



DATE: December 3, 2019

TO: Mayor and City Council

FROM: Director of Public Works

SUBJECT: East Bay Dischargers Authority – Discussion of Amended and Restated Joint Exercise of Powers Agreement

RECOMMENDATION

That Council reviews and provides feedback on the Amended and Restated Joint Exercise of Powers Agreement for the East Bay Dischargers Authority.

SUMMARY

The East Bay Dischargers Authority (EBDA) was formed in 1974, by a Joint Exercise of Powers Agreement (JPA) entered into by the City of Hayward, City of San Leandro, Oro Loma Sanitary District, Castro Valley Sanitary District, and Union Sanitary District. The purpose of EBDA is to provide for the safe and efficient discharge of wastewater produced by its member agencies into San Francisco Bay. The current JPA expires on January 1, 2020.

The member agencies have negotiated an Amended and Restated (or “new”) JPA that would supersede the current agreement if approved by the governing bodies of all five member agencies. The new JPA is a twenty-year agreement that would take effect on July 1, 2020 to be coincident with the beginning of a fiscal year. Significant changes in the new agreement include: revised capacity rights for certain member agencies, which changes the allocation of fixed annual costs and capital costs among the member agencies; changes to the voting structure to require a majority of Commissioners and a majority of agency capacity weighted votes to approve most actions; and transfer of certain risks and liabilities for certain EBDA facilities to member agencies.

Staff is bringing the Amended and Restated JPA to Council to obtain Council’s comments. After receiving and addressing Council’s comments, staff will bring this item back for Council’s consideration on December 17, along with a recommendation to approve a six-month extension of the current JPA since the new JPA would not take effect until July 1, 2020.

BACKGROUND

The East Bay Dischargers Authority (EBDA) was formed in 1974, by a Joint Exercise of Powers Agreement (JPA) entered into by the City of Hayward, City of San Leandro, Oro Loma Sanitary District, Castro Valley Sanitary District, and Union Sanitary District. The purpose of EBDA is to provide for the efficient disposal of wastewater produced by its member agencies. EBDA owns and operates four effluent pump stations, a dichlorination facility, pipelines, and a deep-water outfall system that allows for the discharge of treated wastewater from member agency service areas into the San Francisco Bay (see Attachment II). The JPA was last amended in 2007 and is effective through January 1, 2020.

EBDA's costs are apportioned to member agencies based on each agency's fixed capacity in the system, the agency's variable flow, and a variety of other factors. Under the current JPA, member agencies share in all costs, based on set allocations, regardless of whether or not an agency uses a certain part of the system.

For the past few years, EBDA's members have engaged in discussions related to the renewal of the JPA in anticipation of the 2020 expiration, with certain agencies seeking changes to their allocated portion of flow capacity and right to discharge to EBDA's facilities (capacity rights), and changes to the allocation of infrastructure cost and risk among the member agencies.

On May 16, 2019, the EBDA Commissioners, which include Council Member Mendall as the current representative for the City of Hayward, adopted a Term Sheet as the framework for negotiating the new JPA. The proposed terms include revised capacity rights for each member agency, which changes each member agency's share of fixed annual costs and capital costs that are allocated based on an agency's proportionate share of capacity rights. The proposed terms would also shift the liability for certain EBDA facilities to member agencies.

DISCUSSION

Since May 2019, the EBDA Commissioners and respective agency staff have been negotiating language for the new JPA based on the concepts in the agreed upon term sheet. On October 29, 2019, the EBDA Commission adopted the EBDA Amended and Restated JPA (Attachment II) that would provide for the continued discharge of effluent from the member agencies for another twenty years. If approved by the governing body of each member agency, the Amended and Restated JPA would take effect on July 1, 2020 and would supersede the previous agreement and all amendments.

A summary of the key terms for the Amended and Restated JPA is provided below:

- **Term:** The term of the new JPA would be twenty years, with no unilateral opt out or ability for member agencies to adjust capacity rights downward during the term of the agreement. While reducing capacity rights reduces a member agency's costs, most of that cost savings would be re-distributed to other members. The new JPA

would provide for member agencies to increase capacity rights during the term of the agreement, if the increased capacity is available in the EBDA system and subject to other specified terms and conditions.

If approved, the new JPA would take effect on July 1, 2020, to be coincident with the start of the fiscal year and extend through June 30, 2040.

- Capacity Rights:** Capacity rights are based on maximum flow rate capacities and are used to allocate fixed annual costs and capital costs. The new JPA includes provisions for assessing fees for agencies that exceed their capacity right. As summarized in the table below, the new JPA includes revised maximum flow rate capacities for most of the member agencies. The City is proposing to reduce its maximum flow rate capacity from 35.0 million gallons per day (MGD) under the current JPA to 15.0 MGD under the new JPA.

Member Agency	Maximum Flow Rate Capacity, MGD (Current JPA)	Maximum Flow Rate Capacity, MGD (New JPA)
San Leandro	22.3	14.0
Oro Loma/Castro Valley	69.2	30.0
Hayward	35.0	15.0
Union Sanitary District	42.9	42.9

The revised maximum flow rate capacity of 15.0 MGD was determined based on staff's analysis of flow data and cost information and the desire to avoid paying for unused flow capacity in the EBDA system. The City plans to utilize City-owned storage ponds to manage peak wet weather flows and stay below its new capacity right of 15.0 MGD. Based on operational experience and growth projections, the City may need to increase its maximum flow rate capacity in the future. As discussed previously, the new JPA provides for member agencies to increase their capacity right during the term of the new agreement, if needed.

- Governance:** The new JPA makes changes to the governance structure. The current JPA requires unanimous approval for most actions, including adoption of budget, which effectively allows a single agency to prevent an action from passing. In addition, the current governance structure gives equal weight to each agency's vote, regardless of cost or risk allocation. The new JPA would require approval from both a majority of the agencies (three) and a majority of weighted votes that would be calculated based on each agency's share of capacity rights to approve most actions. Certain decisions (*e.g.* amendments to the JPA) would require unanimous approval of the Commission.
- Cost Allocation:** Except for the City of San Leandro, the formula for allocating fixed and variable annual costs and capital costs for pump stations would remain the

same as the current JPA. Fixed annual costs are allocated based on capacity rights selected by each agency and variable annual costs are based on total annual flow. In the new JPA, San Leandro would be fully responsible for annual and capital replacement costs associated with the pump station and pipeline that solely serves San Leandro in exchange for only sharing in annual costs for the facilities that are used by all five member agencies. San Leandro will not share in the cost of facilities that the city does not use.

Capital costs for pipelines would be shared by all agencies, excluding San Leandro, up to a cumulative total of \$325,000 during the term of the new JPA. Based on past experience, this amount should be sufficient for the term of the new JPA. If and when this maximum threshold has been reached, capital replacement costs for pipelines would be shared by the agencies using the pipeline segment based on capacity rights. The City of Hayward's overall costs are anticipated to remain basically the same under the new JPA once costs are allocated using the revised capacity rights for member agencies.

- **Infrastructure Risk and Liability.** The new JPA shifts most of the risk and liability for pipelines to the member agencies based on which agencies use specific pipeline segments. For example, the City of Hayward and Union Sanitary District would have shared liability for the pipeline from Hayward to Oro Loma Sanitary District (see Attachment II). EBDA would still retain ownership of the pipelines and be responsible for performing emergency repairs to the pipeline system in the event of a failure of the pipeline system. However, the member agencies using the specific pipeline segment would be responsible for any permanent repairs, environmental, or third-party liability costs that exceed a cumulative total of \$1.25 million over the term of the new JPA. Pipeline failure costs below the \$1.25 million threshold would be shared by all member agencies, excluding San Leandro. Under the new JPA, Hayward's overall risk exposure for pipeline failure is anticipated to decrease since Union Sanitary District would have the primary responsibility for the segment between Union Sanitary District and Hayward (see Attachment II), which is the longest pipeline segment in the EBDA system.

Except for the City of San Leandro, EBDA would retain ownership and liability for the pump stations throughout the term of the new JPA, but the terms of the new JPA shift ownership of the Hayward and Union Sanitary District pump stations to the respective agencies at the end of the twenty-year term. San Leandro would assume ownership and liability of the pump station serving San Leandro at the start of the new JPA.

- **Termination.** The new JPA includes a process for beginning negotiations for renewing the JPA at Year 15 for member agencies desiring to continue using the system beyond Year 20. If the agencies cannot reach agreement, the Amended and Restated JPA would terminate at the end of the twenty years. As discussed above, the City of Hayward would take ownership of the Hayward pump station when the

new JPA terminates. Other facilities would be disposed of and assets would be liquidated, and retirement obligations allocated based on 2020 capacity rights.

Six-month Extension of Current JPA

As previously discussed, the current JPA expires on January 1, 2020. The member agencies have negotiated an Amended and Restated JPA that would supersede the current agreement and take effect until July 1, 2020 to be coincident with the start of the fiscal year. Therefore, the member agencies have agreed on a Fourth Amendment to the current JPA (Attachment IV) to extend the current JPA by six months in order to allow for this fiscal year alignment and prevent a lapse in the agreement. Council will be asked to consider approving the six-month extension of the current JPA at the same time Council considers approval of the Amended and Restated JPA.

STRATEGIC INITIATIVES

This agenda item does not directly relate to one of Council's Strategic Initiatives.

ECONOMIC IMPACT

Approval of the Amended and Restated JPA is not expected to impact Hayward's sewer rates.

FISCAL IMPACT

The City currently pays approximately \$1 million annually to EBDA, which accounts for approximately 5 percent of the Wastewater Enterprise's budget. For a typical account, this is less than \$2 per month. The City's costs are anticipated to remain basically the same under the new JPA. No fiscal impacts to the City Wastewater Enterprise Fund are anticipated as a result of approving the Amended and Restated JPA. There are no General Fund impacts.

SUSTAINABILITY FEATURES

The Amended and Restated JPA provides for the safe and efficient discharge of wastewater produced by its member agencies into San Francisco Bay. The new JPA includes language supporting the development and use of recycled water as a more sustainable alternative to disposal of effluent through EBDA facilities.

PUBLIC CONTACT

In 2014, the EBDA Commission formed an Ad Hoc Committee that met monthly to discuss issues related to the new JPA. Both the monthly EBDA Commission and Ad Hoc Committee meetings are publicly noticed. In addition, the EBDA Commission held four workshops in 2019 that focused on the new JPA and provided opportunities for public comment.

NEXT STEPS

Council is scheduled to consider approval of the six-month extension of the current JPA and adoption of the Amended and Restated JPA on December 17, 2019. If the governing bodies of all EBDA member agencies approve the Amended and Restated JPA, it would take effect on July 1, 2020 and would supersede the previous agreement and all amendments.

Prepared by: Jan Lee, Assistant Director of Public Works - Utilities

Recommended by: Alex Ameri, Director of Public Works

Approved by:

A handwritten signature in black ink, appearing to read 'K. McAdoo', written in a cursive style.

Kelly McAdoo, City Manager