



● **Board of Directors**  
***Legal and Claims Committee***

5/12/2020 Board Meeting

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**8-3**

**Subject**

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Authorize an increase in the maximum amount payable under contract with Best, Best & Krieger LLP for legal services related to the Surface Mining and Reclamation Act by \$150,000 to a maximum amount payable of \$250,000; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA

**Executive Summary**

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This action authorizes an increase in the maximum amount payable under contract with Best, Best & Krieger LLP (BBK) for legal services related to the Surface Mining and Reclamation Act (SMARA) by \$150,000 to a maximum amount payable of \$250,000. Metropolitan retained BBK in July 2017, under the General Counsel's authority, to provide expert legal assistance related to application of SMARA to Metropolitan. Work since July 2017 has expended the initial contract amount and additional assistance is required.

**Details**

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As reported to the Board in September 2018 and October 2019, Metropolitan uses aggregate material obtained from approximately 127 sites located along the Colorado River Aqueduct (CRA) in the counties of Riverside and San Bernardino for critical maintenance and repair activities, for example, replacing road base and pipeline cover after significant rain events. This material is largely from the original construction of the CRA, and its use was granted to Metropolitan for construction and operation of the CRA by Congress in 1932. Metropolitan has used these aggregate materials since that time.

In April 2017, Metropolitan received a letter from San Bernardino County stating that its staff observed "mining-like activities" along the CRA right of way potentially in violation of SMARA. The county of Riverside subsequently raised similar concerns. The counties initially argued that use of this aggregate material is subject to SMARA.

Metropolitan staff met with staff from both counties and toured many of the sites identified by the counties as raising a concern. Staff researched Metropolitan's historical records and worked with outside counsel to respond to the issues raised. The investigation and site visits revealed that, of the 127 sites identified, Metropolitan had excavated into native soil at approximately 20 of the sites. After negotiations with the county regulators, Metropolitan voluntarily agreed to prepare reclamation plans to ensure that these approximately 20 sites are reclaimed to a useable condition if and when Metropolitan ceases to use them in the future. This agreement was discussed at the Legal and Claims Committee meeting in September 2018.

No county had previously claimed SMARA applied to these maintenance and repair activities or asserted that Metropolitan may be in violation of SMARA. Because this was a case of first impression, Metropolitan retained expert special counsel, Andrew Skanchy, in BBK's Sacramento office to assist staff counsel in responding to the claims and working with the counties.

Metropolitan agreed to voluntarily prepare two SMARA reclamation plans, one for sites in the county of San Bernardino and the other for sites in the county of Riverside, along with related environmental documentation. Staff prepared a request for proposals to get technical assistance with development of the plans, and CEQA analysis, and is concurrently asking the Board to approve a contract for this work (May 12, 2020 Board Agenda Item 7-1). Outside counsel will work with staff and the technical consultant in the preparation of

the reclamation plans. Additionally, per the Board's direction in October 2019, Metropolitan sponsored legislation to clarify and streamline the application of SMARA to Metropolitan. This effort is embodied in Assembly Bill 2246, sponsored by Assembly Member Chad Mayes, an Independent representing portions of Riverside and San Bernardino counties. If adopted, AB 2246 will allow Metropolitan to complete a master reclamation plan for all its SMARA-regulated sites and submit required inspection reports to the Department of Conservation, rather than working through multiple counties eliminating duplication, unnecessary fees and expenditures, and potential conflicts. Due to the current coronavirus pandemic, AB 2246 was deferred to the 2021 legislative year. In the interim, Metropolitan will continue to work with Riverside and San Bernardino counties on the two reclamation plans under existing law and renew AB 2246 next year.

BBK is continuing to provide special counsel assistance with these efforts. Staff anticipates this work continuing over the next two years.

## **Policy**

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Metropolitan Water District Administrative Code Section 6431: Authority to Obtain Expert Assistance

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

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

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### **CEQA determination(s) for Option #1:**

The proposed action is not defined as a project under CEQA (Public Resources Code Section 21065, State CEQA Guidelines Section 15378) because the proposed action involves fiscal decisions that will not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Additionally, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

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

None required

## **Board Options**

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### **Option #1**

Authorize an increase in the maximum amount payable under contract with Best, Best & Krieger LLP for legal services related to the Surface Mining and Reclamation Act by \$150,000 to a maximum amount payable of \$250,000.

**Fiscal Impact:** \$150,000

**Business Analysis:** Expert special counsel will assist staff in interpretation of SMARA.

### **Option #2**

Do not authorize the contract increase.

**Fiscal Impact:** Unknown

**Business Analysis:** Without expert special counsel, application of SMARA could be more uncertain.

## **Staff Recommendation**

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Option # 1

  
 Marcia L. Scully  
 General Counsel

4/29/2020  
 Date