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December 2, 2002

Mayor Gary Podesto and
Council Members Johnston, Nickerson, Martin, Ruhstaller, Giovanetti, and Nomura
City of Stockton
425 N. El Dorado St.
Stockton, CA 95202

Re: CEQA Review of Environmental Effects of Privatization of Municipal Utilities

Honorable Mayor and Council members:

The Concerned Citizens Coalition of Stockton, Sierra Club, League of Women Voters of San Joaquin County, DeltaKeeper, and California Office of Public Citizen submit the following comments on the CEQA Review of Environmental Effects of Privatization of Municipal Utilities, related to item 7.1 on the December 3 City Council agenda.

The Concerned Citizens Coalition and the other groups believe that the City of Stockton is obligated to study the environmental consequences of the City's decision to contract for the "Operation and Maintenance of, Capital Improvements to, and Billing Services for, Water, Wastewater and Stormwater Utilities," as required by the California Environmental Quality Act ("CEQA").

The Request For Proposal ("RFP") for this contract, and the responses received to the RFP, includes detailed proposals to provide water, wastewater, and storm water services to Stockton residents in lieu of those services that are now provided by the City's Municipal Utilities Department (MUD). The RFPs and the proposals received also contain specific plans to design and construct certain capital improvements at Stockton's Regional Water Control Facility and stormwater facilities. This change from public to private service provision, and the proposed capital improvements are noted below. CEQA analysis of the environmental consequences of

choosing private operations over MUD operations, and the impacts of construction and operation of new capital facilities must be analyzed before the City awards a contract. The City cannot rely on posting a Class I Categorical Exemption, exempting the City contract from further CEQA review, as suggested in a recent letter from the City Attorney (see below), nor can the City rely on an outdated 1994 Negative Declaration as the appropriate CEQA analysis, as at least one city staff member has suggested.

Three companies have submitted proposals, each different, in response to this RFP. The designated Preferred Proposer, OMI-Thames, has presented a specific proposal that details capital improvements, including construction of a wetlands, as part of their proposal to the City. The City must analyze environmental issues related to these improvements now, not after a contract with OMI or another firm has been signed.

Initial Study Must be Prepared in Accordance with CEQA

Under CEQA, the OMI proposal must be subject to preparation of an Initial Study to determine whether a Negative Declaration or Environmental Impact Report is required to analyze potential impacts related to the contract and the specific capital improvements that are proposed under the contract. The City must prepare the Initial Study and subsequent environmental analysis before any further action in the matter, but most certainly prior to making a legally binding decision.

CEQA guidelines emphasize the importance of early consideration of environmental consequences, regardless of whether the project is a publicly or privately initiated one: "Early preparation is necessary for the legal validity of the process and for the usefulness of the documents. Early preparation enables agencies to make revisions in projects to reduce or avoid adverse environmental effects before the agency has become so committed to a particular approach that it can make changes only with difficulty," (CEQA Guidelines Section 15004). The current project is a publicly initiated one, and thus CEQA should be invoked at the earliest possible point in time.

Under any circumstances, the CEQA process must occur prior to project approval, Section 15004(a). The guidelines under CEQA define project approval as "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (Cal. Code Regs, tit. 14, Section 15352(a).) In *City of Vernon v. Board of Harbor Commissioners of the City of Long Beach*, (2002) 63 Cal.App. 4th 677, 74 Cal. Rptr.2d 497, the court stated, "[t]he agency commits to a definite course of action not simply by being a proponent or advocate of the project, but by agreeing to be legally bound to take that course of action." Any CEQA analysis done after entering into a binding contract with any bidder on this project will not guide the planning process nor aid the City in its decision-making process, thus falling afoul of CEQA and its implementing regulations.

Council Actions to Choose OMI Proposal and Sign Contract Are a "Project"

One purpose of CEQA is to provide the decision-making agency (in this case, the City) with environmental information to assist in making an ultimate decision on any "project" as that term is used in the law. The City Council on October 8 voted to enter into contract negotiations with one

of three bidders on the project, a joint venture of OMI and Thames Water Company, pursuant to a recommendation by Alternative Resources Inc. (ARI). This decision considerably narrows the options available to the City in meeting its environmental review obligations. The plans proposed by OMI/Thames are different than those proposed by the other two bidders and will have different environmental consequences. Further, the choice to proceed with a private company bidder, as opposed to keeping operations within the City's Municipal Utility District (MUD), is also very likely to have different environmental consequences. Yet, there has been absolutely no environmental analysis to help guide the City or the public in making a determination with regard to an enormously significant contract of 20 years' duration that totals \$400 to \$500 million.

The terms of the OMI/Thames bid, now the sole alternative being considered by the City, will result in different environmental outcomes than if a different bidder, or the continued public operation alternative, were chosen (see discussion, below). By waiting until almost every significant decision has been made before an Initial Study has been prepared, the City will be ignoring the important information that the CEQA process should provide. Not only would it be prudent to have performed the Initial Study and subsequent environmental analysis by now, in this case, it is a clear violation of CEQA that the City is committed to a particular outcome prior to the completion of the CEQA review.

Background

Shute, Mihaly & Weinberger have submitted three separate Requests for Public Records related to the City's compliance with CEQA for the privatization of municipal utilities (the last letter dated October 7, 2002). In response to these requests, the City has provided a Negative Declaration/Expanded Initial Study (IS3-94) for "Stages I and II of the Regional Wastewater Control Facility Staged Expansion Program," adopted by the City for in 1994, as well as numerous related documents from that time period (1994).

Shute, Mihaly & Weinberger, in addition to Delta Sierra Group of the Sierra Club and Public Citizen, have also submitted letters to the City demanding the City conduct a CEQA evaluation prior to approving a contract with OMI or any other proposer (letters of August 30, October 22, and November 4, 2002, respectively). The City has responded to the first two letters with very similar letters.

In response to the Shute, Mihaly & Weinberger letter, the City Attorney writes "...the parties are in agreement that some level of review is required under CEQA..." (letter of October 15, 2002). The City Attorney quotes Section 15301 of the CEQA Guidelines that allow a "Class I" categorical exemption from further environmental review for "operation, repair, maintenance" of public facilities "involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." The City Attorney argues that "if the City determines to hire a private company to operate its existing facilities, the private company simply "stands in the shoes" of the City, and the execution of a contract for the maintenance and operation of the City's facilities will not affect the existing use of any of the facilities and will not, as a matter of law, create a significant impact on the environment," assuming that no "unusual circumstances" or "cumulative impacts" apply.

The City Attorney further argues that “the RFP requested the qualified companies to “bid” on the design and construction of certain capital improvements” and that these improvements would not be constructed until after the City has issued a “Notice-to-Proceed” as described in Addendum 5 to the RFP (the Draft Service Contract). However, the addendum language actually states “The City shall have [sic] the right, but not the obligation to issue a Notice-to-Proceed with respect to each of the Initial Capital Improvements.” The permissive language indicates that the City does not have the “obligation” to issue the Notice-to-Proceed, but could choose not to issue a Notice-to-Proceed for a specific improvement.

The City Attorney finally states that “the City shall retain, under the terms of the Draft Service Contract, the complete discretion on any decision to construct any of the identified capital improvements. Therefore, there can be no CEQA analysis until the City determines, in its unlimited discretion under the specific language set forth above, to require the company to commence construction of any capital improvement.”

City Agrees that CEQA Applies to the Project

The City agrees that CEQA applies to the upgrading of the wastewater treatment facility to meet increasingly restrictive regulatory requirements, which are key components of the RFP and the proposals received. Most recently, the City in its Stipulation for Order Issuing Stay submitted to the State Water Resources Control Board (September 16, 2002) related to staying execution of the water discharge requirements for the City’s Regional Wastewater Control Facility states that “the City of Stockton shall proceed with respect to activities described in Phase 1a and Phase 1b of the “Ammonia Effluent Limitation Work Plan...However, the parties further acknowledge and agree: (i) that the City of Stockton cannot at this time determine what level of CEQA compliance would be required for any selected alternative...with respect to the manner of implementation of facility improvements;... and (iii) that alternative means of implementation are under consideration which may affect the timing of any action by the City Council as well as the project that is the subject of CEQA evaluation” (Section 3).

Capital Improvements Outlined in RFP and Proposals Are Integral, Not Just “Bids”

The City’s claims that the capital improvements identified in the RFP and recommended in the three proposals received by the City are not an integral piece of the privatization “project,” but are simply company “bids” on future isolated facilities, are not credible and are inconsistent with text in the RFP and OMI proposals themselves.

The City’s RFP places great importance on the capital facilities that are needed to bring the City’s utilities into compliance with existing and future regulations. At the outset, the RFP states explicitly that the City “is soliciting Proposals from Qualified Respondents to: 1) operate and maintain, repair and replace, and design and construct certain capital improvements, to its municipal water, wastewater and stormwater facilities...” (Page 1-1). The City’s goals and objectives for the RFP and proposals are to “provide an enhanced quality of service, meeting current and future needs” and to “improve, operate and maintain its facilities in conformance with all environmental requirements and Applicable [sic] law” (page 1-2). The chosen company shall “be responsible for the design and construction of Initial Capital Improvements for all utilities and

Billing Services, including those necessary to meet the Tentative NPDES Wastewater permit requirements. In addition, other changes to the Company's responsibilities for design and construction of Initial Capital Improvements have occurred since the RFQEI was issued. Proposers are advised to pay close attention to these revised requirements for capital improvements as presented in this RFP" (pages 1-2 and 1-3).

While the City Attorney argues that "the RFP requested the qualified companies to "bid" on the design and construction of certain capital improvements" and that these improvements would not be constructed until after the City has issued a "Notice-to-Proceed," the word "bid" does not appear anywhere in the opening chapter of the RFP. Rather, the RFP text is clear that the proposers are submitting a proposal to actually design and build the specific facilities to ensure the City's plants will operate in accordance with "applicable laws."

Section 4.5 of the RFP outlines the specific scope of work for design and construction of Initial Capital Improvements. The successful company "shall be responsible for design, constructing, starting-up, acceptance testing and achieving City Acceptance of the Initial Capital Improvements. In addition, the Company shall be responsible for certain permitting activities; i.e., obtaining local building permits for constructing the Initial Capital Improvements. The City shall obtain all other environmental permits and approvals and prepare studies and any Environmental Impact Reports required to gain approval to construct and operate Initial Capital Improvements..." (Page 4-45).

Section 4.5.2.1 details the seven specific water facilities capital improvements and completion schedule that the proposer must implement, including water system expansion projects, new wells, water transmission lines, and the South Stockton Aqueduct project. None of these water projects have apparently received CEQA review by the City.

Section 4.5.2.3 details the three specific stormwater facilities capital improvements and completion schedule that the proposer must implement, including providing a SCADA system for 67 stormwater pump stations; "major repair and/or replacement of existing pump stations and appurtenances," and other pumping station upgrades. None of these stormwater projects have apparently received CEQA review by the City.

Section 4.5.2.2 details the nine specific wastewater facilities capital improvements and completion schedule that the proposer must implement, including "RWCF Modification and Replacement projects [which] include specific items that are not included in the RWCF expansion program." (The RWCF expansion program has been studied, apparently, only in the previously mentioned 1994 Negative Declaration. The "new items" have not been studied under CEQA.) Other major wastewater facilities capital improvements include "providing a SCADA system for the RWCF main plant," construction of headworks odor and emission controls, and a "final biotower," based on City plans.

The most significant capital facilities are identified as "TNDPES-WW Improvements (WW39)" on page 4-52 of the RFP. The text states the scope of work for these improvements must include:

"...the necessary improvements for the RWCF to meet the discharge requirements of the TNDPES-WW permit issued on April 9, 2001. A Proposer should propose a technical

approach that it believes best meets the TNDPES-WW requirements. Proposers may, but are not required to, propose an approach originally identified by the City in its list of six alternatives...

The City seeks to structure the ICI project for compliance with the TNDPES-WW requirements to minimize environmental impacts and to limit construction to the RWCF site to the extent possible; thereby potentially reducing impacts and CEQA requirements. Proposers are requested to consider these City goals in preparing Proposals. After Proposals are submitted, the City will assess whether the proposed action is subject to exemption, a negative declaration, a mitigated negative declaration, a focused EIR or a full EIR, and then implement the required actions(s). The City will serve as lead agency for the CEQA process...[emphasis added]

Obviously, none of these wastewater projects have apparently received CEQA review by the City. It is quite notable that the RFP states that “after Proposals are submitted” the City will assess whether the proposed action is subject to a specific CEQA analysis. The RFP indicates that the CEQA assessment decision will be made after all of the proposals are submitted for review by the City, but not after a decision has been made by the City to choose a specific proposal.

Finally, the RFP lists the specific “technical criteria” by which the proposals will be evaluated by the City. The plans for Initial Capital Improvements will be evaluated for, among others, “completeness of the technical proposal; conformity with required content; utility and efficacy of design;” and “conformance to the City’s schedule requirement; likelihood of securing timely regulatory approval.” Pointedly absent from the City’s dozen criteria are any criteria that address the environmental impacts, or lessen the potential impacts, of constructing the facilities.

City Must Analyze Environmental Consequences of Private Operations over MUD Operations

In addition to the obvious environmental issues related to construction of new wastewater and other capital facilities, the City must also analyze the potentially significant environmental effects of changing the management of the water facilities from the current City MUD management to a private international company. The City Council has already received much testimony on the potential environmental and political consequences of changing the management of water, wastewater, and storm water services from public oversight by City employees to a private company which has a known history of successes and failures in meeting regulatory compliance and the terms of contracts in other cities in the country (e.g., Rialto, Fairfield, New Haven).

For example, a strong argument can be made that contracting out City services to a private company may create a direct incentive for the company managers to cut back on environmental programs such as those described in the series of memoranda the City Council has already received from the existing MUD staff (see further discussion below). Put simply, if a private company that has been chosen to provide public utility services eliminates a service or an environmental program, for example, the company would probably cut their operating expenses and make more profit on the City contract.

An environmental analysis must be prepared to assess whether the OMI or other proposals are

recommending the elimination of some specific services and environmental programs, and what the consequences of eliminating those service and programs would be to residents and to environmental goals and regulations. A major incentive to privatize City services, as advocated by the Mayor and others, is that a private company will find items to cut from the existing MUD operations. The City must determine, through preparation of an Initial Study, whether and to what extent the proposed operational changes contained in the three proposals will have an effect on the environment.

We are also concerned that the RFP, and consequently the proposals that have been received by the City, do not indicate specific performance standards that would be met, to ensure that there would not be any dramatic changes for the worse in terms of environmental performance. The issue of specifying detailed performance standards, and analyzing their potential to meet regulatory goals, is particularly important in light of the evidence that OMI and other private companies have apparently failed to conform to standards in other cities such as Rialto and New Haven.

Failure to Assess Environmental Impacts of OMI Proposal versus Other Proposals Bids or Status Quo

The City has failed to adequately contrast and judge the potential environmental impacts of the management plans, specific technologies, and capital construction projects of each of the three proposals. The City has also failed to contrast the proposals against a City MUD proposal to continue to provide services, and to construct and operate these same modified facilities. The terms of the OMI/Thames proposal, now the sole alternative being considered by the City, will result in different environmental outcomes than if a different bidder, or the continued public operation alternative, were chosen. An Initial Study and CEQA document must analyze these different environmental outcomes, before the City Council commits to a single proposal.

Each of the proposals is very detailed and different, especially as related to improvements for the wastewater treatment facility. This is quite obvious to any casual reader of the OMI/Thames proposal. The proposal itself contains 52 engineering drawings which recommend specific details for the necessary capital construction improvements to the City's wastewater treatment facility. The other two proposals submitted to the City contain similar detailed engineering drawings, which recommend very different approaches to the wastewater facility construction projects.

However, the City evaluator has not assessed the differences between the proposals in terms of potential environmental impacts. This is largely because the technical evaluation criteria do not explicitly include environmental impact factors, as noted above. The City evaluator (ARI, October 1, 2002) alludes to some differences but is unable to describe or quantify any environmental impacts. ARI notes that the OMI/Thames proposal includes "detailed narratives, plans, design calculations, technical forms and schematics" for the RWCF upgrades. ARI judges that OMI plans for capital improvements for NPDES compliance "are imaginative, environmentally sensitive and well thought out," but gives no evidence of the environmental "sensitivity" other than a brief description of the proposed wetlands system. ARI describes the other two proposals for the RWCF as "well thought out" but their evaluation contains no assessment of their relative environmental sensitivity.

The City Director of the Municipal Utilities Department (MUD) has also raised very significant questions related to the operational and environmental consistency of the OMI/Thames proposal and the type and level of services now provided by the City staff (memorandum from Morris Allen to City Manager, October 23, 2002, and accompanying memoranda from MUD staff members Purita Billedo, Robert Castelli, Larry Huber, Bob Murdoch, Mark Van Aspern, Mike McDonald, Stephen Gittings, Locaso/Cornell, and Ed Formosa). For example, the MUD director notes that many specific services now performed by City staff do not appear to be included in the OMI proposal, including water conservation programs; odor control, vector control and graffiti removal at outlying facilities; laboratory services related to compliance with the TMDL program and Delta Water Supply Project; administration of the industrial user/wastewater discharge permit program; MUD security; and several other tasks or programs.

The City must analyze the environmental consequences of eliminating the programs outlined in the MUD memoranda. If the wide array of existing services and programs are not included in the OMI proposal and draft contract, then there could be a potentially significant decline in services to residents. Changes to, or the elimination of, key existing programs that are provided by MUD staff could have direct effects on the local and regional environment.

For example, if water conservation programs are curtailed, the City could be forced to rely on more groundwater pumping during drought years, which could further harm the aquifer and natural resources. If the administration of the industrial user/wastewater discharge permit program is reduced or eliminated, the result could be more industrial pollution of Stockton's waterways. If odor control, vector control, graffiti removal, and MUD security levels are reduced or cut, there could be discernable environmental impacts to residents and business located near the MUD facilities.

Most alarmingly, two MUD managers have criticized the OMI proposal for containing statements that are "false and/or misleading" (Stephen Gittings memo to Mark Madison, Wastewater Operations, October 11, 2002) and statements "of half-truths or completely false portrayals of our current operation" (Ed Formosa, undated memo). The latter memo criticizes the OMI proposal for its water service deficiencies: "The proposal, in my view, does not prioritize customer service as highly as our current operation. This may be acceptable to Council but it does impact our base line in many indirect areas."

Clearly, there could be significant environmental impacts to existing City services and environmental resource if the specific programs and services listed in the MUD memos were curtailed or cut back. A CEQA analysis must assess these potential impacts prior to the City entering into a contract with OMI.

City Cannot Rely on Categorical Exemption, Class I

As already note above, in response to the Shute, Mihaly & Weinberger letter, the City Attorney has argued that the City may adopt a "Class I" categorical exemption to exempt the OMI proposal from further environmental review "if the City determines to hire a private company to operate its existing facilities, the private company simply "stands in the shoes" of the City, and the execution of a contract for the maintenance and operation of the City's facilities will not affect the existing

use of any of the facilities and will not, as a matter of law, create a significant impact on the environment,” assuming that no “unusual circumstances” or “cumulative impacts” apply (letter of October 15, 2002).

Section 15301 of the CEQA Guidelines allows a “Class I” categorical exemption for “operation, repair, maintenance” of public facilities “involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.” However, the construction of the extensive capital improvements outlined in the RFP and the proposals clearly do not involve “negligible or no expansion of use,” but include significant expansion of the existing wastewater treatment facility, among other facilities, and use of a “Class I” categorical exemption would be inappropriate.

Secondly, CEQA precludes the use of any categorical exemption “where there is a reasonable possibility that the activity would result in a significant effect on the environment” (CEQA Guideline 15300.2(c)). Contracting existing City services to a private company, accompanied by the possible reduction or elimination of existing services and the construction of several new facilities, clearly indicates “a reasonable possibility that the activity would result in a significant effect on the environment.”

City Cannot Rely on Previous 1994 Negative Declaration

The City also cannot rely on previous environmental analysis from 1994, such as the Negative Declaration/Expanded Initial Study (IS3-94) for “Stages I and II of the Regional Wastewater Control Facility Staged Expansion Program.” Section 15162 of the CEQA Guidelines precludes the use of previous adopted environmental documents if “substantial changes” have occurred and “the changes meet any of the following criteria:

- (a) Substantial changes are proposed in the project; or
- (b) Substantial changes have occurred “with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects, or a substantial increase in the severity of previously identified significant effects”; or
- (c) New information “of substantial importance which was not known...shows that the project will have one or more significant effects not discussed in the previous EIR, or significant effects previously examined will be substantially more severe than shown in the previous EIR.”

Since the City adopted the 1994 Negative Declaration, there have been numerous regulatory changes and environmental analyses that constitute substantial changes “with respect to the circumstances under which the project is undertaken,” as well as “new information of substantial importance.”

A partial listing of the substantial changes that have occurred since 1994 and would affect the analysis of the OMI or other proposals include: additional federal 303(d) impaired waterways and Endangered Species Act listings; other specific wastewater and water permit requirements that were not contemplated in the early 1990s such as full-time Title 22 disinfection requirements to

protect downstream shell fishing activities, and requirements to analyze the impacts of stormwater discharges; new Total Maximum Daily Load laws and requirements; and numerous subsequent scientific studies that have analyzed water quality and biological issues of the San Joaquin River and the Stockton shipping channel, etc.

CEQA Process and Voter Initiative Must Not Be Ignored by City

Finally, the CEQA policy guidelines and recent important case law notes that CEQA documentation plays a critical role in allowing local citizens to judge their elected representatives. CEQA Guidelines Section 15003 (d) states: "The EIR is to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action" (People ex rel. Department of Public Works v. Bosio, 47 Cal. App. 3d 495). Section 15003 (e) states, "The EIR process will enable the public to determine the environmental and economic values of their elected and appointed officials thus allowing for appropriate action come election day should majority of the voters disagree" (People v. County of Kern, 39 Cal. App. 3d 830).

Given the opposition to this project from many individuals and organizations in Stockton, and the contentious nature of the proceedings surrounding the City's actions in this matter, the prudent and legally sufficient decision by the City should be to commence the CEQA process immediately.

Concerned Citizens collected more than 18,000 signatures to force the City to place a ballot initiative on the ballot that would provide the people of Stockton the ability to approve any significant privatization contract. The collection of these signatures indicates the highest level of citizen interest in the issue. If ignored by the City through a hurried process to approve a contract prior to the March 2003 election in an effort to avoid voter participation, then the timing of the City's process is especially suspect and will be challenged. The City's further failure to commence the CEQA process is further evidence of an attempt to "beat the clock" and is, thus, unlawful and a failure of its duty to comply with the statute. See CEQA Regulations, Section 15004(b)(2) et seq.

In conclusion, the Concerned Citizens Coalition of Stockton, Sierra Club, League of Women Voters of San Joaquin County, DeltaKeeper, and the California Office of Public Citizen believe that a privatization contract cannot and must not be negotiated or finalized until a full and valid CEQA process is completed. We would be glad to assist the City in scoping the issues that should be identified in an Initial Study and included in a CEQA document.

Sincerely,

Eric Parfrey, Chair
Mother Lode Chapter,
Sierra Club

Sylvia Kothe, Chair
Concerned Citizens Coalition
of Stockton

Bill Jennings, Director
DeltaKeeper

Phyllis Morel, President
League of Women Voters
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Jane Kelly, Director
California Office
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Cc: City Attorney
City Clerk
San Joaquin County Board of Supervisors
Bill Lockyer, Attorney General, State of California
Winston Hickox, Secretary, California Environmental Protection Agency
Mary Nichols, Secretary, California Resources Agency
Tom Pinkos, Executive Officer, Central Valley Regional Water Quality Control Board
Wayne Nastri, Regional Administrator, Environmental Protection Agency, Region 9
Mike Machado, California State Senate
Barbara Matthews, California State Assembly