

DATE ISSUED: June 4, 2004 REPORT NO. 04-122

ATTENTION: Natural Resources and Culture Committee
Agenda of June 9, 2004

SUBJECT: Authorization to Negotiate Early Transfer Conveyance of the Naval
Training Center Boat Channel

REFERENCE: Manager's Report No. 04-055

SUMMARY

Issue - Should the City submit a request to the Navy to initiate negotiations for conveyance of the NTC boat channel under an Early Transfer Authority?

Manager's Recommendation – The City should submit a request to the Navy to initiate negotiations for conveyance of the NTC boat channel under an Early Transfer Authority.

Fiscal Impact - None with this action.

BACKGROUND

This item was presented to the Natural Resources and Culture Committee at its meeting of March 17, 2004. At that time the Committee directed staff to seek input from the San Diego Bay Council and return to the Committee at a future date. Staff has had discussions with the San Diego Bay Council whose members, at the time this report was written, were reviewing the Navy's Remedial Investigation Report on the boat channel and the correspondence between the Navy and the Regional Water Quality Control Board. Staff will report on the Bay Council's input at the Committee meeting.

All of the NTC property with the exception of the boat channel has been conveyed to the City. The boat channel has not been conveyed due to continuing discussions since 1999 between the Regional Water Quality Control Board ("RWQCB") and the Navy over the areas of the boat

channel that are considered environmentally impacted. The two parties still have unresolved issues. The studies and discussions lead to the conclusion that the northern area of the boat channel would be considered an Area of Ecological Concern and several areas throughout the length of the boat channel would be considered Potential Areas of Ecological Concern. If these are the final conclusions, these areas would require that remedial actions be studied to determine what action would be most protective of the boat channel aquatic environment.

DISCUSSION

The City's Memorandum of Agreement with the Navy stipulates that no development will occur within 15 feet of the top of the bank that may result in the sloughing of soil or other materials into the channel, which has delayed the construction of a boat dock adjacent to the Metropolitan Wastewater Department's environmental monitoring laboratory on the Camp Nimitz side of NTC. In addition, proposed improvements to the storm drain outfalls in the boat channel have been postponed until remediation issues are resolved. (All other improvements to the storm drains, including the water quality measures, are being constructed in accordance with the approved plans and permits.) Construction will begin on the first phase of the waterfront NTC Park in January 2005 with completion of all phases scheduled to occur in the last quarter of 2006. In order to expedite the conveyance of the boat channel, staff is seeking authorization to request that the Navy negotiate with the City for conveyance of the boat channel through an Early Transfer authority. Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), prior to conveying federal property, the Federal government is required to grant a covenant indicating that all remedial action necessary to protect human health and the environment has been taken with respect to any hazardous substances. However, CERCLA also has a provision, commonly known as "Early Transfer Authority" which authorizes the Governor to defer the covenant warranty requirement and determine that the property is suitable for Early Transfer prior to completion of the remedial action.

The request to commence negotiations for an Early Transfer does not commit the City to accepting an Early Transfer of the boat channel. It does allow the Navy to commence negotiating the terms of a proposed Early Transfer with the City. Should the results of the negotiations prove not to be beneficial to the City, the City is not committed to accepting the boat channel via Early Transfer.

Should the City submit a request to the Navy for an Early Transfer of the boat channel, a series of agreements would be negotiated to protect the City's interests and to reduce the City's risk. Staff would seek direction from the City Council throughout the period of negotiations, and all agreements would require City Council approval. These agreements include an Environmental Services Cooperative Agreement ("ESCA") between the Navy and the City whereby the City would agree to do the cleanup pursuant to State and Federal laws and regulations, and the Navy would provide an up-front lump sum payment to the City for the cleanup. The ESCA would also establish the Navy's "retained conditions" which would protect the City in the event of any unknown conditions, cost overruns related to the quantity of cleanup or toxicity of contaminants being remediated, cost of insurance provisions, and cost of long term monitoring. The City would have assurances under CERCLA that the Navy would always retain the responsibility and

liability associated with contamination in the boat channel. In addition to the CERCLA assurances, the Navy would provide funding for Pollution Legal Liability and Cleanup Cost Cap Insurance policies as part of the up-front lump sum payment.

A Consent Agreement between the City and the RWQCB would be negotiated to establish the City's responsibilities for clean-up, environmental closure and long term stewardship. The Consent Agreement would provide for the process of investigation, analysis and remediation to a level acceptable to the RWQCB. The Navy would enter into a similar agreement with the RWQCB.

The advantages of Early Transfer to the City include:

- The transfer of the boat channel would occur as soon as the agreements are finalized, which typically takes 6 to 9 months. Under the standard process, the conveyance could take 2 to 3 years for the Navy to reach consensus with the regulators and complete the cleanup.
- The City would control the cleanup, which would allow the City: a) to negotiate the cleanup with the regulators taking reuse and community concerns into consideration, and not being burdened with issues the Navy is typically concerned about, such as not setting any kind of precedent for other Navy cleanups; and b) to establish working relationships with the regulators that often expedite the process, without the Navy being involved.
- Navy funding for the cleanup of the boat channel would become a high priority in the Navy funding system, insulating the boat channel cleanup from the year to year uncertainties of the standard appropriation process and allowing for the immediate application of higher funding amounts toward cleanup activities, which will expedite the clean-up.
- The City will be responsible only for known conditions, the remediation of which can be quantified with a great deal of precision. The Navy will remain responsible for unknown conditions, catastrophic conditions such as natural resource damages and any other conditions the City believes cannot be quantified ("Navy Retained Conditions"). Typically, if such conditions are discovered, the Navy will provide additional funding for the City to undertake the additional cleanup.
- ESCA dollars will fund a comprehensive set of environmental insurance policies in the name of the City that will include a pollution legal liability policy ("PLL") insuring against third party damage claims and cost cap insurance that will provide coverage for remedial costs that exceed agreed upon amounts. The limits of these policies are typically very high on a \$20 million cleanup, limits of \$60 to \$100 million are not unusual, affording the City a substantial amount of protection, in addition to the ESCA funds and Navy Retained Conditions.
- The statutory protections afforded to the City through the CERCLA Covenants and indemnification protection under Section 330 of the National Defense Authorization Act for Fiscal year 1993 ("Section 330") are fully applicable to Early Transfers.

The advantages of Early Transfer to the Navy include:

- Under CERCLA and Section 330, the Navy has continuing responsibility for newly discovered conditions at the boat channel and third party liabilities. The Navy cannot purchase insurance directly, but can fund the purchase of insurance through the ESCA, thus providing a financial buffer against potential future Navy liability. This in no way compromises ultimate Navy liability.

- Historically, at almost every site in California, the relationship of the Navy with the regulatory community (DTSC and RWQCB) has not been good, which has added years to the transfer process. For example, at both Stockton and Mare Island, regulators and the Navy were at odds over issues for years without any real prospects for resolution. In both cases, Early Transfer took the Navy out of the middle and resolutions between the regulators and local redevelopment authorities were reached very quickly. Navy headquarters understands and accepts this dynamic, realizes that Navy administrative costs to support years of indecision are enormous and thus encourages Early Transfer wherever possible.
- Early Transfer allows the Navy to more accurately quantify costs going forward and attain budget priority for the necessary funds.
- The Navy is under great pressure to complete the disposal of property from past BRAC rounds, in anticipation of BRAC 2005.

In conclusion, Early Transfer expedites transfer, puts control of the cleanup in the hands of the City, allowing for more responsive remedies and the integration of reuse issues and remedial actions and affords significant layers of protection and cleanup funding priority going forward. The Navy would be responsible for retained conditions, and environmental insurance would be funded through the proceeds. The public would have access to the boat channel concurrent with the completion of the waterfront NTC Park, and the Metropolitan Wastewater Department would be in a position to construct the boat dock adjacent to its environmental monitoring laboratory. By submitting a request to the Navy for an Early Transfer, the City is not committed to accepting the boat channel through an Early Transfer; but it allows the Navy to commence negotiations with the City over the terms of a proposed Early Transfer.

ALTERNATIVE

Do not submit a request to the Navy for conveyance of the NTC boat channel under an Early Transfer Authority, and follow the standard process for conveyance of the property.

Respectfully submitted,

Hank Cunningham
 Community & Economic Development Director
 Redevelopment Agency Assistant Executive Director

Approved: Bruce Herring
 Deputy City Manager

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