

**AGENDA
ITEM**

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AGENDA STAFF REPORT

DATE: September 20, 2017

TO: Mayor and City Council

APPROVED BY: Armando Villa, City Manager *Armando Villa*

PREPARED BY: Carlos Campos, Interim City Attorney

SUBJECT: Memorandum of Understanding by and between City of Calexico, County of Imperial and Imperial Irrigation District Regarding Maintenance and Operation of the New River Improvement Project

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RECOMMENDED ACTION

Consideration to Approve a Memorandum of Understanding by and between the City of Calexico, County of Imperial and Imperial Irrigation District Regarding Maintenance and Operation of the New River Improvement Project.

BACKGROUND

The New River is a cross-border, transboundary river that flows from Mexicali, Mexico, into the City of Calexico and on to the Salton Sea. The New River is severely polluted primarily from discharges of wastes from domestic, agricultural and industrial sources in Mexico. The New River's problems are both cumulative and severe.

New River pollution threatens public health, prevents supporting healthy ecosystems for wildlife and other biological resources in the New River. Water quality objectives are not being met in the United States' section of the New River because trash: (a) is discharged to the New River and tributaries in Mexico, (b) crosses the International Boundary, and (c) impacts beneficial uses of the New River in the United States. Trash adversely affects fish and wildlife communities and also causes secondary water quality impacts that may extend to the New River's terminus at the Salton Sea.

The purpose of this MOU is to outline the mutual agreement between the City of Calexico, County of Imperial and Imperial Irrigation District regarding priorities, goals and future obligations related to the New River Improvement Project ("Project"). The

Project includes three elements: 1) a trash screen, 2) a pipe for re-routing water, and 3) a pump back system as more specifically described in Exhibit A attached to the MOU. The owner of the Project has not yet been determined.

DISCUSSION

Assembly Bill 1079 authored by Assemblyman Victor M. Perez requires the California-Mexico Border Relations Council ("CMBRC") to create a strategic plan to study, monitor, remediate and enhance the New River's water quality to protect human health. Pursuant to provisions in Assembly Bill 1079, the Chair of the Council appointed the New River Technical Advisory Committee ("TAC") to oversee the development of the Plan and ensure community involvement. The TAC began work in the summer of 2010 and continued with multiple internal and stakeholder interactions through fall of 2011. The New River Improvement Project Strategic Plan ("NRIP") was submitted by the New River Improvement Technical Advisory Committee in December 2011 and presented to the California Mexico Border Relations Council, as well as sent to the Legislature.

In January 2016, the Colorado River Basin Regional Water Quality Control Board of Region 7 presented an updated New River Improvement Project with an approach that reduced the cost of the Project from approximately \$80 million to \$20 million by removing the planned disinfection facility and utilizing wetlands to clean the water. The updated Project includes three elements: 1) a trash screen, 2) a pipe for re-routing water, and 3) a pump back system as more specifically described in Exhibit A attached to the MOU.

Senate Bill (SB) 859 (2016) then appropriated \$1.4 million of funding being held in the Waste Discharge Permit Fund to the SWRCB to provide grants or contracts for the development of planning, environmental, and design documents in furtherance of projects for eliminating public health and safety risks from wastewater, and agricultural and other drainage of urbanized areas for tributaries to the Salton Sea. This funding may be used toward planning, design and environmental documents for the water quality infrastructure ("Phase 1") of the New River Improvement Project.

The Project will provide a health and safety benefit to the residents of the City of Calexico and the affected regional communities.

A Request For Qualifications ("RFQ") is being drafted by the California State Water Resources Control Board and the Colorado River Basin Regional Water Quality Control Board for Phase 1 and is expected to be available for circulation in 2017.

The funding for the construction of the Project has not yet been determined. The Parties desire to enter into this MOU to delineate the responsibilities of the Parties for the operations and maintenance of the Project ("Phase 3") to allow for the release of the \$1.4 million funding for the contract coming out of the RFQ for Phase 1.

Under the terms of the MOU, the Parties have agreed to an equal split of the costs to maintain the New River Improvement Project after completion and have agreed to

individually contribute an annual, maximum amount of \$50,000 to the Project. Such funding is contingent upon all three elements of the Project (trash screen, pipe for re-routing water, and pump-back system) being successfully completed and is contingent upon the execution of a binding legal agreement among the Parties and the eventual Owner of the Project which has not been determined. Moreover, the MOU is for a term of 20 years and provides that the funding shall be reviewed annually, and the Parties shall have the right to alter the financial commitment annually.

ENVIRONMENTAL DETERMINATION

No impact.

FISCAL IMPACT

Provides for an annual, maximum contribution of \$50,000 upon the completion of New River Improvement Project and upon the Parties entering into a written agreement with Owner of the Project.

ALTERNATIVES

The City Council may wish to consider the following alternatives:

1. Provide alternative direction to staff.

ATTACHMENT(S)

1. Memorandum of Understanding by and between City of Calexico, County of Imperial and Imperial Irrigation District Regarding Maintenance and Operation of the New River Improvement Project

**MEMORANDUM OF UNDERSTANDING BY AND BETWEEN
CITY OF CALEXICO, COUNTY OF IMPERIAL AND IMPERIAL IRRIGATION
DISTRICT REGARDING MAINTENANCE AND OPERATION OF THE NEW RIVER
IMPROVEMENT PROJECT**

This MEMORANDUM OF UNDERSTANDING (“MOU”) is entered into on this 20th day of September, 2017 between **CITY OF CALEXICO** (“City”), **COUNTY OF IMPERIAL** (“County”) and **IMPERIAL IRRIGATION DISTRICT** (“IID”), individually referred to as “Party” and collectively referred to as “Parties.”

A. PURPOSE.

The purpose of this MOU is to outline the mutual agreement between City, County and IID regarding priorities, goals and future obligations related to the New River Improvement Project (“Project”). The Project includes three elements: a trash screen, a pipe for re-routing water and a pump back system as more specifically described in Exhibit A attached hereto and incorporated herein by reference. The owner of the Project has not yet been determined and shall be defined in this MOU as “Owner.”

B. RECITALS.

1. The New River is a cross-border, transboundary river that flows from Mexicali, Mexico, into the City of Calexico and on to the Salton Sea. The New River is severely polluted primarily from discharges of wastes from domestic, agricultural and industrial sources in Mexico. The New River’s problems are both cumulative and severe.

2. New River pollution threatens public health, prevents supporting healthy ecosystems for wildlife and other biological resources in the New River. Water quality objectives are not being met in the United States’ section of the New River because trash: (a) is discharged to the New River and tributaries in Mexico, (b) crosses the International Boundary, and (c) impacts beneficial uses of the New River in the United States. Trash adversely affects fish and wildlife communities. Trash also causes secondary water quality impacts that may extend to the River’s terminus at the Salton Sea because trash serves as a carrier for pathogens, dissolved organic matter, and volatile organic compounds that pose a public health threat to people and fish and wildlife communities. Based on the most recent available data, the following water quality problems are evident in the New River: pathogens, low dissolved oxygen, toxicity, trash, selenium, sediment/silt, chlordane, dichlorodiphenyltrichloroethane, dieldrin, toxaphene, polychlorinated

biphenyls (PCBs), hexachlorobenzene, nutrients and mercury. Of those, the impact of each pollutant determined to be the most severe are pathogens, low dissolved oxygen, toxicity, trash, selenium and sediment/silt.

3. The following have found to be beneficial use designations in the Basin Plan for the New River adopted by the State Water Resources Control Board (“SWRCB”): warm freshwater habitat; wildlife habitat; preservation of rare, threatened or endangered species; water contact recreation; non-contact water recreation; and freshwater replenishment. The SWRCB Basin Plan includes narrative water quality objectives related to trash to protect the beneficial uses including: (a) general surface water objectives for general surface waters of the Region (aesthetic qualities, tainting substances, dissolved oxygen, suspended soils and settleable solids, biostimulatory substances and turbidity) and (b) specific surface water objectives for the New River at the International Boundary (Qualitative Standards 1 through 5 of Minute No. 264 of the Mexican-American Water Treaty); and

4. New River pollution also hinders economic development in Imperial County.

5. Assembly Bill 1079 (Pub. Resources Code, § 71103.5, added by Stats. 2009, ch. 382, § 1), authored by Assemblyman Victor M. Perez, requires the California-Mexico Border Relations Council (“CMBRC”) to create a strategic plan to study, monitor, remediate and enhance the New River’s water quality to protect human health. Specifically, the strategic plan is required to: quantify water quality impairments and their threat to public health; identify and prioritize actions to protect public health, meet water quality objectives and other environmental goals; identify funding sources; and identify public agency roles and responsibilities for implementation. Pursuant to provisions in Assembly Bill 1079, the Chair of the Council appointed the New River Technical Advisory Committee (“TAC”) to oversee the development of the Plan and ensure community involvement. The TAC began work in the summer of 2010 and continued with multiple internal and stakeholder interactions through fall of 2011. The New River Improvement Project Strategic Plan (“NRIP”) was submitted by the New River Improvement Technical Advisory Committee in December 2011 and presented to the California Mexico Border Relations Council, as well as sent to the Legislature.

6. In January 2016, the Colorado River Basin Regional Water Quality Control Board of Region 7 presented an updated NRIP with an approach that reduced the cost of the Project from approximately \$80 million to \$20 million by removing the planned disinfection facility and

utilizing wetlands to clean the water. The NRIP updates were presented to the CMBRC and sent to the California Legislature in February 2016.

7. Senate Bill (SB) 859 (2016) then appropriated \$1.4 million of funding being held in the Waste Discharge Permit Fund to the SWRCB to provide grants or contracts for the development of planning, environmental, and design documents in furtherance of projects for eliminating public health and safety risks from wastewater, and agricultural and other drainage of urbanized areas for tributaries to the Salton Sea. This funding may be used toward planning, design and environmental documents for the water quality infrastructure (“Phase 1”) of the NRIP.

8. In October 2016, CalEPA coordinated with Assembly Member Garcia and the Colorado River Basin Regional Water Quality Control Board to host a community meeting in Calexico to discuss the \$1.4 million appropriation and the timeline for the Project.

9. Congressman Juan Vargas introduced New River legislation at the federal level in 2016, and CalEPA collaborated with Congressman Vargas’ staff to include the Strategic Plan and the work of the CMBRC in a new version of the bill which was reintroduced in 2017.

10. The City, County and IID do not have the authority to require Mexico or the U.S. Government to reduce trash that crosses the International Boundary. However, the City, County and IID have the ability to shed light on the need for both the U.S. Government and the Mexican Government to take action and fund the reduction of the trash inflow across the U.S. boundary.

11. The City, County and IID are not responsible for the reduction of trash that crosses the International Boundary and this MOU is an effort to improve the quality of life for Imperial County residents. City, County and IID do not accept responsibility for any violations of Minute No. 264 of the Mexican-American Water Treaty and will continue to look to and demand that the U.S. Government and the Mexican Government comply with the terms of the Mexican-American Water Treaty.

12. The Project will provide a health and safety benefit to the residents of the City of Calexico and the affected regional communities.

13. A Request For Qualifications (“RFQ”) is being drafted by the California State Water Resources Control Board and the Colorado River Basin Regional Water Quality Control Board for Phase 1 and is expected to be available for circulation in 2017.

14. The funding for the construction of the Project has not yet been determined but will be required for a future binding written legal agreement by and among the Parties. The Parties desire to enter into this MOU to delineate the responsibilities of the Parties for the operations and maintenance of the Project ("Phase 3") to allow for the release of the \$1.4 million funding for the contract coming out of the RFQ for Phase 1.

15. This MOU is not a "project" under the California Environmental Quality Act nor the National Environmental Policy Act. All required Project approvals and permitting will be completed prior to the execution of a binding written legal agreement by and among the Parties.

C. TERM.

This MOU shall become effective on the date entered above and will continue in effect for twenty (20) years or until terminated in writing by agreement of all Parties. The funding amount shall be reviewed each year and the Parties shall have the right to alter the financial commitment annually.

D. RESPONSIBILITIES OF THE PARTIES.

Subject to the execution of a binding written legal agreement by and among the Parties and the Owner:

1. CITY OF CALEXICO

- a. City shall contribute an annual, maximum amount of \$50,000 to the Project.
 - i. Such funding is contingent upon all three elements of the Project being successfully completed.
 - ii. Such funding is contingent on agreement and execution of a binding written legal agreement approved by the City of Calexico City Council at a noticed, public meeting.
 - iii. Such funding is contingent on completion of construction of the Project.
- b. By June 1st of each year, Owner shall submit to City an invoice detailing the amount of requested contribution.
- c. City's annual contribution shall only be used for operation and maintenance of the Project.

2. COUNTY OF IMPERIAL

- a. County shall contribute an annual, maximum amount of \$50,000 to the Project.
 - i. Such funding is contingent upon all three elements of the Project being successfully completed.
 - ii. Such funding is contingent on agreement and execution of a binding written legal agreement approved by the Imperial County Board of Supervisors at a noticed, public meeting.
 - iii. Such funding is contingent on completion of construction of the Project.
- b. By June 1st of each year, Owner shall submit to County an invoice detailing the amount of requested contribution.
- c. County's annual contribution shall only be used for operation and maintenance of the Project.

3. IMPERIAL IRRIGATION DISTRICT

- a. IID shall contribute an annual, maximum amount of \$50,000 to the Project.
 - i. Such funding is contingent upon all three elements of the Project being successfully completed.
 - ii. Such funding is contingent on agreement and execution of a binding written legal agreement approved by the Imperial Irrigation District Board of Directors at a noticed, public meeting.
 - iii. Such funding is contingent on completion of construction of the Project.
- b. By June 1st of each year, Owner shall submit to IID an invoice detailing the amount of requested contribution.
- c. IID's annual contribution Funding shall only be used for operation and maintenance of the Project.

E. RENEGOTIATION AND OTHER LIMITATIONS.

1. After completion of Phase 1 of the Project and a thorough review of the scope of the Project based on engineering design plans, but no later than _____, 201_, the Parties shall meet and confer to determine whether this MOU shall be renegotiated. In no event shall costs exceed an annual amount of \$50,000 each to City, County and IID (collectively \$150,000).
2. If the scope of the Project is reduced and no longer includes any element of the Project, the obligations set forth above by City, County and IID shall be renegotiated and either eliminated or reduced in a manner mutually satisfactory to City, County and IID.

3. This MOU is limited to the financial contributions to the Owner as set forth above for operation and maintenance of the Project only. In no way will City, County or IID be liable or responsible for providing any services, facilities, in-kind contributions, payment of expenses or any other obligations associated with the Project. This MOU shall in no way assign or imply the assumption of any Party or any combination of the Parties acting as or otherwise becoming the Owner. The Owner will be determined at a future date and not within this MOU or based upon this MOU.
4. The City, County and IID will jointly make efforts to require the responsible entities comply with the terms of the Mexican-American Water Treaty Minute No. 264 rather than requiring the local governments (City, County and IID) to pay for the Project. When funding or improvements are made by responsible entities, this MOU shall be renegotiated.

F. ANTICIPATED BINDING LEGAL AGREEMENT.

The Parties agree to cooperate diligently and in good faith in the creation of the binding legal agreement with the Owner necessary for the Project.

G. GENERAL PROVISIONS.

1. This MOU may be terminated by any Party upon ninety (90) days written notice.
2. It is understood that the Parties shall be subject to examination and audit of any records associated with the provisions of services, claims to obtain funding and payment records for a period of five (5) years after final payment under this MOU, whichever is longest. The examination and audit shall be confined to those matters connected with the performance of this MOU including, but not limited to, the costs of administering this MOU.
3. This MOU is not in effect nor enforceable until signed by all Parties.

H. MODIFICATIONS.

Modifications within the scope of the MOU shall be made by mutual consent of the Parties, by the issuance of a written modification, signed and dated by all Parties, prior to any changes being made.

I. COMPLIANCE WITH APPLICABLE LAWS.

The Parties agree that in performing this MOU, each Party shall comply with all applicable laws, ordinances and codes of the Federal, State and Local governments.

J. INDEMNIFICATION.

The Parties agree that the Owner will, to the fullest extent permitted by law, indemnify, defend, protect and hold the City, County and IID and its representatives, officers, directors, designees, employees, agents, successors and assigns harmless from any and all claims, expenses, liabilities, causes of action, demands, losses, penalties, attorneys' fees and costs, in law or equity, of every kind and nature whatsoever arising out of or in connection with the negligent acts and omissions or willful misconduct under this MOU ("Claims"), whether or not arising from the passive negligence, but does not include Claims that are finally determined to be the result of the sole negligence or willful misconduct of City, County or IID as to that local agency only.

K. NOTICES.

Any notice required or permitted to be given under this MOU shall be in writing and shall be served by registered mail or personal service upon the other Parties. When serviced by registered mail, services shall be conclusively deemed delivered three (3) days after deposit with the United States Postal Service, postage prepaid, addressed to the Parties to whom such notice is to be given as hereinafter provided.

L. MISCELLANEOUS.

1. This MOU is the final integrated agreement between the Parties regarding the matters addressed herein, and may not be modified except in a writing signed by the Parties.

2. This MOU only covers what is written herein.

3. This MOU shall be construed in accordance with the laws of the State of California.

4. In the event of a breach, damages may not be sufficient as compensation. Equitable remedies, including without limitation specific performance, injunctive relief (temporary and permanent restraining orders) may be available to the Parties upon proper showing of irreparable injury in a court of competent jurisdiction.

5. All Parties represent they have the legal authority to perform and carry out all covenants and obligations to be performed under and pursuant to this MOU. The execution, delivery, and performance by both Parties has been duly authorized by all necessary action, and does not and will not require any consent or approval of senior management or governing bodies, other than that which has been obtained. All such actions herein shall require a legal, binding agreement as set forth above.

6. This MOU may be signed in counterparts. Signatures sent via facsimile or electronic mail shall be valid.

[Signatures on following page]

IN WITNESS WHEREOF, the PARTIES hereto have executed this MOU as of the date first stated above.

CITY OF CALEXICO

By: _____
Maritza Hurtado, Mayor

ATTEST:

APPROVED AS TO FORM:

By: _____
Gabriela T. Garcia, City Clerk

By: _____
Carlos Campos
City Attorney

COUNTY OF IMPERIAL

By: _____
Michael W. Kelley,
Chairman, Board of Supervisors

ATTEST:

APPROVED AS TO FORM:

By: _____
Blanca Acosta, Clerk of the
Board of Supervisors

By: _____
Katherine Turner,
County Counsel

IMPERIAL IRRIGATION DISTRICT

By: _____
Bruce Kuhn, Division 2
President, Board of Directors

ATTEST:

APPROVED AS TO FORM:

By: _____
Gloria A. Rivera
Secretary to the Board

By: _____
Frank A. Oswald, III
General Counsel

EXHIBIT A