

March 5, 2014

Ms. Diana Lenik  
Mr. Jerry Lyke  
Ms. Jenny Putman  
Urbana Champaign Sanitary District  
1100 East University Avenue  
Urbana, Illinois 61801

Re: UCSD-Cronus Chemical contract for sale of effluent

Dear Trustees:

We write to set forth our concerns with the draft District agreement with Cronus Chemical, LLC. We also set forth our recommendations for changing the agreement so that it better promotes the community's welfare and the ecological health of local waterways while providing much-needed public confidence in future District operations. Upon dispatch of this letter to you we plan to distribute it publicly.

**The income to the District is not assured, and could be much less than predicted.**

Reading the latest draft of the agreement, we note with surprise that Cronus makes no particular commitment to purchase any amount of effluent from the District. It is not committing to purchase 6.3 million gallons of effluent per day (mgd), nor any other amount. The pricing terms are ambiguous, but seem to give Cronus the option, by purchasing less than 5.5 mgd, to cut in half (or more) the amount it pays per thousand gallons (Section 5.2). The District's ability to recover its up-front construction costs (the Capital Recovery Fee) is also qualified in a way that makes recovery uncertain.<sup>1</sup> Because of these uncertainties, the agreement's economic benefits to the District and to its local customers are not assured. They could be much less than predicted.

**The District is agreeing to sell all of its effluent above the minimum flows to the streams, not just 6.3 mgd or even 7.5 mgd.**

We also note with concern that the District is not (as is sometimes said) simply agreeing to sell to Cronus 6.3 mgd of effluent. It is, to the contrary, agreeing (under Section 5.1(d)) to sell all of its effluent, should Cronus want it, except for the minimum flows to local streams (referred to, in the agreement, as "Minimum Flow to Area Waterways"). The District does not, as the agreement now stands, have the flexibility to decide that it will deliver only 6.3 mgd and devote its further effluent to other purposes, such as enhancing stream flows or otherwise benefitting local water sources.

---

<sup>1</sup> The duty of Cronus to pay the Capital Recovery Fee under Section 5.3 is suspended on any day when the District fails to make at least 5.5 mgd available to Cronus. The fee itself is based on effluent actually delivered to Cronus (suggesting that Cronus can reduce the amount by refusing to accept delivery). Here and elsewhere the agreement creates uncertainty by variously referring to effluent "delivered to" Cronus and effluent "made available to Cronus." Presumably the different language is meant to have different meaning.



### **The District is not making any promise to maintain the minimum discharges to streams.**

A particularly grave concern for us is that the District has not committed to maintain the minimum discharges to the area waterways. It has simply reserved the right to do so. It says that, at the moment, its “first priority” is to maintain minimum discharges but priorities change and leadership changes. The District in fact has retained full flexibility in the matter. This omission is particularly troubling because Cronus’s payments to the District go down when the District delivers less effluent, and quite sharply when delivery falls below 5.5 mgd. Thus, the agreement gives the District strong financial incentives to reduce discharges of effluent to area waterways and divert the effluent instead to Cronus. Given this combination—no promise to maintain discharges, and strong economic reasons not to do so—the public has good reason to worry about whether its waterways in coming years will get their due.

### **The District is not well protected in case of a default by Cronus.**

A final group of concerns has to do with the limited legal protections the District enjoys under the agreement should Cronus default in its obligations or simply announce that it is no longer interested in purchasing effluent. The District can cancel the agreement. But if it does so, it brings to an end all future-accruing duties of Cronus to pay money.<sup>2</sup> Under the agreement (Section 5.3), Cronus’s duty to reimburse the District for its up-front construction costs only arises over time (approximately 5 years), as effluent is delivered. If the agreement is ended, all future-accruing payments are erased, and the District can end up with no cost recovery. The agreement does commit Cronus to submitting a \$10 million letter of credit, but this letter does not increase the District’s right to recover any money; it simply provides a source to get the likely small amounts of money that the District is due. And the District can only draw upon the letter of credit if it terminates the agreement; it cannot draw upon the letter of credit to recover for unpaid bills while it continues to deliver more effluent. The agreement does not expressly empower the District to recover its full consequential damages in the event of default.

### **These concerns lead us to urge the following:**

*First*, the District should delay taking action on the agreement until it is revised to address these and any other concerns. The public needs to see a revised final version of the agreement, and have a full chance to comment on it, before the Trustees act.

*Second*, it is essential that the District commit in writing, in a legally binding form, that it will maintain the minimum discharges to area waterways. It is not enough that it simply reserve the power to do so and express its current good intentions. We deem it essential that this commitment be undertaken in a form that allows for enforcement by designated non-profit organizations with demonstrated commitments to the ecological health of waterways and the welfare of the many people who live along and make use of them. This could be done either by adding a party (and terms) to the existing two-party agreement or by way of a separate agreement with a public-interest organization. (We stand ready to draft such terms or a separate agreement.)

*Third*, the agreement needs revision (in Section 5.1) so that the District retains the right, at any time, to make other plans for the use of its effluent above the 6.3 mgd that Cronus has said it requires. It should have the ability in particular to commit such effluent to sustain waterway flows or in any other way to promote local hydrological systems.

*Fourth*, Cronus should be liable for the full unpaid portion of the Capital Recovery Fee (which reimburses the District for up-front construction costs) should it default. The Fee can be paid over time, but the payment

---

<sup>2</sup> The effect of termination is explained in Section 9.1(c). It states that termination will not end “any obligation for the payment of money.” But the obligations of Cronus to pay money (under Sections 5.2 and 5.3) are only incurred day by day as effluent is delivered (or made available—not always clear which) to Cronus. Upon termination, no effluent deliveries would be made and thus Cronus would incur no further obligations to pay money.



obligation should not be cut short if the District finds it necessary to terminate the agreement. The full amount should be immediately due and payable should the District terminate the agreement due to a default by Cronus.

*Fifth*, the pricing scheme for the effluent should be revised. We propose that the price per thousand gallons remain constant, without regard for the amount delivered or made available to Cronus; only in this way, can we avoid tempting the District to divert effluent to Cronus when it should go to area waterways or other local uses. As a lesser step, the agreement should be altered: (a) to clarify that the lower per-unit charges are applicable only if the District is *unable* to deliver at least 5.5 mgd (not when Cronus simply refuses to purchase the effluent); and (b) to increase the price of effluent to \$.75 when deliveries are below 5.5 mgd, thereby reducing (though not eliminating) the incentive for the District to maintain high-delivery levels in times of shortage.

Finally, Cronus should commit in the agreement to use the effluent only at its proposed Douglas County project except as otherwise approved by the District. (The new language in Section 5.1(j), we sense, seems designed to address this concern but without in fact limiting Cronus's ability to use the effluent in other ways and the ability of anyone acquiring its rights under the agreement (for instance, through a default by Cronus in its financing agreements) to use the effluent elsewhere and for other purposes.)

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kim Knowles", written in a cursive style.

Kim Knowles  
Staff Attorney

cc: Rick Manner  
rmanner@u-csd.com