



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Office of the General Counsel

Via E-mail

August 17, 2020

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

Re: Metropolitan Agenda Item 7-9 - Repeal Administrative Code Sections 4119 and 4405 (Wheeling Service) and rescind Resolution 8520 (Fixing and Adopting Wheeling Rates)

Dear Mr. Hattam,

I have received your letter dated Saturday, August 15, 2020, regarding Agenda Item 7-9 on Metropolitan's August 17 & 18 committee and board agendas. I have responded to the points you raised below.

The item is on the consent calendar: As you know, due to the legal requirement for roll call votes during Metropolitan's telephonic board and committee meetings, in recent months all items have been placed on the consent calendar and voted on with a single vote. Items may be removed from the consent calendar at the request of a director.

The item was not approved for the agenda by the Executive Committee: There is no prohibition against staff adding items to the board or committee agendas without the prior approval of the Executive Committee. It is a frequent occurrence and 7-9 is not the only later-added item this month.

The recent judgment: You include a paragraph citing some excerpts from Judge Massullo's final judgment issued late Thursday, August 13. If you intend to suggest that the Metropolitan Board has not been informed of the judgment in the 2010 and 2012 cases, containing challenges to rates in 2011-2014 and other claims, please note the Board was provided with a copy of the judgment the next day. The transmittal memo to the Board included a full quotation of the judgment with respect to the decision that inclusion of the Water Stewardship Rate in Metropolitan's wheeling rate and transportation rates charged under the Exchange Agreement is unlawful and,

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specifically, that Section 4405 of Metropolitan's Administrative Code, entitled "Wheeling Service," is unlawful and invalid because it includes the Water Stewardship Rate. The judgment is based upon the Court of Appeal's 2017 decision, which concerned the sufficiency of the record to support the Water Stewardship Rate in 2011-2014. The validity of rates adopted in 2014, 2016 and 2018, based on different records, has not been litigated.

Additional information relating to the litigation that is not included in your letter to me and our Board is that, as part of SDCWA's motions to take the 2014 and 2016 cases off stay and file amended petitions/complaints scheduled for hearing next week on August 25, SDCWA proposes amending the 2014 and 2016 complaints to allege that Metropolitan's wheeling rate in 2015-2018 is unlawful by omitting offsetting benefits and to allege a breach of the Exchange Agreement in those years by omitting offsetting benefits in the price term. SDCWA has, in the past, asserted that, over the life of the Exchange Agreement, SDCWA should receive up to \$7 billion in offsetting benefits.

Given that Section 4405 does not apply to either the Exchange Agreement or any agreement with a duration of more than one year, the deletion of this unused section of the Administrative Code is irrelevant to both the Exchange Agreement and the litigation.

Metropolitan is not required to pre-set a wheeling rate: It is correct that Metropolitan must comply with state law. However, Metropolitan is not required by state law to establish a pre-set wheeling rate. The Wheeling Statute contemplates review of wheeling transactions on a case-by-case basis. Therefore, the repeal of the wheeling rate, which can govern only a limited number of wheeling transactions and will become inoperative in January 2021, does not result in any statutory violations as you suggest.

The court did not rule that Metropolitan cannot have a Water Stewardship Rate: It is correct that Metropolitan is not prohibited from having a Water Stewardship Rate. It is also correct that the Metropolitan Board suspended the Water Stewardship Rate in December 2019, effective in January 2021, making Section 4405 inoperable as of that date. It is unclear at this time when, and in what form, Metropolitan may determine to fund the costs of Local Resources and Conservation Programs in the future and how those costs may be allocated.

The Legislature encourages water transfers: The repeal of the pre-set wheeling rate for Metropolitan member agencies for up to one year is not a disincentive to wheeling. The provision is of very limited application and rarely used; the last transaction subject to the rate was over 10 years ago.

SDCWA recommends deferring the item and modifying the provision to delete the reference to the Water Stewardship Rate: As noted above, the provision is not required, is rarely used, and will no longer be valid as of January 2021.

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As noted above, Metropolitan is not required to have a pre-set wheeling rate. The Wheeling Statute contemplates entering into wheeling transactions on a case-by-case basis. There is no basis to defer action on this matter. It is staff's recommendation that the unused provision be deleted at this time.

Very truly yours,

A handwritten signature in cursive script that reads "mScully". The signature is written in black ink and is positioned above the typed name of the signatory.

Marcia Scully
General Counsel

cc: Metropolitan Water District Board of Directors
San Diego County Water Authority Board of Directors
Sandy Kerl, SDCWA General Manager