

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: July 11, 2006

TO: David Monroe, San Diego Parks and Recreation Department

FROM: Alex W. Sachs, Deputy City Attorney

SUBJECT: Mission Trails Regional Park CAC Request

You have asked the City Attorney's Office's assistance in responding to the Citizen Advisory Committee regarding its concerns with the proposed San Diego County Water Authority Mission Trails Flow Regulatory Structure (FRS) II.

Attached please find the City of San Diego's comprehensive comments on the Draft Environmental Impact Report (EIR) for the Water Authority's project. The response asserts the City's right as a Responsible Agency under the California Environmental Quality Act (CEQA). Under CEQA, a Responsible Agency is an agency, other than the lead agency, which has responsibility for "carrying out or approving a project." (Pub. Res. Code §21069)

At a minimum, the City will likely be asked to provide approval of a Site Development Permit and either a Right of Entry Permit or an amendment to the current easement the Water Authority maintains through Mission Trails Regional Park (MTRP). As the CAC reviews the City's response, I suggest it note the areas of significant concern addressed by City staff, including potential impacts on Multi-Habitat Planning Area (MHPA) lands as well as the potential aesthetic and visual quality impacts at MTRP.

In addition, the City comments include extensive discussion of the impacts on biological resources within MTRP, including sensitive plant species (variegated dudleya and coast barrel cactus) and impacts to critical habitat for the endangered least Bell's vireo and the California gnatcatcher.

San Diego County Water Authority's Responsibility

As the lead agency responsible for the project, the SDCWA is responsible for preparing the draft EIR, the review of comments to the draft, and the preparation of the responses to significant issues raised by reviewers of the EIR. There is no requirement for the final EIR to be made available for public review and comment.

Under CEQA, however, the agency must provide a response to the City of San Diego's comments – either by providing a copy of the final EIR or by making a separate response – at least 10 days before it certifies the final EIR. (Pub. Res. Code §21092.5)

Once the final EIR is complete, the SDCWA must determine whether to approve the project or not. A public agency “should not” approve a project “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” (Pub. Res. Code §21002)

Alternatively, the SDCWA could choose to approve a project even with unmitigable environmental impacts, so long as it adopts a Statement of Overriding Considerations that is “factually oriented and supported by substantial evidence in the record.” (Curtain's California Land Use and Planning Law, Chapter 6, CEQA, page 148)

The Board of Directors of the SDCWA will decide whether to accept the final EIR, to direct additional mitigation measures, or to adopt a Statement of Overriding Considerations. The Board is made up of members from each participating jurisdiction, and at present has 10 members representing the City of San Diego, including George Loveland, the Vice Chair and former Senior Deputy City Manager of San Diego.

Rights of the City of San Diego and the MTRP CAC Under CEQA

Although the SDCWA conducted a public hearing on the draft EIR on April 27, 2006, both the City of San Diego and the CAC may request the SDCWA conduct an additional public hearing before the final EIR is released and certified. This is justified because the City may have to process development permits for this project and may be required to grant additional easements and/or process land acquisition by SDCWA.

The Office of the City Attorney has not yet reviewed the draft EIR, and, on behalf of the City, would like the opportunity to formally do so before the SDCWA attempts to finalize the EIR for this project. We are in the process of requesting that SDCWA extend the comment period or, in the alternative, to accept our late comments.

Regardless, as entities submitting comments to the draft EIR, both the City and the CAC also have the ability to challenge the final, certified EIR in court if we find it inadequate. Once a notice of determination has been filed with the County Clerk, a 30-day statute of limitations on court challenges to the approval under CEQA will commence. (CEQA Guidelines §15094(g))

Rights of the City of San Diego As A Part of the Development Process

The SDCWA asserts that it “is not subject to local land use plans, policies and ordinances. Furthermore, water supply facilities are exempt from local zoning per California Government Code Section 53091¹.” (Mission Trails FRS II Project EIR, page 3.1-2).

While this assertion has not been legally analyzed, the City, through the Development Services Department, has suggested that project areas outside the existing SDCWA easement be assessed for conformance to the City’s Environmentally Sensitive Lands Regulations and the Historical Resources Regulations of the Land Development Code. (City of San Diego Comments on Draft EIR, May 15, 2006, page 3) In addition, as a practical matter, the City may have to issue Right of Entry Permits and possibly amend the SDCWA’s existing easement with the City.

The City Attorney’s Land Use and Environmental Review Section will be analyzing the issues which the CAC has raised, along with other issues raised in the City’s formal response to SDCWA. If you have further questions or need clarification on the status of this project, please do not hesitate to contact me at 619/533-5875.

Alex W. Sachs
Deputy City Attorney

AWS:mm
Attachment

cc: Ted Medina, Director of Parks & Recreation
Karen Heumann, Assistant City Attorney
Bob Manis, Assistant Deputy Director, Development Services Department
Shirley Edwards, Deputy City Attorney

¹ Zoning ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, treatment or transmission of water... Govt. Code §53091(e).