

August 15, 2020

Marcia Scully, General Counsel
Metropolitan Water District of Southern California
P. O. Box 54153
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RE: Board Memo 7-9 Repeal Administrative Code Sections 4119 and 4405 (Wheeling Service) and rescind Resolution 8520 (Fixing and Adopting Wheeling Rates)

Dear Ms. Scully:

At this month's Finance and Insurance Committee, the MWD Board of Directors will consider staff's recommendation to repeal Administrative Code Sections 4119 and 4405 relating to the provision of wheeling service, and also to rescind MWD's 1997 Resolution 8520 fixing and adopting Metropolitan's wheeling rate. The Board Memo also recommends against replacing the current wheeling rate with a new and lawful rate. This added item, listed on the Consent Calendar even though it is a significant change to the Administrative Code, was not reviewed by the Executive Committee in July for the Board agenda this month.

The Water Authority understands the need to modify the wheeling rate in Administrative Code Section 4405 to comply with the law. The Board Memo suggests that this recommendation is being made because MWD voluntarily suspended collection of the Water Stewardship Rate. In fact, MWD's wheeling rate had already been determined to be unlawful and invalid by the courts and, therefore, offending portions of the Code are required to be modified. A simple fix would be to delete the Water Stewardship Rate as a charge for wheeling service.

MWD's wheeling rate was effectively invalidated by the Court of Appeal's decision in *San Diego County Water Authority v. Metropolitan Water District of Southern California* ("*SDCWA v. MWD*"), holding that it is "improper" for Metropolitan to allocate to the wheeling rate "water stewardship charges" for the recovery of the "costs of conservation programs and other water management programs." 12 Cal. App. 5th 1124, 1130, 1138 (2017). On August 13, 2020, the trial court in *SDCWA v. MWD* entered final judgment formally declaring MWD's wheeling rate, the transportation rates charged under the Exchange Agreement, and Section 4405 of MWD's Administrative Code "unlawful and invalid because it includes Water Stewardship Rate in the rates charged for wheeling service." Aug 13, 2020 Final Judgment at 5:27-6:4; *see also id.* at 4:21-5:20. The trial court also entered a peremptory writ of mandate commanding MWD "to enact only legal wheeling and transportation rates in the future" and to "henceforth exclude the costs of conservation programs and other demand management programs," from MWD's wheeling rate and transportation rates charged under the Exchange Agreement. Aug. 14, 2020 Peremptory Writ of Mandate at 1:22-23, 2:1-5.

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As the Board Memo correctly recognizes (page 2), modifying MWD's wheeling rate "will not affect pending litigation" between the Water Authority and MWD. That is because, irrespective of whether the Board repeals or modifies the wheeling rate in its Administrative Code, MWD still must comply with the Wheeling Statutes, Water Code Sections 1810, *et seq.*, and all other applicable law in any wheeling transaction, including the Exchange Agreement. Further, the actions at issue in the pending cases all predate your proposed action.

We also question whether the Board has all of the information it needs from this Board Memo to consider the wheeling rate, and why MWD staff is not explaining to the entire Board the effects of what the trial court and Court of Appeal ruled and why changes are needed. This information would be helpful to the Board, not only in connection with its consideration of modifications of the wheeling rate, but also in connection with the setting of rates generally.

The courts did not rule that MWD cannot have a Water Stewardship Rate, only that it could not be applied to wheeling transactions including the Exchange Agreement. The real issue is that the courts have expressly found that the costs of conservation programs and other demand management programs are supply costs, not transportation costs.

It is also important to emphasize that the California Legislature's express policy is to *encourage* water transfers. *See, e.g.*, Wat. Code § 109 (directing state agencies "to encourage voluntary transfers of water"); *id.* at § 475 (similar). MWD's published Administrative Code and wheeling service provisions would help effectuate this policy by continuing to provide a uniform wheeling rate (which as you know, MWD is statutorily required to do) and avoid the potential for inconsistent treatment. This is an important issue that should be part of both the Integrated Resources Plan and rate review processes, rather than treated in this ad hoc fashion.

For all of these reasons, we recommend that the Board either defer the action in its entirety at this time, or support Option 2, to direct staff to modify Administrative Code Section 4405 by deleting all references to the Water Stewardship Rate as a charge for wheeling service.

Sincerely,

/S/

Mark Hattam
General Counsel

cc: MWD Board Members
San Diego County Water Authority Board Members