



- Board of Directors  
*Water Planning and Stewardship Committee*

4/9/2019 Board Meeting

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**8-6**

## **Subject**

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Authorize the General Manager: (1) to include in all future demand management agreements the provision regarding legality already used in Future Supply Actions/Foundational Actions Funding agreements; and (2) to no longer include or enforce in Local Resources Program, Seawater Desalination Program, and similar agreements the termination provision directed by the Board in 2009; the General Manager has determined that the proposed actions are exempt or otherwise not subject to CEQA

## **Executive Summary**

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Staff requests authorization to update language in Metropolitan's demand management agreements. Staff recommends including in all future demand management agreements a provision regarding the legality of the agreement, which was already used in Foundational Actions Funding agreements and is being used in pending Future Supply Actions agreements. This language would replace a termination provision that has applied to Local Resources Program, Seawater Desalination Program, and similar incentive program agreements since 2009 based on the Board's direction. This termination provision would not be included in future agreements and would not be enforced in existing agreements.

## **Details**

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Metropolitan's demand management programs have included the Local Resources Program (LRP), Seawater Desalination Program (SDP), conservation programs, and Future Supply Actions (FSA). The FSA was previously called Foundational Actions Funding (FAF). Demand management programs are funded by Metropolitan's Water Stewardship Rate (WSR).

In October 2009, at a meeting of the Special Committee on Desalination and Recycling, general managers from several member agencies recommended that a pending seawater desalination agreement be conditioned on the continuation of: (1) the LRP, and (2) the WSR applicable to all water conveyed on Metropolitan's system. The member agencies raised concerns about entering into a large agreement while the Board was debating the future of the WSR which funds such agreements. Based on the member agencies' proposal, discontinuance or substantial modification of the LRP or the WSR in the future would result in termination of the agreement along with the incentive payments.

In November 2009, Metropolitan staff recommended that the Board include the proposed termination provision in all existing and future SDP agreements, and consider including it in future LRP agreements.

On November 10, 2009, the Board voted that all future LRP, SDP, and similar incentive program agreements would include a provision that the agreement would terminate if:

- a. Metropolitan determines that it will no longer:
  - (i) provide incentives or other financial support to its member agencies for seawater desalination, water recycling or groundwater recovery projects through the LRP, SDP, or similar programs; or
  - (ii) utilize the WSR or a similar charge to fund the LRP, SDP, or similar programs; or

- (iii) include the WSR as a charge for all water conveyed on the system; and
- b. the member agency included in the agreement or a delegate from that member agency votes in favor of the determination.

The Board's vote also included: "These provisions would apply only so long as all new Seawater Desalination Program agreements, Local Resources Program agreements and similar agreements contain similar provisions." Thereafter, these provisions applied to all LRP, SDP, and similar agreements. Since that date, 23 agreements that include these provisions have been signed with 11 member agencies.

Since the inception of the FSA/FAF program, the FSA/FAF agreements have included the following provision regarding the agreement's legality:

"Each Party represents that it is represented by legal counsel, that it has reviewed this Agreement and agrees that:

- a. This Agreement is legally enforceable;
- b. Payments made by Metropolitan to Agency pursuant to this Agreement are a legal use of Metropolitan's funds; and
- c. Metropolitan may legally recover the costs incurred by Metropolitan pursuant to this Agreement in the water rates charged to its Member Agencies, including Agency."

Staff recommends including the above FSA/FAF agreement language regarding the agreement's legality in all demand management agreements entered into after April 9, 2019 (with an alternative to the word "Agency" as may be appropriate). Staff believes it is beneficial for all demand management agreements to include consistent language in which the parties confirm the agreement and Metropolitan's obligations under it are enforceable.

Staff has determined that if this language is included in LRP, SDP, and similar agreements, the termination provision based on the Board's 2009 direction would no longer be necessary and so would not be included in future agreements. Staff is requesting the Board to authorize this change from its November 10, 2009 direction. Further, based on the Board's 2009 direction that the termination provision would apply only as long as it was included in new agreements, Metropolitan would not enforce this provision in existing agreements.

LRP agreements, and other demand management agreements as appropriate, would continue to include provisions and exhibits that allow Metropolitan to withdraw or reduce its contractual obligations if a project fails to meet a set of performance milestones outlined in the agreement. Also, each agreement includes provisions for Metropolitan and the member agency to mutually amend or terminate the agreement.

## **Policy**

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Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

By Minute Item 48084, dated November 10, 2009, the Board voted that all future LRP, SDP, and similar incentive program agreements would include a provision that the agreement would terminate based on certain Metropolitan determinations, if the member agency included in the agreement or a delegate from that member agency votes in favor of the determination; and the provision would apply only so long as all new SDP, LRP, and similar agreements contain similar provisions.

## **California Environmental Quality Act (CEQA)**

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### **CEQA determination for Option #1:**

The proposed actions are not subject to CEQA because they involve continuing administrative activities, such as general policy and procedure, as well as government fiscal activities, which do not involve any commitment to any specific project that may result in a potentially significant physical impact on the environment (Sections 15378 (b) (2) and 15378(b)(4) of the state CEQA Guidelines).

### **CEQA determination for Option #2:**

None required.

**Board Options**

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**Option #1**

Authorize the General Manager: (1) to include in all future demand management agreements the provision regarding legality already used in Future Supply Actions/Foundational Actions Funding agreements; and (2) to no longer include or enforce in Local Resources Program, Seawater Desalination Program, and similar agreements the termination provision directed by the Board in 2009.

**Fiscal Impact:** None.

**Business Analysis:** All demand management agreements would include consistent language regarding legality.

**Option #2**

Do not authorize the change.

**Fiscal Impact:** None

**Business Analysis:** LRP, SDP, and similar agreements would continue to include the termination provision directed by the Board in 2009.

**Staff Recommendation**

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Option #1

  
Brad Coffey  
Manager, Water Resource Management

3/28/2019  
Date

  
Jeffrey Kightlinger  
General Manager

3/29/2019  
Date