MEMORANDUM OF LAW

DATE: November 8, 1989

TO: H. R. Frauenfelder, Deputy City Manager
FROM: City Attorney
SUBJECT: Perceived Problems of the EIR/EIS for Secondary Treatment Regarding the "No Project" Alternative

By letters from Monty Griffin of May 4 and August 4, 1989, the Clean Water Program has been chastised for not aggressively addressing the "no project" alternative in its initial environ-mental documents. This failure is alleged to violate the provisions and regulations of NEPA (the National Environmental Policy Act).

Mr. Griffin's letters suggest that The City of San Diego has not met the NEPA requirement contained in 42 U.S.C. Sec. 4332(2)(c)(iii), which requires the City to provide "alternatives" to its Metropolitan Sewer System Project. More specifically, he cites 40 C.F.R. Sec. 1502.14(c) and three federal cases for the proposition that the list of alternatives cannot exclude an alternative simply because its adoption would require legislative changes.

While the points are summarily addressed in Mr. Seraydarian's letter of June 27, 1989 (copy attached), I think it would be beneficial to examine the allegations in light of the NEPA requirements and analogous case law. Examined in both of these lights, the assertion that a detailed examination of a "no pro-ject" alternative is mandated by NEPA is erroneous.

It is axiomatic that NEPA is an "essentially procedural" statute. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). The Environmental Impact Statement (EIS) is judged against a "rule of reason" as to whether the discussion fosters informed decision making and informed public participation. Specifically it need not consider "remote and speculative" alternatives. Vermont Yankee, at 551.

The City is obligated to comply with the Clean Water Act, 33 U.S.C. Sec. 1251 et seq. Alternatives which would require changes in the Clean Water Act, therefore, are simply "remote and speculative." Because the possibility of changing the Act's requirements is so remote, the City is not obligated to consider alternatives which would mandate changing that formidable legislation. And the case law bears witness to this precise

fact.

In Kilroy v. Ruckelshaus, 738 F.2d 1448 (9th Cir. 1984), the Ninth Circuit addressed this exact issue. That case involved disposal of sewage sludge from a Los Angeles waste-water treatment plant. The plaintiffs asserted that the EPA failed to consider ocean dumping as an alternative to an interim disposal project even though the Clean Water Act would not allow ocean dumping.

The Kilroy court recognized that "legal barriers ... do not automatically render discussion of an alternative unnecessary." Kilroy, 738 F.2d at 1454. However, the court specifically found that the Clean Water Act was a formidable enough legislative barrier to render the possibility of change "substantially remote from reality." Kilroy, 738 F.2d at 1454. The court further said that "it would be unreasonable and wasteful to require extensive development and discussion of such a remote alternative." Kilroy, 738 F.2d at 1455 (emphasis added). The United States Supreme Court has agreed with the general rule stated above: the "NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' where they are deemed only remote and speculative possibilities." Vermont Yankee, 435 U.S. at 551 (1978), citing NRDC v. Morton, 458 F.2d 827, 837-838 (1972) (emphasis added).

In NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), the court first developed the exception to the general rule discussed above. In that case, an Environmental Impact Statement ("EIS") was held inadequate because it failed to consider an alternative outside the jurisdiction of the Department of the Interior, which prepared the EIS. However, the EIS pertained to the sale of oil and gas leases which were part of a large coordinated plan to deal with the energy crisis experienced in the 1970's. Each agency involved in the plan had filed a separate EIS report. As a result, the environmental consequences of the total project were not adequately addressed. For that reason, considering alternatives which required legislative change was held reasonable.

In contrast, San Diego's Metropolitan Sewer System is not part of a large coordinated plan. A single EIS is being filed which covers the environmental consequences of secondary treatment. Furthermore, the project is local in nature and does not deal with broad national problems. This is simply not one of the "rare circumstances" in which the Morton exception applies. City of Argon v. Hodel, 803 F.2d 1016, 1021 fn. 2 (9th Cir. 1986) (an alternative which requires congressional action will qualify for inclusion in an EIS only in very rare circumstances). In

short, the City is simply not required to consider alternatives which require congressional changes in the Clean Water Act.

I trust this addresses the concerns expressed by Mr. Griffin. If other questions arise, please feel free to contact me.

JOHN W. WITT, City Attorney
By
Ted Bromfield
Chief Deputy City Attorney

TB:GB:mb:452.1:(043.2)
Attachment
cc Susan C. Hamilton
R. David Flesh
Monty Griffin
ML-89-106