

● **Board of Directors**
Legal and Human Resources Committee

September 9, 2008 Board Meeting

8-4

Subject

Report on *Central Basin Municipal Water District v. Metropolitan Water District*, LASC Case No. BS114382; and authorize increase of \$525,000 for a total of \$625,000 in maximum amount payable under contract with Bingham McCutchen to defend Metropolitan. [**Conference with legal counsel – existing litigation; may be heard in closed session pursuant to Gov. Code Section 54956.9(a).**]

Description

Central Basin Municipal Water District filed *Central Basin Municipal Water District v. Metropolitan Water District* on April 16, 2008 in Los Angeles Superior Court, challenging Metropolitan's adoption of the Water Supply Allocation Plan (WSA Plan). In 17 separate causes of action, the Petition alleges that the WSA Plan:

- Was adopted without complying with the California Environmental Quality Act (CEQA)
- Violates Central Basin's preferential rights and/or the ten-year Purchase Order agreements signed by most member agencies regarding the delivery of Tier 1 and Tier 2 water
- Fails to address "environmental justice"
- Contains an unfair and unreasonably discriminatory penalty rate
- Is a "special tax" enacted without compliance with Proposition 218
- Requires Central Basin to make a gift of public funds
- Violates State and Federal constitutional rights regarding impairment of contract, due process and equal protection

The Petition seeks an order directing Metropolitan to set aside the WSA Plan; a declaration that the WSA Plan is unconstitutional and establishing the parties' rights with regard to the Purchase Orders; and an order requiring Metropolitan to follow the terms of the Purchase Orders.

Since this action is between two public agencies, it is subject to transfer to a superior court in a neutral county outside Metropolitan's service area or to the assignment of a judge from a neutral county to hear the case in Los Angeles. The Los Angeles Superior Court held two hearings on the issue and ordered the case transferred to the San Francisco Superior Court on June 24, 2008. No formal court activity will occur until the San Francisco Superior Court notifies the parties that it officially has accepted transfer of the case; we have not yet received that notice.

In the meantime, Legal Department staff and outside counsel met with plaintiff's counsel for an initial settlement conference required under CEQA, but did not achieve resolution of the issue involved. The parties currently are attempting to reach agreement on a proposed briefing schedule and trial date to submit to the Court. In addition, Metropolitan has assembled the administrative record that will be the evidentiary basis for the case and sent it to plaintiff for its review prior to submission to the Court.

The General Counsel retained the firm of Bingham McCutchen (Bingham) to assist staff in representing Metropolitan. The Bingham firm was selected after the General Counsel solicited proposals from several law firms and interviewed five. The main Bingham attorneys representing Metropolitan include a CEQA expert who is the author of the Continuing Education of the Bar's treatise on CEQA law and a recognized expert on writ litigation. Both are located in Bingham's Walnut Creek office and are familiar with the judges and practices of the San Francisco Superior Court. The firm's rates – \$499 per hour for the partners and significantly lower for associates – are the same or lower than the other firms interviewed and competitive with other firms with large,

sophisticated litigation practices and CEQA expertise. Bingham has worked successfully with Metropolitan on other litigation and generally is familiar with the organization and the issues it faces.

The case involves 17 causes of action covering several differing areas of law, ranging from CEQA to constitutional issues to Metropolitan's Act. While most claims will be determined on the administrative record, some may require development of additional evidence and discovery. It is possible that there will be disputes over the contents of the record, the schedule and other procedural issues. Pre-trial motions to resolve some of the claims prior to trial also are possible. Given the complexity of the case and the range of issues involved, Legal Department staff and outside counsel have established a potential budget of up to \$625,000 through trial. The firm's current contract, executed under the General Counsel's delegated authority, has a maximum amount payable of \$100,000. Therefore, the General Counsel recommends that she be authorized to amend the existing agreement with Bingham McCutchen to increase by \$525,000 the maximum amount payable under the contract to a total of \$625,000.

Policy

Metropolitan Water District Administrative Code Section 6430(d): Employment of outside counsel

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities (Section 15378(b)(2) of the State CEQA Guidelines). In addition, the proposed action is not subject to CEQA because it involves other government fiscal activities, which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Section 15378(b)(4) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to the provisions of CEQA pursuant to Sections 15378(b)(2) and 15378(b)(4) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Counsel to amend the agreement with Bingham McCutchen to increase by \$525,000 the maximum amount payable under the contract to a total of \$625,000.

Fiscal Impact: Legal costs of up to \$525,000

Business Analysis: The additional resources provided by outside counsel familiar with the court in which the case will be tried and with the issues involved would assist the Legal Department staff to efficiently defend this litigation while continuing its day-to-day work for Metropolitan.

Option #2

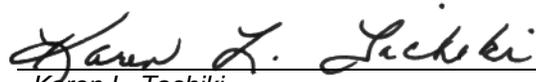
Do not authorize the General Counsel to amend the agreement and terminate it when the existing maximum amount payable is reached.

Fiscal Impact: None

Business Analysis: Metropolitan staff could take over the case and defend it independently. However, the extensive time involved in litigation could limit staff availability to work on on-going Metropolitan issues; and Bingham's knowledge of the San Francisco Superior Court, knowledge of the legal issues involved and its litigation experience would be lost.

Staff Recommendation

Option #1

 8/20/2008

Karen L. Tachiki Date
General Counsel

BLA #6273