Submitted at 8/19/13 Board Meeting
Items 11 & 12


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MPWMD


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**VIA EMAIL & U. S. MAIL**

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**RE: Peoples Moss Landing Desalination Project**

Dear Mr. Stoldt & Members of the Board:

We are legal counsel for the Peoples Moss Landing Desalination Project ("PML"). In that capacity, we write to request, and insist, that the Board refrain from taking action on item nos. 11 and 12 on tonight's agenda. Those items consist of a reimbursement agreement and option agreement between the District and DeepWater Desal, LLC, wherein the District agrees to reimburse DeepWater for half of its environmental and permitting costs, and in exchange, to receive an option to own and operate Phase I of the Desalination Plant.

The Agreements raise a number of significant concerns, including the following provisions:

- Exhibit 11-A declares an "official intent" to reimburse DeepWater's expenditures
- The District will be financing environmental and permitting fees for a private project, in advance of any CEQA analysis (Exhibit 11-A, par. 2; Exhibit 12-A, par. Background A, pars. 1.1-1.2. )

- The District expects to sell and deliver bonds and/or certificates of participation, up to an "expected maximum principle amount" of $200 million (Exhibit 11-A, par. 3)

- Exhibit 11-A "expresses the District's expectations as of this date with respect to the financing of the ***construction and acquisition*** of the Project" (Exhibit 11-A, par. 6)

- The District will fund the reimbursement obligation from proceeds from the MPWMD Water Supply Charge – the legality of which is already in litigation (Exhibit 12-A, par. 1.4)

- The District shall have the sole and exclusive option to own and operate Phase I of the Desalination Plant, with the option being exercisable within sixty (60 days following issuance of a Coastal Development Permit (Exhibit 12-A, par. 4.1)

- If the District exercises its option, then DeepWater "shall transfer sufficient title and interest to MPWMD for all improvements and appurtenances, site leases, agreements and/or contracts for source water, easements, and all other assets necessary for the location and operation of Phase I of the Desalination Plant" (Exhibit 12-A, par. 4.2)

- Once the option is exercised, the commercial fair value of the property shall be decided by a qualified valuation expert, whose opinion would be binding on the parties (Exhibit 12-A, par. 4.3)

The provisions mentioned above violate the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq*. PRC section 21100, subdivision (a) provides in pertinent part: "All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment."

CEQA compliance must occur before, not after, a public agency approves a project. *Save Tara v. City of West Hollywood (*2008) 45 Cal. 4th 116, 134. The CEQA Guidelines define "approval" as follows: [T]he 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. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval. 14 CCR Section 15352(a).

Furthermore, with regard to private projects, approval is deemed to occur: "Upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." 14 CCR Section 15352(b).

The purpose behind the rule that requires environmental review prior to agency approval is to ensure that a lead agency is neutral and objective and that its interest is in compliance with CEQA. "It is this neutral role which would cause [the lead agency] to reject the project or certify an EIR supporting one or more of the project alternatives or calling for mitigation measures to which the applicant is opposed. The agency's unbiased evaluation of the environmental impacts of the applicant's proposal is the bedrock on which the rest of the CEQA process is based. *Citizens for Ceres v. Sup. Ct.* (2013) 217 Cal. App. 4th 889, 917.

As the *Save Tara* court noted, "the later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project . . . For that reason, EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project, program or design . . . at a minimum an EIR must be performed before a project is approved, for "[i]f postapproval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken." *Save Tara,* 45 Cal. 4th at 130-31; *see also id.* ("if, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has 'approved' the project").

In *Save Tara,* the California Supreme Court was confronted with the issue of whether a city's approval of an agreement with a corporation for the development of low-income housing prior to conducting environmental review constituted "approval" under CEQA. The city entered into an agreement to develop property conditioned upon subsequent environmental review and CEQA compliance. Before environmental review was complete, the city lent money to the developer for preparatory activities, announced publicly that it was determined to proceed with the project, and began relocating tenants whom the project would displace. *Save Tara,* 45 Cal. 4th at 140-142. The Supreme Court held that the city violated CEQA because it had committed itself to the project prior to fully evaluating its environmental effects. *Id.* at 142. Particularly significant to the court's analysis was the fact that the city promised to loan the developer over half a million dollars, a promise not conditioned upon CEQA compliance. *Id.* at 141.

Here, under the plain language of the CEQA Guidelines and implementing caselaw, approval of Resolution 2013-14 and the "Cost Sharing Agreement" would constitute approval of the project in violation of CEQA. First, the MPWMD is committing itself to give DeepWater $800,000 for "reimbursement" costs under Section 1.2 of the Agreement. Since the DeepWater project is private, and MPWMD is giving Deepwater financial assistance, approval of the Cost Sharing Agreement clearly constitutes approval under 14 CCR Section 15352.

Second, the District's proposed funding is for various activities, including CEQA review, permitting work, financing of construction, and financing for acquisition of the Project. Expenditures of these sums, including the authorization to issue up to $200 million in bonds, goes well beyond initial steps and constitutes a project approval for CEQA purposes.

Third, under 4.1 of the Agreement, MPWMD has the exclusive option to own and operate Phase 1 of the Desalination Plan, giving the agency a financial incentive to approve the project regardless of environmental impacts. It can hardly be argued that a MPWMD is a disinterested decision maker when it has such a huge financial stake in the approval of the Desalination Plant. Given this financial incentive, the District has" foreclosed any meaningful options to going forward with the project."

Fourth, the two documents are at odds with each other. Whereas Resolution 2013-14 states that the funding will be paid for via the sale of bonds, the Cost Sharing Agreement states that the funding will take place through the Water Supply Charge. Given the discrepancy between the two documents, the District has not clearly set forth the anticipated funding mechanism.

As we have addressed in previous correspondence, we feel that this entire evaluation has been flawed and biased, and we have concerns that this decision is being driven by favoritism. It is extremely important that this MPWMD decision be based upon accurate factual information, that the decision be an open process, that the applicants and the public have a full opportunity to provide information and comment. The applicants and the public need to feel as though the process has been thorough, accurate and free of bias. For this reason, PML respectfully requests that this matter be sent back to the Water Supply Planning Committee, with all necessary instructions.

Moreover, as specifically pertains to tonight's meeting, PML requests that Agenda Items Nos. 11 and 12 be taken off calendar. Passage of those items would violate clear CEQA norms and simply invites needless litigation.

Very truly yours,

JOHNSON, MONCRIEF & HART

By: ______________________
David W. Balch

Attorneys for Peoples Moss Landing Desalination Project