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**DATE:** April 11, 2003  
**TO:** Richard Mendes, Utilities General Manager  
**FROM:** City Attorney  
**SUBJECT:** Applicability of Prevailing Wage Law to the Miramar Water Treatment Plant Upgrade and Expansion - Contract A

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**MEMORANDUM OF LAW**

**QUESTION PRESENTED**

Is the Miramar Water Treatment Plant Upgrade and Expansion - Contract A a municipal affair project, and therefore not subject to the state law requirement for payment of prevailing wages?

**SHORT ANSWER**

Yes, the project is a municipal affair because it does not use any state or federal funds that require the payment of prevailing wages and the project is not a matter of statewide concern.

**BACKGROUND**

The Miramar Water Treatment Plant [WTP] is located in the City of San Diego and generally serves customers in the northern parts of the City. The WTP is being expanded from its current capacity of 140 million gallons per day [MGD] to 215 MGD to meet the water demand of its service area. The WTP also is being upgraded to improve the treatment processes,

operation and maintenance, and to meet the drinking water standards set by the U.S. Environmental Protection Agency. The project is included in the California Department of Health Services [DHS] compliance order requiring that construction be completed by June 2008.

Contract A represents the first of four components of the Miramar WTP expansion and upgrade. It consists of construction of new overflow, rapid mix and splitter box facilities, preozonation and deaeration facilities, demolition of flocculation/sedimentation basins, structural and mechanical modifications to flocculation/sedimentation basins, construction of ozone facilities, twelve high rate filters, bulk chemical storage facilities, chemical feed facilities, chlorine facilities, an administration/operations building, main switchgear building, emergency generator and a clearwell inlet structure. The estimated construction cost of these improvements is approximately \$73,000,000.

The City generally considers improvements to its water system to be a municipal affair and the Miramar WTP plans and specifications do not require the payment of prevailing wages. After the project was advertised, the City received inquiries from potential bidders about whether the project is a matter of statewide concern and therefore subject to State prevailing wage requirements. The issue was raised in connection with a recent unpublished California Court of Appeal case, *City of Modesto v. Department of Industrial Relations*, 2002 WL 1278074, Case No. F036603 (Fifth App. Dist., June 10, 2002), which held that prevailing wages were required on improvements to a wastewater treatment system because the improvements were a matter of statewide concern. As discussed below, the facts of that case can be distinguished to demonstrate that improvements to the City's water system are not a matter of statewide concern which require the payment of prevailing wages.

## DISCUSSION

### I. "Municipal Affairs" Doctrine and the Prevailing Wage Requirement

General prevailing wage requirements are found in the California Labor Code, sections 1770-1779, pertaining to "Public Works and Public Agencies." The "municipal affairs" doctrine, which has been discussed in numerous previous City Attorney Memoranda of Law, makes these general provisions of the Labor Code inapplicable to charter cities. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981). In *Vial*, the Court upheld the City of San Diego's resolution declaring payment of prevailing wages to be appropriate "only when required by Federal or State grants and on other jobs considered to be of State concern . . ." The court concluded that the prevailing wage law, a general law, does not apply to the public works projects of a chartered city, as long as the projects in question are within the realm of "municipal affairs." *Id.* at 348.

Deciding whether a particular ordinance or matter deals with municipal affairs or a subject of statewide concern is a judicial, not a legislative, function. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61-62 (1969). A prevailing wage requirement is not a matter of statewide concern. *Regents of the University of California v. Aubry*, 42 Cal. App. 4th 579 (1996); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296 (1979). There is no clearcut definition of municipal affairs and a court must review the facts of each case to

determine whether the subject matter is a municipal or statewide concern. Some of the factors considered by the courts include: (1) the source and control of the funds used for the project; (2) the extent of non-municipal control over the project; and (3) the nature, purpose, and geographic scope of the project. *Southern California Roads Co. v. McGuire*, 2 Cal.2d 115, 123 (1934).

Generally, the construction and operation of municipal water facilities are deemed to be municipal affairs. *Smith v. City of Riverside*, 34 Cal. App. 3d 529 (1973). The distribution of water within municipalities is a municipal affair. *City of Pasadena v. Chamberlain*, 204 Cal. 653, 659-60 (1928). However, public improvements that historically have been municipal affairs can become matters of statewide concern when the projects transcend the boundaries of one or several municipalities or when such projects also affect matters which are acknowledged to be of statewide concern, such as protection of navigable waters, tidelands, and the public health. *City of Santa Clara v. Von Raesfeld*, 3 Cal.3d 239 (1970). In such circumstances the project ceases to be a municipal affair and comes within the domain and regulation of the general laws of the state. *Id.* at 246.

In *City of Santa Clara v. Von Raesfeld*, the court concluded that the charter city's issuance of bonds to finance its share of a regional water pollution control facility was not a municipal affair. The revenue bonds to finance the City's share of the facility involved the efforts of several cities acting in common. The facilities could not be constructed without the city's participation and payment of the costs. The sewage treatment facilities would protect not only the inhabitants of the city, but all of the San Francisco Bay Area inhabitants. *Id.* at 247. Accordingly, the court found that the matter was not a municipal affair and that the City must comply with certain state statutes with respect to the issuance of the bonds.

As discussed in more detail below, the Miramar WTP project does not involve the efforts of several cities acting in common. It is not being funded by other municipalities or agencies. The primary purpose of the upgrade and expansion is not the protection of inhabitants outside the City. Accordingly, the facts in *City of Santa Clara* can be distinguished to show that the Miramar WTP project is not a matter of statewide concern.

## **II. *City of Modesto v. Department of Industrial Relations***

The unpublished opinion *City of Modesto v. Department of Industrial Relations*, 2002 WL 1278074, Case No. F036603 (Fifth App. Dist., June 10, 2002) has been referenced in support of the contention that the Miramar WTP should be subject to the state prevailing wage requirements. The facts of that case can be distinguished, and more importantly, the case cannot be cited in court because it was ordered not to be published. The case is discussed briefly herein in response to inquiries about the applicability of the case to the Miramar WTP project.

*City of Modesto* involved a sewer treatment facility that was part of a special district formed under the Community Facilities Law (California Health & Safety Code § 4600 et. seq.). The district encompasses the city and certain unincorporated territory in the county contiguous to the city. The costs of the construction and operation of the district facilities had been defrayed in

part by taxes or assessments levied by the district upon persons and entities who own property outside the boundaries of the city. A significant portion of the construction took place in district area outside the city. The court found that one of the main purposes of the project was the protection of the health and safety of inhabitants of areas outside the city and is subject to a considerable degree of overall state regulation. Based on these factors, the court concluded that the improvements were a matter of statewide concern subject to the state prevailing wage law.

To the contrary, the Miramar WTP is not part of a special multi-territory district formed under state law. The improvements will not be funded by federal grants, other agencies or others outside the City boundaries. The primary purpose of the improvements is not the protection of health and safety of inhabitants of areas outside the City. The improvements are geographically located within the City. Accordingly, there is no merit to the contention that the ruling in *City of Modesto* should apply to this matter.

### **III. The City's Water System**

#### **A. Brief Overview**

The City purchased the water system in 1901 from the privately owned San Diego Water & Telephone Company. The system consists of nine raw water storage facilities, three water treatment plants, 29 treated water storage facilities and more than 3,460 miles of transmission and distribution lines. In 1944, the City and other local retail water distributors formed the San Diego County Water Authority [CWA] to purchase Colorado River water from the Metropolitan Water District of Southern California and convey it to local distributors within San Diego County. The City receives approximately 90% of its water from CWA and 10% from local rain runoff.

The water system services the City of San Diego and certain surrounding areas, including both retail and wholesale customers. The retail customers account for approximately 91% of total water deliveries and represent approximately 97% of the revenues from total sales of water. The wholesale customers make up the difference with approximately 9% of total water deliveries and 3% of the revenues. The City sells and delivers or treats and delivers water on a wholesale basis to four wholesale customers: (1) the California-American Water Company; (2) the City of Del Mar; (3) the Santa Fe Irrigation District; and (4) the San Dieguito Irrigation District. In addition, the City has contracted with the Otay Water District for delivery of treated water in the future. The Water Department also maintains several emergency connections to and from neighboring water agencies.

The Water Department expended approximately \$371 million for July 1, 1998, through June 30, 2002, on its Capital Improvement Program [CIP]. In April 2002, the City Council adopted increases on the water base fee rate and commodity charge to increase revenues from retail sales in each of the next five fiscal years. The rate increases will provide revenue to continue funding the upgrade and expansion of the water system in order to ensure a reliable water supply for all City residents.

## **B. Federal and State Regulation**

The water system is subject to regulations imposed by the Federal Safe Drinking Water Act which is administered by the EPA. The Act sets maximum levels for contaminants and allows regulations to require water treatment plants to meet defined "Treatment Techniques." In addition to Federal regulations, the City must comply with various State requirements including: operational requirements; design and construction standards for dams and reservoirs, distribution systems and pipelines; requirements for control of cryptosporidium and other water safety issues; and training and other requirements for water treatment and distribution operations. Failure to meet these standards may subject the City to civil or criminal sanctions.

The State Department of Health Services [DHS] is the regulatory agency responsible for ensuring that water systems meet the Federal regulations as well as additional or stricter State regulations. In 1994, DHS notified the City that certain deficiencies in the water system were found during a routine sanitary survey of the water system, primarily related to the future reliability of various components of the water system. The City and DHS entered into a compliance agreement pursuant to which the City agreed to correct the deficiencies and undertake required rehabilitation and replacements by the deadlines established in the compliance agreement. The City provides DHS with quarterly written updates and periodic status meetings are held. There have been eight amendments to the compliance order as a result of project scope changes, date revisions, project sequencing, and operational considerations.

## **IV. The Miramar WTP**

It is contended that the Miramar WTP project is not a municipal affair because: (1) the treatment plant is subject to extensive state oversight and permitting during the construction and operation of the plant; (2) the bond debt used to finance the project will be repaid in part by customers outside the City; (3) the treatment plant treats water from outside the City, services customers outside the City, is being improved to meet federal standards; and (4) the project is an essential component of the greater San Diego regional water system due to its connection with the San Diego County Water Authority, in that the City receives water from CWA through a regional pipeline, wheels water to other cities and water districts, and improvements to the water treatment plant will benefit those within and outside the City. Each of the factors is analyzed below.

### **A. The Extent of Non-Municipal Control Over the Project**

The Miramar WTP is owned and operated by the City. The expansion and upgrade is overseen by the City's Water Department. The project was designed and the process of construction is consistent with the City's charter and statutory scheme for its public works projects. Nonetheless, the contention is that the project is subject to extensive state oversight because the City must submit the plans and specifications to DHS for approval, the project is subject to DHS oversight and inspection during construction, and the City must obtain approval and permits from the RWQCB prior to construction and operation.

As discussed above, the water system is subject to federal and state regulation and a compliance order from DHS. The City submitted the plans and specifications to DHS, as part of the permitting process, although DHS does not “approve” the plans. The project also is subject to environmental review and a permit is required by the State Water Resource Control Board for storm water pollution prevention during construction. The RWQCB conducts periodic inspection for compliance. However, these factors should not change the project from a municipal affair to a matter of statewide concern.

In *Southern California Roads Co.*, the City of Los Angeles, a charter city, contended that the construction of improvement of Sepulveda Boulevard by the city was a municipal affair and that its charter did not require payment of prevailing wages. The court noted that whether prevailing wages would be required is determined by whether the improvements were a concern of the people of the state or a local concern. The court determined that the street legally was a secondary state highway and not “an ordinary city street.” *Id.* at 120. The entire cost of the improvements were paid for by the state. The work was to be done by the city to the satisfaction of the state department of public works. Both parties approved the specifications and no significant changes were to be made without the approval of the state. Based on these facts, the court concluded that the street improvement was an affair in which the state has a direct and vital interest.

On the other hand, the Miramar WTP is not a state project, there are no state funds financing the project, and the state does not approve the plans and specification. While there may be federal and state regulatory interest in the outcome of the project, they do not control the construction process, means, or methods of the project. In *Smith v. City of Riverside*, the court noted that “Matters of intracorporate structure and process designed to make an institution function effectively, responsively, and responsibly should generally be deemed a municipal affair.” *Id.* at 535. The court also noted the municipal activity at issue was not the distribution of water, but the mode chosen to build and extend the distribution facilities. *Id.* at 536. Similarly, there is no statewide concern over the method or mode of the construction of the Miramar WTP, only the outcome that the water is safe to drink. Further, research did not disclose any cases that hold that compliance with federal or state regulations transforms an otherwise municipal affair project into a matter of statewide concern.

## **B. The Source and Control of the Funds Used to Finance the Project**

The City is financing the improvements of the Miramar WTP from bonds issued by the City. There are no state or federal monies being used to fund the project. It is contended that the Miramar WTP improvements will be financed by City revenues and bond revenues which include revenues raised from the sale of water to customers outside the City, therefore, becoming a matter of statewide concern. As discussed above, the rate increase intended to pay for the water system improvements affects only retail customers within the City. The customers outside the City are wholesale customers. To the extent that any of the revenues from these wholesale customers may be used to partially finance the Miramar WTP, the amount would be insignificant.

### **C. The Nature and Purpose of the Project**

The primary purpose of the upgrade and expansion is to meet water demand of its service area, to improve the treatment processes, operation and maintenance, and to meet the drinking water standards set by the U.S. Environmental Protection Agency [EPA]. However, it has been contended that the project extends beyond a municipal affair because the City receives water from outside its boundaries, the City's service area includes wholesale customers outside the City, and the City is required to comply with EPA requirements.

None of these contentions have merit. As noted above, the wholesale customers outside the City make up only 9% of the total water deliveries and about 3% of the revenues. Of these wholesale customers, only the City of Del Mar regularly receives water from the Miramar WTP. The City contracts with Del Mar to treat raw water which Del Mar purchases from CWA. Last year, treatment of Del Mar water represented less than 0.5% of total deliveries and 0.1% of revenues from total sales of water. This amount is insignificant to render the project a matter of statewide concern. The incidental supplying of water to an outside territory, does not change the municipal affair purpose of supplying water to the cities' inhabitants. *City of South Pasadena v. Pasadena Land and Water Company*, 152 Cal. 579, 593-594 (1908).

Although the City does receive water from outside the City limits, no California cases have held that the source of water for a distribution system is a factor in determining whether a project is a municipal affair. Likewise, the relevant cases do not hold that mere compliance with federal or state regulations transforms an otherwise municipal affair project into a matter of statewide concern.

### **D. The Geographic Scope of the Project**

The final contention is that the Miramar WTP transcends the municipality and that the "extraterritorial aspect of the project is not incidental to the municipal enterprise." Basically, the contention is that the project is an essential component of the regional CWA water system, the City uses "regional" pipelines to import and export water, and the City wheels water which will benefit customers outside the City.

Although CWA's Regional Water Facilities Master Plan - Draft Report considered the expansion of both the Miramar WTP and Alvarado WTP in its analysis of the existing regional water delivery system, the Miramar WTP upgrade and expansion primarily is intended to benefit customers within the City of San Diego. CWA did not direct or require the City to make the upgrades. It is not funding or overseeing the improvements. While the expansion may relieve future demands for treated water from CWA, that is an incidental benefit of the City taking responsibility for meeting the future demands of its customers.

To the extent that the Miramar WTP transcends the boundaries of the City, it is incidental to its primary purpose. The City contract with Del Mar to treat raw water represents less than 0.5% of total water deliveries and 0.1% of revenues. Other customers outside the region also may occasionally receive water from the Miramar WTP because the City's water system is

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designed to provide redundancy and emergency services within the system. However, the wholesale customer base is only 9% of the total water system deliveries and only 3% of the revenues.

The City's water system also provides emergency services to and from neighboring water agencies, including the Santa Fe Irrigation District (Miramar WTP), the Poway Municipal Water District (Miramar WTP), the Cal-American (Alvarado and Otay WTPs), Sweetwater Authority (Otay WTP), and Otay Water District (Otay WTP). These emergency services are a small part of the overall operation of the City's water system and should not transform the project into a statewide concern. Although the Miramar WTP expansion and upgrade likely will have an incidental benefit to the region, the improvements are within the City limits and are primarily intended to provide water within the City's boundaries.

### CONCLUSION

The Miramar WTP is owned and operated by the City. The plans and specifications were prepared by the City and follow the City's scheme for constructing public improvements. The improvements will be funded by City bonds and revenues. The revenues are generated from retail customers within the City, rather than wholesale customers which make up only a small part of the overall revenues. The upgrade and expansion primarily is intended to meet the future water needs in the northern region of the City and to meet new federal guidelines for drinking water. The City's method of letting its construction contracts is a municipal affair and the state or federal oversight of the quality of the water produced at the WTP should not change the character of the project to a matter of statewide concern. Miramar WTP's importance to the region is incidental to its primary importance to the City's customers who regularly receive water from the treatment plant. The improvements were not required by the state or CWA and are not being funded by those agencies. Accordingly, the project should be deemed a municipal affair and therefore, not subject to state prevailing wage requirements. Nonetheless, the City could include a prevailing wage specification if it determines that such specification will not conflict with the City's Charter regarding competitive bidding. *See, Op. City Att'y 2003-1 (Apr. 8, 2003).*

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