

Jonathan Wittwer
William P. Parkin
Shandra D. Handley
Brett W. Bennett

WITTMER & PARKIN, LLP

147 SOUTH RIVER STREET, SUITE 221
SANTA CRUZ, CALIFORNIA 95060
TELEPHONE: (831) 429-4055
FACSIMILE: (831) 429-4057
E-MAIL: office@wittwerparkin.com

PARALEGAL

Miriam Celia Gordon

October 12, 2006

Jerry Hill, President
Board of Supervisors, County of San Mateo
400 County Center
Hall of Justice and Records
Redwood City, CA 94063

**Re: Midcoast Local Coastal Program (LCP) Update Project
Staff Report Received September 19, 2006**

Dear Members of the Board:

The Granada Sanitary District ("GSD") has reviewed the County Staff Report dated September 5, 2005 and received September 19, 2006 ("Staff Report") for the Midcoast Local Coastal Program Update Project ("LCP Update"). GSD has previously provided comment letters to the County regarding the LCP Update which we request be considered by the Board of Supervisors ("County Board"). The most recent previous comment letter from GSD was dated December 1, 2005. The new Staff Report contains some new recommendations, still differing from those made to the County Board by the County Planning Commission. The GSD Board of Directors has asked its General Counsel to submit this letter addressing those new recommendations and other mission critical aspects of the LCP Update affecting GSD's ability to provide wastewater services to its ratepayers.

EXECUTIVE SUMMARY

At the time of GSD's December 1, 2005 comment letter, Sewer Authority Midcoastside ("SAM") and its member agencies (including GSD) had been the subject of an ongoing compliance evaluation inspection of the collection system since 2004. This was generated by wet weather sewage overflows ("SSOs") from SAM's wastewater collection system. EPA issued its NPDES Compliance Evaluation Report on August 18, 2006 ("EPA Report"). The EPA Report cites the applicable regulations as being the Clean Water Act and the National Marine Sanctuaries Act and describes a prior warning letter to SAM from NOAA for a violation of the National Marine Sanctuaries Act and a prior RWQCB Penalty Order, both based on SSOs.

The EPA Report finds that while SAM and its member agencies are taking appropriate steps to address the collection capacity insufficiency, "[t]he SAM Sewer System does not have sufficient capacity to convey peak flows during the winter rains." The EPA Report further states that "[c]apacity assessment studies conducted by SAM indicate that the capacity problems stem primarily from excess inflow and infiltration (I/I) from the member agencies' sewer systems. ...

The largest spills, however, have occurred when the excess wet weather flow hits bottlenecks in the SAM IPS [Intertie Pipeline System] at the Montara and Portola Pump Stations.”

The EPA Report goes on to indicate that SAM and its member agencies are taking appropriate steps to address the collection capacity insufficiency, noting, for example, the Carollo Engineering studies which outline potential solutions to the wet weather overflows, and recent improvements to member agency collection systems which have resulted in I/I reduction of approximately 1,000,000 gallons. Nevertheless, the EPA Report observes that I/I remains “high” and that funding for the remedial alternative selected by SAM was still being pursued.” **The EPA Report concludes that “I/I remains and SAM is faced with making capacity fixes on the IPS.”**

Thus, despite responsible actions and proactive infrastructure improvements by SAM and its member agencies to prevent wet weather overflows (as acknowledged in the EPA Report), the problem has not yet been solved and there is no assurance that it will be solved. Of SAM’s \$940,391 capital improvements budget for FY 2004-2005, the EPA report notes that \$600,000 (nearly 2/3) was for Wet Weather Capital Improvements. Indeed, SAM and its member agencies (including GSD) are doing all they can reasonably be expected to in improving the collection system. The findings in the EPA Report require recognition that the impact of the insufficiency of the wastewater collection system to Midcoastside residents and property owners could still be very substantial and warrants very serious consideration by the County Board in making decisions regarding this LCP Update. **An increase in buildout capacity will clearly increase the risk of future Sanitary Sewage Overflows.**

GSD has previously submitted letters to the County regarding currently insufficient collection capacity for wastewater and the resultant SSOs. However, until this latest version of the LCP Update there had been no mention of SSOs resulting from the lack of collection capacity. GSD appreciates the County Staff’s inclusion of the following statement in this latest version of the LCP Update: “SAM has undertaken major tank and pump station improvements to accommodate wet weather flow.” However, this statement results in an LCP Update which continues to misstate the status of the “INFRASTRUCTURE DEMAND AT BUILDOUT” under which topic the statement is made. It is a disservice to all in the Midcoast LCP area not to state the full situation, as found by the EPA Report. The EPA Report acknowledged and considered the “major tank and pump station improvements” identified, as well as numerous other improvements by SAM and its member agencies to prevent wet weather sanitary sewage overflows (SSOs). **After considering those improvements, the EPA Report concluded that the collection system remains “insufficient.”**

SAM provides for collection through the Intertie Pipeline System, and GSD (as well as other member agencies of SAM) provide additional collection and transmission infrastructure connected to the Intertie Pipeline System individually within its jurisdictional boundaries. The fact that the EPA Report has found this critical collection system to be “insufficient,” even after the “major

improvements” already made, **must be included in the LCP Update. That is necessary for the LCP Update to comply with its stated intention to provide accurate updated “baseline data” critical to the stated goal of the “Vision Alignment” that “[l]and use decisions consider ... infrastructure demand” and “not overburden infrastructure.”**

GSD would be put at significantly increased risk of having wet weather SSOs if the new recommendations in the Staff Report are adopted (rejecting the Planning Commission recommendations) so as to:

- (1) increase the Residential Buildout Estimate;
- (2) delay merger of substandard lots not included in buildout (and thereby enhance potential for avoidance of merger);
- (3) set the Residential Growth Rate Limit higher than the recent average;
- (4) allow unlimited residential floor area in the C-1 Zoning District above the first floor for “affordable” housing;
- (5) rezone Community Open Space and Conservation (“COSC”) Zoning District properties to a newly to be created “El Granada Gateway (“EG”) Zoning District to facilitate building more and much larger houses (a use recommended for elimination in COSC by the Planning Commission) rather than encourage community open space as was the purpose of this LCP land use designation; and
- (6) decline to utilize the “proportionality rule” applicable in Half Moon Bay to limit house size on substandard lots.

In addition, the Staff Report recommends that the LCP Update specifically request GSD to repeal its policy described as “adding regulatory barriers for a sewer connection serving a house on a nonconforming parcel.” In one of its publications, the EPA listed as a method of reducing wet weather SSOs “curtail new development until problems are corrected.” Furthermore, in a February 16, 2005 letter to the County Board, **Coastal Commission Staff recommended “prohibiting new residential sewer hookups”** as a method of addressing another type of wastewater capacity problem. GSD has taken a far more targeted approach than across the board curtailment of sewer connections. It has established a gatekeeping device allowing it to review and limit the number of new sewer connections for nonconforming lots or residential development not included in buildout calculations. To date, no sewer connections have been denied based on this regulation. GSD’s targeted regulations would appear to be reasonable and appropriate given that future wet weather SSOs would likely result in EPA orders, sanctions and penalties for which GSD and other member agencies of SAM would be liable.

As GSD pointed out before, neither GSD, nor (to the best of GSD’s knowledge) any other member agency of SAM, was contacted to discuss the impacts of the above described new recommendations rejecting the Planning Commission recommendations. In the interest of the

public, the Midcoastside ratepayers and property owners, and intergovernmental cooperation, it is respectfully requested that the County Board take no action on the above-described new recommendations and that the Board Subcommittee first meet with the SAM Board and the member agency Governing Bodies.

DISCUSSION AND ANALYSIS

A. The Wastewater Collection System Is Currently Insufficient as Determined by the August 18, 2006 EPA Report Despite “Major Improvements” Recognized by the County and the EPA and Future Resulting Wet Weather SSOs Would Likely Result in More Severe EPA Action.

The Staff Report states at Section 2 (addressing collection and transmission for the first time) that “SAM has undertaken major tank and pump station improvements to accommodate wet weather flow.” However, this statement results in an LCP Update which continues to misstate the status of the “INFRASTRUCTURE DEMAND AT BUILDOUT” under which the statement is made. **The LCP Update is intended to “update LCP baseline data,” including “Infrastructure Demand at Buildout.” The Staff Report further states that it is a goal of the “Vision Alignment” that “[I]and use decisions consider ... infrastructure demand” and “not overburden infrastructure.”** GSD has previously submitted letters to the County regarding currently insufficient collection capacity for wastewater during wet weather. The EPA Report acknowledged and considered the “major tank and pump station improvements” identified in the County’s latest version of the LCP Update, as well as numerous other improvements by SAM and its member agencies to prevent wet weather sewage overflows (SSOs). After considering those improvements, the EPA Report concluded that the collection system remains “insufficient.” SAM provides for collection through the Intertie Pipeline System, and GSD (as well as other member agencies of SAM) provide additional collection infrastructure connected to the Intertie Pipeline System individually within its jurisdictional boundaries. The fact that the EPA Report has found this critical collection system to be “insufficient” even after the “major improvements” already made must be included in the LCP Update. That is necessary for the LCP Update to comply with its stated intention to provide accurate updated “baseline data” critical to the stated goal of the “Vision Alignment” that “[I]and use decisions consider ... infrastructure demand” and “not overburden infrastructure.”

The failure to include the full situation in the LCP Update, namely that despite “major improvements” the collection and transmission system is still insufficient, and the **resultant failure of the LCP Update to “plan growth to the level that the [infrastructure] resources can support” as recommended by the Planning Commission places an unfair burden on the infrastructure providers and the affected residents and property owners.**

The County of San Mateo and the California Coastal Commission, with their direct land use authority, have the opportunity through the LCP Update to take critical action to limit a major source of wet weather SSO problems. Instead, the new recommendations in the Staff Report increase the risk that SAM and its member agencies will face adverse consequences from the EPA in the event of a future SSO.

B. Increase in the Residential Buildout Estimate Will Add to Risk of Wet Weather SSOs

GSD's previous objection to the increased Residential Buildout Estimate is only strengthened by the finding of the EPA Report that the current collection system is insufficient. The Staff Report states at Section 1 that, in terms of residential buildout estimates, "[t]here are 3,719 existing Midcoast residential units, and at buildout, there will be between 6,757 and 7,153 units. Thus, the Midcoast is approximately half built out." The January 5, 2005, Staff Report to the Board of Supervisors stated that this information was based on "2001 parcel information and existing LCP land use policy, and *assumes that applicable substandard lots will be merged.*" **As GSD commented before, given that wet weather SSOs are a problem with only 55% buildout, there is clearly insufficient wastewater collection capacity for full (and proposed increased) buildout and more SSOs will be the result. As the letter to the County Board from Coastal Commission Staff dated March 7, 2005 states, one of the strategies for addressing infrastructure issues is "[r]educing residential growth and buildout level in the Midcoast."** Regulators at all levels are moving toward "zero tolerance" requirements for SSOs. SAM and its member agencies (and the real people who fund them) cannot afford the infrastructure improvements necessary for zero tolerance if buildout levels are increased as proposed.

C. Raising the Residential Growth Rate Limit Will Add to the Risk of Wet Weather SSOs

This issue is addressed in Section 3 of the Staff Report. The Coastal Commission Staff states in a letter to the County Board dated March 28, 2005 that "it appears that improvements to the areas' ... wastewater systems needed to adequately serve existing, let alone future development are not likely to be provided for several years." That letter notes that Sections 30250 and 30254 of the Coastal Act require there to be adequate infrastructure and recommends a quantitative analysis to demonstrate that the required findings can be made. The letter also states that the Coastal Staff does not support the proposed exclusions from the Residential Growth Rate limit for affordable housing, second units, and caretakers and mixed use units.

The November 9, 2005 Staff Report stated at Section 3 that, in terms of alignment with the vision principles, "[m]aintaining the 125 units per year [Growth Rate] limit ... holds a greater potential to over-burden infrastructure...." The Planning Commission recommended a Growth Rate limit of 1% per year (40 units in 2005 and not to exceed 52 units per year). The current Staff report

recommends 75 units per year, nearly double the limit recommended by the Planning Commission for 2005. Given the existing problem with an insufficient collection system to prevent wet weather SSOs despite the “major improvements” that SAM and its member agencies have undertaken to address the problem, the position of the Coastal Commission Staff should be adopted and at maximum the Growth Rate limit recommended by the Planning Commission should be adopted. Any other approach would add to the risk of wet weather SSOs.

D. Delay in Merger of Substandard Lots Enhances Potential for Avoidance of Merger and Increased Wastewater Production Leading to Increase Wet Weather SSOs

The Staff Report states at Section 4 that, in lieu of mandatory lot merger as recommended by the Planning Commission, Staff prepared a phased approach to lot merger: Phase 1 being an 18 month period for voluntary merger with incentives; and Phase 2 being mandatory merger. However, GSD previously expressed concern that during the 18-month voluntary Phase 1 merger program, property owners may be tempted to place their substandard lots into separate ownership in an effort to avoid mandatory merger. The latest LCP Update takes a positive step to address this by automatically shifting to the Phase 2 mandatory merger program should more than three lots eligible for merger change ownership such that the lot is no longer eligible for merger. Although this would not be optimum from GSD’s perspective, it would be acceptable if there was assurance that no other lots could be allowed to advance to a stage where they, too, would be able to avoid the mandatory merger. This latter element is critical because as set forth above, buildout calculations assume merger will occur. **Without such merger, there would be an increase the amount of wastewater production because, as the Staff Report states (possibly understates), if a housing unit was built on each vacant substandard lot, LCP buildout would be exceeded by over 700 new units. Hence, an ineffective merger program will result in increased wet weather SSOs.** The Planning Commission recommended a comprehensive and proactive merger of all residentially zoned substandard lots up to 5,000 square feet or the zoning minimum parcel size. For the sake of reducing wet weather SSOs alone, this recommendation is preferable and the latest LCP Update approach should be followed only if the additional element of assurance described above is included.

E. Allowing Unlimited Residential Floor Area in the C-1 Zoning District Above the First Floor for “Affordable” Units Will Add to the Risk of Wet Weather SSOs

The November 9, 2005 Staff Report stated at Section 5 that the Planning Commission recommended limiting residential use to above the first floor, limiting residential floor area to the square footage of the commercial area and reducing the building height to 28 feet. The Subcommittee recommendation of that date recommended no limit on the residential floor area. The current Staff Report recommends the same as the Planning Commission recommendation **except that there would be no limitation on the residential square footage if it is developed for affordable housing.** This would actually allow the residential development to predominate

over the commercial C-1 use if the residential development is “affordable” (an apparently undefined term in this context and usually including “moderate” income housing affordable to those with incomes 120% of median or less). No residential use whatsoever was included in buildout calculations for the C-1 Zone District. The result would be more residential development which was not included in buildout for which GSD (under Measure A) cannot provide infrastructure and hence increased problems with wet weather SSOs. Therefore, although GSD supports low income housing and has adopted a resolution giving it service priority, absent a limit to low income (defined to be for those with incomes 80% of median or less) and a limit in additional square footage (e.g. an additional 50%), GSD cannot support this proposed LCP policy.

F. Rezoning Community Open Space and Conservation (“COSC”) Zoning District Properties to a newly to be created El Granada Gateway (“EG”) Zoning District to Facilitate More and Larger Houses (a Use recommended for Elimination in COSC by the Planning Commission) Will Add to the Risk of Wet Weather SSOs

Currently, one-story single-family residences are allowed in the COSC Zoning District and they are significantly limited in size and lot coverage, including a maximum height of 16 feet, a 10% maximum lot coverage, 50 foot front and rear setbacks, and 20 foot side setbacks. The Planning Commission recommended that the County prohibit single-family residences in the COSC Zoning District. There are several uses, besides residential uses, that are allowed in the COSC Zoning District that would provide an owner opportunity to make a return on investment.

Furthermore, allowing residential uses in an area intended to be community open space will add to the risk of wet weather SSOs. Additionally, the Staff Report in Section 7 makes the recommendation to “[r]ezone the ‘Burnham Strip’” from COSC to a newly to be created “El Granada Gateway/Design Review (EG/DR)” Zoning District. The proposed rezoning would allow larger houses than COSC, with more bedrooms and more resulting wastewater generation, and with more impervious surface resulting in more runoff and hence the potential for more Infiltration and Inflow (I/I) resulting in more SSOs. Therefore, it is requested that the Planning Commission’s original recommendations be followed. The Planning Commission appears to have recognized that for various reasons residential development (and sewer connection) was not intended for these properties, whether zoned COSC or EG/DR.

G. Declining to Utilize the “Proportionality Rule” applicable in Half Moon Bay to Limit House Size on Substandard Lots Will Add to the Risk of Wet Weather SSOs

Although not addressed in this Staff Report, the Board previously tentatively approved retaining the existing zoning controls, i.e., no change, in lieu of following the Planning Commission’s recommendation to follow the “Proportionality Rule” established in Half Moon Bay,

because it “least respects property rights,” and suggests using the existing floor area limit. However, declining to utilize the “Proportionality Rule,” will add to the risk of wet weather SSOs, because larger homes with more bedrooms will be allowed to be built on lots which were not included in buildout in the first place. GSD would not be able to lawfully build infrastructure to serve those lots, resulting in additional risk of wet weather SSOs. The November 9, 2005 Staff Report states at page 1 that among the County Board’s goals is to “ensure that small houses are built on small parcels.” It is critical that the houses be small enough to limit the number of bedrooms, given that the lots in question were not included in buildout. The Planning Commission’s recommendation that the “Proportionality Rule” be adopted best serves this purpose.

H. Noncompliance with Measure A Adopted by the Voters in 1986 and with District Regulatory Process for Lots or Residential Development Not Included in Buildout Will Add to the Risk of Wet Weather SSOs

Under Midcoast LCP Policy 2.6, adopted by the voters through Measure A in 1986, the development or expansion of public works facilities must be limited to a capacity which does not exceed that needed to serve buildout under the LCP. Buildout does not include nonconforming and substandard lots. County approval of permits for housing on substandard lots would compound the risk of wet weather SSOs because SAM and GSD would not be allowed to build the capacity needed to serve these lots because they are not counted as part of buildout.

With the foregoing in mind, the District submits that this LCP Update should make every effort to assure that the burden on local sanitary sewer infrastructure providers is not increased at this time. In fact, under the circumstances, if it is reasonably possible, this is a time when the buildout numbers should be reduced (as recommended by the Coastal Commission Staff). Although Measure A limited the ability of SAM and GSD to construct infrastructure to the capacity necessary to serve buildout (and no more), the effect of increasing the buildout number will be at least two-fold: (1) the greater the number of residential units, the greater the likelihood of more wet weather SSOs; and (2) the greater the buildout number, the greater the pressure on the District to build more infrastructure to serve it. Both effects carry with them greater costs to the District and those who fund it.

GSD has established a gatekeeping device allowing it to review and limit the number of new sewer connections on lots not included in buildout calculations. The Staff Report recommends that the LCP Update specifically request GSD to repeal its policy described as “adding regulatory barriers for a sewer connection serving a house on a nonconforming parcel.” Case law has established in the case of *Home Gardens Sanitary District v. City of Corona* (2002) 96 Cal.App.4th 87, relying on the decision in *Rodeo Sanitary District v. Board of Supervisors of Contra Costa County and Mt. View Sanitary District* (1999) 71 Cal.App. 4th 1443 that:

Sanitary districts are created pursuant to state law (Health & Saf. Code, § 6400 et seq. [Sanitary District Act of 1923]) and are statutorily authorized to collect and dispose of [‘sanitary sewage’] and solid waste (*id.* at Health & Saf. Code, §§ 6518.5, 6512, subd. (a)). In doing so, ‘they exercise a portion of the police power of the state within their district boundaries,’ which is **superior** to the police powers exercised by cities or counties to the extent that they conflict. (*Rodeo, supra*, 71 Cal.App.4th at p. 1447.) ‘Where, as here, a general law of the state grants certain powers to sanitary districts within their boundaries, the county or city may not exercise its police power to override those district powers, because such action would be in conflict with the general laws of the state.’ (*Ibid.*) (emphasis added)

By way of illustration of interference by a city, in *West Bay Sanitary District v. City of East Palo Alto* (1987) 191 Cal.App.3d 1507, the First Appellate District held that a city had no power to control a sanitary district’s authority over wastewater discharge permits. The issuance of these wastewater discharge permits was a traditional function of the sanitary district, but the city sought to require that the district not issue such permits without first either giving notice to the city and obtaining its consent, or alternatively, pursuing the matter to arbitration before a third party. Relying on the powers granted by the Legislature to the district under the 1923 Sanitary District Act, the Court condemned the City’s attempt to exercise authority over the independent sanitary district, characterizing such action as an attempt to “usurp[] powers which the Legislature has vested exclusively in the board of the sanitary district.” (*Id.* at p. 1511.)

Furthermore, in one of its previous publications, the EPA listed as a method of reducing wet weather SSOs “curtail new development until problems are corrected.” Furthermore, in a February 16, 2005 letter to the County Board, **Coastal Commission Staff recommended “prohibiting new residential sewer hookups”** as a method of addressing another type of wastewater capacity problem. GSD’s targeted regulations would appear to be reasonable and appropriate given that additional wet weather SSOs would likely result in EPA orders, sanctions and penalties for which GSD and other member agencies of SAM would be liable.

REQUESTED ACTIONS

The Granada Sanitary District requests that the County Board take the following specific actions:

1. take no action on the new recommendations contained in the September 5, 2006 Staff Report until after the Board Subcommittee has first met with the SAM Board and the member agency Governing Bodies;
2. adopt the recommendations of the Planning Commission, including with regard to: (a) the Residential Buildout Estimate; (b) the merger program; (c) the Residential Growth Rate Limit; (d) residential floor area in the C-1 Zoning

District above the first floor; (e) maintenance of Community Open Space and Conservation ("COSC") Zoning Districts on properties currently zoned COSC and elimination of single family dwellings as an allowable use in said District; and (f) utilization of the "Proportionality Rule" applicable in Half Moon Bay to limit house size on substandard lots.

3. delete the request that GSD repeal its gatekeeping regulation allowing it to review and limit the number of new sewer connections for nonconforming lots or residential development not included in buildout calculations.

Thank you for your consideration of these matters.

Sincerely,
WITTWER & PARKIN, LLP
District General Counsel



Jonathan Wittwer

cc: George Bergman, San Mateo County Planning Department
California Coastal Commission
Montara Sanitary and Water District
City of Half Moon Bay
Sewer Authority Midcoastside
Granada Sanitary District Board of Directors
District General Manager Chuck Duffy