

Tauriainen, Andrew@Waterboards

From: Vasquez, Victor@Waterboards
Sent: Thursday, April 02, 2015 11:09 AM
To: Bare, Kathy@Waterboards
Subject: FW: Sale of Treated Wastewater to Westside Irrigation District
Attachments: SWRCB Emails.pdf; Westside Irrigation District 2014 Annual Report.pdf

Kathy, I'm assigning this to you and Kathy M has asked me to make it a priority. I'll come over and discuss.

From: Steve Nicolaou [mailto:stevenicolaou@yahoo.com]
Sent: Wednesday, April 01, 2015 9:42 PM
To: Mrowka, Kathy@Waterboards
Cc: Sawyer, Andy@Waterboards; Fernandez, Patricia@Waterboards; Vasquez, Victor@Waterboards
Subject: Fw: Sale of Treated Wastewater to Westside Irrigation District

Ms. Mrowka:

I am forwarding to you for your information the e-mail I sent below yesterday to Troy Brown, the City Manager of Tracy, voicing my concerns about the proposed sale of treated waste water out of Old River by the City to the Westside Irrigation District along with the attached documents referenced therein. I am also copying Andy Sawyer, Patricia Fernandez and Victor Vasquez for their own information. I will send to you shortly Mr. Brown's response that I received earlier today.

Sincerely,

Steve Nicolaou
Attorney at Law
445 W. 11th Street, Suite C
Tracy, California 95376
Office: (209) 832-2501
Fax: (209) 832-0085
E-mail: stevenicolaou@yahoo.com

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----- Forwarded Message -----

From: Steve Nicolaou <stevenicolaou@yahoo.com>
To: Michael Langley <mlangley@tracypress.com>
Sent: Wednesday, April 1, 2015 10:56 AM
Subject: Fw: Sale of Treated Wastewater to Westside Irrigation District

Michael,

Thank you for taking the time last Friday and having a cup of tea (coffee in my case) with me. Please see an e-mail I sent to the City yesterday on the proposed water deal with Westside. Thought you'd be interested in keeping an eye on this one.

Thanks,
Steve

----- Forwarded Message -----

From: Steve Nicolaou <stevenicolaou@yahoo.com>

To: Troy Brown <troy.brown@ci.tracy.ca.us>

Cc: Maria Hurtado <maria.hurtado@ci.tracy.ca.us>; Daniel Sodergren <daniel.sodergren@ci.tracy.ca.us>; Council <council@ci.tracy.ca.us>; Gary Hampton <gary.hampton@tracypd.com>; Steve Bayley <steve.bayley@ci.tracy.ca.us>

Sent: Tuesday, March 31, 2015 11:48 AM

Subject: Sale of Treated Wastewater to Westside Irrigation District

Troy,

When we last communicated, you indicated to me that you felt comfortable with the advice you were given concerning the propriety of the proposed sale this year of treated waste water discharged by the City into Old River downstream to Westside Irrigation District ("WSID"). I also indicated to you at the time that I had serious reservations about the legality of that proposed sale and that I had contacted the State Water Resources Control Board ("SWRCB").

Attached, please find an e-mail I received last Friday, March 27th, from Kathy Mrowka, the manager of the Enforcement Section - Water Rights for the SWRCB. It appears that the City obtained consent from the SWRCB for the sale of treated waste water to the Tesla Power Plant, but that there is nothing to indicate that the City has applied for an additional wastewater change petition for the proposed sale to WSID.

As you will also note further in the e-mail chain, I did receive confirmation from Andrew Sawyer, Assistant Chief Counsel of the SWRCB by way of an e-mail dated March 26, 2015 that he agreed with my interpretation of **Water Code Section 1210** as standing for the proposition that the City owns the wastewater placed into the system, but that it has no application in determining the rights as between the City as the treatment works owner and other stakeholders that have the right to divert water from Old River. He further states that the consent of the SWRCB is required under **Water Code Section 1211**.

Given the foregoing, in order to protect the City's interests, my suggestion to the City is that it rescind the resolution authorizing the contract for the sale of treated wastewater to WSID that was approved at the March 3rd Council meeting, and that the City go through the proper channels to obtain the SWRCB's consent if it wishes to sell treated wastewater out of Old River to WSID, just as it did when it decided to sell treated wastewater to the Tesla Power Plant. The fact that the City followed the rules in that particular situation makes it even harder to understand why it did not follow that same protocol to protect its interests in the sale to WSID. Its kind of hard to play Sgt. Schultz on this one by trying to say that the City "knew nothing" of this requirement.

By cancelling the WSID contract approved on March 3rd by the Council, the City avoids exposing itself to additional risk vis-a-vis the SWRCB by being a party to an unauthorized water transfer for this year. In addition, since the SWRCB has been made aware of last year's transaction, cancelling the agreement for this year may result in the SWRCB being more lenient in how it chooses to handle the apparently illegal water transfer that occurred last year. It is my understanding that the fine for the unauthorized diversion of water is \$2,500.00 per acre foot; it is my understanding that the City sold WSID appx. 2,700 acre feet last year of treated waste water out of Old River. That would translate to a potential fine of up to \$6,750,000.00.

As for the argument that the City would be protected by its indemnity with WSID from any such fine should be viewed with serious reservations for several reasons.

First of all, insurance does not cover fines, so any fines would need to be paid by WSID pursuant to its indemnity agreement with the City for last year's sale.

Secondly, when I spoke to Steve Bayley a few weeks ago, I asked him whether the City had vetted WSID's financials to see if they had the checkbook to back their indemnity obligations. All indications are that the City had not conducted such a review as part of its due diligence.

Based on WSID's annual financial report for last year which I was able to easily obtain, as of December 31, 2014, it appears that WSID had \$1,904,195.00 in unrestricted funds available that would presumably be available to cover any fine assessed and imposed by the SWRCB. In this regard I refer you to page 8 of the 2014 annual report, which I have attached for your review. In doing some simple math, it becomes readily apparent that the City in all likelihood would be left holding the bag for any portion of a fine imposed by the SWRCB for last year's sale exceeding \$1.9 million. This is simply a risk we cannot afford to undertake, especially with Measure E going away next year. The City would be compounding the violations if it were to repeat this year what was done last year.

Based on the foregoing, I think the smart thing to do is to place an item on the consent calendar for the upcoming City Council meeting on April 7th rescinding what was approved on March 3rd and going to the SWRCB to obtain its consent to any sale of treated wastewater for this year to WSID. Doing anything else would just be, in my humble opinion, foolishly whistling while walking past the proverbial graveyard.

Sincerely,

Steve Nicolaou
Attorney at Law
445 W. 11th Street, Suite C
Tracy, California 95376
Office: (209) 832-2501
Fax: (209) 832-0085
E-mail: stevenicolaou@yahoo.com

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