWWD staff conducted a summary evaluation of the potential impacts on the wastewater treatment and disposal operations of MWWD by increased levels of fluoride in the wastewater that may result from fluoridation of the domestic water supply. As to Facility operations, staff concludes there will be no impact (*i.e.*, no interference or inhibition to operations at its facilities).

At the Point Loma, North City and South Bay Plants, fluoridation will not impact NPDES permit compliance for *ocean discharge*, as fluoride effluent is not regulated at those locations. Nor is fluoride regulated by sludge disposal regulations.

However, the Waste Discharge Requirements [WDR] for the distribution of reclaimed water from the South Bay Water Reclamation Plant could cause a violation of its WDR permit. The regulations for reclaimed water at that facility contain a 30-day average concentration limit of 1.0 mg/l for fluoride. The City's domestic water currently averages about .25 mg/l of fluoride and the Water Department proposes to augment that by about .55 mg/l in order to achieve a nominal concentration of about .8 mg/l in the fluoridated product.

The processes at the South Bay Plant do not significantly remove fluoride and the reclaimed water currently runs between .4 to .6 mg/l fluoride. Adding .55 mg/l to that results in averages of .95 to 1.1 mg/l which could result in potential non-compliance with WDR permit requirements. As the Act makes no mention of covering costs for expenses related to complying with NPDES or WDR permits (nor is there case law or agency opinion on the subject), it is substantially likely that the City would need to either (1) obtain a waiver of the fluoride discharge limits for the South Bay Plant, or (2) accept responsibility for costs associated with preventing a potential violation.

B. Legal Liability/Indemnity:

As to potential legal liability or indemnity to the City as a result of fluoridating and complying with state law, Section 116410 (e) provides that "[a]s used in this section and Section 116415, "costs" means only those costs that require an actual expenditure of funds or resources, and do not include costs that are intangible or speculative, including, but not limited to, opportunity or indemnification costs." Thus, such costs would remain a liability of the City, likely through the Water Department's current insurance policies.

CONCLUSION

The pending offer of First 5 to provide capital and O&M financing for the City to fluoridate its water supply creates a legal obligation under the provisions of the Act to negotiate the terms and scheduling for citywide fluoridation. Although the Act clearly provides that the City is not required to fluoridate unless such outside funds are available, the failure to negotiate in good faith will result in legal action against the City.

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By

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