

MEMORANDUM OF LAW

DATE: April 25, 2008

TO: Mario Sierra, General Services Director

FROM: City Attorney

SUBJECT: Diversion of Groundwater from the Convention Center to the Sewer System

INTRODUCTION

In 1998, the City agreed to assume the Port District's responsibility for the National Pollutant Discharge Elimination System [NPDES] permit for effluent discharge from the underground parking garage at the Convention Center. The Port District had been experiencing compliance problems, and had recently been issued a Notice of Violation (No. 97-06) from the Regional Water Quality Control Board [RWQCB] for exceeding effluent limitation for certain metals. The City agreed to assume responsibility for the NPDES permit as part of the negotiations for the expansion of the Convention Center.¹ The current NPDES permit (No. CA0109029) expired on March 12, 2008, and the City is engaged with the RWQCB regarding potential solutions.

The effluent from the Convention Center consists primarily of water from San Diego Bay that infiltrates the underground parking garage, which is below sea level. The effluent is pumped from the parking garage and back into the bay through a 36-inch outfall pipeline extending about 246 feet offshore. The effluent must meet certain water quality standards, set forth in the NPDES permit, to be discharged into the bay. Failure to meet these water quality standards may subject the City to fines and penalties from the RWQCB.

The City has experienced difficulty complying with the NPDES permit, just as the Port District did. The water in San Diego Bay (and probably the soil beneath the Convention Center) is laden with many pollutants. These pollutants are therefore present in the water that infiltrates the underground parking garage. The City added treatment equipment to the pumping facilities to reduce the level of pollutants, but the modifications have failed to consistently achieve the required water quality standards. The City has been fined by the RWQCB for exceeding the permitted limits on a number of pollutants.

The City is considering permanently diverting the groundwater into the sewer system to resolve the compliance issues surrounding the Convention Center outfall. The sewer system could transport the groundwater to the Point Loma Wastewater Treatment Plant, where sufficient facilities and capacity exist to treat the groundwater to applicable standards. The outfall at the Convention Center would no longer discharge effluent, thereby eliminating any potential of

¹The Port District should share in the cost of bringing the Convention Center outfall into compliance with the NPDES permit pursuant to Section 1 of the "Dewatering MOU" between the City and the Port District.

violating that NPDES permit.

QUESTIONS PRESENTED

1. May groundwater from the Convention Center be permanently diverted to the sewer system?
2. If so, may payment of the capacity fees associated with such diversion be postponed until next fiscal year?

SHORT ANSWERS

1. The City's Sewer Use Ordinance, codified in San Diego Municipal Code [SDMC] section 64.0512(b)(6), currently prohibits the permanent diversion of groundwater into the sewer system. The Sewer Use Ordinance was enacted as a condition of receiving state and federal funds, so allowing the discharge of groundwater into the sewer system will require permission from the appropriate state and federal agencies, and a subsequent ordinance of the City Council.
2. Yes, payment of capacity fees for discharging groundwater may be postponed for up to one calendar year pursuant to SDMC section 64.0410, provided the Convention Center receives an industrial wastewater discharge permit from the Wastewater Department.

DISCUSSION

I. The Sewer Use Ordinance.

As a condition of receiving funds from the State Revolving Fund [SRF] for construction of sewer facilities, the City had to certify to the State that it enacted a Sewer Use Ordinance meeting certain requirements.² An approved Sewer Use Ordinance is also required by the Federal Environmental Protection Agency [EPA], which provided federal funds to the State and the City under the Clean Water Act.³ An approved Sewer Use Ordinance must “prohibit any new connections from inflow sources into the treatment works.”⁴ Inflow is defined as:

Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters,

or drainage. Inflow does not include, and is distinguished from infiltration.⁵

The State provided sample ordinance language implementing the prohibition of inflow into the sewer system:

No person shall discharge or cause to be discharged any rainwater, storm water, groundwater, street drainage, subsurface drainage, yard drainage, including evaporative type air cooler discharge water, to any public or private sewer which directly or indirectly connects to the wastewater treatment works of the (municipality).⁶

The Municipal Code mirrors the State's sample language:

§ 64.0512 Prohibited Discharges and Local Limits

. . . .

(b) Specific Prohibitions. In addition, it is unlawful to introduce the following pollutants into a public sewer which directly or indirectly connects to the City's wastewater system:

. . . .

(6) Any rainwater, storm water, groundwater, street drainage, subsurface drainage, roof drainage, yard drainage, water from yard fountains, ponds, or lawn sprays, or any other uncontaminated water.

The reason for this prohibition is that sewer systems with excessive inflow and infiltration are generally ineligible for federal assistance.⁷ Treatment works consistently receiving excessive inflow and infiltration may be larger than otherwise necessary, and would not be an efficient use of federal funds.⁸

An exception to the prohibition of diverting groundwater into the sewer system is warranted for the Convention Center. The State's policy is to phase out discharges to enclosed bays (like San Diego Bay) "at the earliest practicable date."⁹ The RWQCB has already suggested that diverting the groundwater from the Convention Center into the sewer system is the only

practicable manner of compliance.⁰⁰ Compliance with the Convention Center's NPDES permit has been problematic, and further violations will likely result in escalating fines and penalties.

Permanently diverting the groundwater from the Convention Center will require an ordinance of the City Council. SDMC section 64.0512(b)(6) currently prohibits such action, and only another ordinance of the City Council can relieve the City of that requirement. Prior to the adoption of an ordinance, the City will need the consent of the RWQCB and the EPA. Without their consent, the City risks violating the terms of the SRF loans and federal grants it received for the construction of various improvements to its sewer treatment facilities.

II. Capacity Fees for Groundwater Discharge.

Generally, new users must pay a capacity fee before connecting to the City's sewer system.⁰¹ The capacity fee is based on anticipated volume of flow, and calculated at a rate of \$4,124.00 per equivalent dwelling unit.⁰² A capacity fee reimburses the City for the user's fair share of the capital cost to construct the sewer system.⁰³

The Municipal Code allows payment of the sewer capacity fee to be waived for up to one year for groundwater discharge:

Any person, firm, corporation, or other entity pumping groundwater to the sewerage system, under the guidelines established by Division 5, Industrial Wastewater, shall be eligible for an industrial users wastewater discharge permit issued by the City Metropolitan Wastewater Department Industrial Waste Program, and a waiver of capacity charges, for a period of one (1) year If, upon expiration of the original permit . . . the discharge continues, capacity charges will be levied at the then current rates.⁰⁴

The rationale behind the waiver is that if the use is only temporary, paying the capacity fee would be inequitable. Instead, applicants must pay an industrial wastewater discharge permit fee.⁰⁵

The City will need to apply for an industrial wastewater discharge permit from the Wastewater Department to divert the groundwater into the sewer system. The Wastewater Department must treat the City like any other industrial user, and impose whatever permit conditions may typically be associated with the pollutant concentrations involved here, including the possibility of pretreatment, monitoring, and reporting requirements. If the City is granted an industrial wastewater discharge permit, the City will be allowed to defer payment of the capacity fee for up to one calendar year.

⁰⁰RWQCB Cease and Desist Order No. R9-2003-0086 at p. 2.

⁰¹SDMC § 64.0410.

⁰²San Diego Resolution R-302378 (February 26, 2007).

⁰³Cal. Gov't Code § 66013(a)(3).

⁰⁴ SDMC § 64.0410.

⁰⁵SDMC § 64.0508.

CONCLUSION

Currently, the City cannot permanently divert groundwater from the Convention Center into the sewer system. To do so, the City will need to obtain the consent of the RWQCB and the EPA, because they contributed funds towards construction of the City's treatment facilities on the condition that excessive inflow into the sewer system not occur. The City will also need an ordinance adopted by the City Council to exempt the Convention Center from the Municipal Code prohibition on permanently diverting groundwater into the sewer system. Finally, the City must also receive an industrial wastewater discharge permit from the Wastewater Department, which will establish the conditions for diverting the groundwater into the sewer system while postponing payment of the capacity fee for up to one calendar year.

MICHAEL J. AGUIRRE, City Attorney

By

Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
ML-2008-8