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Comments on Miramar Landfill  
RFQ for Privatization  
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November 9, 2010

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CC:

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San Diego City Council President Ben Hueso  
San Diego City Councilmember Kevin Faulconer  
San Diego City Councilmember Sherri Lightner  
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RE: Miramar Landfill – RFQ for privatization

*Submitted via Electronic ([hpepper@sandiego.gov](mailto:hpepper@sandiego.gov)) Mail and U.S. Mail*

Dear Mr. Pepper,

This letter is submitted on behalf of the San Diego Sierra Club (hereinafter “SDSC”), in response to the City of San Diego’s issued (July 8, 2010) Request for Qualifications (hereinafter “RFQ”) to privatize the Miramar Landfill (hereinafter the “Landfill” or the “Project”). The following comments are submitted to highlight the serious legal and political ramifications that would result from the dramatic step of privatizing the landfill. We strongly recommend that the City acknowledge and address these concerns before proceeding with any further action on this RFQ.

It is SDSC’s sincerest belief that the City must analyze the Project’s impacts pursuant to the California Environmental Quality act (“CEQA”), Public Resources Code sec 21000 et. seq.,

and the CEQA Guidelines, California Code of Regulations, title 14, sec 15000 et. seq. (hereinafter “Guidelines”), before any action is taken to execute a contract under the RFQ. The approval of a privatization contract is a discretionary action carried out and approved by a public entity that may cause either a direct, or reasonably foreseeable indirect, physical change in the environment, for which there is no statutory or regulatory exemption. Subsequently, the proposed privatization is subject to CEQA as a matter of law.

Under CEQA, an environmental review process and document will allow the City –and the public—the opportunity to identify detailed information about how privatization will affect the environment and the community, to list ways in which significant effects of the Project might be minimized or mitigated, and to allow the City to identify alternatives to the Project. In this regard, CEQA review protects not only the environment, but also informed self-government.

In addition there are other potential legal implications resulting from privatization of the landfill, including, but not limited to, those arising under State law such as the California Public Records Act, Government Code section 6250 et seq. and the Brown Act, Government Code section 54950 et seq. These two areas will be discussed in further detail below. The City should embark on a careful analysis of the Project’s compliance with these and other applicable laws and to provide this analysis to the public for comment, either as part of its CEQA review documents or separately.

### **I. CEQA Applies to the Proposed RFQ as a Project.<sup>1</sup>**

The Legislature enacted CEQA to “[e]nsure that long-term protection of the environment shall be the guiding criterion in public decisions.” (*No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 74 (1974).) The California Supreme Court has repeatedly held that CEQA must be interpreted so as to “afford the ‘fullest possible protection’ to the environment.” (*Wildlife Alive v. Chickering*, 18 Cal.3d 190, 206 (1976) (quoting cases).) Therefore, the proper interpretation of CEQA is one that will impose a “low threshold requirement for preparation of an EIR.” (*No Oil*, 13 Cal.3d at 84.)

CEQA establishes a three-stage process that requires the preparation of an EIR “whenever a public agency proposes to approve or to carry out a project that *may* have a significant effect on the environment.” (*Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 390 (1989) (emphasis added).) First, the agency must determine whether the particular action is a “project” covered by CEQA, and if so, whether the project falls within one of CEQA’s narrow exceptions (*No Oil*, 13 Cal.3d at 74.). If the project is covered by CEQA and not exempt, the agency *must* proceed to the next stage and conduct an initial threshold study. (*Id.*; see Pub. Res. Code § 21080(c).) Finally, if there is substantial evidence in light of the record before the agency that a project *may* have a significant effect on the environment, an EIR is required. (Pub. Res.

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<sup>1</sup> For the purposes of this letter, if the City proceeds with a privatization contract, beyond that of reviewing proposed bids, the issues identified in this letter continue to apply equally to that action. See, *Concerned Citizens Coalition of Stockton v. City of Stockton*, 128 Cal.App 4<sup>th</sup> 70 (2005).) California Courts twice found that a privatization contract violated the law by failing to require an Environmental Impact Report.

Code § 21080(c) (emphasis added.)

It is not unduly burdensome to engage in CEQA review prior to accepting a proposal, and courts have ruled it is necessary. For example, in *Concerned Citizens Coalition of Stockton v. City of Stockton*, the Superior Court held that the City abused its discretion in determining that a contract to privatize municipal water, wastewater and storm drain facilities was exempt from CEQA review. (*Concerned Citizens Coalition of Stockton v. City of Stockton*, 128 Cal.App 4<sup>th</sup> 70 (2005). (Attached, Exhibit A.) In *City of Stockton*, the City approved a \$600-million contract with OMI/Thames Water Stockton Inc. (OMI) that privatized the City's water, wastewater and storm water utilities. (*Concerned Citizens Coalition of Stockton*, 128 Cal.App 4<sup>th</sup> 70, 74-75.) The City decided that the contract constituted the approval of a "project" for CEQA purposes and that it was categorically exempt as an existing facility. (*Id.* at 75.) In October 2003, the Superior Court ruled that approval of the contract was an abuse of discretion because the transfer of the utility to a private operator would likely have a substantial impact on the environment. (*Concerned Citizens Coalition of Stockton v. City of Stockton*, Ruling on Petition for Mandamus, Case No. CV020397, 3.) The Court in its ruling found there was "substantial evidence" that "the transfer of the operation ... to [a] private operator will likely have a substantial impact on the environment" and "... common sense dictates that methods of operation will differ between a government and private sector based on at minimum the profit motive." (*Id.* (internal quotations omitted).) Reinforcing the rationale, the Court noted that "[t]here will always be situations in which profits versus environmental considerations will militate a decision which negatively impacts the public." (*Id.*)

The City of San Diego should heed the lessons learned by the City of Stockton and at a minimum choose to embrace and engage in a transparent public process that will result in a comprehensive assessment of the significant environmental impacts of Miramar's privatization. Privatization of municipal services can lead to unforeseen expenses and environmental damage. A recent law review article by leading scholars concludes that the privatization of public utilities, such as water, pose severe problems—including serious environmental risks—for communities across the nation. See Anthony Arnold, "Privatization of Public Water Services: The States' Role in Ensuring Public Accountability," 32 Pepp. L.Rev. 561, 586 (2005). Attached as Exhibit B.

#### **A. The Request for Qualification is a Project.**

CEQA applies whenever an agency proposes to *approve* a discretionary *project*. (Pub. Res. Code § 21080(a); *Laurel Heights*, 47 Cal.3d at 390.) *Project* is defined "extremely broadly" under CEQA to include "an activity which may cause either a direct or indirect physical change in the environment," and is carried out or authorized by a public agency. (*Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster*, 52 Cal.App.4<sup>th</sup> 1165, 1188 (1997); Pub. Res. Code § 21065.) The term *project* applies to the "whole of an action" which has a potential for resulting in a direct or reasonably foreseeable indirect change in the environment, including, both activities undertaken directly by a public agency such as public works projects, as well as activities undertaken by private persons through public agency contracts or with public agency approval. (CEQA Guidelines § 15378(a).) *Approval* means "the decision by a public

agency which commits the agency to a definite course of action” in regard to any “project to be carried out by any person.” (CEQA Guidelines § 15352.) The CEQA analysis therefore should be prepared “as early in the planning process as possible” in order “to enable environmental considerations to influence project, program or design.” (*Bozung v. LAFCO*, 13 Cal.3d 263, 282 (1974).)

In this case, it is apparent that such a fundamental change in the operation of the Landfill, from public to private, will necessarily result in at least an indirect change to the environment. The RFQ suggests options (future development, change in use, etc.) that a bidder may consider. None of these options were evaluated under the most recent EIR. It is more than likely that the final bids will include plans for future operations that have not been previously evaluated under CEQA. There can be no question that the City’s selection of a binding best and final offer for privatization of the landfill would constitute approval of a project as defined by CEQA, and that the City is therefore required to study the environmental consequences of the decision *before* taking action. The approval of a best and final offer is a discretionary approval because there is no requirement for the City to privatize the Miramar Landfill, let alone to privatize it pursuant to the proposals received in response to the RFQ.

**1. Direct and indirect reasonably foreseeable physical changes to the environment will result from privatization.**

The City’s approval of a Best and Final Offer for Leasehold Acquisition of the Miramar Landfill would result in both direct and reasonably foreseeable indirect physical changes to the environment. For example, the manner in which the landfill is operated and maintained directly affects important environmental variables such as the lifespan and further development of the West Miramar Landfill, greenhouse gas emissions from operating equipment, increased transportation caused by changes in waste acceptance at the landfill and disturbance of surrounding imperiled wildlife and critical habitats. Specific examples of direct and reasonably foreseeable indirect impacts follow.

**a) Exhausting Capacity at Miramar Leads to New Landfills**

The Miramar staff has done much to extend the life of the landfill, through increased recycling and diversion of green waste to produce mulch and compost, among other methods. Private landfills have incentives to fill up faster, as the company makes more money in tipping fees if more trash comes in. Private operators often use green waste as cover layers within the landfill, because it is cheaper than using dirt or the reusable tarps, Miramar currently uses. This practice uses more space and releases more methane into the air. Filling Miramar faster is not in the public interest, because when it reaches capacity and closes, new landfills or trash exporting may be required.

**b) Environmental Stewardship**

The Landfill area includes mesa tops with both undisturbed and disturbed native vegetation such as coastal sage scrub, chaparral, stipa grassland, mima mounds and vernal pools. (*Fish and*

*Wildlife Services Biological Opinion 1-6-94-F-37, 2.)* San Clemente Canyon runs east to west through the landfill area and provides an essential wildlife corridor for small and large mammals to Carroll Canyon and to Los Penasquitos Canyon Preserve. (*Fish and Wildlife Services Biological Opinion 1-6-94-F-37, 2.)* The landfill is located in designated reserve areas in the Multiple Habitat Planning Area as described by the City's General Plan. (*Fish and Wildlife Services Biological Opinion 1-6-94-F-37, 2.)*

The current staff at Miramar is adept at balancing the needs of the environment and the landfill. The city employs biologists and botanists to keep watch over the protected species. Without equivalent expertise, there is a great risk that the environmental protection efforts suffer significant impacts. The impacts here are particularly alarming in light of the direct impacts which will be sustained to the San Clemente canyon ecosystem, which runs directly to Mission Bay and provides vital habitat linkages. The vital importance and fragile nature of the flora and fauna that resides in and along the canyon is confirmed by the Marine Corps Air Station Miramar's recent decision to evict and close a civilian shooting range located nearby in order to prevent environmental impacts to the canyon. (See, <http://www.signonsandiego.com/news/2010/oct/18/marines-show-damage-done-shotgun-range/>).

c) **Landfill Development and Protected Wetlands**

The City's RFQ allows potential development of the West Miramar Landfill that would impact protected wetlands. The land fill site includes several vernal pools, which are an imperiled ecosystem. In California, vernal pools are protected wetlands. (Cal. Fish and Game Code § 2785.) Wetlands are protected by the Federal Clean Water Act, Section 404, Endangered Species Act, Section 7, and Migratory Bird Treaty Act. In California, additional protections for wetlands are provided by the State Endangered Species Act, California Fish and Game Code Sections 1600-1607, and the California Environmental Quality Act.

The presence of vernal pools in the landfill area was documented by the United States Department of the Interior, Fish and Wildlife Services Biological Opinion issued for the West Miramar Landfill Overburden Disposal. The vernal pools on the landfill site support a number of vernal pool plant species, such as the San Diego Mesa Mint and Button-Celery, and other vernal pool species, including the federally listed San Diego Fairy Shrimp. Disturbance of the wetlands on the landfill site thus requires section 401 water quality certification from the army Corps of Engineers, section 1600-1607 agreement with the Department of Fish and Game and an Environmental Impact Report under CEQA.

e) **Habitat Conservation Plan**

City Planning and Community Investment is in the process of creating a new Habitat Conservation Plan (HCP) for vernal pool species within the City that the Council has approved. The City should take no action that would affect the vernal pools until the Habitat Conservation Plan is in place. The HCP will analyze the remaining habitat, determine the boundaries of a preserve and create mechanisms for the City to issue *incidental take permits*. (Craig Hooker, *Plan It San Diego Quarterly Spring (2010).*) Under the Federal Endangered Species Act, an

incidental take permit is required when non-federal activities will result in a “take” of threatened wildlife. (U.S. Fish and Wildlife Service Planning Agreement, 5 (2009).) A Habitat Conservation Plan must accompany an application for an incidental take permit (*id.*) Because the privatization of Miramar Landfill will result in the expansion of the landfill, the new operator will be obligated to obtain an incidental take permit. The purpose of the HCP planning process is to ensure there is adequate minimization and mitigation for the effects of authorized incidental takes. There is no way that this purpose can be fulfilled if the City allows a new operator to obtain an incidental take permit before the HCP has been completed. City Planning and Community Investment estimates that the HCP will be complete in March 2012. (Craig Hooker, *Plan It San Diego Quarterly.*)

**f) Emissions and Greenhouse Gases**

The current policy at the landfill is that all heavy equipment must be shut down completely when an operator goes on a break. This was not always the case as it is much easier for an operator to leave machinery running idle during a lunch break. The management imposed the rule against idling when it sought ISO certification for the landfill. A private operator would have no obligation to continue practices that qualify for ISO certification and thus would have no incentive to shut down equipment during breaks. In fact, workers save the time it takes to restart machinery when they leave the machinery idling. This practice would result in greater carbon dioxide emissions, which is an indirect, reasonably foreseeable environmental impact.

Further increases in greenhouse gas emissions will result from the private operator’s likely increase in operations. There would be no limit on the distance the operator could truck waste into the landfill. That increase in greenhouse gases alone is a reasonably foreseeable significant change to the environment requiring CEQA review.

**g) Flow Control**

The City will no longer be able to control the flow of waste into and within San Diego if the Miramar landfill is privatized. Two recent Supreme Court cases make clear that a City may only determine the destination for waste in its jurisdiction if that destination is publicly controlled. In *C&A Carbone, Inc. v. Clarkstown*, The Supreme Court struck down, as a violation of the dormant commerce clause, a “flow control ordinance” that directed all trash entering the jurisdiction to a privately owned transfer station (*C & A Carbone v. Clarkstown*, 511 U.S. 383 (1994)). However, in *United Haulers v. Oneida-Herkimer*, a similar ordinance directing waste to a *public* facility was upheld because “any arguable burden the ordinances impose on interstate commerce does not exceed their public benefit... [And] [t]he Counties’ ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government” (*United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007) at 1801). Under these cases San Diego would not be capable of directing extra jurisdictional waste to Miramar or any other local facility, as they will all be privately owned. Therefore, future waste management efforts by the City will be severely handicapped if it goes forward with privatizing the landfill.

**h) Environmental Problems Under Private Stewardship**

In 2003, large amounts of toxic fluid (leachate) gushed from a slope at the Las Pulgas Landfill because of substandard construction by a private company. Cleanup cost \$20 million and ended with treated leachate being poured into the ocean. In San Diego County, the private operators of Otay and Sycamore landfills have been cited numerous times for poor oversight and permit violations. Many of these violations entailed exceeding daily tonnage limits and accepting unapproved types of waste, which can lead to toxic discharges.

**i) Native Plant Nursery**

The Miramar landfill operates the largest native plant nursery in California, growing plants to replace any disturbed by the landfill and to sell to private consumers. The U.S. Department of Fish and Wildlife requires the City to plant up to five new specimens for every one uprooted by landfill operations. The Miramar nursery greatly exceeds these requirements. The Scope of Services as stated in the City's RFQ does not include operation or maintenance of the Native Plant Nursery, identified as Area 16 by the City's RFQ. Therefore, a new operator would be under no obligation to continue the nursery. Its removal would manipulate the environmental character of Area 16, causing a direct environmental impact.

**j) Greenery Recycling**

Currently, Miramar Landfill saves approximately three cubic yards of landfill space for every ton of green waste it collects. While the RFQ requires bidders to include their plans for greenery recycling and resale of products in their proposal, it does not require that these services be provided. Therefore, while the proposals will show whether a bidder is qualified to perform greenery processing, it does not follow that the new operator will continue the practices of the Greenery. As noted, private operators don't have the same motivation to save landfill space.

**B. The Project is not Categorically Exempt as an Existing Facility**

Categorical exemptions are strictly construed and shall not be unreasonably expanded beyond their terms and may not be used where there is substantial evidence that there are unusual circumstances, including future activities, which may reasonably result in significant impacts that threaten the environment. (*McQueen v. Mid-Peninsula Regional Open Space*, 202 Cal.App.3d 1136 (1988).) Section 15301 of the CEQA Guidelines describes the class of projects exempt as *existing facilities* as those for which the proposed activity will involve negligible or no expansion of the use existing at the time the exemption is granted.

The Miramar project does not qualify for an *existing facilities* exemption because the RFQ specifically calls for further development of the West Miramar Landfill. In addition to a landfill expansion, the RFQ also contemplates an agreement for facility and infrastructure development including a transfer station, material recovery facility and conversion facility. (RFQ,4). The City treats operation of the landfill, the expansion of the landfill and the construction of new infrastructure as a single project for the purposes of the RFQ and evaluation

of the proposals received. Because of these proposed changes to the landfill, any contract entered into by the City for leasehold acquisition would be subject to new environmental requirements that have not been reviewed in a CEQA document. The acquiring party will undoubtedly seek to expand the West Miramar landfill and develop new and existing facilities and infrastructure. The City need not approve a project or even future portions of a project before an environmental impact report is necessary under CEQA. (*Laurel Heights Improvement Ass'n.*, 47 Cal.3d 376, 395.) EIRs “should be prepared as early as feasible in the planning process to enable environmental considerations to influence project proposal and design.” (CEQA Guidelines §15004.)

### **III. CEQA Review Promotes Sound Public Policy and Effective Decision-Making.**

CEQA operates first by promoting informed decision-making and public participation. The statute outlines an initial process, called scoping, that aids in achieving these goals. The CEQA Guidelines identify the benefit of scoping as helpful for cities in, “identifying the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and eliminating from detailed study issues found not to be important.” (Guidelines, §15083, subd.(a).) In addition, scoping has been found to be an effective way to bring together and resolve the concerns of affected federal, state and local agencies, the proponent of the action, and environmental groups.” (*Id* at subd. (b).) Classically, scoping is achieved through a series of public workshops or other types of public meetings geared toward informing and receiving input from the public on the proposed privatization.

CEQA accomplishes its objective of informing both the public and decision-makers by requiring preparation of an EIR for projects that may have a significant negative effect on the environment. The courts have clearly articulated that the purpose of the EIR is to “inform the public and its responsible officials of the environmental consequences of their decisions before they are made.” (*Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990).) The EIR also intends “to demonstrate to an apprehensive citizenry that the agency has in fact, analyzed and considered the ecological implications of its action. (*No Oil*, 13 Cal.3d at 86.) Because it must be certified or rejected by the public agency’s elected officials, it is also “a document of accountability.” (*Laurel Heights*, 47 Cal.3d at 392.)

As set out in the RFQ, the proposed privatization of the Miramar Landfill presents a host of public policy issues and potential environmental impacts that call for further study and public feedback. The public policy and environmental impacts can readily be accomplished through the CEQA scoping/EIR process. Thus, even if the City were not legally required to do so, the City should nevertheless strongly consider engaging in a public review process before deciding on a course of action regarding the privatization.

Public input insures transparency and accountability when dealing with a public service. The public’s input will guarantee that responsible officials are taking a long-term view of the potential risks and benefits. In order to facilitate accountability to the public, all relevant information—the proposals in response to the RFQ—should be released to the public prior to

acceptance of any proposal. Such transparency can serve as a check on the city's discretion and this prevents arbitrary decision-making. The public should be involved in the privatization decision since private companies are not directly accountable to the public, they are only accountable to their contract with the city, and after a contract is approved, the public will lose the ability to participate in decisions regarding the City's waste and its effects on the environment.

**a.) The Protections Afforded by the Brown Act Would Be Lost.**

The Brown Act was enacted to ensure that the actions of public agencies are "taken openly and that their deliberations [are] conducted openly." (Cal. Govt. Code § 5490.) A major purpose of the Brown Act is to "facilitate public participation in all phases of local government decision-making and to curb misuse of the democratic process by secret legislation of public bodies." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District*, 139 Cal. App.4<sup>th</sup> 1356, 1409 (2006).) Under this Act, the public is entitled to participate in the City Council meetings regarding waste management and environmental policies regarding the sensitive habitat on the Miramar site and to voice their opinions regarding services provided by the City's Environmental Services Department at the municipal landfill.

If the Miramar Landfill were to be privatized, such transparency and accountability would be entirely lost. A private company is under no obligation to open its meetings and the public would have no right to participate in decisions affecting the city's waste stream and the environment. (*See* Govt. Code § 54952(c)(1).

**b.) The Protections Afforded by the Public Records Act Would be Eliminated.**

In enacting the Public Records Act (CPRA), the legislature declared, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state." (Govt. Code § 6250.) It is implicit in the notion of the democratic process that the government should be accountable for its actions. In order to verify that accountability, the public must have access to government records to operate as a check against arbitrary exercise of official power and secrecy in decision-making. (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4<sup>th</sup> 319, 328 (2007).) In the context of a municipal landfill, the citizens of the city should have access to public records regarding policies on tipping fees and environmental policy.

This essential transparency would be lost if the landfill were to be privatized. The landfill operator would not be held accountable by the public regarding fees and operating practices that affect the life of the landfill. "Municipal financing experts have cautioned that cities that do not own their landfill sites "lose control over prices." (*O'Reilly, State & Local Gov't Solid Waste Management* § 8:27 (2d ed.)). The City's Environmental Services Department has effectively implemented recycling and composting programs at the Miramar Landfill in order to avoid the high cost of siting a new landfill. Given that a private operator is not accountable to the public,

the private operator will have no incentive to continue practices that avoid the expense of expansion and the eventual siting of a new landfill.

### **Conclusion**

Given the high likelihood of adverse impacts and the fundamental inconsistencies between operations oriented to the public interest and to a private company's profit motive, the SDSC strongly opposes the privatization of Miramar Landfill without full environmental review. We respectfully request the City suspend any further action on the RFQ until such time as a CEQA Environmental Impact Report has been prepared. In the alternative, if the City proceeds with its consideration of bids received under the RFQ, we urge the City to conduct an EIR in accordance with the process required by CEQA and other applicable laws. It has been clearly articulated by the courts that "environmental review should occur as early as feasible" and that time is now. (*See, Laurel Heights, supra*, Cal.3d at 395, *No Oil, Inc., supra*, Cal. 3d at 77 f.n.5). It is only through a public evaluation of the project's legal, environmental, and public policy considerations that informed decision-making can occur.

Thank you for your consideration of these comments.

Respectfully Submitted,



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**The San Diego Chapter of the Sierra Club is San Diego's oldest and largest grassroots environmental organization, founded in 1948. Encompassing San Diego and Imperial Counties, the San Diego Chapter seeks to preserve the special nature of the San Diego and Imperial Valley area through education, activism, and advocacy. The Chapter has over 14,000 members. The National Sierra Club has over 700,000 members in 65 Chapters in all 50 states, and Puerto Rico.**

