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MEMORANDUM OF LAW

DATE: December 14, 2015

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Exemptions from Environmental Regulations for Emergency Channel Clearing in Preparation for El Niño

INTRODUCTION

El Niño is expected to bring frequent, intense rainstorms to Southern California this winter. Flooding is likely in locations where the City's drainage channels are full of sediment, vegetation, and debris. At meetings of the Committee on the Environment on October 7th and November 4th, Council Member Alvarez asked whether emergency permitting procedures and California Environmental Quality Act (CEQA) exemptions would allow the City to expedite its channel clearing efforts given the predicted El Niño rains.

QUESTIONS PRESENTED

1. Does the Municipal Code allow the City to issue Emergency Site Development Permits authorizing emergency maintenance of the channels at highest risk of flooding?

2. May the City rely on the CEQA exemption for "specific actions necessary to prevent or mitigate an emergency" when issuing site development permits for emergency channel maintenance?

3. Might channel maintenance qualify for emergency permits issued by the Regional Water Quality Control Board (Regional Board) and the Army Corps of Engineers (Army Corps) based on the threat of El Niño?

4. Are there any legal risks associated with not clearing the channels?

SHORT ANSWERS

1. Yes. The Municipal Code allows the City to issue Emergency Site Development Permits for channels at high risk of flooding if necessary to prevent actual or threatened conditions of disaster.

2. Possibly. The CEQA exemption applies if an emergency presents (1) a sudden, unexpected occurrence, (2) a clear and imminent danger, and (3) a substantial threat to life or property. El Niño could be a condition rather than an "occurrence," and the danger may not be "imminent" enough to constitute an emergency.

3. Possibly. The Regional Board and the Army Corps have some discretion in deciding how to implement their regulatory programs and in determining what circumstances constitute emergencies for permitting purposes.

4. Yes. If flooding occurs, property owners will likely sue the City. The City will be liable if the City's channel maintenance is unreasonable and a substantial cause of damage.

BACKGROUND

The Transportation and Storm Water Department (T&SW) must comply with numerous local, state, and federal laws before maintaining a channel, including the Municipal Code, CEQA, the Federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act, and state and federal laws that protect wildlife. It takes one to two years per channel to conduct the studies and obtain the permits these laws require. The Municipal Code, CEQA, and federal permitting requirements all contain special exceptions for emergencies. However, certain stringent criteria must be met to qualify for emergency exceptions. This memorandum analyzes whether CEQA and permitting exemptions allow emergency maintenance of high-risk channels given El Niño forecasts.

ANALYSIS

I. LEGAL AUTHORITIES REGARDING EMERGENCY CHANNEL MAINTENANCE

Before maintaining a channel, T&SW must typically obtain a Site Development Permit (SDP) for impacts to environmentally sensitive lands. SDMC §§126.0502, 126.0107.[1] It can take years to prepare, submit, and process individual permit applications. In 2011, T&SW obtained a Master Site Development Permit (Master Permit) and prepared a Programmatic Environmental Impact Report (PEIR) for channels under the Master Maintenance Program (MMP).[2] These

[1] Development includes grading, excavating, and managing brush. SDMC §113.0103. Environmentally sensitive lands include areas containing sensitive biological resources, such as wetlands. *Id.* Since most drainage channels contain sensitive biological resources, T&SW must typically obtain a Site Development Permit before dredging sediment or removing vegetation.

[2] T&SW prepared the MMP to govern channel maintenance throughout the City.

documents expedite the permit process somewhat, but it still takes months to prepare, submit, and review the plans and studies needed to maintain a single channel.

A. Emergency Site Development Permitting Under the Municipal Code

Where deviance from standard procedures is necessary to protect public health or safety, the Mayor, or an official with authority delegated by the Mayor, may issue an emergency SDP. SDMC §143.0126.[3] For site development purposes, an emergency is defined as "the actual or threatened existence of conditions of disaster or extreme peril to the public peace, health or safety of persons or property within this City caused by, but not limited to, such conditions as air pollution, fire, flood, storm, epidemic, riot, or earthquake, or other conditions." SDMC §51.0102.[4] Under this definition, El Niño likely constitutes an emergency. Although it has not yet caused severe weather, it "threatens" to cause large storms, and these storms are likely to put people and property in "extreme peril" near the most impaired channels.

The following findings must be made when issuing an emergency SDP:

(1) An emergency exists that requires action more quickly than would be permitted by the normal procedures for acquiring a Site Development Permit and the development can and will be completed within 30 days unless otherwise specified in the permit; and

(2) Public comment on the proposed emergency action has been solicited and reviewed to the extent feasible.

SDMC §143.0126.

In addition, only the minimum development necessary to stabilize the emergency is authorized under an emergency SDP. *Id.* Where impacts are permanent, the City must also process "after-the-fact" permits using the decision process that would have applied had the work occurred under normal conditions.[5] *Id*., MMP p.30.

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[3] Municipal Code section 143.0126 refers to the City Manager. Pursuant to section 260(b) of the City Charter, all executive authority, power and responsibility conferred on the City Manager under the City Charter have been transferred to the Mayor, in accordance with the "Strong Mayor" form of government. The Mayor has delegated emergency site development permitting functions to the Development Services Department.

[4] "Emergency" is not defined in the site development regulations, however, the Master Maintenance Program adopted the above definition from Chapter 5, Article 1 of the Municipal Code for emergency site development permits for channel maintenance. MMP p.30.

[5] Additional requirements apply to channels in the Coastal Zone. If channels in the Coastal Zone are identified for emergency maintenance, this Office will consult with T&SW staff and provide advice as necessary.

B. CEQA Emergency Exemptions

Before the City approves an SDP, it must comply with CEQA or it must rely on an exemption. "Specific actions necessary to prevent or mitigate an emergency" are exempt from CEQA review. Cal. Pub. Res. Code § 21080(b)(4).[6] Under CEQA, an emergency is defined as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services." Cal. Pub. Res. Code § 21060.3. "Occurrences" such as "fire, flood, [or] earthquake" are emergencies; "long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term" are not. *Id*, Cal. Code Regs. title 14, §15269.

"It is well established that CEQA is to be interpreted ... to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* 8 Cal. 3d 247, 259 (1972). The CEQA exemption for emergencies "is extremely narrow," and exemptions may not be used "as a means to subvert rules regulating the protection of the environment." The administrative record "must contain substantial evidence of every element of a contended exemption." *Western Municipal Water Dist. v. Superior Court*, 187 Cal. App. 3d 1104, 1111, 1113 (1986) disapproved of on other grounds by *Western States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559 (1995); *Castaic Lake Water Agency v. City of Santa Clarita*, 41 Cal. App. 4th 1257, 1268, (1995). The elements of the emergency exemption are discussed in greater detail below.

1. Sudden Unexpected Occurrence

To qualify as an emergency under CEQA, there must be some "sudden, unexpected occurrence" creating an imminent danger. The exemption is not applicable to known conditions within a public entity's control. *Los Osos Valley Associates v. City of San Luis Obispo* 30 Cal. App. 4th 1670, 1682 (1994). In *Los Osos*, the City of San Luis Obispo claimed an exemption to drill wells to supplement water supplies in a drought. The Court held the exemption did not apply because the city created the emergency by drawing down surface water instead of implementing adequate conservation measures. *Id.* The slow accumulation of sediment, vegetation, and debris may be similarly attributed to the City's ongoing maintenance decisions. To claim the exemption, the City must

[6] "Emergency repairs to public service facilities" and "[p]rojects undertaken. . . to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor . . ." are also exempt. Cal. Pub. Res. Code §§21080(b)(2), 21080(b)(3). The first exemption probably does not apply to dredging or vegetation removal because these are commonly understood to be "maintenance," activities, not "repairs." The second exemption does not apply because the drainage facilities have not been "damaged or destroyed" as a result of a disaster for which a state of emergency has been declared by the Governor.

therefore be able to identify some additional factor, some changed circumstance or "unexpected occurrence" supporting the exemption.

It is not clear whether El Niño constitutes a "sudden unexpected occurrence" because courts differ in their interpretation of this element. Some courts hold that a sudden event must have already occurred to satisfy the requirement. *Western*, 187 Cal. App. 3d at 1111. In *Western*, a water district claimed the exemption to drill and operate two dewatering wells to prevent liquefaction in case of an earthquake. The court held that the exemption did not apply because the CEQA definition "limits an emergency to an occurrence, not a condition," and the purported emergency was based on soil "conditions" and not on any sudden occurrence. *Id.* The court did not address the fact that earthquakes, which the project was designed to guard against, are themselves sudden, unexpected occurrences. If a court follows the reasoning in *Western*, it could find that El Niño is not a "sudden unexpected event" because it is only a set of atmospheric and oceanic "conditions" that have not yet caused a "sudden occurrence" like a flood or a major storm.

Not all courts require a sudden event to have already occurred to meet this element, however. Some courts apply the exemption more broadly to situations where a condition threatens to cause a sudden occurrence in the future. *CalBeach Advocates v. City of Solana Beach*, 103 Cal. App. 4th 529, 537 (2002). In *Cal Beach*, the City of Solana Beach claimed an emergency exemption to build a sea wall to prevent the collapse of a coastal bluff. Petitioner Cal Beach argued that the erosion threatening to cause the collapse was a "condition" not an "occurrence" because it was a gradual process. The court found the distinction unpersuasive, noting that the "condition" of erosion may be made up of many small "occurrences" like grains of sand carried by a wave striking a bluff. *Id.* at 537. The court also noted that CEQA "exempts not only projects that mitigate the effects of an emergency but also projects that prevent emergencies," so regardless of whether erosion was a condition, the collapse of the bluff would be a "sudden occurrence" making the situation an emergency. *Id.* If a court finds the reasoning in *Cal Beach* more persuasive than the reasoning in *Western*, it could hold that El Niño justifies the exemption. Although El Niño might be characterized as a "condition" because ocean temperatures rise slowly and incrementally, it threatens to cause sudden, unexpected occurrences like unusually large storms and flooding.[7]

[7] Although the holding of *Cal Beach* supports the assertion that El Niño could qualify as a "sudden unexpected event," there are other distinguishing facts that make the situation in that case more clearly an emergency. In *Cal Beach*, there was an initial collapse north of the portion of the bluffs the city sought to stabilize. The adjacent collapse was itself sudden and unexpected, and the loss of the adjacent bluff left the southern portion of the bluffs exposed, accelerating their erosion. The court noted the initial collapse, however the holding does not appear to rely on the initial sudden collapse in concluding the situation met the criteria for the exemption.

While atmospheric conditions may or may not be sudden unexpected occurrences, significant unforeseen physical changes in a channel probably are. For example, large segments of sediment or vegetation may become dislodged as a result of a rain event, or heavy rains may cause rapid erosion to undermine a structure. If these changes occur over a short period of time and if they are relatively uncommon or difficult to anticipate, they likely qualify as "sudden unexpected occurrences."

2. Clear and Imminent Danger Demanding Immediate Action

To qualify for an emergency exemption, there must also be a clear and imminent danger with a high probability of occurrence in the short term, rather than a speculative or distant threat. In *Cal Beach,* two engineers with extensive expertise in coastal stabilization believed the bluffs' collapse was imminent. 103 Cal. App. 4th at 534, 538. One engineer stated "a catastrophic failure of the bluff" could occur "within a few weeks." *Id.* The other said there was "no question" the bluff would collapse before an EIR could be certified. *Id.* at 535. The court reached the opposite outcome in *Western*. It held the exemption inapplicable where geologists predicted a strong earthquake within the next two decades. *Western*, 187 Cal. App. 3d at 1108-1109, 1115.

It is unclear whether the increased risk of heavy rains brought on by El Niño is clear or imminent enough to constitute an emergency under *Cal Beach* and *Western*. The existence of El Niño conditions "tilts odds more strongly" toward heavy precipitation in Southern California, with some reports showing over a sixty percent chance of a wetter than normal winter in Southern California. Rong-Gong Lin II, *Massive El Niño is now 'too big to fail,' scientist says*, Los Angeles Times, October 9, 2015. However El Niño conditions result in a range of precipitation patterns, and they do not guarantee a wetter than usual winter in Southern California. *See El Niño Update and Prospects*, Scripps Institute of Oceanography, Presentation at Environment Committee, October 7, 2015, pp. 13, 16, 20. Since there is no binding case law directly on point, it is very difficult to predict whether a court would find El Niño conditions present an imminent danger.

At any rate, El Niño would not justify claiming a blanket exemption for all channels because not all channels are at imminent risk of flooding. For instance, a channel does not present an imminent risk where it has the capacity to convey a hundred-year rain event if such an event is relatively unlikely, even in an El Niño year.[8] On the other hand, flooding might be imminent where a channel only has

[8] A hundred-year rain event is a rain event that has, on average, a one percent chance of occurring in a given year.

the capacity to convey a two-year rain event if historical weather data show a two-year rain event is highly likely in an El Niño year.[9]

While it is difficult to say whether El Niño presents an imminent flood risk, the imminence element is probably met when a specific storm is forecast and the amount of rain in the forecast has a high probability of overtopping a given channel.

3. Damage to Life, Health, Property, or Essential Public Services

"The magnitude of the exigency must factor" in determining whether an emergency exists under CEQA, and there must be a "substantial" threat to public safety or property for the exemption to apply. *Los Osos,* 30 Cal. App. 4th at 1681. Given these considerations, it is probably not an emergency where flooding would only threaten minor property damage, like flooding an empty parking lot or an unimproved yard. An emergency exemption is supported where channels are near homes or businesses, and flooding will cause significant property damage or serious threats to public safety.

C. Consequences of Failure to Comply With CEQA

Citizen groups may sue in superior court to force CEQA compliance. *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 170 (2011). If a court finds any of the three elements above are not met, the court must issue an order specifying the action necessary to comply with CEQA. *POET, LLC v. California Air Resources Bd*., 217 Cal. App. 4th 1214 (2013). For instance, a court could issue an order prohibiting the City from clearing channels under the emergency exemptions in the short term.[10] If a court finds that the CEQA violations extend to the City's practices and procedures under the Master Maintenance Program, a court order could affect the MMP and the PEIR and could alter the City's ability to clear channels going forward. Litigation may also be costly. A court may award the prevailing party costs and attorney's fees. Cal. Code Civ. Proc. §§1032, 1021.5; *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 268 (2012).

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[9] A two-year rain event is a rain event that has a fifty percent chance of occurring in a given year.

[10] This occurred previously in 2010. In both 2009 and 2010, the City claimed emergency exemptions to clear channels in the Tijuana river valley. In both instances, the exemptions were based on the construction of the border fence causing the channels to fill with sediment at an unexpectedly rapid pace. Both times, San Diegans for Open Government (SDOG) sued. In the first case, the court found the exemption was justified because the construction of the border fence was an unexpected "occurrence" and because an El Niño predicted for that winter made flooding "imminent." See *SDOG v. City of San Diego*, Case No. 2009-00098375, Judgement on Petition for Peremptory Writ of Mandate (September 17, 2009). In the second case, the court found the sedimentation was no longer "unexpected" since it had occurred the previous year, and flooding was no longer "imminent" because El Niño conditions no longer existed. The court ordered the City to immediately stop work and enjoined the City from conducting further work on the channel under the claimed exemption. See *San Diegans for Open Government v. City of San Diego*, Case No. 37-2010-00103095, Tentative Ruling Granting Preliminary Injunction (December 3, 2010).

II. CLEAN WATER ACT DREDGE AND FILL PERMITS

When channel maintenance will result in a discharge of dredged and/or fill material into waters of the United States, the City must obtain a permit issued by the Army Corps pursuant to Section 404 of the Clean Water Act (a "404 permit"). 33 U.S.C. §§1341, 1344. The Regional Board must also certify that the maintenance activity complies with all state water quality laws (a 401 Certification).[11] The Army Corps takes several months to issue a 404 permit, and the 401 Certification process often takes more than a year.

When an emergency requires immediate action, instead of applying for an individual 404 Permit and 401 Certification, the City may seek Army Corps authorization to enroll in Regional General Permit Number 63 For Repair And Protection Activities In Emergency Situations (RGP 63). Projects enrolled in RGP 63 may also seek the Regional Board's authorization to enroll in the 401 Certification Order for RGP 63 (the Certification Order).

Under RGP 63, an "emergency situation" exists where there is "a clear, sudden, unexpected, and imminent threat to life or property demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property or essential public services (i.e., a situation that could potentially result in an unacceptable hazard to life or a significant loss of property…)." RGP 63 "cannot be used to authorize long-planned-for projects, nor shall it be used for projects that are likely to have been known to the applicant but for which an application was not submitted in a timely manner." Furthermore, the 401 Certification Order for RGP 63 "is limited to emergency actions that meet the CEQA definition of emergency" and that: "(1) have occurred, or (2) have a high probability of occurring in the short term as a result of recently discovered factors or events not related to known or expected conditions."

The RGP 63 definition of emergency contains essentially the same elements as the CEQA definition (a sudden event, not a known condition; a clear and imminent threat; an unacceptable hazard to life or property), and the Certification Order explicitly incorporates the CEQA definition, so the Army Corps and Regional Board will likely weigh factors similar to the CEQA factors discussed above in deciding whether to allow enrollment. It is important to note, however, that these agencies must make an independent determination that a project constitutes an emergency under relevant laws and regulations. The Army Corps will not allow enrollment in RGP 63 just because the City claims a project is an emergency, and the Army Corps' determination that a project is an emergency does not shield the City from a CEQA lawsuit.

In all but the most imminent emergencies, the City must submit applications to the Army Corps and the Regional Board and must obtain a notice to proceed before beginning work. The Army Corps will transmit the application to other applicable agencies, including the Department

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[11] Some channel maintenance activities are exempt from CWA 404 and 401 permitting requirements but may require State permits called Waste Discharge Requirements (WDRs), issued by the Regional Board. Cal. Water Code §§13260, 13263, 13264. Currently, it is expected that most emergency maintenance will require federal permits, not WDRs, so emergency WDR exemptions are not addressed in this memorandum. This Office is available to provide advice regarding emergency WDR exemptions if necessary.

of Fish and Wildlife, and restrictions may be placed on the work if protected species are present.[12] Work must begin within 14 days of receiving the notice to proceed.

If the City proceeds without authorization, the City may be subject to civil penalties and fines. Violations of section 404 carry penalties of up to $25,000 per violation per day, and violations of the 401 Certification requirements carry maximum penalties of $10,000 per violation per day. 33 U.S.C. § 1319, Cal. Water Code § 13385. Factors for assessing penalties for 404 violations include "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. §1319(d).

III. COMPETING CONSIDERATIONS – LIABILITY FOR FLOODING

While emergency maintenance presents certain legal risks, it should be noted that not maintaining channels carries significant risks as well. Owners whose properties flood will likely sue the City for inverse condemnation and nuisance, and the City will be liable if damage is caused by an unreasonable maintenance plan.

Liability for damage caused by public works arises from the just compensation clause of the California Constitution, which provides: "Private property may be taken or damaged for public use only when just compensation… has first been paid to… the owner." Cal. Const. Art. I, § 19. This constitutional provision "rests on the notion that the private individual should not be required to bear a disproportionate share of the costs of a public improvement." *Locklin v. City of Lafayette,* 7 Cal. 4th 327, 367 (1994).

Typically, a plaintiff in an inverse condemnation action only needs to prove that a public work caused damage (i.e., the public entity is "strictly liable"). However, in cases involving public drainage improvements, a public entity is only liable if a drainage improvement's design, construction, or maintenance poses an unreasonable risk of harm, and the unreasonable aspect of the improvement is a substantial cause of damage. *Arreola v. County of Monterey*, 99 Cal. App. 4th 722, 739 (2002). "Substantial cause" may be shown by eliminating the possibility that other forces alone produced the damage,[13] and unreasonableness is determined by balancing the following factors set forth in *Locklin v. City of Lafayette*:

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[12] Laws regulating the "take" of protected species are not covered in depth in this memorandum because T&SW staff does not currently expect permitting issues to arise regarding protected species. If such issues arise, this Office will consult with T&SW and will advise as necessary.

[13] An unusually large rain event may be a superseding cause and may relieve the City of liability where the drainage system is reasonably designed but rainfall exceeds its design capacity. See *Biron v. City of Redding*, 225 Cal. App. 4th 1264, 1279 (2014).

(1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availabilityto the public entityof feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

7 Cal. 4th 327, 368-69 (1994).

Depending on how these factors are weighed, a court could find that the City's practice of maintaining two to three channels a year is unreasonable, and it could hold the City liable in inverse condemnation for flood damage.

In drainage cases, liability for nuisance is decided under a rule of reasonableness similar to inverse condemnation. *Skoumbas v. City of Orinda*, 165 Cal. App. 4th 783, 793 (2008). All property owners have a duty to act reasonably with respect to the discharge of surface water, and a party may be liable for nuisance where a lack of maintenance is unreasonable and causes damage. See *Contra Costa County v. Pinole Point Properties*, LLC, 235 Cal. App. 4th 914, 932, 934 (2015).

If a court holds the City liable for inverse condemnation or nuisance, the City may be required to pay cleanup, restoration, and reconstruction costs; compensation for diminution in property value; relocation costs; and, potentially, damages for emotional distress. *Smith v. County of Los Angeles*, 214 Cal. App. 3d 266, 287 (1989). Attorney's fees are also recoverable in an inverse condemnation action. Cal. Civ. Proc. Code § 1036.

CONCLUSION

Given the substantial penalties, fines, and potential for other enforcement actions, this Office strongly recommends against conducting emergency maintenance without obtaining necessary authorizations from the Army Corps and Regional Board. If these authorizations are obtained, the City is still susceptible to a lawsuit if the City claims a CEQA exemption for El Niño since courts differ in how they interpret the exemption. In deciding whether to move forward with emergency channel clearing, the City should weigh the risk of a CEQA lawsuit against the liability the City could incur if a court attributes flooding to an unreasonable channel maintenance plan.

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By /s/

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ML-2015-19