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City of Eureka Community Development Department
Ms. Sidnie L. Olson, Principal Planner
531 "K" Street
Eureka, CA 95501-1165

RECEIVED
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DEPARTMENT OF
COMMUNITY DEVELOPMENT

Dear Ms. Olson:

My name is Ralph Faust and I represent the Northcoast Environmental Center (NEC). The NEC is a coalition of environmental groups that has worked for almost forty years to conserve the area's biological interests in the public interest through environmental information and education and when necessary, activism and litigation.

The comments contained herein are in response to the recent circulation of a Draft Environmental Impact Report (DEIR) for the Marina Center Project on the so-called Balloon Track. The Balloon Track, or Tract, is the premier undeveloped piece of property in the City of Eureka, located in the coastal zone at the Northwest corner of the City. It provides a sweeping panorama of Humboldt Bay as well as being completely in the view shed of tourists and residents recreating on the Bay and along the shoreline. It is adjacent to the Core Area Old Town and Downtown of the City, and its location along Hwy. 101, the only north-south highway in the County, makes it uniquely accessible to tourists and residents alike.

The DEIR in its present form is completely inadequate. It misstates the nature and scope of a number of the project's impacts, and completely ignores others. It ignores the policies of the Coastal Act. It contains a completely inadequate range and discussion of alternatives. The project described in that report and the report itself have numerous problems, and it is our contention that either the project proponent should abandon the project in its present form, or the City should reexamine the project in light of these and other comments and redo the EIR to focus accurately on the impacts of the project and its potential approvability, as is required by law.

WETLANDS

The proposed project would fill wetlands in order to enable a big box commercial development. The DEIR contains two characterizations of the wetlands present on the site, one study based upon the Army Corps of Engineers criteria that identified 7.09 acres of wetlands, and another study based upon the State Coastal Commission criteria that identified 8.76 acres of wetlands. It does not present a third study, also based upon the Coastal Commission criteria, that is in the

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possession of the developer if not of the City, that finds an additional 0.442 acres of wetlands on the site including in the turntable area ("Biotic Characterization of Clark Slough and 'Balloon Tract'", prepared by H. T. Harvey and Associates, January 29, 2008). In the absence of further information not presented in the Draft EIR, the largest delineated area of wetlands found in any of the studies consistent with the Coastal Commission criteria should provide the basis for the City's assessment of the project. That would appear to be about 9.2 acres.

In the face of this evidence of the presence of wetlands, the DEIR goes on to conclude, inexplicably, that the project is approvable under the Coastal Act. It does so despite a specific statement that it does not meet the allowable use criteria contained both within Public Resources Code section 30233, and in Policies 6.A.9 and 6.A.14 of the City's certified LCP. The City also completely ignores the fact that Policy 6.A.6 of its certified LCP declares sloughs and wetlands to be Environmentally Sensitive Habitat Areas (ESHA). Public Resources Code section 30240 is strong and explicit in stating that ESHA "shall be protected against any significant disruption of habitat values and only uses dependent on those resources shall be allowed within those areas". This state policy is mirrored in Policy 6.A.7 of the City's certified LCP. Further, the courts have definitively interpreted section 30240 to require the protection of ESHA regardless of the extent to which it may have become degraded. (See e.g., *Sierra Club v. California Coastal Commission*, 12 Cal. App. 4th 602 (1993); *Bolsa Chica Land Trust v. Superior Court*, 71 Cal. App. 4th 493 (1999). For a more recent discussion of the protection afforded ESHA in the context of a permit proceeding, see *McAllister v. California Coastal Commission*, Sixth Appellate District Case # H031283, 12/30/2008).

Apparently, though the decision path is not presented, the City appears to believe that it can find "overriding considerations" for this inconsistency, or that it can "balance" under the terms of Public Resources Code sections 30200 and 30007.5 (DEIR p. IV.I-14). The City has no such authority. "Overriding considerations" does not apply to the Coastal Act. Nor does the City have the ability to utilize section 30007.5 to approve the project. In order for the Commission to approve the project using these sections, it must identify a conflict between Chapter 3 policies, and then find that, on balance, the decision made is most protective of coastal resources. But there are no coastal resources protected by the fill of wetlands pursuant to this project, so no balancing can occur.

The City suggests that the developer's proposal would result in a "higher value" of wetlands on the site. Whether this opinion has merit is irrelevant; the Coastal Commission does not and cannot interpret the Coastal Act to allow fill of a wetland or destruction of an ESHA by a project on the basis that a newly constructed wetland would have "higher values". (See e.g., *Bolsa Chica, supra*, at 507: "...the language of section 30240 does not permit a process by which the habitat values of an ESHA can be isolated and then recreated in another location. Rather, a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA" (emphasis in original)).

More to the point, the developer appears to have convinced the City that there can be no cleanup of the toxic contamination on the site without filling the wetlands. This is patently

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false. Both the present owner and Union Pacific, the prior owner, have an immediate enforceable legal obligation to clean up the site, independent of any proposed development. The particular cleanup plan, which is itself development under the Coastal Act (see Public Resources Code section 30106), will have to be approved not only by whatever relevant state and federal agencies have jurisdiction over the toxic cleanup itself, but also by the City and the Commission under the Coastal Act. Only then will decisions be made regarding the appropriate restoration of the site. In this regard, the City should review the language of its existing LCP Policy 6.A.11, regarding maintaining or enhancing the functional capacity of wetlands or estuaries. Because the site was originally sub-tidal and tidal waters as well as estuarine wetlands, and appears to remain subject to the public trust, there is no reason to suggest that restoration of the site, the Coastal Act basis for dredge of the toxic material from the existing wetlands, requires refilling of the site to eliminate the wetlands and allow for a concrete parking lot and big box commercial development. That isn't restoration.

The City and the developer appear to confuse both the necessity for the cleanup with the desire for a particular project and the general requirements for a cleanup outside the coastal zone with the more stringent ones applicable in coastal zone wetlands. Contrary to the project proposal, the outcome of a legitimate "restoration plan" would be that Clark Slough and all of the wetland areas on the site are restored to their original status. The Marina Center only masquerades as a "restoration" project in an attempt to circumvent the clear standards of sections 30233 and 30240. For these reasons, this portion of the DEIR is fatally flawed. At a minimum, the project and the DEIR should be revised to remove all proposed development from the area that includes the slough and all delineated wetlands as well as from an upland buffer area of, at minimum, 100 feet from the boundary of any delineated wetland. There is clearly room for some development on the site, but it almost certainly will be mostly in the area north of the line drawn from 4th Street to the west to Waterfront Drive.

COASTAL ZONE LAND USES

The DEIR is also flawed in that it does not discuss or take into account the preference of land uses declared in the Coastal Act for development planned in the coastal zone. The Coastal Act, in several sections, particularly Public Resources Code sections 30222 and 30255, sets up a ranking or prioritization of uses to be allowed. The uses proposed for the Marina Center, including private residential, general industrial and general commercial are the least favored uses under the law. Higher priority uses include coastal-dependent (both industrial and non-industrial), coastal-related (those that support coastal-dependent), and visitor-serving commercial and recreational. Although the DEIR notes that the site is not geographically appropriate for coastal-dependent industrial use, no further attempt is made to discuss the prioritization of uses under the Coastal Act. The project is adjacent to a number of parcels zoned coastal dependent industrial, including "a number of vacant parcels owned by the City of Eureka Redevelopment Agency". In this context, and given the City's ability to combine use of this property with that of parcels owned by the Redevelopment Agency, the DEIR is required to analyze these priority coastal uses. For this reason the DEIR is deficient.

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This is especially egregious for a project of this magnitude in a location of this significance. Most particularly, the City must consider the possibility of a visitor-serving use in this area. The City recognizes in various parts of its DEIR that restoration of the slough and creation of wetlands, even at the minimal level proposed by this project in its present form, will be a great attraction for residents and tourists in the area. Imagine: How much more attractive would genuine restoration of the slough and wetlands be? And when that could be combined with the magnificent location of the site that includes views across the Bay in two directions, how nice a location for a destination hotel and restaurant, something completely lacking in Eureka at the present time? The City might consider responding that this vision is beyond the scope of what is required in a DEIR, but it is certainly not beyond the scope of what is required by the Coastal Act; and Coastal Act approval is required for any proposed use on this site that is not consistent with the existing zoning.

LAND USE AND IMPACTS

More generally, the City appears to take the view that its analysis of the economic impacts of the uses proposed in the project is limited to physical urban decay pursuant to the decision in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184. The City has attached several lengthy analyses of this issue and appears to have concluded that whatever impacts might occur, they won't rise to the level of causing urban decay, because there is a very low commercial vacancy rate in the area and empty stores will quickly be filled with new tenants. With respect to physical urban decay, this assumes that all areas of the City are equally desirable, and thus that no particular less commercially desirable area will be abandoned. In this regard, the DEIR assumes that the economic effects of this project will be spread throughout the City, with all areas suffering some, but none to the extent that it will reach the level of urban decay. With respect to economics, this assumes that either many more shoppers will come who do not presently shop in Eureka, or that entirely different businesses will be invented. No evidence is presented to justify either of these assumptions.

Further, the DEIR takes note in passing of the rapidly changing economic conditions that are presently closing stores and draining spending in the economy both locally and nationally, but all of the statistics presented are from the third quarter of 2007 or earlier, and thus completely fail to encompass the magnitude of the present economic shift. At this time, one of the "anchor" stores at the Bayshore Mall has closed and another is in bankruptcy, with no end in sight. Even Home Depot, mentioned in the DEIR as a possible anchor tenant for this project, has recently reported significant financial losses and closed a number of stores. There is no basis to assume at the present time that development of this project will not have a major effect upon other businesses in the City, and particularly in the City's Core Area. Since the new stores are unlikely to market goods different from those already sold in Eureka, the analytical flaw in the DEIR is the apparent assumption that there is an unlimited pool of shoppers, representing what the DEIR estimates to be about 10,620 vehicle trips per day specifically attributable to retail traffic, simply waiting for these new stores to appear. There is no evidence to support this assumption either.

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Thus, the statement that the proposed project is consistent with Policy 1.L.1 of the General Plan is simply wrong. The discussion notes that the project could draw some customers away from Core Area businesses, but then states that it would “add residents, day-time workers and visitors to an area within walking distance of the Core Area”. This is absurd. The DEIR states that the project will generate about 15,700 vehicle trips daily, many of these presumably shopping at the Center instead of in the Core area. Meanwhile, only about 100 new residents will live in the Center. Even if every one of these new residents shopped only in the Core Area, these numbers do not approach equivalency. Nor are very many of the shoppers or office workers in the Marina Center likely to walk 6-12 blocks to eat lunch or shop in the Core Area when options will be immediately available in the Center; and as for driving to Old Town, that would be an unlikely nightmare given the traffic generated by this project.

It seems clear that the Marina Center will economically bleed the Core Area by drawing away business. As quoted in the DEIR, Policy 1.L.1 states that the “City shall discourage new commercial development within the City that will adversely affect the economic vitality of the Core area. This City shall also encourage Humboldt County to discourage such development in adjacent unincorporated areas”. What kind of development could be so detrimental to the commercial success of the Core Area that the City would adopt a formal policy to discourage such development *in areas outside the City*? Only one kind: the big box “category killer” development that is proposed for the Marina Center. Regardless of its strained interpretation of the *City of Bakersfield* case, and regardless of whether the big box turns out to be a Home Depot, a Wal-Mart, or something else, the City’s support of this proposed project would undercut the economic vitality of its most critical commercial area, the Core Area, to which it has devoted substantial renovation efforts over the past 20 to 30 years, and would also directly contravene General Plan Policy 1.L.1, its primary commercial development policy.

This raises a more general point with respect to the Land Use policies of the General Plan and the Land Use and Planning section of the DEIR. Simply, there is no analysis in that section. Most of the section, 56 out of 80 pages, consists of a table that quotes policies and then makes a summary conclusion regarding applicability (Consistent, Potentially Inconsistent, or Not Relevant). The discussion in support of these conclusions is summary and trivial at best, or non-existent. One example of this is the Consistency Analysis of Goal 1.B, and the various policies that implement that goal. This is the section that deals with the “Concentrated Mixed-Use Core Area”. The Goal of 1.B is to create a “robust central Core Area that provides a clear geographic focus for attracting visitors and residents and for increasing private sector investment”. In its analysis of a project within a mile of the Core Area that would build a big box “category killer” and generate about 15,700 vehicle trips a day, the EIR finds this goal and all of the policies that implement it to be “Not Relevant”, because the “project site is not located in the area the General Plan defines as the ‘Core’ of Eureka”. No further discussion is provided. This does not pass what lawyers and judges call the “straight face” test; it is, instead, absurd on its face.

It is not the duty of a commenter to present an extensive analysis of topics that the City did not analyze itself. Suffice it to say that additional goals and policies that need further analysis and discussion, and that are not otherwise discussed in this letter include, but are not limited to:

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1. Goal 1.H and Policy 1.H.1 pertain to View Corridors. The analysis contained in the Land Use section and in Chapter IV-A is deficient in two respects. First, there is no showing that the project has been designed to protect view corridors to Humboldt Bay through the development. Contrary to the position stated in the Land Use section (p. IV.1-21) the view corridor policies are relevant to this proposed project. In addition, Public Resources Code section 30251 states that “the scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance”, and that “(P)ermitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas...”. This does not apply only to the Core Area, but also to the project area. In addition, it appears that the project has been designed to present to viewers along the shoreline the unattractive backsides of its retail establishments and restaurants that border Waterfront Drive. The City should analyze how this is consistent with protecting views along the shoreline and from important coastal areas such as the Wharfinger Building and the shoreline access areas. Finally, there is presently a view from the shore area inland toward Old Town and to the mountains east of Eureka. The placement of a four-story parking structure and a five-story office building in the development, to be among the tallest buildings in the City, should be analyzed in terms of the policy directives of section 30251.
2. Goal 1.M and several of the related policies that follow pertain to Industrial Development. The elimination of the industrial zoned land along Broadway between 4th and 1st is inconsistent with the clear language of Policies 1.M.1, 1.M.2 and 1.M.10. In addition, the proposed project appears to undermine Policy 1.M.5 and would likely make realization of the goal of Policy 1.M.6 difficult, by changing adjacent uses. Further, if the railroad is again operational, as evidence suggests that the DEIR must assume (see below), it is unclear how the City intends to implement Policy 3.F.2 to ensure an adequate replacement of the railroad functions historically performed at the Balloon Tract. It is also not clear how the City intends to reconcile the proposed development with Policy 3.B.3, which calls for the development of an intermodal transportation center between A and Commercial Streets south of the railroad tracks. The DEIR states that this policy is “Not Relevant” because it contains “no directive for a project applicant”, but this is the City’s General Plan and the City’s DEIR, and thus it is the City’s responsibility to reconcile this conflict. All of these Policies require much more extensive analysis and discussion than is provided in the cursory table.
3. Goal 1.N relates to the provision of Community Facilities. Because the area is presently zoned “Public”, the DEIR must analyze the rezone to another set of uses in terms of its ability to ensure an adequate supply of land for public or quasi-public community facilities. Why is it not important to keep all or a portion of this land zoned “Public”, particularly after the cleanup of the site has been completed and a full range of potential uses can be examined? Contrary to the City’s assertions, there appears to be almost no “public zoned” land in or adjacent to the Core Area or in the City’s populated areas that is not already developed. [See the City’s Zoning and Land Use Maps at: <http://info.ci.eureka.ca.gov/gisms/pdfs/zoning.pdf> and at <http://info.ci.eureka.ca.gov/gisms/pdfs/land use.pdf>]. The City dismisses this Goal as

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not relevant, but the removal of this large and unique parcel from "public" zoning without any identified alternatives makes this decision relevant to the DEIR discussion. The City must analyze and discuss this decision.

TRANSPORTATION IMPACTS

The transportation analysis is, to say the least, opaque and bound up with conclusions that are driven by its assumptions. It is based upon traffic studies conducted in March and April, although residents know, as the City knows, that peak traffic use on Highway 101 is during the summer months when significant tourist traffic is added to the ongoing flow of local traffic. This baseline must be corrected. In addition, the transportation section of the DEIR is inadequate because: 1) it does not account for congestion and circulation difficulties caused by drivers trying to avoid or affirmatively being directed to avoid congestion at the project exits onto Broadway and instead using back routes accessed from Waterfront Drive to reach either Old Town or Broadway; 2) it counts already planned mitigation measures necessary to alleviate existing traffic congestion along Hwy. 101 as a result of existing conditions as measures to alleviate the congestion caused by this project, thereby using up all known available mitigation and precluding traffic impacts from any other possible project in the foreseeable future without further decreasing the level of service along 101 (cumulative impacts); and 3) it does not account for the known projected railroad trips along the right of way, particularly as the railroad crosses 1st Street, and also where Waterfront Drive becomes 1st Street and trains proceed along the middle of 1st Street through the Core Area, impacting traffic trying to move from the project site to the Core Area or using Waterfront Drive to get to street access to Highway 101.

Anyone who presently uses the various north/south streets in the Core Area knows that it is harder and takes longer to get to and across Highway 101 than it does to proceed along 101. Put another way, the most troublesome existing congestion is in the north/south direction rather than in the east/west direction. It is rare for a driver to wait longer than the length of one stoplight as one proceeds in either direction along 101. The lights are not perfectly timed for synchronous flowing traffic, but they are long enough in the green cycle to allow large numbers of vehicles to move through the various intersections. On the other hand, to go north or south along any of the various streets in the Core Area from C Street through at least I Street, to try to get from, for example 3rd Street to 7th Street or beyond, takes much longer. The traffic volume is far heavier along 4th and 5th Streets, but because that road is wider and the green lights are longer, congestion is more troublesome along the north/south lettered streets.

This is important because the DEIR does not account for all of the various vehicle trips that will be generated by the project. The DEIR assumes that the only traffic congestion that must be accounted for is that along Highway 101. But because the EIR does not account for the fate of the 15,700 daily vehicle trips that are projected to be generated by the project, it leaves the congestion on all of the various adjacent streets and intersections unanalyzed. The DEIR obliquely recognizes this problem when it acknowledges that Koster Street will be impacted at its intersection with Wabash. This recognizes that traffic generated by the project, desperately

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seeking access to Broadway, but unable easily to obtain it at the 4th or 6th Street exits, will try "back road" alternatives. In fact, using these "back road" alternatives as a way to relieve traffic congestion on Broadway is specifically encouraged by the City's traffic consultant, who goes on to recommend closing all direct project access to Broadway by 2025. These alternatives include Waterfront Drive to either Washington or Wabash, with various "shortcuts", e.g. Koster, used as well, and Waterfront and 2nd Streets into the Core Area, with drivers then desperately seeking access to Highway 101 at Commercial, C Street or further east. It is important to recognize and to attempt to alleviate the known problems along Highway 101, but it is not sufficient as a traffic analysis of the impacts of the project. A heavily congested Highway 101 with its lights timed to favor traffic flowing along it rather than onto and across it will inevitably cause serious congestion on all of the back streets surrounding the project. The DEIR does nothing to analyze or to propose to mitigate, if mitigation is possible, these impacts.

The City is well aware of this problem in the Core Area, as is evidenced by its General Plan Policy 3.H.2, which requires the City to "balance north-south travel needs through the Core Area (i.e., along E, F, and G Streets) with east-west travel needs by modifying traffic control devices (i.e., traffic signals and stop signs), working with Caltrans as necessary". Thus the City is aware that this is an existing problem, but the DEIR proclaims that this policy is "Not Relevant" to the project because the "project site is not within Eureka's 'Core Area'". This statement completely ignores the fact that the traffic impacts of a project are not limited by the precise boundaries of the project site. Instead they will ripple out throughout the area around the project. The DEIR recognizes this with respect to Highway 101, but largely ignores it with respect to the roads that go to and across Highway 101. For this reason the DEIR analysis of traffic impacts is deficient and must be redone.

Related to this problem of traffic on the surrounding streets is the issue of coastal access. The Coastal Act mandates the protection of access to and along the shoreline, and it is well recognized that the Coastal Commission focuses upon the relationship of traffic impacts to coastal access. In parts of the DEIR the City recognizes the importance of this coastal access, touting the existing and planned improvements to coastal access in the area. Coastal access presently exists at the foot of Del Norte, at the foot of Washington and north along the shoreline past the Wharfinger Building to the boat harbor, and then from Commercial all along the waterfront through the Core Area. But the DEIR says not a word about how the traffic exiting the project onto Waterfront Drive will affect this coastal access. This impact must be analyzed now, before the analysis is forced upon the City by the Coastal Commission's review of the proposed LCP amendment.

This analysis is complicated by another potential impact to both traffic and coastal access that is not discussed in the Draft EIR. The Northwestern Pacific Railroad Co., in a memo from John H. Williams, its President to Allan Hemphill, the Chairman of the North Coast Railroad Authority dated January 8, 2009, (copy attached as Exhibit A) stated its intent to operate a "separate short line railroad that would provide both rail freight and excursion passenger train service in the Humboldt Bay Area extending from South Fork...to Samoa". The memo indicates that the project could generate about 6000 rail carloads of aggregate annually with the potential to

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attract additional traffic. Further, as the City is well aware, the Humboldt Bay Harbor District is proposing a shipping terminal at Samoa, the Redwood Marine Terminal, which would generate additional railroad traffic through the project, at least 12 train trips a week, as well as additional large truck traffic along the Highway 101 corridor. The DEIR indicates that the project would keep the rail line open and free to traffic along its western and northern edge, but provides no further analysis of the impacts of the railroad's actual operation in conjunction with the Marina Center. Because the railroad tracks cross Waterfront Drive in two places, and in particular move directly onto 1st Street near Commercial and then run along 1st Street through the City's Core Area, traffic impacts from the project will be significantly exacerbated by the railroad's operation. In addition to the traffic impacts caused by the renewed operation of the train, the traffic impact analysis must include the projected additional truck traffic generated by the proposed Redwood Marine Terminal. These impacts must be analyzed or re-analyzed, as appropriate, at a minimum from a traffic perspective, because both railroad operation and the proposed Redwood Marine Terminal will affect transportation on the project site and in the area surrounding it.

In addition, further clogging of traffic along Broadway due to the proposed project will increase the likelihood that drivers in the City will seek alternative routes through the neighborhoods east of Broadway in order to avoid the traffic jams on Broadway itself. Drivers in Eureka know that this already occurs, but adding 15,700 vehicle trips to the mix, as the DEIR forecasts, will exacerbate the problem significantly. Yet the effect of the project's trip generation upon traffic in the neighborhoods east of Broadway was not studied or even mentioned in the DEIR. These impacts must be analyzed as well.

Further, the project relies upon intersection changes and traffic flow modifications that have been long discussed as necessary to help move existing traffic through the urban area of Eureka along Highway 101, as mitigation for the impacts of this particular project. There are at least three of these that are particularly critical: changing the intersection at Broadway and Wabash to eliminate access from Fairfield, changing the intersection at Broadway and Henderson, thus eliminating what the traffic consultant characterized as "bottlenecks" at both intersections, and installing the electronics to provide for coordination and synchronization of the traffic signals along Highway 101 through Eureka south to Bayshore Mall. These are important changes that Caltrans and the City would have had to cooperate on in order to relieve the existing traffic problems on 101. The financial advantage to Caltrans and the City of having the project proponent finance these changes is clear. But the effect of this is to allow the project to absorb all of the feasible short-term traffic mitigation along this thoroughfare that is presently necessary to fix existing problems, and leave no traffic capacity margin for any other future development that may occur in Eureka or elsewhere that would have traffic impacts on Highway 101 at any time through 2025. Put simply, this project would take Highway 101 to the edge of or over the tipping point of its capacity in its present configuration.

This is particularly problematic because all available traffic capacity, including that gained by the extensive mitigation that the City proposes, is being utilized for a project that is not a coastal priority use and it makes even more necessary a re-evaluation of the appropriate use

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for this unique and critical site. Because there will be no traffic capacity left for Highway 101 that does not compromise levels of service, there can be no possibility that the City will be able to plan for and develop any coastal priority uses at other sites in the foreseeable future.

As the traffic study makes clear, by 2025 additional mitigation will be necessary. The consultant makes suggestions such as extending Waterfront Drive, widening Broadway to six lanes or diverting Broadway traffic onto neighborhood surface streets, all of which the City is well aware are difficult or impossible for legal, financial and/or political reasons. Particularly egregious in this context is the suggestion of reliance on building Waterfront Drive through existing preserved wetlands when the City has already been put on notice by the Coastal Commission that this is prohibited by the Coastal Act. For all of these reasons, the City cannot use these particular mitigations as the basis upon which to discount the very significant traffic impacts of the project without a much more extensive cumulative impacts analysis, including an examination of all known development plans of all jurisdictions the traffic of which could impact Highway 101 in Eureka.

WASTEWATER TREATMENT

The DEIR is flawed in that it incorrectly states the existing permitted capacity of the Elk River Wastewater Treatment Plant, incorrectly states the existing legal and contractual capacity of the City to utilize that plant, appears to ignore the fact that the plant already operates at or in excess of full capacity during peak wet weather events, and does not take into account proposed development in the County that has received "will serve" letters from the Humboldt Community Services District that will utilize existing District capacity that the City appears to rely upon to support this project. For all of these reasons the City must revise the DEIR to properly consider this impact prior to approval.

On December 4, 2008, the City submitted a letter to the North Coast Regional Water Quality Control Board (copy attached as Exhibit B) withdrawing a previous request to increase capacity at the Greater Eureka Area (Elk River) Wastewater Treatment Plant from 5.24 mgd to 6.0 mgd. This is significant in several respects. First, the DEIR finds a "less than significant" impact with respect to the treatment of wastewater from the Marina Center project based upon the assumption that the renewed NPDES permit would allow 6.0 mgd capacity for the plant. Assuming that the projected wastewater of the project would be accommodated with the additional 0.76 mgd that had been applied for, the DEIR concludes that "implementation of the proposed project would not result in the construction of new or expanded wastewater treatment facilities". Because this assumption no longer can be maintained, the City must reanalyze its conclusion.

The situation is compounded by the fact that the City has been continually and substantially exceeding its allowed capacity at the treatment plant. A letter dated August 2, 2007 from Mark Bryant, General Manager of the Humboldt Community Services District, to David Tyson, City Manager, (copy attached as Exhibit C) describes a continuing practice of the City over a number of years to utilize capacity at the plant that contractually belonged to the District. At the time of that letter the City had been exceeding its capacity rights over a period of six years by

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“190,000 to 330,000 gallons dry weather flow” per year. (By way of comparison, the project, according to the DEIR, is estimated to produce approximately 130,000 gallons per day of wastewater.) The District indicated in that letter that it needed to utilize its currently unused capacity in the near future. This is because the District has been giving “will serve” letters to various property owners/developers within the district who are planning major subdivision developments (e.g., Forster-Gill).

Taken together, this means that the City not only does not have the wastewater treatment capacity that it represented in the DEIR but it also does not legally possess the capacity that it actually has been using for a number of years. For this reason the DEIR must analyze not only the proposed usage of this project in relation to the actual capacity of the Elk River plant, but also the cumulative effect of the District’s contractual rights and intent to serve all known future development within its service area and any known future development that the City itself foresees within its boundaries. Based upon the facts in the DEIR and those cited above, the City cannot permit the project because it does not have the available treatment capacity to handle the needs of the project.

ALTERNATIVES

The Alternatives chapter of the DEIR is deficient in several respects: its definition of the basic objectives of the project is far too narrow, making it suitable only for the proposed project; its screening of the identified alternatives improperly eliminates feasible alternatives; and most importantly, it abdicates the responsibility of the City to actually plan for the site.

Beginning with the last point, the City’s analysis of alternatives is based upon the limiting assumption that a zoning change can be considered for the particular project proposed but not for the “no project” alternative, having the effect of unduly straining the analysis of the latter alternative. The DEIR states (at p. VI-17) that “if the project does not go forward, the property would remain zoned and planned predominantly for Public uses”. It then analyzes the possible uses in the Public zone, as if those were the only option to the proposed project. But this is not the case. If the proposed project were fully consistent with the General Plan and Local Coastal Program, and thus did not require an amendment, this analysis might well be appropriate. In that situation, analysis of the alternatives, including the “No Project” alternative, would require alternative uses to be consistent with the existing Plan. But here the Developer is proposing a project that requires a significant amendment to the General Plan and the Local Coastal Program. This means that the alternatives, including the no project alternative, can include any use. The City is not constrained by the proposal of a developer to build something consistent with its Plan. Instead the City can actually plan.

Limiting the analysis in this way, particularly with respect to the no project alternative, is an abdication of the responsibility to plan for the site. In short, the “No Project” alternative should not assume that only development consistent with the existing zoning will occur on the site. Land Use Planning was conceived and developed in the early 20th century precisely to allow communities to determine their own future rather than having development based solely upon the interests or desires of the landowner, as previously had been the case. The real

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opportunity for the City in the “No Project” alternative is that it can plan what it thinks is best for the site, rather than simply respond to whatever the owner puts forward as its plan. As noted above, this property is probably the premier piece of undeveloped land in the City of Eureka. If the City determines a vision for this site that reflects both the will of the community and an economic opportunity for the landowner, healthy development will follow.

The definition of the project objectives is hopelessly stilted. Three objectives are identified but all of them are defined in ways that skew the analysis in favor of this particular project as the developer proposed it, rather than looking at a more broad definition of how the interests of the City could most benefit from some project on the site. The first objective is to “strengthen Eureka as the retail and employment center of Humboldt County”. Taken at face value, this requires only that whatever project is approved create jobs. It could include but does not require a retail component.

The second objective is to “develop an economically viable mixed use project (e.g., retail, office, residential, industrial)”. This is an attempt to limit the consideration of alternatives to what the developer proposes, but it is disingenuous and ultimately meaningless, because the development proposed here is not real “smart growth” or mixed use growth. Smart growth requires bringing a mix of uses into a residential sector. It was developed specifically as a conceptual attempt to mix other uses into the monoculture of suburban residential development. The Smart Growth Network states:

“Smart growth supports the integration of mixed land uses into communities as a critical component of achieving better places to live. By putting uses in close proximity to one another, alternatives to driving, such as walking or biking, once again become viable. Mixed land uses also provide a more diverse and sizable population and commercial base for supporting viable public transit.” (Emphasis added).

<http://www.smartgrowth.org/about/principles/principles.asp?prin=1&res+1280>

Precisely the opposite is done in this development. Here a few residents are brought into a huge commercial development so that it can be called “smart growth” and “mixed use”. But the essence of the development, big box commercial with large parking lots to accommodate the estimated 15,700 vehicle trips daily, remains decidedly not “smart growth”. This proposal introduces 54 apartment/condominium units (perhaps 100 residents at most) into a project that includes over 300,000 sq. ft. of retail commercial, and over 100,000 sq. ft. of office space. It actually reduces the amount of industrial use on the site. It is unlikely that even one of the project’s two proposed 7000 sq. ft. restaurants could be filled by the residents even if they all decided to eat at the same time. This is big growth, but it is not smart growth.

The third objective, to “facilitate brownfield redevelopment and urban infill development of property in the redevelopment area in the City of Eureka”, is also at best misleading in its language. It has two components. The urban in-fill component can be satisfied with any development on this site, as well as in any similar site in Eureka. On the other hand the key to facilitating brownfield development is the cleanup of the toxics on the site, and this is completely unrelated to this or any other development. As the DEIR concedes, the landowner,

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as well as Union Pacific, the prior landowner, is under a legal mandate to clean up the site. It is not necessary that this or any other particular development be approved to secure a cleanup. Therefore, it has become an objective of the project only because the developer might hope to link a reduced cleanup obligation to some particular form of development (such as a concrete cap upon which a big box commercial development can be placed), as well as to finance the cleanup through the development. Whatever the reasons for this preference of the developer, it is not an essential project objective that can be used to drive the alternatives analysis for the use of the property.

Because all of these objectives have been skewed toward approval of the proposal, in ways that are meaningless upon further analysis, the City should redo the alternatives analysis. However, even using the objectives that the City used, the analysis unreasonably excluded some project alternatives. For example, as noted earlier, one possible use for the site that would be a preferred use under the Coastal Act would be a visitor-serving commercial or recreational use. This is presumably what is meant in the Alternatives analysis as a Tourism Use. The Tourism use was found not to meet the Feasibility Screening because it was not "economically" feasible. The explanation given was that "[T]he tourism use would be a public project. The cost to acquire the land, remediate the site and construct the tourist use is economically prohibitive". But this is simply wrong, invented without significant thought. There is no requirement that a tourism use be a public project; private developers do this all the time. Further, as noted earlier, remediation of the site must occur regardless of the future use of the property, so this is no more significant a deterrent than it is to any other possible use. The only reason that the use might be infeasible is that the developer would prefer not to do it; but that hardly satisfies the City's obligation to plan for the site.

In conclusion, the Marina Center DEIR is inadequate for the following reasons:

1. The project proposes to fill wetlands and eliminate ESHA without taking into account the standards of the Coastal Act and the City's General Plan with regard to those habitat types; if the project is going to go forward, the proposed development must be sited outside of the area of delineated wetlands, including an appropriate buffer.
2. The DEIR assumes that cleanup of the toxics on the site must go forward in conjunction with the proposed project, and thus justifies fill of the wetlands to allow a big box store. There is no basis for this assumption. The cleanup must be disconnected from the proposed project, because separate criteria determine the approvability of each. Only after the appropriate restoration of the site is determined can the site be evaluated for appropriate uses and projects.
3. The DEIR is deficient because it does not take into account the prioritization of land uses under the Coastal Act. An LCP amendment in the coastal zone, particularly on a site of this importance, must consider these priority uses.
4. The Land Use and Planning section of Chapter IV of the DEIR is deficient because it lacks any substantive analysis upon which to determine why the City made the consistency decisions that are presented. The table form, with its cursory comments, is clearly inadequate. As has been noted above, a number of these determinations are clearly

January 30, 2009

wrong, or without basis in fact. Because of this, this section of the DEIR needs to be redone.

5. Mindful of the City's apparent position with respect to the *City of Bakersfield* case, the DEIR is clearly inadequate with respect to the economic effect of the proposed project upon other businesses in the City, and particularly in the Core Area. It ignores existing General Plan policy and undermines decades of City efforts to bolster the economic vitality of that area. This is a major decision for the City of Eureka. Unless the City can demonstrate that the Marina Center will draw in new customers that do not presently shop in Eureka, a fact not demonstrated by the City's economic analyses, the economic effect in the City becomes a zero-sum game, in which business is shuffled from one store to another. This has two effects. First, it is likely to lead to significant vacancies and urban decay, particularly in the Core Area, which appears likely to suffer both fierce competition subsidized by major companies with a nationwide pricing scope, and a deterioration in shopper amenities as traffic from the proposed project clogs the streets of Old Town. Second, it is likely to lead to a deteriorating economic situation in the City of Eureka generally, as more money is taken out of town to national ownership, rather than being recirculated within the City by local owners. The DEIR does not adequately address these impacts.
6. The traffic analysis is completely inadequate, limited by its assumptions in ways that prevented a proper evaluation of the fate of the estimated 15,700 daily vehicle trips that the proposed project will generate. It provides inadequate mitigation for its effects upon Highway 101, particularly in light of the cumulative impacts of other known proposed development discussed above, and it completely ignores the problems that will be caused by drivers trying to get onto Highway 101 after exiting onto Waterfront Drive, and the difficulties caused for the Core Area by these exiting drivers and for the neighborhoods south and east of Highway 101 as drivers seek alternative routes to avoid the problems being caused on Highway 101 by drivers exiting the Center.
7. The DEIR is facially inadequate with respect to wastewater treatment because it relies upon a factual assumption that is incorrect. At least as important, any future EIR must discuss the real legal availability of wastewater treatment capacity in light of the City's historic use of capacity that is contractually that of the Humboldt Community Services District and pledged to future use within that district. It appears that the City already may be committed to provide service for existing development in excess of its legal available capacity at the wastewater treatment plant.
8. Finally, the Alternatives chapter of the DEIR does not provide an appropriate range of alternatives for analysis, and is skewed narrowly in order to justify approval of the project. Feasible alternatives were excluded, and no proper analysis of alternatives was conducted.

For all of these reasons, the City should reject the DEIR and send its planners and the project proponent back to the drawing board. The landowner should plan and carry out a true restoration of the site, cleaning up the toxic wastes in the land and water on site, and restoring to the extent possible the natural habitat values of this site before any development is

January 30, 2009

proposed. Meanwhile, the City planners should conduct a true planning exercise, of the sort that was once to be funded by the Headwaters Fund, involving the community at large, and consistent with existing law including the Coastal Act, in order to determine the best use of the site. The premier undeveloped parcel in the City deserves no less.

Sincerely,



Ralph Faust

CTA 1-8-09

NORTHWESTERN
PACIFIC
RAILROAD
COMPANY

EXHIBIT A

MEMORANDUM

Date: January 8, 2009
To: Allan Hemphill, Chairman NCRA
cc: Mitch Stogner, Executive Director, NCRA
From: John H. Williams, President, NWP Co.
Subject: Outline of NWP Co. Business Plan for Railroad Service in the Humboldt Bay Area

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JAN 30 2009
DEPARTMENT OF
COMMUNITY DEVELOPMENT

I. Background

During January 2008, the Humboldt Bay Harbor, Recreation and Conservation District, NCRA, and the Northwestern Pacific Railroad Company (NWP Co.) jointly applied for Prop 1B funding in the amount of \$19.117 million in order to restore rail service in the Humboldt Bay Area and to improve the capabilities of the Port of Humboldt Bay. Because that Application was made about one year ago, I am now providing you with this updated and current outline of NWP Co.'s Business Plan for the restoration of railroad service in the Humboldt Bay Area.

II. Business Plan Objectives

It is NWP Co.'s intent to operate a separate short line railroad that would provide both rail freight and excursion passenger train service in the Humboldt Bay Area extending from South Fork (on the south) to Samoa (on the north) on the NWP Line.

NWP Co.'s Business Plan for rail operations in the Humboldt Bay Area has the following primary objectives:

- Restore competitive and cost-efficient rail freight service between South Fork and Samoa;

- Restore excursion train passenger service between Eureka and Samoa;
and
- Provide jobs from railroad operations and from railroad users and
provide beneficial economic impacts to the surrounding communities.

III. Railroad Rehabilitation Project

The key to restoring rail service in the Humboldt Bay area is the completion of a substantial railroad rehabilitation project. NWP Co. estimates that the cost of rehabilitating the rail lines between South Fork and Samoa, a distance of 63.2 miles, would be about \$15 million, to be spent primarily for track rehabilitation and restoration of the existing rail-highway grade crossing systems. NWP Co. expects that either public funding will become available for the rehabilitation project or, if warranted by NWP Co.'s railroad customer contracts and future volume commitments, NWP Co. would borrow the \$15 million, most likely through the Federal Railroad Administration's Railroad Rehabilitation and Improvement Financing Program (RRIF).

IV. Excursion Passenger Train Service

In order to restore excursion passenger train service between Eureka and Samoa, NWP Co. proposes to work with the Timber Heritage Association (THA). I have reviewed the *THA Business Plan* dated February 7, 2008 for such a service, and I believe it to be realistic and achievable, based not only on my review of the *THA Business Plan* but on my own experience as Executive Director of NCRA and the North Coast Railroad when we operated rail passenger excursion service in the Humboldt Bay Area during the early 1990's. I am persuaded that the passenger market potential volumes identified by THA are attainable, and that the attraction of those passenger volumes to the excursion passenger train service will also be beneficial economically to the communities served because of passenger spending for goods and services in the related communities. NWP Co. has agreed in principle to provide funding in order to purchase three vintage Harriman rail passenger cars that have been identified as purchase candidates by THA for use in the service. NWP Co. has also agreed in principle to provide start-up financing and operational expertise and services in support of the THA excursion passenger train service.

V. Rail Freight Service

NWP Co. has identified several commodities that could be moved within the Humboldt Bay area including aggregate, lumber, logs, and construction materials. As has been widely publicized, the San Francisco Bay Area currently has, and is projected in the future, to have an increasing shortage of aggregate. NWP Co. believes that the availability of rail freight service in the Humboldt Bay area serving aggregate sources in the Humboldt Bay Area that are already permitted would, in conjunction with barge service, permit Humboldt Bay Area aggregate shippers to efficiently and economically access the San Francisco Bay Area market. Such access is not available at present because of the high cost of trucking aggregate from the origin sources to a rail-barge transload facility in Humboldt Bay.

NWP Co. projects that this aggregate traffic would be transferred from rail to barge at a transload facility within the Port of Humboldt Bay and that such traffic is projected to generate about 6,000 rail carloads annually. The restoration of rail freight service in the Humboldt Bay Area would also provide the potential to attract additional traffic to the South Fork to Samoa rail lines including the movement of additional traffic that would both originate and terminate on this line segment, as well as the movement of inbound traffic moving through the Port of Humboldt Bay.

VI. Next Steps

Highest in priority for NWP Co. is the next step of obtaining rail freight customer contractual commitments to use a restored freight service sufficiently to warrant private financing of the Railroad Rehabilitation Project. Because a rail-barge haul would be involved, the marketing of such a service has been unusually complex for NWP Co. Further magnifying the complexity of such a business arrangement is the need for considering and including the financial and operational parameters of both a barge operator and a rail-barge transfer facility. Also of importance will be the next step of continuing to work with THA toward implementation of the excursion passenger train service.



CITY OF EUREKA

531 K Street • Eureka, California 95501-1146

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DEPARTMENT OF
COMMUNITY DEVELOPMENT

EXHIBIT B

December 4, 2008

Mr. Charles E. Reed
Water Resource Control Engineer
California Regional Water Quality Control Board
North Coast Region
5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403



DEC 05 2008

ENGINEERING DEPARTMENT

RE: NPDES Form 2A Application

Dear Mr. Reed:

On September 23, 2008, the City of Eureka submitted NPDES Form 2A Application for the Greater Eureka Area Wastewater Treatment Plant NPDES Permit renewal. The application was accompanied by a cover letter stating the City is preparing a plant rating study to justify a request for capacity beyond the nameplate design shown in the original construction documents and that the City would provide information about the relationship between total BOD and cBOD to support our request for changing our permit limits to cBOD.

After further discussion, we have elected to not pursue a request for a capacity change beyond the nameplate design at this time. Further, we are not requesting a modification of our permit as it pertains to BOD. Instead, the City intends to complete the Phase II Facility Plan effort and construct improvements needed at the WWTP identified in the study in order to request a capacity increase during the next permit renewal cycle.

The application submitted on September 23, 2008, showed a design flow rate of 6.0 mgd which reflected our intention to request a capacity increase based on a plant rating study. Please substitute revised Page 3 of 21 of our application with the enclosed Page 3 of 21 which correctly reflects a design flow rate of 5.24 (Item A.6 a) consistent with our current permit.

Please work directly with Clay Yerby, Utility Manager, (707) 441-4360 if you have any questions regarding the permit application.

Sincerely,

Mike Knight
Assistant City Manager - Operations

Enclosure

cc: Utility Manager
Deputy Public Works Director
City Engineer

PUBLIC WORKS/BUILDING DEPARTMENT • (707) 441-4192 Public Works Fax: (707) 441-4202
(707) 441-4155 Building

Building Regulations Code Enforcement Equipment Operations Facilities Operations Harbor Maintenance Park Operations
Recreation/Storm Water Street/Alley Maintenance Wastewater Collection Water Distribution Wastewater/Water Treatment Zoo

Humboldt Community Services District

Post Office Box 158 Cutton, CA 95534 (707) 443-4558 Fax (707) 443-1490

August 2, 2007

Mr. David Tyson, City Manager
City of Eureka
Post Office Box 1018
Eureka, CA 95501

COPY

EXHIBIT C

RECEIVED
JAN 20 2009
DEPARTMENT OF
COMMUNITY DEVELOPMENT

Dear David:

In conjunction with consideration of the proposed Martin Slough project, requests for service from developers, and other issues, the Humboldt Community Services District Board of Directors has been reviewing the District's 1982 regional wastewater treatment contract with the City of Eureka. That review has brought to light several issues that need to be addressed and resolved. The Board has requested that I initiate discussions with you to work together for the mutual benefit of the City and the District.

There are three related issues that arise out of the City of Eureka's use of wastewater treatment plant capacity owned by the Humboldt Community Services District without the District's consent and without compensation to the District.

As you are aware, the proportional capacity share in the wastewater facility was originally City of Eureka, 69.5 percent; Humboldt Community Services District, 23.6 percent; and County Services Area 3, 6.9 percent. Subsequently, the Humboldt Community Services District assumed County Service Area 3, resulting in the current proportional capacity shares of City, 69.5 percent and District, 30.5 percent.

Although the 1982 contract assumed a total design capacity of 6.03 million gallons per day Average Dry Weather Flow, in fact the facility has only been permitted by the California Regional Water Quality Control Board for 5.24 million gallons per day Average Dry Weather Flow. Pursuant to section 3.14 of the contract, if the actual capacity of the sewer treatment facilities should be less than the design capacity, the "deficiency shall be allocated among the parties in proportion to their Reserve Capacity Rights".

As a result, the City of Eureka has capacity rights to 69.5 percent of the current permitted 5.24 million gallons per day Average Dry Weather Flow, or 3.64 million

gallons per day, while the District has capacity rights to 30.5 percent of the permitted capacity, or 1.6 million gallons per day Average Dry Weather Flow.

Pursuant to Section 1.8 of the contract, Average Dry Weather flows for the purposes of determining Proportional Capacity Share is measured by the August average flows (absent abnormal levels of precipitation during that month). According to the City of Eureka's Annual Reports for the Elk River Wastewater Treatment Plant for the past six years (2001-2006), the average (mean) flows for August have been consistently 5 million gallons per day.

In 2001, the District's average flow in August was 1.16 million gallons per day, which means the City contributed the remainder of the 5 million gallons per day flow, or 3.84 million gallons per day. This was 200,000 gallons per day more than the City's Proportional Capacity, and equated to a use of 13 percent of the District's total capacity rights. The City contributed 77 percent of the total Average Dry Weather Flow to the system, while the District's total share of the Average Dry Weather Flow was 23 percent for that year.

In 2002, the District's average flow in August was 1.03 million gallons per day, which means the City contributed the remainder of the 5 million gallons per day flow, or 3.97 million gallons per day. This was 330,000 gallons per day more than the City's Proportional Capacity, and equated to a use of 21 percent of the District's total capacity rights. The City contributed 79 percent of the total Average Dry Weather Flow to the system, while the District's share of the Average Dry Weather Flow was 21 percent for that year.

In 2003, the District's average flow in August was 1.11 million gallons per day, which means the City contributed the remainder of the 5 million gallons per day flow, or 3.89 million gallons per day. This was 250,000 gallons per day more than the City's Proportional Capacity, and equated to a use of 16 percent of the District's total capacity rights. The City contributed 78 percent of the total Average Dry Weather Flow to the system, while the District's share of the Average Dry Weather Flow was 22 percent for that year.

In 2004, the District's average flow in August was 1.17 million gallons per day, which means the City contributed the remainder of the 5 million gallons per day flow, or 3.83 million gallons per day. This was 190,000 gallons per day more than the City's Proportional Capacity, and equated to a use of 12 percent of the District's total capacity rights. The City contributed 77 percent of the total Average Dry Weather Flow to the system, while the District's share of the Average Dry Weather Flow was 23 percent for that year.

In 2005, the District's average flow in August was 1.15 million gallons per day, which means the City contributed the remainder of the 5 million gallons per day flow, or 3.85 million gallons per day. This was 210,000 gallons per day more than the City's Proportional Capacity, and equated to a use of 13 percent of the District's total capacity

rights. The City contributed 77 percent of the total Average Dry Weather Flow to the system, while the District's share of the Average Dry Weather Flow was 23 percent for that year.

And in 2006, the District's average flow in August was 1.04 million gallons per day, which means the City contributed the remainder of the 5 million gallons per day flow, or 3.96 million gallons per day. This was 320,000 gallons per day more than the City's Proportional Capacity, and equated to a use of 20 percent of the District's total capacity rights. The City contributed 79 percent of the total Average Dry Weather Flow to the system, while the District's share of the Average Dry Weather Flow was 21 percent for that year.

Although section 3.2(b) of the contract allows a party to the contract to obtain rights to a portion of another party's unused capacity in the system, the contract requires that the party who is releasing excess capacity determine "that it has unused capacity in excess of its requirements" and the "additional capacity may be assigned by the party to any other public entity by written agreement subject to a right of first refusal by the parties to this Agreement". The District has never made a finding it has excess capacity, nor has it assigned any of its capacity rights to the City of Eureka in writing. The City has not compensated the District for the City's use of the District-owned capacity.

The City's level of utilization of the wastewater treatment facilities, and the unauthorized and uncompensated use of a portion of the District's unused capacity rights, creates three related problems that need to be addressed and resolved: 1. Credit and/or reimbursement to the District for excess operation and maintenance expenses charged by the City to the District; 2. Credit and/or reimbursement for annual capital expenses; and 3. Restoration of the District's contractual Reserved Capacity Rights for future development.

First, as you are probably aware based upon communications between financial staff of the City and the District, the City of Eureka has overcharged the District \$773,464 over the years for annual maintenance and operations costs due to the City's calculation errors, primarily by using average monthly flows rather than the "Proportional Volumetric Share", as defined as the "total annual sewage volume of flow" by section 1.9 of the contract. The errors have apparently been corrected for calculations on an on-going basis but the issue of a credit or reimbursement for past overcharges remains unresolved.

Second, pursuant to section 2.4 of the contract, estimated annual capital expenses are allocated under the contract 67.9 percent to the City and 32.1 percent to the District (when the contract's allocation to County Service Area 3 is combined). (Apparently the non-City entity's shares are slightly higher than Reserve Capacity Share percentages due to the City's commitment to incur additional capital-related commitments at the outset of the project.)

While the District agrees that it is fair and equitable for each party to bear its contractual percentage of capital expenses if both sides are using less than their respective Reserved Capacity Rights, the District does not believe it is fair that it pay the annual allocation of capital expense for capacity owned by the District but being used by the City of Eureka.

The District believes that it should receive a reimbursement or credit for its paid allocation of capital expenses for prior years in an amount equal to the percentage of the District's capacity that the City used for each of those years. Beginning with the current year, the on-going capital expense allocations should also be adjusted accordingly.

It appears that the City has exceeded its Reserved Capacity Rights, and has been using a portion of the Reserved Capacity Rights owned and paid for by the District, for approximately 10 years. However, for just the last six years, the District's financial officer has calculated the District's share of treatment capital costs for the portion of the District's capacity used by the City has been over \$200,000.

The final issue that must be resolved is how the City will restore to the District the District's remaining contractual Reserved Capacity Rights, so that the District can make that capacity available for development within the District's service area.

Section 3.4 of the contract requires each party to "limit the rate of flow of sewage to or into the Project originating from each party to its Reserved Capacity Right", an obligation which is reiterated in section 3.11. As discussed above, for each of the past six years the City has exceeded its Reserved Capacity Right by 190,000 to 330,000 gallons Average Dry Weather flow, and has used a portion of the District's capacity without consent of the District, or compensation to it. In the past, the District has not had an immediate need for the use of this Reserved Capacity Right, and therefore its residents have not been prejudiced (other than unfairly financially subsidizing the City's wastewater treatment, as discussed above).

However, the District sees the potential need to utilize its currently unused Reserved Capacity Rights in the near future. The City must immediately address how it will reduce its flow to bring it at or below the City's Reserved Capacity Right (3.64 million gallons per day Average Dry Weather Flow) so that there will be actual capacity at the wastewater facility for the District to utilize its Reserved Capacity Right of 1.6 million gallons per day Average Dry Weather Flow. Absent such action by the City, the City will be unable to fulfill its obligation to the District under section 3.2 of the contract, which requires the City to "receive and treat discharges into the City's facilities up to the amount of the reserved capacity".

The District is also concerned that the City appears to continue to approve new developments within the city limits that will increase the City's sewage flow to the treatment facility, thus increasing its infringement of the District's Reserved Capacity Right.

The 1982 contract requires a specific notice and demand for cure of a breach of the agreement. Therefore, pursuant to section 4.9 of the contract, this letter is the District's notice to the City that the District believes the City is in breach of the 1982 contract and the District demands compliance with the terms of that agreement.

Specifically, the District demands that the City comply with the terms of Sections 1.8, 3.2, 3.4, 3.10, 3.14 and related provisions (related to the City's use of the District's Reserved Capacity Rights without consent or compensation); that the City comply with sections 1.9 and 2.5 of the contract by crediting or reimbursing the District for excess operation and maintenance expenses charged by the City and paid by the District; that the City comply with the intent of section 2.4 of the contract by compensating the District for capital expenses for that percentage of the District's Reserved Capacity Right the City is using without the consent of, or compensation to, the District; and that the City comply with sections 3.4 and 3.11 by limiting its flow to its Reserved Capacity right, thereby making actual wastewater facility capacity available to District in the amount of the District's Reserved Capacity Rights.

Although section 4.9 of the contract technically requires that breaches of the agreement be cured within 30 days, the District realizes that some of these issues will reasonably require more than 30 days to address and solve. The District values its longstanding contractual and working relationship with the City, and recognizes that we have additional challenges in the future that will require continued cooperation. The District trusts that these issues can be resolved to the mutual satisfaction of the District and the City, and is committed to working toward an amicable resolution of not only these issues related to the 1982 contract, but to issues related to the additional challenges faced by the District and the City in meeting the current and future needs of the residents of the City and the District. We look forward to the City's response and proposals on how to address these issues as soon as possible and look forward to constructive, concrete discussions on how we will work to resolve these problems.

Very truly yours,

HUMBOLDT COMMUNITY SERVICES DISTRICT

COPY

By Mark Bryant
General Manager