MEMORANDUM OF LAW

DATE: September 13, 1994

TO: John M. Kovac, Senior Planner, EAS/Development Service Division, Planning Department

FROM: City Attorney

SUBJECT: Revisions to International Boundary & Water Commission Final Environmental Impact Statement for Use as an Adequate CEQA Document

The International Boundary & Water Commission ("IBWC") has provided a Final Environmental Impact Statement ("EIS") for construction of both the International Treatment Plant and the South Bay Ocean Outfall. As you know, the adequacy of that document is currently being challenged in Sierra Club v. IBWC et al, Case No. 94-920-GT, in the United States District Court for the Southern District of California. Subsequent to this challenge, the Metropolitan Wastewater Department desires to accept management responsibility of the construction of the ocean outfall component, all as designated by President Clinton in his letter of August 4, 1994.

We have been asked to review: a) whether there is any applicable emergency exemption to the California Environmental Quality Act ("CEQA"), and b) whether the federal EIS document can be beneficially used to satisfy the lead agency's CEQA obligation. In reviewing this matter we have had the benefit of your two (2) memos of July 19, 1994 and August 29, 1994, which will be more specifically referenced, and the August 5, 1994 comments of the Environmental Protection Agency on adequacy of the EIS.

a) EMERGENCY EXCEPTION

In the CEQA statutory scheme, the Legislature has provided for certain exemptions. Expressly exempted from CEQA requirements are "specific actions necessary to prevent or mitigate an emergency." Public Resources Code section 20180(b)(4).

"Emergency," however, is further defined:

> Section 21060.3. Emergency
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> "Emergency" means 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. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.

Public Resources Code section 21060.3

While the continuing invasion of raw sewage from Tijuana presents a health emergency and has been continually declared an emergency in ongoing resolutions of the City Council (Resolution No. R-284482, most recently renewed August 8, 1994), the CEQA statutory definition has been held to be "extremely narrow."

> The "emergency" exception of section 21080, subdivision (b)(4) is obviously extremely narrow. "Emergency" as defined by section 21060.3 is explicit and detailed. We particularly note that the definition limits an emergency to an "occurrence," not a condition, and that the occurrence must involve a "clear and imminent danger, demanding immediate action."
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> As one commentator has noted: "At least in principle, the emergency exemptions are appropriate, common sense provisions. The theory behind these exemptions is that if a project arises for which the lead agency simply cannot complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the EIR requirement is justifiable. For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper." (Comment, The Application of Emergency Exemptions Under CEQA: Loopholes in Need of Amendment? (1984) 15 Pacific L.J. 1089, 1105, fn. omitted.)
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> Although the water district urges that "CEQA, including its environmental impact report requirements, shall not apply to specific actions necessary to prevent or mitigate earthquakes or other soil or geological movements," this interpretation is unsupported by the text of the exemption. Such a construction completely ignores the

> limiting ideas of "sudden," "unexpected," "clear," "imminent" and "demanding immediate action" expressly included by the Legislature and would be in derogation of the canon that a construction should give meaning to each word of the statute.

Western Municipal Water District v. Superior Court, 187 Cal. App. 3d 1104, 1111 (1986)

Given this judicial admonition to give express meaning to the term "sudden," we cannot say that the condition of transborder sewage which has occurred for well over fifty (50) years and has been the subject of continuing "emergency" resolutions for well over a year is "sudden" within the statutorily defined meaning of emergency. Hence we find that CEQA requirements apply.

b) FEDERAL EIS AND CEQA

Where a federal agency has already analyzed a project as has been done here, the clear statutory preference of CEQA is to rely as much as possible on the National Environmental Policy Act (NEPA) documents "in lieu of preparing new CEQA documents." Michael H. Remy et al, Guide to the California Environmental Quality Act 280 (8th Ed. 1994).

> Section 21083.7. Use of environmental impact statement as environmental impact report in event project requires both state report and federal statement
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> In the event that a project requires both an environmental impact report prepared pursuant to the requirements of this division and an environmental impact statement prepared pursuant to the requirements of the National Environmental Policy Act of 1969, the lead agency shall, whenever possible, use the environmental impact statement as such environmental impact report as provided in Section 21083.5. In order to implement the provisions of this section, each lead agency to which this section is applicable shall consult, as soon as possible, with the agency required to prepare such environmental impact statement.

Public Resources Code section 21083.7

This clear statutory preference of reliance on the NEPA document is echoed in the following CEQA Guidelines.

> 15221.
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> (a) When a project will require compliance with both CEQA and NEPA, state or local agencies should use the EIS or Finding

of No Significant Impact rather than preparing an EIR or Negative Declaration if the following two conditions occur:

(1) An EIS or Finding of No Significant Impact will be prepared before an EIR or Negative Declaration would otherwise be completed for the project; and

(2) The EIS or Finding of No Significant Impact complies with the provisions of these Guidelines.

(b) Because NEPA does not require separate discussion of mitigation measures or growth inducing impacts, these points of analysis will need to be added, supplemented, or identified before the EIS can be used as an EIR.

15225.

Where the federal agency circulated the EIS or Finding of No Significant Impact for public review as broadly as state or local law may require and gave notice meeting the standards in Section 15072(a) or 15087(a), the Lead Agency under CEQA may use the federal document in the place of an EIR or Negative Declaration without recirculating the federal document for public review. One review and comment period is enough. Prior to using the federal document in this situation, the Lead Agency shall give notice that it will use the federal document in place of an EIR or Negative Declaration and that it believes that the federal document meets the requirements of CEQA. The notice shall be given in the same manner as a notice of the public availability of a draft EIR under Section 15087.

State CEQA Guidelines, sections 15221; 15225

In light of the strong statutory preference that encourages the use of the EIS, we urge you to reassess your August 29, 1994 reservations about the completeness of the present EIS and in accordance with Public Resources Code section 21083.7 and sections 15221 and 15225 of the CEQA Guidelines to supplement the EIS only to correctly describe the updated proposed project and to add those matters additionally required by CEQA Guideline section 15221(b), i.e., "mitigation measures" and "growth inducing impacts." This approach we believe is sound for at least three (3) reasons. Initially, there is a clear statutory preference to rely

on the EIS in lieu of an EIR. Secondly, we understand that the Environmental Protection Agency is pressing for an early adjudication in the Sierra Club v. IBWC challenge to the EIS. Hence to the extent a favorable ruling is received affirming the sufficiency of the EIS, this would presumptively satisfy CEQA as supplemented. Alternatively, whatever deficiencies are judicially found must be supplemented and hence they too would bear on the satisfaction of CEQA. Thirdly and most importantly, it is obvious that there will be professional disagreement over what constitutes an "adequate" environmental document.

Your July 19, 1994 memorandum identifies areas of concern and an August 5, 1994 memorandum from the Environmental Protection Agency rebuts some of these views, which in turn are distinguished by your August 29, 1994 memorandum. Undoubtedly useful and professional critiques could be done on many environmental documents and CEQA recognizes that. The CEQA Guidelines, at section 15151, expressly state that the environmental analysis "need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible." emphasis added. Moreover this reasonable standard has been supported by the courts.

> CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. (Guidelines Section 15151.) Although disagreement among experts does not render an EIR inadequate, the report should summarize the main points of disagreement. The absence of information in an EIR, or the failure to reflect disagreement among the experts, does not per se constitute a prejudicial abuse of discretion. (Pub. Resources Code, Section 21005.) A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process. (Laurel Heights Improvement Assn. v. Regents of University of California, supra, 47 Cal. 3d at pp. 403-405)

Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 712 (1990) emphasis added.

Hence while your August 29, 1994 memorandum correctly points out areas of disagreement, this does not undermine the potential adequacy of the EIR document. Rather, the adequacy of the document to satisfy CEQA is judged on an analysis of what was reasonably feasible and whether the document provides a sufficient degree of analysis to permit

decisionmakers to make intelligent judgments. Michael H. Remy et al, Guide to the California Environmental Quality Act 177 (8th Ed. 1994).

Given this flexible standard of "adequacy," CEQA has both a practical and a statutory basis for relying on a previously prepared environmental analysis.

Use of NEPA Documents to Satisfy CEQA

State and local agencies are encouraged to use NEPA documents to replace CEQA documents if the NEPA process is proceeding faster than the CEQA process and the NEPA document complies with CEQA. Guidelines sec. 15221

The state or local agency may use the NEPA document without recirculation if the NEPA document is circulated as broadly as required by CEQA, and if the agency gives notice that it intends to use the NEPA document. Guidelines Sec. 15225

Bass and Herson, Successful CEQA Compliance, A Step by Step Approach 86 (3rd Ed. 1994)

CONCLUSION

Thus given the statutory preference for relying on EIS documents where applicable, the pending adjudication of the EIS adequacy and the practical need of an adequate but not exhaustive document, we believe the Final EIS should be utilized to comply with CEQA, supplemented to satisfy the additional areas of CEQA concern as specified in CEQA Guidelines section 15221 and to reflect the updated proposed project and whatever new or deferred studies bear on same. To assist in detailing these supplemental areas, it would be useful to meet and review those areas. By relying on the NEPA document as supplemented, the City would be fulfilling the strong preference of CEQA to use federal environ-mental documents "whenever possible" (Public Resources Code section 21083.7) and saving the City valuable time and money.

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