**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

March 30, 1993

(Legal and Claims Committee--Action)  
 (Organization and Personnel Committee--Action)  
 Board of Directors (Water Problems Committee--Information)  
 (Executive Committee--Information)  
 General Manager and Assistant General Counsel  
 Legal Representation of Bay/Delta Related Matters

### Report

It appears appropriate for Metropolitan to consider directly retaining outside counsel with respect to Bay/Delta and related matters. Specifically, it is recommended that your Board authorize the Assistant General Counsel to contract with Best, Best & Krieger (BB&K) to represent Metropolitan's interests in the State Water Resources Control Board's (SWRCB) interim standards proceedings, while that firm continues to represent the State Water Contractors (SWC) with respect to other matters in which the contractors share a common position. This arrangement would formalize the existing ad hoc relationship. While BB&K's representation of both Metropolitan and the SWC could raise technical conflict of interest concerns, staff believes that, at the present time, there are compelling reasons to continue to use BB&K in this manner which outweigh any potential conflict fears.

### New Contractual Arrangements

Presently, BB&K has a contract with the SWC for legal services with respect to Bay/Delta and related matters. While BB&K does not have a contractual relationship with Metropolitan, the firm has since the beginning of the Bay/Delta proceedings performed additional services of more specific interest to Metropolitan and other urban contractors. In recognition of this fact, Metropolitan reimburses SWC for 70 percent of BB&K's billings. In a somewhat similar arrangement, the firm of Kronick, Moskovitz, Tiedemann and Girard (KMT&G) is under contract to the Kern County Water Agency (Kern). Although KMT&G does not have a contract with SWC, the firm provides legal services to SWC on a range of Bay/Delta related issues and SWC reimburses Kern for 30 percent of KMT&G's billings related to those matters.

This relationship has worked well and the two firms can still effectively represent the SWC's interests jointly in many matters. However, it now appears that on a number of specific issues Metropolitan and other urban contractors favor an approach different than that of Kern and a number of agricultural contractors. The differing response of the urban and agricultural contractors to the recent D-1630 is an example. It has become apparent that Metropolitan needs to retain its own outside counsel with respect to certain Bay/Delta matters. In order to provide Metropolitan with that representation, and still retain effective representation of SWC on matters in which there is common interest, the following new contractual arrangements are recommended.

First, Metropolitan (and perhaps other urban contractors) should enter into a contract with BB&K for legal services in connection with SWRCB proceedings related to SWRCB's interim standards proceedings and other Bay/Delta matters in which the SWC do not have a common position. That contract would provide that in those areas BB&K owes its duty of representation to Metropolitan (and any other urban SWC signatories to the contract) alone. The SWC would then amend its contract with BB&K to limit BB&K's representation of the SWC to only those matters in which the contractors have a common interest. In those matters, BB&K would represent the interests of all the contractors. This might include such matters as the Golden Gate Audubon case, endangered species issues and the San Francisco Estuary Project. Each of these contracts would provide that BB&K will bill Metropolitan for all work on Bay/Delta and related matters under these contracts. Finally, SWC will enter into an agreement with Metropolitan agreeing to reimburse Metropolitan for 30 percent of BB&K's total billing under both contracts. Reimbursement at this flat percentage eliminates the difficulty and administrative burden of allocating the cost of each task performed, is a reasonable allocation of the work likely to be performed, and would continue the current cost sharing formula.

Similarly, KMT&G would continue to represent Kern (and perhaps other agricultural contractors) in the SWRCB's interim standards proceedings and other Bay/Delta proceedings in which there is no common contractor position, and the SWC in those areas where there is a common SWC position. SWC would continue to reimburse Kern for 30 percent of the billings in recognition of services provided by KMT&G on behalf of all contractors.

In this manner, Metropolitan and Kern (and perhaps other contractors who share their respective views) would have a contract with counsel who would represent them on those issues on which SWC do not have common interest. On the other hand, SWC would still be represented by both firms in those matters in which SWC has a unified position. At its meeting of March 24, 1993, the SWC Board of Directors approved, in general terms, the recommended contractual arrangements.

BB&K is uniquely suited to represent Metropolitan in Bay/Delta related matters. Arthur Littleworth and Greg Wilkinson, the two partners who would be assigned, are among the preeminent water law and resource attorneys in the state, with many years of practical experience in those areas. Moreover, because of their seven years experience representing Metropolitan's interests through the SWC in the Bay/Delta and related proceedings, they have an intimate knowledge of the issues involved and of Metropolitan's specific needs and interests. They also have established a very close working relationship with both the General Manager's and General Counsel's staffs, which will foster an efficient and economical integration of effort on Bay/Delta related matters. The fees proposed are very competitive, especially considering the expertise and experience of the attorneys involved. Messrs. Littleworth and Wilkinson will bill at the rate of \$200 per hour; where associates are used, they will bill at the rate of \$165 per hour. The proposed maximum contract would be for a maximum of \$250,000 per year. In 1992, Metropolitan was billed approximately \$210,000 by the SWC for BB&K's services attributable to work for Metropolitan.

#### Potential Conflicts of Interest

The differing reactions of the various contractors to the State Water Resources Control Board's D-1630 indicates that SWC likely will not always have a unified position on issues arising in the Bay/Delta proceedings. In fact, individual contractors have taken, and likely will take in the future, positions that are directly contrary to those of other contractors. Indeed, this is the reason for the new contractual arrangements recommended above. These arrangements offer a structure that will recognize these differences, provide Metropolitan with individual representation on disputed issues, but still allow SWC to continue to assert positions as a broad-based coalition where that is possible.

However, California's Rules of Professional Conduct for attorneys and general conflict of interest law limits the ability of attorneys to represent parties with potentially conflicting interests, unless the informed consent of the parties is obtained. Specifically, these rules prohibit an attorney from representing more than one client in a matter in which the interests of the clients potentially conflict, or from accepting employment adverse to a client or former client where because of that representation the attorney has obtained confidential information. The potential application of those rules to BB&K's and KMT&G's work for Metropolitan and the SWC is apparent. However, these rules do not prohibit such representation if the clients are informed of the potential conflicts in writing and provide a written agreement to the representation after such disclosure.

Because of the expertise and experience BB&K has in Bay/Delta matters and the working relationship it has developed with Metropolitan, it is in a unique position to represent Metropolitan in those matters. Metropolitan and the SWC as a group would be harmed if, because of the potential conflicts, BB&K (and KMT&G) are no longer retained to represent contractor interests. Additionally, the shared legal representation will help encourage cooperation or coordination among the contractors in Bay/Delta matters to the extent possible and in those other areas in which SWC is unified. Where cooperation on a particular matter is not feasible, the direct contracts with Metropolitan will allow Metropolitan (and others who share their position) to work separately with BB&K, limiting the confidential information problem identified in the conflict rules.

#### Board Committee Assignments

This letter is referred to:

The Legal and Claims Committee for action because of its authority to study, advise and make recommendations with regard to the selection of special counsel and the determination of the scope of their assignments, pursuant to Administrative Code Section 2461(e);

The Organization and Personnel Committee for action because of its authority to study, advise and make recommendations on the terms and conditions of employment of all consultants, advisors, and special counsel, pursuant to Administrative Code Section 2471(g);

The Executive Committee for information because of its authority to study, advise and make recommendations with regard to policies and procedures to be considered by the Board, pursuant to Administrative Code Section 2417(e); and

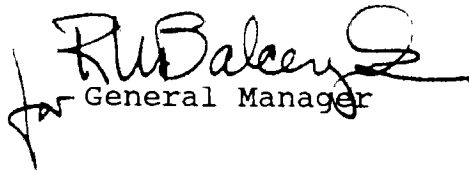
The Water Problems Committee for information because of its authority to study, advise, and make recommendations with regard to policies, sources, and means of importing water required by the District, pursuant to Administrative Code Section 2481(a).

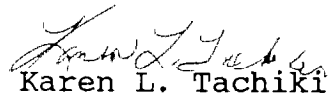
Recommendations

**LEGAL AND CLAIMS AND ORGANIZATION AND PERSONNEL COMMITTEES  
FOR ACTION.**

It is recommended that the Assistant General Counsel be authorized to retain the firm of Best, Best and Krieger as outside counsel in Bay/Delta and related matters as described in the body of this letter.

It is recommended that Metropolitan consent to Best, Best and Krieger continuing to represent the State Water Contractors in those areas in which that organization has a common position, irrespective of the technical potential conflicts discussed above.

  
General Manager

  
Karen L. Tachiki