



THE METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA

*Office of the General Counsel*

**Via Electronic Mail**

Mark J. Hattam, Esq.  
General Counsel  
San Diego County Water Authority  
4677 Overland Avenue  
San Diego, CA 92123-1233

Re: Letter Dated April 4, 2019 re Metropolitan Water Planning and Stewardship Committee  
Item 8-6

Dear Mr. Hattam:

This letter responds to your letter dated April 4, 2019, regarding Metropolitan Water Planning and Stewardship Committee Item 8-6. There are a number of misstatements in your letter.

Provision Regarding Legality

Metropolitan staff recommends that the language regarding legality that has been included in Future Supply Actions agreements, and before that Foundational Actions Funding agreements, be included in all future demand management agreements. As the Board Letter states, Metropolitan 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.

As your letter states in quoting the provision, the provision merely provides that each party represents that it is represented by legal counsel, has reviewed the agreement, and agrees: (a) the agreement is legally enforceable; (b) payments made by Metropolitan under it are a legal use of Metropolitan's funds; and (c) Metropolitan may legally recover the costs incurred by Metropolitan in the water rates charged to its member agencies.

Contrary to your letter, Civil Code Sections 3513 and 1668 are not applicable. The legality provision does not prevent challenges to Metropolitan's water rates, nor exempt Metropolitan from any liability.

The parties do not form a contract if there is not a meeting of the minds on material terms. Performance under a contract must be legal for the contract to be enforceable. It is in the interests of all parties to a demand management agreement to ensure they agree they are forming a contract and Metropolitan may perform it. The parties make financial, operational, and other planning decisions based on a demand management agreement, at times for significant

Mark J. Hattam, Esq.

April 8, 2019

Page 2

expenditures over decades. If a party does not wish to form a contract, it is not required to do so. All Metropolitan demand management programs and agreements are voluntary, and member agencies and others request participation.

Metropolitan is not asserting that signing agreements with the provision renders an illegal act or agreement legal. While a court may ultimately be asked to determine legality, all parties to an agreement should believe they are acting lawfully and effectively in signing the agreement. If a party to an agreement believes it authorizes an illegal act and is unenforceable, the party should not execute it. No contract would be formed if there is no meeting of the minds on formation and performance.

Further, contrary to your letter, the Court of Appeal's 2017 decision in the *SDCWA v. Metropolitan, et al.* litigation regarding the Rate Structure Integrity ("RSI") provision is not applicable to the legality provision. Metropolitan ceased including or enforcing the RSI provision in 2017 as a result of the court's decision. The RSI provision permitted Metropolitan to terminate certain agreements in the event of a legal challenge to Metropolitan's rates. In contrast, the legality provision here does not provide for Metropolitan's termination of an agreement, or any other response, in the event of a legal challenge.

In sum, if a party seeks to enter into a demand management agreement and for Metropolitan to perform under it, the parties should wish to agree that they have formed a contract and that Metropolitan may honor it.

#### 2009 Board-Directed Provision

SDCWA agrees with staff's recommendation that Metropolitan no longer include or enforce the termination provision which in 2009 the Board directed to be included in all future Local Resources Program (LRP), Seawater Desalination Program (SDP), and similar agreements. However, there is incorrect information in your statement of support.

Metropolitan staff makes this proposal in the event the Board votes to include the legality provision in future demand management agreements. If not, staff recommends that the Board's 2009 direction remain in place. The Court of Appeal's decision does not require any change to the status quo.

The Board-directed provision calls for an agreement's termination if Metropolitan makes one of the listed determinations - including that it will no longer fund such programs, or no longer include the Water Stewardship Rate (WSR) as a charge for all water conveyed on the system - and a representative of the affected member agency votes for that determination.

The Court of Appeal's decision concerning the WSR was a decision that the administrative records for the years 2011-2014 were not sufficient to support the allocation of the WSR to transportation rates in those years. There has been no determination about the sufficiency of

Mark J. Hattam, Esq.

April 8, 2019

Page 3

later records that more fully explain and support the allocation. The provision has also never been triggered, as indicated in your attached letter dated February 13, 2019. The Board's vote to suspend collecting the WSR on Metropolitan's exchange deliveries to SDCWA from 2018-2020, while Metropolitan conducts a cost-of-service study regarding the most appropriate allocation of demand management costs, is not a decision to no longer include the WSR as a charge for all water conveyed.

We hope this letter has provided helpful information concerning Item 8-6.

Very truly yours,



Jeffrey Kightlinger  
General Manager



Marcia Scully  
General Counsel

cc: Metropolitan Board of Directors  
SDCWA Board of Directors