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JAMES M. BOYD, JR., Of Counsel

September 21, 2006

Mr. Ross Walker, City Manager
City of Willits
111 East Commercial Street
Willits, California 95490-3188

Re: City's Current Water Supply Issues

Dear Ross:

Per your request, I prepared this letter, which discusses the City's current water supply and demand issues.

For the reasons discussed in this letter, I recommend that the City authorize West Yost & Associates ("West Yost") to prepare the drought and water supply action plan that is described in their July 27 proposal. Among other things, this plan should specify how many new connections can be made to the City's water system as the new supplies contemplated by Phases 1, 2 and 3 of the proposed groundwater supply program become available.

I also recommend that, after this water supply action plan is completed, the City promptly adopt a detailed ordinance that specifies the procedures and priorities that the City will follow to determine when to allow new connections to the City's water system and how many new connections to allow. The available information indicates that this ordinance should prohibit most new connections to the City's water system until the City has approved Phase 1 of the proposed groundwater supply program described in the February 2006 West Yost Report and a revenue and financing plan for this Phase 1, and has a specific schedule to construct and implement this Phase 1. Until these events occur, this ordinance should allow connections to the City's water system only for projects: (1) that will use only very small amounts of water; (2) for which all of the new demands will be offset by reductions in existing demands; or (3) for which there is a compelling public need.

Based on our recent discussions, I recommend that, during the period before the West Yost water supply action plan is completed and the City adopts the detailed ordinance described in the preceding paragraph, the City allow new connections to its water system only for relatively small, new facilities that are exempt from the California Environmental Quality Act ("CEQA").

BACKGROUND

1. Water Supply Planning Study Report

West Yost & Associates completed their Water Supply Planning Study report for the City in February 2006. Figure 3-2 on page 3-3 of that report shows that, with current demands on the City's water system, there would be significant shortages in the City's water deliveries to its customers in future drought years. If the drought conditions that occurred in 1977, the worst drought year of record, were to occur again in a future year, then the estimated shortages would be 651 acre-feet ("af") out of a total demand of 1,099 af, which would be almost a 60% shortage. (See also Report, p. D-1.) The blue curve in figure 3-4 on page 3-4 of the West Yost report shows that, with current demands, some shortages are predicted to occur in about 25% of all water years.

The West Yost report also estimated how much these shortages would be reduced by implementation of Stage II of the City's Ordinance 95-4, which would require 50% reductions in residential customers' water uses and 15% reductions in all other customers' water uses during droughts. (See Report, p. 4-2.) If the City could achieve these savings for eight months during a drought year, then the worst-case deficit would be reduced from 651 af to 429 af. However, a 429-af deficit still would be 39% deficit. (See Report, p. 4-3.) To eliminate this latter deficit, the City needs to develop 0.6 million gallons per day ("mgd") of new source and production capacity just to meet current levels of demand. (See Report, p. 4-5.) To eliminate the entire deficit at current levels of demand without any implementation of Stage I or Stage II of Ordinance 95-4, the City needs to develop 0.9 mgd of new source and production capacity.

To address these very significant risks of future water-supply shortages, the West Yost report recommended that the City: (1) make the necessary arrangements to include Wente Lake in the City's water supply contingency plan for severe droughts (see Report, p. 5-4); and (2) develop a groundwater supply (see Report, pp. 5-10 to 5-13). Additional recommendations, including starting a water-conservation program, were discussed on pages ES-1, ES-2 and 6-2. Phase I of the proposed groundwater supply program, which would consist of two new 330-gallons-per-minute wells and a 0.9 mgd water treatment plant (see Report, p. 5-10), would provide a sufficient supply to meet the 0.6 mgd deficit discussed above while providing some additional supply that could be used either to reduce the need to fully implement Stage II of Ordinance 95-4 during droughts or to supply some substantial new connections to the City's water system.

Chapter 6 of the West Yost report contains a list of recommended actions, which include negotiating an agreement with the Boy Scouts to use Wente Lake during droughts, developing Phases 1, 2 and 3 of the proposed groundwater supply program, and various other measures to reduce demands and to increase supplies.

2. Recent Developments

Since February, there have been two major developments regarding the City's water supply planning work.

First, on March 6, DHS sent the City a letter, which stated that DHS had concerns about the City's treated-water storage capacity and source capacity. This letter directed the City to evaluate these capacities and to submit a technical report documenting these evaluations to DHS by March 1, 2007. On April 28, DHS sent a follow-up letter to the City, which discussed the West Yost report. This follow-up letter directed the City to include an evaluation of its source capacity in its technical report.

Second, in June you advised me that the City has received and is evaluating applications for several large development projects that, if approved, could cause the growth in demands on the City's water system to substantially exceed the 1.66% per year growth rate that is discussed in the West Yost report. (See Report, p. 2-12.)

Besides these major developments, another important consideration is that it will take at least 6 to 12 months to complete the CEQA document for Phase 1 of the proposed groundwater program, and then it probably will take at least another 12 to 18 months to complete construction of this project after it is approved by the City Council.

DISCUSSION

These recent developments raise important issues regarding CEQA, the Safe Drinking Water Act ("SDWA"), and prudent water-supply planning. These issues are discussed in the following sections of this letter.

1. California Environmental Quality Act

a. CEQA-Exempt Projects

Because ministerial projects are exempt from CEQA (Pub. Res. Code, § 21080, subd. (b)(1)), no water-supply analyses are required by CEQA for such projects. Section 15268 of the CEQA Guidelines discusses ministerial projects.

Sections 15260-15285 of the CEQA Guidelines describe numerous other statutory exemptions from CEQA, and sections 15300-15333 of the CEQA Guidelines contain numerous categorical exemptions from CEQA. No water-supply analyses are required by CEQA for projects

that are within the scope of a statutory or categorical exemption. However, the SDWA requirements and the prudent water-supply planning considerations discussed below do apply to such projects.

b. Projects Not Exempt From CEQA

For proposed projects that are not exempt from CEQA, the City needs to complete the environmental checklist form in Appendix G of the CEQA Guidelines to determine whether or not an environmental impact report ("EIR") is required for the proposed project. Three questions in this checklist concern the City's water-supply issues. They are:

XVI. UTILITIES AND SERVICE SYSTEMS

Would the project:

b) Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?

d) Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed?

XVII. MANDATORY FINDINGS OF SIGNIFICANCE

b) Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulative considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects)

For each of these questions, the City must give one of four answers: (a) "Potentially Significant Impact," (b) "Less Than Significant Impact With Mitigation Incorporation," (c) "Less Than Significant Impact," or (d) "No Impact." If the City answers "Potentially Significant Impact" to any of these questions (or any other question on the checklist), then the City must prepare and certify an EIR for the project before it may approve the project. On the other hand, if the City does not answer "Potentially Significant Impact" to any question on the checklist, then the City may prepare and certify a negative declaration or mitigated negative declaration for the project.

Based on Table 2-10 of the West Yost report, a proposed new development project with 50 residential units would require approximately 14 af/yr of water, and a 100-unit residential project would require approximately 28 af/yr. These amounts are 1.3 and 2.6 percent of the total current demand on the City's water system. Because applications for several proposed new projects now are pending with the City, the cumulative increases would be even larger. Also, I am not aware of any new disconnections from the City's water system that would significantly reduce demands.

If the City prepares and certifies a negative declaration or an EIR for Phase 1 of the proposed groundwater supply program, approves this Phase 1 and an adequate revenue and financing plan for it, has a definite schedule for constructing and implementing Phase 1, and adopts a water supply action plan that specifies how many new connections can be made to the City's water system after the Phase 1 supplies are on line, then the City thereafter will be able to answer the CEQA checklist questions quoted above for such proposed projects (up to the amounts of new supplies that will be provided by the Phase 1 supplies) with "Less Than Significant Impact" or "Less Than Significant Impact With Mitigation Incorporation." The City could follow similar processes for Phases 2 and 3 of the proposed groundwater supply program.

2. Safe Drinking Water Act

The California Safe Drinking Water Act ("SDWA") is codified in Health and Safety Code sections 116270-116751. Section 116270, subdivision (a), contains a legislative finding and declaration that "Every citizen of California has the right to pure and safe drinking water." Section 116555, subdivision (a)(3), provides:

Because the West Yost report concluded that the City's water system does not have sufficient capacity to supply current demands during droughts, even with substantial demand reductions during droughts, the City probably will have to conclude that such new projects would have increased demands on the City's water system that could cause significant environmental impacts. Moreover, because applications for several such projects currently are pending, the City almost certainly will have to conclude that these new projects together would have increased demands on the City's water system that could cause significant cumulative environmental impacts.

The City therefore could answer these CEQA checklist questions with "Less Than Significant Impact" or "Less Than Significant Impact With Mitigation Incorporation" only if: (1) the proposed project will have such a small demand for water from the City's system that the effect, even when considered in cumulation with the effects of other projects, would not be significant (this answer may be possible for a mini-storage project or a parking project, for example); or (2) the City has received or prepared a detailed quantitative plan demonstrating that all of the water demands for the new project will be offset by reductions in present demands on the City's water system that definitely will occur.

The City still can proceed under CEQA to process applications for proposed new development projects that will have significant water-supply impacts, but the City must prepare EIR's, and comply with the applicable provisions of CEQA, for such projects. For a project for which there is a compelling public need, the City could certify an EIR for the project, and then adopt a statement of overriding considerations and approve the project. (See Pub. Res. Code, § 21081; CEQA Guidelines, § 15093.) However, even if the City took these CEQA actions for such a project, the SDWA requirements and the prudent water-supply planning considerations discussed below still would apply.

If the City prepares and certifies a negative declaration or an EIR for Phase 1 of the proposed groundwater supply program, approves this Phase 1 and an adequate revenue and financing plan for it, has a definite schedule for constructing and implementing Phase 1, and adopts a water supply action plan that specifies how many new connections can be made to the City's water system after the Phase 1 supplies are on line, then the City thereafter will be able to answer the CEQA checklist questions quoted above for such proposed projects (up to the amounts of new supplies that will be provided by the Phase 1 supplies) with "Less Than Significant Impact" or "Less Than Significant Impact With Mitigation Incorporation." The City could follow similar processes for Phases 2 and 3 of the proposed groundwater supply program.

2. Safe Drinking Water Act

The California Safe Drinking Water Act ("SDWA") is codified in Health and Safety Code sections 116270-116751. Section 116270, subdivision (a), contains a legislative finding and declaration that "Every citizen of California has the right to pure and safe drinking water." Section 116555, subdivision (a)(3), provides:

Any person who owns a public water system shall ensure that the system does all of the following:

(3) Provides a reliable and adequate supply of pure, wholesome, healthful and potable water.

Section 64562 of title 22 of the California Code of Regulations, a DHS regulation implementing the SDWA, provides:

(a) Sufficient water shall be available from the water sources and distribution reservoirs to supply adequately, dependably and safely the total requirements of all users under maximum demand conditions before agreement is made to permit additional service connections to a system.

(b) To ascertain this, first determine the total capacity of the existing source by procedures prescribed in Section 64563 and determine the total storage volume of the existing distribution reservoirs. Then determine the needed source capacity and the needed storage volume by procedures prescribed in Section 64564. The total available source capacity shall not be less than the needed source capacity.

Section 64563(b) of the DHS regulations provides:

(b) The source capacity of a surface water supply or a spring shall be the lowest anticipated daily yield, based on adequately supported and documented data.

Section 64564(a) of the DHS regulations provides:

(a) Whenever possible, needed source capacity and needed storage volume shall be determined from existing water use records of the water system.

The records used shall clearly indicate total source capacity, total storage volume and maximum day demand of previous years.

The existing records of the water system may be supplemented as needed by the records of a similar water system acceptable to either the Department or a qualified registered engineer.

Section 64564(d) of the DHS regulations provides:

(d) The data used and the calculation made by the water supplier to determine whether sufficient water is available to accommodate additions to the systems must be kept and are subject to the Department review and approval at its discretion.

Section 64568 of the DHS regulations provides:

A new service connection may be added to a distribution system only if the water system will comply with Section 64562 after the new service connection is added . . .

In *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1807, the court held:

These statutes and regulations clearly impose an obligation on the district to determine whether an adequate water supply exists to serve existing needs before new service connections may be added and prohibit new service connections if these state requirements are not met.

In that case, the Court of Appeal upheld the trial court's imposition of a moratorium on new connections to the district's water system.

In *Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 242-243, the court held that these statutes and regulations give DHS the authority to include conditions in the water supplier's permit, including a condition affirming the water supplier's moratorium on new service connections. Although it was the district in that case, rather than DHS, that initially imposed the moratorium on new connections, the court's decision made it clear that DHS also has the authority to impose such a moratorium.

Because neither the applicable statutes nor the applicable regulations contain any specific provisions regarding the level of drought curtailments that a water supplier may include in its water supply action plan, the City has discretion to decide on the levels of such curtailments for its water supply action plan. Nevertheless, to comply with these statutes and regulations, the City should adopt an ordinance that implements a water supply action plan that: (1) contains detailed, quantitative, technically supported provisions specifying what the City will do to reduce demands for water and to increase water supplies during droughts, and (2) specifies the numbers of new connections to the City's water system that will be allowed, with these drought provisions in place, as Phases 1, 2 and 3 of the proposed groundwater supply program are approved, constructed and implemented.

Because the available information indicates that the City's existing water supplies are not sufficient to meet current demands, this ordinance should not allow, until the Phase 1 of the proposed groundwater supply program is approved and being implemented, any new connections to the City's water system that would require significant amounts of water, unless the new connections are for projects for which all of the new demands will be offset by reductions in existing demands. The City might decide to include an exception in the ordinance for new projects for which there is a compelling public need. The ordinance could provide that the City Council will retain discretion to approve such projects on a case-by-case basis. For such projects, the City Council would have to

balance the compelling need for the project against the increased curtailments in water deliveries during droughts that would be required if the project were completed before completion of Phase 1 of the proposed groundwater supply program.

3. Prudent Water Supply Planning

Besides considering its obligations under CEQA and SDWA, the City also should consider prudent water-supply planning. As a general policy matter, it would be very risky for the City to allow any substantial new connections to its water system now, when the City knows that it already will have to make very substantial reductions in water deliveries if any significant drought occurs in the future before Phase 1 of the proposed groundwater supply program is on line. If the City were to allow any significant number of substantial new connections before Phase 1 is on line, then these required reductions would have to be even greater.

4. Actions During Period Before New-Connection Ordinance Is Adopted

It probably will take at least six months for West Yost to complete the water supply action plan and for the City to adopt an ordinance regarding new connections. During this period before this ordinance is adopted, I recommend that the City allow new connections to its water system only for relatively small, new facilities that are exempt from CEQA. CEQA obviously does not prohibit the City from approving such projects. Also, because such projects will use only relatively small amounts of water, they will not have any substantial effects on the City's water supplies that would raise the SDWA and prudent-planning considerations discussed above.

On the other hand, during this interim period, the City should not approve any projects that are subject to CEQA or would use substantial amounts of water.

CONCLUSION

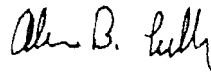
Based on the preceding discussion, I have the following recommendations:

1. The City should approve the July 27 West Yost & Associates proposal to prepare a water supply action plan that: (1) discusses and evaluates specific drought action criteria like implementation of Stages I and II of Ordinance 95-4 or other appropriate demand-reduction measures; (2) quantifies the amounts of water that the City plans to obtain from Wente Lake during droughts; (3) further describes the facilities that the City would use to obtain water from Wente Lake during droughts; (4) determines the amounts of current supplies that would be available and demands that would be present during droughts with such drought action criteria in place; (5) determines the amounts of additional supplies that would be available with implementation of Phases 1, 2 and 3 of the proposed groundwater supply program; and (6) determines how many new connections (or equivalent connections) the City should allow to its water system when Phases 1, 2 and 3 of this program are implemented.

2. After the water supply plan is completed, the City should adopt a detailed ordinance that specifies the procedures and priorities that the City will follow to determine when to allow new connections to the City's water system and how many new connections to allow. The City has the authority to adopt such an ordinance under its general police powers and Water Code sections 350-359.¹ The available information indicates that this ordinance should prohibit most new connections to the City's water system until Phase 1 of the proposed groundwater supply program is approved and being constructed. Until then, the only exceptions should be for projects: (1) that will use only very small amounts of water, (2) for which all of the new demands will be offset by reductions in existing demands; or (3) for which the City Council concludes that there is a compelling public need.

3. Before the West Yost water supply action plan is completed and the City adopts the detailed ordinance described in the preceding paragraph, the City should allow new connections to its water system only for relatively small, new facilities that are exempt from CEQA.

Very truly yours,



ALAN B. LILLY

ABL:tmo

¹The only significant legal limitation on the City's authority to adopt an ordinance regarding new connections to its water system is that the City is subject to the general constitutional requirement that it may not deny anyone equal protection of the laws. In a legal challenge based on an equal-protection argument, a City ordinance regarding new connections to its water system would be upheld if it is supported by any rational basis.